

2016

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

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.

**REPLY BREIF OF APPELLANT**

Appellate Case No. 20150322

**REPLY BREIF OF APPELLANT**

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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FILED  
 UTAH APPELLATE COURTS

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## INTRODUCTION

The basis for Appellees' argument is that the only way for Appellants to be served a summons and complaint was at the home of Appellant Jen Dressel's mother and that Appellants failed to provide support for a claim of mistake, surprise, or excusable neglect. However, Appellees do not properly distinguish the present case from *Reed v. Reed*. 806 P.2d 1182, 1184 (Utah 1991). Appellees fail to address that alternative service was likely obtainable and that Appellees chose not to seek such service. Appellees fail to recognize that the basis for the Court's ruling provides for a post office box to be established as a usual place of abode. Finally, that the Court's ruling that excusable neglect, mistake, or surprise of service is not a proper element as recognized by Utah R. Civ. P. 60(b) since Appellants did not provide sufficient support of excusable neglect, mistake, or surprise and Appellants received actual notice of the Complaint.

The fact of the matter is that the information used by the Court to determine the totality did not come close to the totality of circumstance test that was used in *Reed* for determining "a usual place of abode." 806 P.2d at 1184. Further, if it cannot be determined whether Appellants actually live at a residence for which their mail is forwarded, Appellees had alternatives for proper service, pursuant to Utah R. Civ. P. 4(d)(4)(A). Also, the exact information that the Court used in its ruling supports that a post office box can be a usual place of abode, which is impractical and inconclusive. It is well established in *Metro. Water Dist. Of Salt Lake v. Sorf* that excusable neglect, mistake, or surprise regarding service of a summons and complaint is proper to set aside a default judgment. 2013 UT 27, ¶ 16. Finally, Appellees' statement that evidence exists that Appellants received actual notice is



not supported by the actual facts alleged in the District Court. As such, the Court should reverse the District Court's Ruling that service of the Complaint upon the home of Appellant Jen Dressel's mother, which the District Court found to be Appellants' usual place of abode and reverse the District Court's Ruling that Utah R. Civ. 60(b) does not apply as to excusable neglect, mistake, or surprise in setting aside the Default Judgment despite perfected service.

### **ARGUMENT**

#### **I. THE HOME OF APPELLANT JEN DRESSSEL'S MOTHER WAS AND IS NOT APPELLANTS' USUAL PLACE OF ABODE AND APPELLEES HAD THE OPPORTUNITY TO SEEK ALTERNATIVE SERVICE.**

Clearly, the issue before the Court is whether the address used by Appellees to serve Appellants was their usual place of abode. However, based upon the totality test provided in *Reed*, the totality of the facts fails to meet the necessary requirements for 191 Moonlight Dr. to be Appellants' usual place of abode. 806 P.2d at 1184. Further, the facts for which the District Court relied upon inconclusively established that a post office box can be a usual place of abode, which is not practical. Further, Appellees had alternative means to pursue serving Appellants and chose to not do so.

#### **A. The Totality Test Used By the District Court Did Not Meet the Dispositive Issues That *Reed* Established.**

Appellees state that "[t]he facts of this case line up very well with the facts in the Utah Supreme Court's *Reed* opinion" and that the "[t]he undisputed facts of this case are analogous to the *Reed* opinion." *See Appellees' Br.* pp. 15-16, *See Id.* (brackets added). Appellees incorrectly limit the scope of the totality test used in *Reed* to the fact that the

party “listed his home address as that of his parents”, resided at the place listed as the residence of his parents, “failed to show that he lived elsewhere”, and “received actual notice of the proceedings.” *See Appellee Br.*, p. 15. However, the opinion in *Reed* relied upon actual conclusive evidence than what was used to provide support in the District Court for the determination of “usual place of abode.” 806 P.2d at 1184.

In *Reed*, the totality of circumstances used by the Court included that the party actually resided with his parents just prior to service of the summons, was actually witnessed in town at the time of service, used his parent’s address for his tax returns the previous year, and had knowledge of the summons less than two weeks after it had been served. *See Id.*, at 1184-85. Combine those factors with the fact that the party failed to show he lived elsewhere, the Court determined that those totality of circumstances established that his parent’s home was his usual place of abode. *See Id.*

In comparison to the totality of circumstances in *Reed* to the present case, Appellants, as a married couple, never lived with Appellant Jen Dressel’s mother, there was no witness of Appellants either at the home or in the town around the time of service, the server never established that Appellants actually lived or were present at the home of Appellant Jen Dressel’s mother, no formal documentation were provided showing that the address of Appellant Jen Dressel’s mother was used by Appellants for tax returns or other government filings, and it was only established that the Appellants had actual notice upon receiving the Notice of Entry of Judgment in the mail, which was after the entering of the Default Judgment and more than a month from the alleged service of the summons and complaint. R. at 91-92, ¶¶ 3-4, 94-95, ¶¶ 3-5, 97-98, ¶¶ 2-7, 124, and 127. The only fact



that was used by the District Court in establishing the totality of evidence is that Appellants left a forwarding address with Appellees and the US Post Office. R. at 119, 123, and 212, ¶¶ 7-24. No other factors were used that are remotely as conclusive as the factors used in *Reed*. 806 P.2d at 1184-85.

In fact, even based upon the incorrect standard that Appellees provide under *Reed*, the totality of circumstances is limited to only one