

2015

**Val Copper and Richard Cooper, Plaintiffs/Appellees, vs. Nate Dressel and Jen Dressel, Defendants/Appellants : Brief of Appellants**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VAL COOPER AND RICHARD COOPER,

Plaintiffs/Appellees,

vs.

NATE DRESSEL AND JEN DRESSEL,

Defendants/Appellants.

**BRIEF OF APPELLANTS**

Appeal of Defendants/Appellants  
Nate and Jen Dressel

Appellate Case No. 20150322

**APPEAL FROM A FINAL ORDER ON A MOTION TO  
SET ASIDE DEFAULT JUDGMENT  
OF THE FOURTH DISTRICT COURT, UTAH COUNTY  
THE HONORABLE DAROLD McDADE**

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ORAL ARGUMENT REQUESTED

FILED  
UTAH APPELLATE COURTS

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. § 78A-4-103(2)(h) & (j) (Lexis Nexus Vol. 9 2012).

## **ISSUES PRESENTED FOR REVIEW**

1. Did the District Court err granting jurisdiction by finding Appellants were properly served the Summons and Complaint? Rulings regarding the refusal to set aside a default judgment for lack of jurisdiction or whether a person has been properly served are reviewed as a question of law. *Jackson Constr. Co. v. Marrs*, 2004 UT 89, ¶ 8, 100 P.3d 1211; *see also Reed v. Reed*, 806 P.2d 1182, 1184 n. 3 (Utah 1991).

2. Did the District Court err by denying Appellant's Motion to Set Aside the Default Judgment based upon Utah R. Civ. P. 60(b)(1)? Rulings pursuant to Utah R. Civ. P. 60(b)(1) are reviewed for an abuse of discretion. *Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981); *see also Ostler v. Buhler*, 957 P.2d 205, 206 (Utah 1984); and *Larson v. Collina*, 684 P.2d 52, 54 (Utah 1984).

Each of these issues were preserved in the District Court by motions, briefs and by oral arguments before the District Court.

## **STATEMENT OF CONTROLLING STATUTE OR RULE**

### **Rules**

Utah R. Civ. P. 4(d)(1)(A), Utah R. Civ. P. 60(b)(1), and Utah R. Civ. P. 60(b)(4).

## STATEMENT OF THE CASE

### **Nature of the case**

The Court is being asked to reverse the District Court's Order denying the Motion to Set Aside the Default Judgment. The basis for Appellant's request is predicated upon Utah R. Civ. P. 4(d)(1)(A), 60(b)(1), and 60(b)(4).

Appellants entered into a lease agreement with Appellees to lease a residence. R. at 9. During the course of the lease agreement, Appellants sold the property, which was being leased, to a third party. R. at 85. Appellants entered into an agreement with the third party that purchased the property and moved from the residence prior to the expiration of the lease agreement. R. at 3, ¶ 13; 89-90. Despite the sale of the property to a third party, Appellees filed a Complaint in District Court seeking to recover for unpaid rents for the remaining duration of the lease and for damages to the residence, including personal property. R. at 1. Appellees served the Summons and Complaint upon Appellant Jen Dressel's mother, Peggy McKenzie, at the residence of Peggy McKenzie. R. at 21, 24. Appellants did not live at Peggy McKenzie's residence at the time of service, nor had they lived at such residence as a married couple, and were living in their motorhome in California. R. 91-92, ¶¶ 2-5; 94-95, ¶¶ 2-5; 97-98, ¶¶ 3-5; 136, ¶ 2. Appellants did not know of the Complaint prior the entering of the Default Judgment and did not file an answer to the Complaint. *Ibid.* The District Court granted a Default Judgment, which included an amount for damages to real and personal property, although the District Court did not conduct an evidentiary hearing to determine the amounts for the unliquidated damages, pursuant to Utah R. Civ. P. 55(b)(2). R. at 47-48.

Appellants received notice, through the mail, of the Default Judgment and timely caused to be filed a Motion to Set Aside the Default Judgment, pursuant to Utah R. Civ. P. 60(b). R. 91-92, ¶¶ 2- 5; 94-95, ¶¶ 2- 5; 97-98, ¶¶ 3- 5; 70-71. After review of the briefs and conducting oral arguments on the Motion to Set Aside the Default Judgment, the District Court denied vacating the Default Judgment. R. at 170-172.

Appellants' appeal seeks to reverse the District Court's decision denying the Motion to Set Aside the Default Judgment.

### **Course Proceedings and Disposition of the District Court**

On November 13, 2014, the District Court granted a Default Judgment in favor of Appellees. R. at 47-48. On December 23, 2014, Appellants filed a Motion to Set Aside the Default Judgment. R. at 70-71. On March 24, 2015, the District Court ruled to deny the Motion to Set Aside the Default Judgment at the hearing on the Motion. R. at 143. On April 15, 2015, an Order Denying the Motion to Set Aside the Default Judgment was entered by the District Court. R. at 170-72.

### **Statement of Facts**

On November 10, 2013, Appellant Nate Dressel and Appellees entered in a "Utah Residential Lease Agreement" (the "Agreement") concerning 672 Meadow Crest Way, Saratoga Springs, Utah 84045 (the "Property"). R. at 9. Although the Agreement refers to Tenant(s) as "Nate Dressel/Jen McKellar," only Appellant Nate Dressel signed the Agreement. R. at 9, 18. On the same date, only Appellant Nate Dressel signed an "Addendum No. 1 to Utah Residential Lease Agreement", which provided a move-in date, utility contact information, information concerning furnished items, applicable laws,

repair information, landlord contact information, yard requirements, parking requirements, rent deposit information, and number of dogs allowed. R. at 18. The Agreement provides that tenants are to pay a monthly rent amount of \$1,350, beginning on December 1, 2013. R. at 9, ¶ 1.1. The Agreement required a “security deposit” in the amount of \$1,650, to be paid no later than November 13, 2013. R. at 9, ¶ 2.1. The Agreement states that “[i]f Tenant breaches any obligation under this Agreement Landlord has the right to retain the Security Deposit as liquidated damages.” R. at 10, ¶ 2.5 (bracket added). The term of the Agreement was from November 13, 2013 through November 30, 2014, essentially a year. R. at 10, ¶ 3. The Agreement states that if tenants vacate the Property prior to completing the entire term of the Agreement, tenants must pay “the greater of: (1) an early termination fee in the amount of three (3) months of rent; or (2) the actual costs and damages incurred by Landlord[.]” R. at 10, ¶ 3.3 (bracket added). Appellant Jen Dressel never signed the Agreement or Addendum and the parties were not married at the time Appellant Nate Dressel signed the Agreement. R. at 9-18; 137, ¶ 3.

On August 1, 2014, Appellants notified Appellees that Appellants were vacating the Property on the grounds of constructive eviction, effective August 1, 2014. R. at 119. Appellants’ August 1, 2014 letter also made a demand for the return of the security deposit, minus \$300 for pets, in the amount of \$1,350, which was to be mailed by check or money order to Nathan and Jennifer Dressel, 191 Moonlight Drive, Sequim, Washington 98382. R. at 119. Appellants’ August 1, 2014 letter never stated that

Appellants would be residing at the address given for the return of the security deposit, only that funds could be sent to that address. R. at 119-20.

On August 7, 2014, counsel for Appellees sent Appellants a letter stating that Appellants “breached the lease by unilaterally declaring the lease terminated and by failing to pay rent when due.” R. at 87. The letter also stated that, pursuant to 2.9 of the Agreement, Appellees were evoking their right to claim the security deposit as liquidated damages and that, pursuant to 3.3 of the Agreement, Appellants are entitled to \$4,050.00, or three times the normal rent, as an early termination fee. R. at 87. Further, the letter also stated that Appellees “will provide notice of any additional damages to the property for which you may [sic] deemed responsible.” R. at 87 (bracket added).

On August 8, 2014, Appellees signed a Warranty Deed on the Property, granting the Property to Jason and Brandi Snyder, effectively concluding the sale of the Property. R. at 85, 89. On August 12, 2014, 10:09 AM, the Warranty Deed conveying the Property was recorded by the Utah County Recorder. R. at 85.

On August 12, 2014, Appellant Nate Dressel entered into a “Lease Termination Agreement” (“Termination”) with the new owners of the Property, Jason and Brandi Snyder. R. 89-90. The Termination states that “WHEREAS, the Premises will be sold from Prior Landlord to Current Landlord, which includes the transfer of the Lease. The Current Landlord will be the new owner of the Premises.” R. at 89. The Termination further states that “[t]he Parties agree that in lieu of the original expiration date of the November 30, 2014, the Lease shall terminate immediately upon the close of the sale

transaction between the Prior Landlord and Current Landlord.” R. at 89, ¶ 1 (bracket added).

On August 27, 2014, Appellees caused to be filed with the District Court a Complaint seeking to recover \$4,050 for an early termination fee, alleging that Appellants “failed to pay rent for August” of 2014 and “have evidenced a clear intent to refuse to pay rent for the months of September, October, and November” of 2014. R. at 1-3, ¶¶ 12, 14. Appellees also alleged that Appellants caused damage to a dog kennel, valued at \$500, family heirlooms and art work removed from the walls, valued at \$2,000, bed coverings, sheets and other bedroom items, valued in excess of \$500, damage to the yard, grass and sprinkler system valued in excess of \$1,000, and “other items as may be discovered.” R. at 3-4, ¶ 16. Appellees allege Appellants owe at least \$1,500 pursuant to the Agreement for recovery of costs and attorney’s fees. R. at 6, ¶ 30. Appellees also allege that they “have been injured as a result of [Appellants’] breach, and have elected to retain [Appellants’] damage deposit as provided in the Lease Agreement.” R. at 5, ¶ 28 (bracket added). Appellees requested for an award from the District Court, to be proven at trial, for at least \$9,700, plus attorney’s fees and costs of at least \$1,500 but also to be determined at trial. R. at 6-7, ¶ A. Appellees’ Complaint states specifically the amounts of \$4,050 for unpaid rents, at least \$4,000 for damage to the property, and at least \$1,500 for attorney’s fees, which is a total of \$9,550, although Appellees requested for the Court to award at least \$9,700. R. 1-7.

On September 2, 2014, Appellees’ counsel requested change of address information concerning Appellants from the U.S. Postmaster in Saratoga Springs, Utah,

which the U.S. Postmaster replied on September 19, 2014 that Appellants forwarded their mailing address to 191 Moonlight Dr., Sequim, Washington 98382. R. at 123. Appellees' counsel obtained a "Comprehensive Report from Lexis-Nexis which also listed 191 Moonlight Drive as a possible current or prior address for one or both [Appellant]." R. at 100, ¶ 4 (bracket added). Further, Appellees' counsel, although unsupported by any documentation or a specific address, states that the National Guard indicated that Appellant Nate Dressel "was residing in Washington." R. at 100, ¶ 5.

On September 26, 2014, 12:08 PM, attempted service of the Summons and Complaint was made upon Peggy McKellar, mother of Appellant Jen Dressel, at Peggy McKellar's place of residence, 191 Moonlight Drive, Sequim Washington 98382, on behalf of both Appellants, by Mari Fahey, a process server in the State of Washington hired by Appellees. R. at 124, 127. The affidavit of Service for Appellant Nate Dressel states:

The undersigned, being first duly sworn, on oath deposes and says: That s/he is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On SEPTEMBER 26, 2014 at 12:08 pm, at the address of 191 MOONLIGHT DRIVE, SEQUIM 98382, within Clallam County, Washington, this affiant served the above described documents upon NATE DRESSEL by then and there personally delivering ONE true and correct copy thereof, by then presenting to and leaving the same with MRS. McKELLAR, MOTHER OF JEN DRESSEL aka JEN McKELLAR, a white female, age approximately 55-60 yrs, height approximately 5'4", weight approximately 120 lbs, with black hair, a person of suitable age and discretion then a resident therein.

R. at 127. The affidavit of Service of Summons and Complaint for Appellant Jen Dressel states the exact same wording as for Appellant Nate Dressel, except “NATE DRESSEL” is replaced with “JEN DRESSEL, aka JEN McKELLAR.” R. at 124.

Peggy McKellar “told the process server that neither Nate Dressel nor Jen Dressel resided at the address” and “refused to accept any papers from the process server.” R. at 98, ¶¶ 6-7. Peggy McKellar testified, through a declaration under penalty of perjury, that Appellant Jen Dressel is her daughter, Appellant Jen Dressel has not resided at Peggy McKellar’s residence since 2012, where the attempted service of the Complaint was made, and Appellant Nate Dressel as never resided at her address. R. 97-98, ¶¶ 2-5. Appellant Jen Dressel testified, through a declaration under penalty of perjury, that she had not lived at her mother’s address, Peggy McKellar, since 2012, her husband Nate Dressel has never lived at Peggy McKellar’s residence, and Appellants were living out of their motorhome in California at the time Peggy McKellar received attempted service of the Summons and Complaint. R. at 94-95, ¶¶ 3-5; 136, ¶ 2. Appellant Nate Dressel testified, through a declaration under penalty of perjury, that he has never resided at Peggy McKellar’s residence. R. at 91, ¶ 3. Appellants testified that they did not receive notice of the Complaint prior to the entering of the Default Judgment. R. at 91-92, ¶ 4; 95, ¶ 5.

On November 13, 2014, since no response or answer to the Complaint was filed with the District Court, the District Court entered a Default Judgment granting Appellees a total of \$13,005.70, which included a \$9,700 principal amount, \$485.20 for interest from August 7, 2014 through November 14, 2014, \$280 for Costs through November 4,

2014, and \$2,540.50 for attorney's fees through November 4, 2014. R. at 47-48. On December 5, 2014, the Appellees caused to be filed with the District Court a Notice of Entry of Judgment, which certified that the Notice of Entry of Judgment was mailed on November 5, 2014, to Appellants at 191 Moonlight Drive, Sequim, Washington 98382. R. at 59-60.

On or about December 16, 2014, Appellants received their first notice of Appellees' Complaint when they received the Notice of Entry of Judgment, which was certified by Appellees' counsel to have been sent on December 5, 2014 via U.S. Mail. R. at 91-92, ¶ 4; 95, ¶ 5.

On December 23, 2014, Appellants caused to be filed with the District Court a Motion and Memorandum in Support to Set Aside Default Judgment and Dismiss Pursuant to Rule 12(b)(6) ("Motion"), including Declarations from Appellants and Peggy McKellar. R. at 70-98. In the Memorandum in Support of Motion to Set Aside Default Judgment and Dismiss Pursuant Rule 12(b)(6) ("Memorandum"), Appellants allege that Appellant Jen Dressel had not lived at the address used for service of the complaint since 2012, Appellant Nate Dressel never lived at the address used for service, Peggy McKellar told the process server that neither Appellant lived at her address, Peggy McKellar "refused to accept any papers from the process server," and Appellants were not aware of Appellees' Complaint until on or about December 16, 2014. R. at 73, ¶¶ 3-7. Also, Appellants alleged that Appellees sold the Property on or about August 8, 2014, which included all of Appellees' personal property. R. at 74, ¶¶ 9-10. Appellants alleged that they "did not damage or take the dog kennel, family heirlooms, art work, bed, sheets,

other bedroom items or any other personal or real property belonging to [Appellees],” did not damage the yard, grass, or sprinkler system of on the Property, Appellees’ “bed sheets were in a walk-in closet and never used”, and Appellees’ “heirlooms and art were stored in the basement and were in the basement when [Appellants] vacated the property.” R. at 74, ¶¶ 11-14. The Appellants further alleged that since the Property and personal property of Appellees were transferred to a third party upon the sale of the Property, Appellees do not have standing to seek damages. R. 74-75, ¶ 15. Also, Appellants alleged that due to the Termination Agreement, Appellants vacancy of the Property was proper and not a breach of the Agreement. R. at 75, ¶¶ 19-21. Finally, Appellants alleged that Appellees invoked their right to retain the security deposit as liquidated damages, which prevented Appellees from recovering for any allegations concerning a breach of the Agreement. R. at 75, ¶¶ 16-18. All of Appellant’s allegations in the Memorandum were supported by declarations. R. at 91-98.

On January 7, 2014, Appellees caused to be filed with the District Court a Memorandum in Opposition to Motion to Set Aside Default Judgment and Dismiss Pursuant to Rule 12(b)(6) (“Opposition”), which provides states that “[Appellees] do not dispute the timeliness of this motion,” thus showing that the timeliness of Appellants’ Motion is undisputed. R. at 103 (brackets added).

On January 15, 2015, Appellants caused to be filed with the District Court their Reply to Appellees’ Opposition by stating that Appellees’ service of the Complaint was not in compliance with Utah R. Civ. P. 4. R. at 134. Further, Appellants reiterated their allegations denying damage to property and that since the Property had been sold, unpaid

rents for August, September, October, and November would only be proper to the new owners. R. at 134. Also, Appellants alleged that Appellant Jen Dressel did not sign the lease and is not liable for any alleged breach of the Agreement. R. at 134

On March 24, 2015, the District Court heard oral arguments on the Motion. R. at 195-220. Appellants argued that after vacating the Property, they did not know where they would be relocating, although they did not move to Sequim, Washington, and they did forward their mail to Peggy McKellar's residence. R. at 198, ¶¶ 1-9. Appellants also contested that there was not proper service of the Summons and Complaint, pursuant to Utah R. Civ. P. 4. R. at 198, ¶¶ 10-16. Further, Appellants argue that since Peggy McKellar never accepted the Complaint from the process server, there was no documents to forward onto Appellants. R. at 208, ¶¶ 12-21. Appellants also argued that the first time they received notice of the Complaint was when they received the Notice of Entry of Judgment. R. at 198, ¶¶ 17-21. Appellants then argued that under Utah R. Civ. P. 60(b)(1) "there was surprise, excusable neglect, inadvertence or mistake in not responding in time" and that they have meritorious defenses. R. at 199, ¶¶ 1-7. As for the meritorious defenses, Appellants argued that Appellees invoked their right to the liquidated damages by keeping the security deposit, which barred them from seeking to further recover for breach of the Agreement. R. at 199, ¶¶ 17-25. Another defense raised by Appellants was the fact that Appellees sold the Property, including Appellees' personal property, and lacked standing to seek recovery of rent for the months after the Property was sold, particularly when there was a Termination agreement with the new owners. R. at 200, ¶¶ 9-24. Finally, Appellants raised the meritorious defense that any

alleged damage to personal property is in dispute since Appellants provided declarations contesting the alleged damage. R. at 200, ¶¶ 4-8.

The District Court held that since Appellants provided an address where they expected to have their security deposit sent, which was the same forwarding address provided by the U.S. Postal Service, “[a]ll roads point to the fact that this 191 Moonlight Drive in Washington is their usual place of abode and that was where they expected to receive notifications regarding any mail that was received” and “[s]o I’m finding that there was effective service of process in this matter and it’s more likely that the [Appellants] were avoiding service in this matter. R. at 212, ¶¶ 7-24 (brackets added). As for Utah R. Civ. P. 60(b)(1), the District Court stated:

With regard to the motion to set aside using mistake, surprise, excusable neglect, I don’t find that because normally those circumstances come up when a party obtains service and respondents then don’t respond for one reason or another. Usually some emergency. Maybe out of the country. Those kinds of things wherein that rule comes into play. Here, I don’t see how if you don’t respond you can get excusable neglect or mistake or anything like that, claiming you weren’t served. So I don’t think under those circumstances the motion to set aside is well taken. Based upon that then, I’m going to deny the motion to set aside default judgment. Therefore, we don’t get to the motion to dismiss because of that.

I recognize as well that default judgments are not really well liked by the courts. We want to hear issues. But in this case it’s clear to me that that was the address where they said they could be served. I don’t see anything that really refutes that at all. So that’s the ruling.

R. 213-14, ¶¶ 25, 1-16. The District Court never ruled on Appellants’ meritorious defenses or the need for an evidentiary hearing to determine damages. R. 95-220. Further, the District Court did not rule on Appellants’ Motion to Dismiss, pursuant to Utah R. Civ.

P. 12(b). R. 95-220. On April 15, 2015, an Order denying the Motion was entered by the District Court. R. at 170-72.

### **SUMMARY OF THE ARGUMENT**

Appellants request for the Court to reverse the District Court's ruling denying the Motion to Set Aside Default Judgment based on the following: (1) Appellants were not served the Complaint at their dwelling house or usual place of abode, pursuant to Utah R. Civ. P. 4(d)(1)(A); (2) Appellants timely moved the District Court to set aside the Default Judgment, pursuant to Utah R. Civ. P. 60(b); (3) Appellants, due to mistake, inadvertence, surprise, or excusable neglect, failed to file an answer to the Complaint with the District Court, pursuant to Utah R. Civ. P. 60(b)(1); and (4) Appellants have meritorious defenses to Appellees' claims in the Complaint.

Appellants contend that the service of the Summons and Complaint was not proper since it was served upon Peggy McKellar, Appellant Jen Dressel's mother, at her residence. Despite using Peggy McKellar's address as a forwarding address for mail, Appellants had never resided at that address as a married couple, and Appellant Nate Dressel never resided at that address ever. As such, Peggy McKellar's address was not Appellants' personal dwelling house or usual place of abode and service of the Complaint upon Peggy McKellar on behalf of Appellants was improper without the District Court first granting Appellees an Order to serve Appellants by alternative methods. Further, the affidavits of the Summons and Complaint are defective since it does not state that Appellants either were present or resided at the address for which the Summons and Complaint were allegedly served. Therefore, since process service of the Summons and

Complaint was improper and the affidavit of service was defective, the Court should reverse the District Court's Ruling and Order denying the setting aside of the Default Judgment.

It is undisputed that Appellants moved the District Court to vacate the Default Judgment timely. Nevertheless, since the Default Judgment was entered by the District Court on November 13, 2014 and Appellants caused to be filed with the District Court a Motion to Set Aside the Default Judgment on December 23, 2014, Appellants were well within the 90-day period provided by Utah R. Civ. P. 60(b).

Appellants contend that they never received notice of Appellees' Complaint up and until receiving the Notice of Entry of Judgment, despite Peggy McKellar allegedly being served with the Complaint. Appellants failure to answer or respond to the Complaint was either a mistake, inadvertence, surprise, or excusable neglect since they were not aware of the legal action until after the Default Judgment had been entered and there was a mistake as to the validity of the process of service.

Further, Appellants alleged meritorious defenses, including Appellees selling the Property, alleging that no damage was done to real or personal property, Appellees invoking the right to recover liquidated damages, constructive eviction, and lack of standing against Appellant Jen Dressel, who did not sign the Agreement. As such, since the District Court erred in denying Appellants' Motion to Set Aside the Default Judgment, the Court should reverse the District Court's Ruling and Order denying the setting aside of the Default Judgment.

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN FINDING THAT PROCESS SERVICE OF APPELLEES' SUMMMONS AND COMPLAINT ON APPELLANTS' DWELLING HOUSE OR USUAL PLACE OF ABODE WAS PROPER AND THAT THE DEFAULT JUDGMENT IS NOT VOID AND SHOULD NOT BE VACATED.**

Utah R. Civ. P. 4(d)(1) states that “unless waived in writing, service of the summons and complaint shall be done by one of the following methods:” personal service, service by mail or commercial courier service, service in a foreign country, and other service. Utah R. Civ. P. 4(d)(1)(A), which goes into detail concerning the method of personal service, states:

Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's *dwelling house or usual place of abode* with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process[.]

(Emphasis and bracket added).

An individual's usual place of abode has been defined by the Utah Supreme Court when it stated:

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. That is, where a person –lives – at the particular time when the summons is served, constitutes his usual place of abode.

*Reed v. Reed*, 806 P.2d 1182, 1185 (Utah 1991); *quoting Grant v. Lawrence*, 108 P. 931 (Utah 1910). The Court further stated that “[n]o 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) (bracket added)." *Id.* The Court continued:

The provision concerning usual place of abode should be construed liberally 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 the he is being served with process, considering the situation from a practical standpoint.'

*Id.*; quoting 1 Barron & Holtzoff, *Federal Practice & Procedure* § 177, at 299 (Wright ed. 1960).

It is well established that it is the burden of the Appellants to show that Appellees' service of the Summons and Complaint was improper, which prevents the District Court's jurisdiction. *Zions First Nat'l Bank v. Christensen*, 2000 Utah App. 76, ¶ 2; see also *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1074 (Utah 1998) ([Defendant] had the burden of showing that the service was invalid") (bracket added); *Reed*, 806 P.2 at 1185 ("The burden was upon defendant to prove that service was improper."). The Court has stated that "[w]hen a judgment, including a default judgment, has been entered by a court of general jurisdiction, the law presumes that jurisdiction exists, and the burden is on the party attacking jurisdiction to prove its absence." *Zions First Nat'l Bank*, at ¶ 2, quoting *Bonneville Billing v. Whatley*, 949 P.2d 768, 775 n. 7 (Utah Ct. App. 1997);

The Court has also stated that "the invalidity or absence of service can be shown by clear and convincing evidence." *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983). "To overcome his burden, defendant was required to provide competent evidence showing that service of process was not completed or improper" and that only arguments through counsel without sworn statements from the party does not meet the burden of

proof that the District Court was without personal jurisdiction. *Zions First Nat'l Bank*, ¶¶ 4-5.

However, when there is a dispute as to the facts to determine usual place of abode, the District Court must resolve such dispute “by depositions or an evidentiary hearing.” *Stan Katz Real Estate v. Chavez*, 565 P.2d 1142, 1144 (Utah 1977). In *Stan Katz Real Estate*, a default judgment was entered and the defendant filed a motion to set aside the default judgment, which included an affidavit stating “That he was not living or residing at the home of his parents at the time plaintiff alleges that service was made upon his mother.” *Id.* at 1142. Despite the fact that the notation on the return of service stated “Mother stated he [the defendant] had just gone to the store and he did live there and would be right back,” the Court held that both statements supported a “dispute on the fact of the usual place of abode of the defendant.” *Id.* at 1143-44. The Court further stated that an evidentiary hearing was needed to test representations of the witness, based upon the following:

Had no factual dispute arisen to plague the parties' substantive rights, we would perceive no difficulty in the judge's acceptance as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others. In this case, however, despite the factual questions developing as the hearing moved along, no opportunity was afforded anyone to test any representation by the chastening process of cross-examination....The opportunity to judge credibility was non-existent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. Without these twin tools, normal in the trial of factual issues, the factual conclusion was certain to take on an unaccustomed quality of artificiality...We recognize, of course, that trial judges have a discretion to hear and determine ordinary motions either on affidavits or oral testimony portraying facts not appearing of record. We not, however, that an attempted resolution of factual disputes

on conflicting affidavits alone may pose the question whether the discretion was properly exercised.

*Id.* at 1143; *quoting Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C. Cir. 1969).

Therefore, the Court remanded the case for an evidentiary hearing. *Id.* at 1144.

It has also been established that an affidavit of service is defective when “[t]here is no assertion that the defendants so resided or were served,” which provides that “the affidavit is wholly inadequate to establish proper service pursuant to rule 5 of the Utah Rules of Civil Procedure.” *Southland Constr. v. Semnani*, 2001 UT 6, ¶ 3 (bracket added). The Court continued by stating that an affidavit of service is defective if it fails “to allege that defendants were either residing or present at the property where service was made.” *Id.* at ¶ 5. Further, if such affidavit of service is defective and it is combined with “defendants’ affidavit testifying that they resided elsewhere,” it is an abuse of discretion for the District Court to fail to set aside a default judgment. *Id.* at ¶ 5.

**A. Appellants Were Not Served The Summons and Complaint at Their Personal Dwelling or Usual Place of Abode And The Default Judgment is Void Pursuant to Utah R. Civ. P. 60(b)(4).**

Utah R. Civ. P. 60(b)(4) states that “the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding...[when] the judgment is void. (Bracket added).

The Court held that “[a] judgment is void under rule 60(b)(4) if the court that rendered it lacked jurisdiction of the subject matter, or parties or the judgment was entered without the notice required by due process,” which is “true even absent a separate

meritorious defense” since “[t]he court’s lack of jurisdiction is alone sufficient to void its judgment.” *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 18 (brackets added).

In *Reed*, after the entering of a decree of divorce by the district court, the defendant was served a summons by a sheriff at his parents’ home to recover a truck awarded in the divorce proceeding, and the defendant challenged this his parents’ home was not his usual place of abode. 806 P.2d at 1182. The Court held that, despite defendant’s parents’ claim to the process server that defendant was out of state at the time of the service, that the totality of the circumstances of defendant residing with his parents during the divorce, plaintiff witnessing defendant’s presence in town around the time of service, defendant using his parents’ address as his address for his tax returns the previous year, defendant’s actual knowledge of the summons less than two weeks after it had been served, and since defendant “failed to show he lived elsewhere,” the parents’ home was defendant’s place of abode and service was proper. *Id.* at 1184-85.

In the present case, Appellants submitted to the District Court testimony, via declarations, from themselves and Appellant Jen Dressel’s mother, Peggy McKellar. R. at 91-98. The declarations stated that neither Appellant lived at the address at the time the Summons and Complaint was attempted to be served, Appellants had never resided at the address during their marriage, Appellant Jen Dressel had not lived at the address for over two years, and Appellant Nate Dressel had never lived at the address. R. at 91, ¶¶ 2-3; 94-95, ¶¶ 2-4; 97-98, ¶¶ 3-6. Conversely, Appellant Jen Dressel submitted a declaration stating that the Appellants resided in their motorhome and were in California at the time of the alleged service of the Summons and Complaint. R. at 136, ¶ 2. Also, Peggy

McKellar submitted a declaration stating that she told the process server that Appellants did not live at the address and “refused to accept any papers from the process server.” R. at 98, ¶¶ 6-7.

Appellees stated that they used Peggy McKellar’s address to serve the Summons and Complaint because Appellants left that address with Appellees as a place to be contacted in the future, the U.S. Post Office had the same address as a forwarding address for Appellants, a Lexus search showed that either one or both of the Appellants either currently or used to reside at the same address, and that Appellant Nate Dressel’s known employer, the National Guard, informed Appellees’ counsel that Appellant Nate Dressel resided in Washington, although an actual address was not provided by the Appellant Nate Dressel’s known employer. R. at 100, ¶¶ 2-5.

Appellants met the burden for showing that Appellees’ service of the Summons and Complaint was improper and the District Court did not have jurisdiction. Appellants submitted declarations that they were not physically at Peggy McKellar’s residence nor had they resided at such address. Further, Peggy McKellar testified through her declaration that Appellants did not reside at her address. Likewise, Appellants testified that they were living out of their motor home in California at the time of the alleged service. Nonetheless, Appellants do not dispute that that they used Peggy McKellar’s address to give to other parties for the forwarding of their mail and for future contact. However, Appellants dispute that they ever claimed that their personal dwelling or usual place of abode would be or was at Peggy McKellar’s residence. The fact is that Appellants have never lived together at Peggy McKellar’s residence, they only used the

address of such residence for contact purposes until they could determine an actual place of residence, beside their motor home. As such, Peggy McKellar's residence is not Appellants' personal dwelling or usual place of abode.

Appellees' claim that a forwarding address is substantial evidence of a usual place of abode is inconsistent with the fact that Appellant Nate Dressel never resided at Peggy McKellar's residence. Further, unlike in *Reed*, no evidence was shown that Appellants were physically seen at the residence around the time of service, resided at the residence for any specific amount of time, or that Appellants used the address for any identifying purposes, such as tax returns, licenses, loans, etc. Appellees only provided forwarding contact information as evidence, which they claim is a showing of a usual place of abode.

Also, Appellants submitted testimony that controverted testimony or evidence by Appellees concerning Appellants' usual place of abode and the District Court should've held an evidentiary hearing to determine the validity of that evidence. *See Stan Katz Real Estate*, 565 P.2d at 1144. However, the District Court did not hold an evidentiary hearing, despite a crucial conflict that requires the matter to be resolved, to test representations of the witnesses. *Id.* As such, and at the very least, the Court should remand the issue to the District Court for an evidentiary hearing concerning the evidence to determine Appellants' usual place of abode.

Notwithstanding conflicting evidence, the District Court construed too liberally that Peggy McKellar's residence is Appellants' usual place of abode since Appellants did not receive actual notice prior to the entering of the Default Judgment. *See Reed*, 806 P.2d at 1185. In fact, Appellants did not receive actual notice until receiving the Notice of

Entry of Judgment. Appellants have met the burden to show that the improper service of the Summons and Complaint was not notice required for due process. Since the Appellants did not have due process, the District Court lacked jurisdiction, which “alone is sufficient to void its [Default] judgment”. *Sewell*, 2013 UT 61 at ¶ 18 (bracket added). As such, the Court should reverse the District Court’s denial of the Motion to Set Aside the Default Judgment.

**B. Appellees’ Affidavits of Service Are Defective.**

The affidavits of service for the Summons and Complaint by the process server only states that Peggy McKellar resided or was present at the time of the service. R. at 124, 127. The affidavits of service fail “to allege that [Appellants] were either residing or present at the property where service was made.” R. at 124, 127; *Southland Constr.*, 2006 UT at ¶ 5 (bracket added).

The affidavits of service are defective since they fail to allege that Appellants either resided or were present at the property where service was made. *Id.* Appellants submitted testimony that they did not live at the address where service was allegedly made, although there was testimony that they lived in their motorhome in California. Like in *Southland Constr.*, since the affidavits of service are defective and Appellants submitted testimony that they resided elsewhere, the District Court abused its discretion by not setting aside the Default Judgment, if not dismissing the case entirely. *Id.* at ¶¶ 5-6. Therefore, the Court should reverse the District Court’s denial of the Motion to Set Aside the Default Judgment.

C. The District Court's Ruling Provides for Impractical Usual Places of Abode.

The District Court stated that Appellants “provided an address in which they expected to have their deposit sent,” “the same address provided by the U.S. Postal Services as the [Appellants’] forwarding address,” and “the notice of judgment was sent to that address as well,” which establishes that “[a]ll roads point to the fact that this 191 Moonlight Drive in Washington is their usual place of abode and that was where they expected to receive notifications regarding any mail that was received.” R. at 212, ¶¶ 9-20 (brackets added). Essentially, the District court ruled that since Appellants arranged for their mail to be sent to a particular address, that address was their residence, dwelling, or usual place of abode.

The flaw with the District Court’s reasoning is that its ruling invites impractical usual places of abode. Based upon the very same reasoning as used by the District Court, a post office box could be held to be a usual place of abode. Obviously it is impossible for a post office box to be a usual place of abode. Surely no one’s dwelling is in a post office box. However, the District Court relied upon the fact that Appellants provided a forwarding address to Appellees, which was the same address they provided to the U.S. Post Office to have their mail forwarded, and the Notice of Entry of Judgment, which was sent by mail, was received at the same forwarded address. So, if Appellants had used a post office box as their address, the District Court’s rational would have established that Appellants’ usual place of abode was a post office box, which is impractical.

Since the District Court’s reasoning can establish that a usual place of abode can be a post office box, it is likely not proper to use that same reasoning to establish that

Peggy McKellar's residence is Appellants' usual place of abode. The District Court should rely upon more concrete and determinative evidence to establish whether Appellants' usual place of abode was where service was alleged to have been made. The District Court should have more evidence, like in *Reed*, where the Court relied upon testimony of witnesses, documents used for identifying purposes, and evidence of specific periods that the party was physically at the dwelling. 806 P.2d at 1185. As such, since the District Court did not rely on more concrete evidence, the Court should reverse the District Court's denial of the Motion to Set Aside the Default Judgment.

**D. Granting Alternative Service After the Fact is Not Due Process.**

Utah R. Civ. P. 4(d)(4)(A) states:

Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

The District Court stated at the hearing on the Motion to Set Aside the Default Judgment that "I'm finding that there was effective service of process in this matter and it's more likely that the [Appellants] were avoiding service in this matter." R. at 212, ¶¶ 21-24 (bracket added).

At the hearing on the Motion to Set Aside the Default Judgment, the District Court ruled that one of the reasons it found effective service of process was because Appellants

were avoiding service. However, Utah R. Civ. P. 4(d)(4) provides that if a party is avoiding service, a motion seeking alternative service may be filed allowing for service of process to be carried out in a different way other than by the personal method. It seems that the District Court granted alternative service after the fact without Appellees first moving the District Court for permission to seek service alternatively. The District Court's granting of alternative service after the fact is a bypass of due process.

The circumstance of Appellants living out of a motor home at the time of the alleged process of service likely supports that Appellees could have sought alternative service. However, asking for forgiveness rather than permission, which is what Appellees did regarding proper process service, is not proper procedure to ensure due process. The standard is not what is best for the Appellees in conducting service, rather "the question of service must be resolved by what best serves to give notice to [Appellants] that [they] being served with process, considering the situation from a practical standpoint." *Reed*, 806 P.2d at 1185 (bracket added). The importance of due process is a fundamental constitutional right of Appellants that must not be taken lightly. Appellees were required to seek the most proper way possible for process service upon Appellants, including moving the District Court for alternative service. Nevertheless, it was improper for the District Court to grant alternative service after the fact. As such, the Court should reverse the District Court's denial of the Motion to Set Aside the Default Judgment.

## **II. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT PURSUANT TO UTAH R. CIV. P. 60(b)(1).**

Utah R. Civ. P. 60(b) states:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) *mistake, inadvertence, surprise, or excusable neglect*... (4) *the judgment is void*...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than *90 days after the judgment, order, or proceeding was entered or taken*[.]

(Emphasis added).

The Court had held in *Menzies v. Galetka* that “[i]n general, a movant is entitled to have a default judgment set aside under 60(b) if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense.” 2006 UT 81, ¶ 64.

In the present case, it is undisputed that the Motion to Set Aside the Default Judgment was timely since the Default Judgment was entered on November 13, 2014 and the Motion to Set Aside the Default Judgment was filed on December 23, 2014, well within the 90 days required, pursuant to Utah R. Civ. P. 60(b). Appellees conceded in their Opposition brief that there is no timeliness issue. R. at 103. Therefore, Appellants will only provide argument as to the basis for granting relief under 60(b)(1) and Appellants’ alleged meritorious defenses.

**A. Appellants Have a Basis For Relief Under Utah R. Civ. P. 60(b)(1).**

Concerning a decision to relieve a party from a final judgment pursuant to Utah R. Civ. P. 60(b)(1), the Court held in *Helgesen v. Inyangumia* that “discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing.” 636 P.2d 1079, 1081. The Court further stated that “it is quite uniformly regarded as an abuse of discretion to refuse to

vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set it aside.” *Id.*, quoting *Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 952 (Utah 1962).

In *Lund v. Brown*, the Court stated that “a trial court has broad discretion in deciding whether to set aside a default,” but that “discretion is not unlimited.” 2000 UT 75, ¶ 9.

In *Sewell*, the Court stated:

Rule 60(b)(1) provides relief from a default judgment entered as a result of mistake, inadvertence, surprise, or excusable neglect. To qualify for relief under rule 60(b)(1), a party must show he has used due diligence. Due diligence is established where the ‘the failure to act was the result of... the neglect one would expect from a reasonably prudent person under similar circumstances.’

2013 UT 61, ¶ 29; quoting *Judson v. Wheeler RV Las Vegas, L.L.C.*, 2012 UT 6, ¶ 27; see also *Black's Title, Inc. v. Utah State Ins. Dep't*, 1999 UT App 330, ¶¶ 5, 10 (“The law disfavors default judgments” and “To demonstrate that the default was due to excusable neglect, ‘the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control’”, quoting *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 431 (Utah 1973)).

In *Metro. Water Dist. Of Salt Lake v. Sorf*, the District Court stated that “what’s been offered here as excusable neglect...is fairly characterized as Mr. Sorf was not aware of the complaint” and that “the law is fairly clear that [when the rule for perfecting service is complied with, that] is not excusable neglect.” 2013 UT 27, ¶ 16. However, the Court disagreed by stating that “the district court conflated the provisions of rule

60(b)(1), which refers to instances of “mistake, inadvertence, surprise, or excusable neglect” with the provisions of rule 60(b)(4), which refers to instances where a judgment is void for a failure of service of process.” *Id.* The Court further stated that “if the default is issued when a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. *Id.*, quoting *May v. Thompson*, 677 P.2d 1109, 1110 (Utah 1984). Also, the Court stated that “in accordance with the intent of rule 60(b) to ensure that parties are afforded ‘a full opportunity to present their evidence and contentions as to disputed issues so [that cases] may be disposed of on substantial rather than upon technical grounds.” *Id.*, quoting *McKean v. Mountain View Mem’l Estates, Inc.*, 411 P.2d 129, 130 (Utah 1966). The Court then held that one of the factors included the individual’s wife refusing service by throwing the papers, Summons and Complaint, at the process server, where the papers were left on the ground and the complaint was no longer on the ground when the individual returned home from work, thus the individual mistakenly believed he had not been served and vacated the district court’s denial fo the motion to set aside the default judgment. *Id.* at ¶ 20, 26.

In the present case, at the hearing on the Motion to Set Aside the Default Judgment, the District Court stated:

With regard to the motion to set aside using mistake, surprise, excusable neglect, I don’t find that because normally those circumstances come up when a party obtains service and respondents then don’t respond for one reason or another. Usually some emergency. Maybe out of the country. Those kinds of things wherein that rule comes into play. Here, I don’t see how if you don’t respond you can get excusable neglect or mistake or anything like that, claiming you weren’t served. So I don’t think under

those circumstances the motion to set aside is well taken. Based upon that then, I'm going to deny the motion to set aside default judgment.

R. at 213-214, ¶¶ 25, 1-10. The District Court's reasoning was almost the very same reasoning used by district court in *Metro Water Dist.*, which was reversed. *Id.* at 16, 26.

Appellants testified that they never received actual notice of the Summons and Complaint. R. at 91, ¶ 4; 95, ¶ 5. Peggy McKellar, who was served by Appellees' process server, "refused to accept any papers from the process server." R. at 98, ¶ 7. Further, Appellants testified that the only notice they received was when they received the Notice of Entry of Judgment in the mail. R. at R. at 91, ¶ 4; 95, ¶ 5.

It is reasonable that Peggy McKellar was mistaken or had excusable neglect for not taking the Summons and Complaint and forwarding it on to Appellants. Likewise, it is reasonable that Peggy McKellar did not notify Appellants of the alleged service. As a result of such mistake or excusable neglect by Peggy McKellar, Appellants did not have actual notice of the Summons and Complaint. Like in *Sewell*, Appellants demonstrated due diligence since Appellants' failure to act, or answer the Complaint, was "neglect one would expect from a reasonably prudent person under similar circumstances." 2013 UT 61, ¶ 29. Further, like in *Black's Title, Inc.*, Appellants showed that they were "prevented from appearing by circumstances over which [they] had no control." 1999 UT App 330, ¶ 10 (bracket added).

The District Court ended its inquiry at the fact it found that service of process was proper and disregarded whether Appellants "could have still been mistaken about whether [they] had been served or was obligated to file an answer." *Metro. Water Dist.*,

2013 UT 27 at ¶ 17 (bracket added). Instead the District Court held that Appellants' claim of improper service did not provide a basis for mistake, surprise, or excusable neglect. Like in *Metro. Water Dist.*, the District Court "conflated the provisions of rule 60(b)(1) ...with the provisions of rule 60(b)(4)." *Id.* at ¶ 16. This is supported by the District Court's statement:

I recognize as well that default judgments are not really well liked by the courts. We want to hear the issues. But in this case it's clear to me that that was the address where they said they could be served. I don't see anything that really refutes that at all.

R. at 214, ¶¶ 12-16. The District Court disregard the distinct separation between the Appellants having a valid claim of mistake and/or excusable neglect, and the Default Judgment being void for lack of proper service, which would deny the District Court jurisdiction. As such, the District Court failed to diligently consider mistake, inadvertence, surprise, or excusable neglect beyond the provisions of Utah R. Civ. P. 60(b)(4).

Even if Appellants themselves had mistakenly thought that the process service was not proper, they would be "mistaken to a point where, absent such mistake, default would not have occurred," and the equity side of the District Court should have granted relief. *Id.* However, Appellants did not know of the process service and never knew of the case prior to the entering of the Default Judgment. If not for the mistake, inadvertence, surprise, or excusable neglect by either Peggy McKellar or Appellants, an answer would have been filed in response to the Complaint and the Default Judgment would not have

occurred. Therefore, the Court should reverse the District Court's denial of the Motion to Set Aside the Default Judgment.

**B. Appellants Alleged Meritorious Defenses.**

In *Lund*, the Court stated that “[w]e have held that relief from judgment requires a showing of a meritorious defense to a claim.” 2000 UT 75, ¶ 28. In *Metro. Water Dist.*, the Court stated that the requirement for showing meritorious defenses “is a low bar, and ‘a party need not actually prove its proposed defenses to meet this standard.’” 2013 UT 27, ¶ 24, *quoting Lund*, 2000 UT 75 at ¶ 29. Further, in *Judson*, the Court also stated that “[t]he proffer of a meritorious defense under rule 60(b) is subject to a liberal pleading standard analogous to that prescribed under rule 8, which requires only that a party state the basis for its claims or defenses in short and plain terms” and that the defenses, “if proven, would preclude total or partial recovery by the claimant or counterclaimant.” 2012 UT 6, ¶ 23. “Thus, where a party presents a clear and specific proffer of a defense, if proven, would preclude total or partial recovery by the claimant or counterclaimant, it has adequately shown a nonfrivolous and meritorious defense for the purpose of its motion to set aside a default judgment.” *Lund*, 2000 UT 75 at ¶ 29.

In the present case, the District Court never made a ruling concerning whether Appellants' defenses were meritorious. However, Appellants did allege defenses to Appellees' Complaint, which include Appellees' sale of the Property, allegations that no damage was done to real or personal property, Appellees invoking their right to liquidated damages, constructive eviction, and failure to show standing against Appellee Jen Dressel, who did not sign the Agreement. Based upon these alleged meritorious

defenses, which, if proven, preclude a total or partial recovery of Appellees' claims, the District Court's ruling should be reversed and the Default Judgment should be vacated.

**1. Appellees sold the Property to a third party.**

On or before August 8, 2014, Appellees entered into an agreement with a third party to sell the Property, where a Warranty Deed, signed by Appellees on August 8, 2014, was recorded with the Utah County Recorder on August 12, 2014, conveying the Property from Appellees to the third party. R. at 84. Appellees' Complaint is seeking unpaid rent amounts for the months of August, September, October, and November of 2014. R. at 3, ¶ 14. Further, Appellants entered into a Lease Termination Agreement with the third party that bought the Property from Appellees. R. at 89, 90.

Appellants alleged that since Appellees no longer owned the Property for most of August and all of September, October, and November of 2014, they are not damaged by the non-payment of rent, except for possibly a week or so in August, depending on when the Property was actually sold. Further, since Appellants entered into the Lease Termination Agreement with the buyers of the Property, no rent is due from August through November by Appellants. Therefore, since Appellees did not sustain damages for unpaid rent from August through November and Appellants entered into a Lease Termination Agreement with the buyers of the Property, Appellants have alleged a meritorious defense, which, if proven, precludes a total or partial recovery of Appellees' claims.

**2. Appellants alleged they did not damage real or personal property.**

Appellees alleged that damage was done by Appellants to a dog kennel, family heirlooms and art work, bed coverings, sheets, other bedroom items, the yard, grass, and sprinkler system, totaling an amount of \$4,000. R. at 4, ¶ 16.

Appellants have testified, through declarations, that all the personal and real property alleged to be damaged was transferred to the third party who bought the property, which establishes that Appellees did not sustain the alleged damages. R. 92, ¶¶ 7, 12; 95, ¶¶ 8, 13. Appellants testified that they did not damage any family heirlooms or art work, where both were stored in the basement and remained in the basement at the time Appellants vacated the Property. R. at 92, ¶ 11; 95, ¶ 12. Appellants testified that they did not damage bed coverings, sheets, or other bedroom items, where the bed sheets were kept in a walk-in closet and never used. R. at 92, ¶¶ 8, 10; 95, ¶¶ 9, 11. Appellants also testified that they did not damage the yard, grass, or sprinkler system. R. at 92, ¶ 9; 95, ¶ 10. As such, there is a genuine dispute concerning the allegations of damage to Appellees' real and personal property.

The District Court never held an evidentiary hearing, pursuant to Utah R. Civ. P. 55(b)(2) to determine the validity of the alleged unliquidated damages concerning real and personal property. Due to no evidentiary hearing, it has not been established the true value or extent of the alleged damage to Appellees' real and personal property. Further, Appellees' calculation and request for damages in their Complaint fails to include the amount of the security deposit withheld from Appellants. As a result, the Default Judgment amount awarded does not show any adjustment to Appellees' claims for the \$1,350 retained by Appellees. Therefore, since Appellants show a genuine dispute

regarding Appellees' allegations to real and personal property, which the value of such alleged unliquidated damages have not been verified or adjusted by the District Court in an evidentiary hearing, Appellants have alleged a meritorious defense, which, if proven, precludes a total or partial recovery of Appellees' claims.

**3. Liquidated damages.**

On August 7, 2014, Appellants received a letter from Appellees' counsel invoking the right to withhold Appellants security deposit, in the amount of \$1,650, as liquidated damages. R. at 126. The Agreement states that "[i]f Tenant breaches any obligation under this Agreement Landlord has the right to retain the Security Deposit as liquidated damages." R. at 10, ¶ 2.5. Appellants allege that by invoking the liquidated damages, Appellees are barred from seeking further recovery from Appellants concerning a breach of the Agreement. R. at 78. However, Appellees allege that another section of the Agreement, ¶ 2.9, governs and requires Appellants to forfeit their security deposit as liquidated damages and pay further fees upon a breach of the Agreement. R. at 126. Appellants allege that, at the very least, the Agreement is ambiguous concerning liquidated damages and any such ambiguity should go against the drafter of the Agreement, which is Appellees. If it is found that the Appellees invoking of the liquidated damages prevents recovery of further claims for damages, Appellees are precluded from recovery of their claims. As such, Appellants have alleged a meritorious defense, which, if proven, precludes a total or partial recovery of Appellees' claims.

**4. Constructive eviction.**

On August 1, 2014, Appellants sent Appellees written notice that Appellants were vacating the Property due to constructive eviction, which was based upon the fact that Appellees continuously entered the Property without notice. R. at 119-120. If constructive eviction is proved, Appellees cannot be granted relief for breach of the Agreement. As such, Appellants have alleged a meritorious defense, which if proven, precludes a total or partial recovery of Appellees' claims.

**5. Appellant Jen Dressel did not sign the Agreement.**

Appellant Jen Dressel testified that she did not sign the Agreement. R. at 137, ¶ 3. Further, the Agreement, nor the Addendum to the Agreement, does not bear the signature of Appellant Jen Dressel. R. at 17-18. Since Appellant Jen Dressel did not sign the Agreement, or the Addendum to the Agreement, Appellant Jen Dressel is likely not liable for any allegation concerning a breach of the Agreement and cannot be a party to the Appellees' Complaint. Therefore, Appellant Jen Dressel has alleged a meritorious defense, which, if proven, precludes a total or partial recovery of Appellees' claims as to her.

Therefore, based upon the foregoing alleged meritorious defenses by Appellants, the District Court's ruling should be reversed and the Default Judgment should be vacated.

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### **CONCLUSION**

Based upon the foregoing, Appellants respectfully request for the reversal of the District Court's erroneous ruling to deny the Motion to Set Aside the Default Judgment, based upon ineffective process service, which establishes lack of jurisdiction, pursuant to Utah R. Civ. P. 4(d)(1)(A) and 60(b)(4), and for mistake, inadvertence, surprise, and/or excusable neglect, pursuant to Utah R. Civ. P. 60(b)(1).

DATED this 29th, day of December, 2015.

**LAKEY HOGELIN, PLLC**

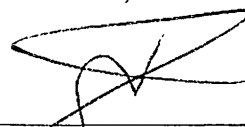
A handwritten signature in black ink, appearing to read 'Jon M. Hogelin', is written over a horizontal line.

Jon M. Hogelin  
Attorney for Defendants/Appellants

**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)(C)**

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because this brief contains 10,282 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) since this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman style.

DATED AND SIGNED this 29th day of December, 2015.


  
\_\_\_\_\_  
Jon M. Hogelin  
Attorney for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of December, 2015, two true and correct copies of the foregoing **APPELLANT'S BRIEF**, were mailed, via U.S. Mail, postage prepaid, to the following:

Tyler S. Foutz  
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Attorney for Plaintiffs/Appellees

  
\_\_\_\_\_  
Jon M. Hogelin  
Attorney for Defendants/Appellants


IN THE UTAH COURT OF APPEALS

VAL COOPER AND RICHARD COOPER,  Plaintiffs/Appellees,  vs.  NATE DRESSEL AND JEN DRESSEL,  Defendants/Appellants.	<b>CERTIFICATE THAT NO ADDENDUM IS NEEDED</b>  Appeal of Defendants/Appellants Nate and Jen Dressel  Appellate Case No. 20150322
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Appellants Nate and Jen Dressel, through their attorneys of record, Lakey Hogelin, PLLC, certify that no addendum is needed concerning their initial Brief of Appellants. As such, the initial Brief of Appellants, which does not have an addendum included, is a true and correct representation of the Appellant's argument and brief.

DATED this 30th, day of December, 2015.

**LAKEY HOGELIN, PLLC**

  
\_\_\_\_\_  
Jon M. Hogelin  
Attorney for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of December, 2015, two true and correct copies of the foregoing **CERTIFICATE THAT NO ADDENDUM IS NEEDED**, was served, via email, to the following:

Tyler S. Foutz  
tyler@osnlaw.com  
Attorney for Plaintiffs/Appellees



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Jon M. Hogelin  
Attorney for Defendants/Appellants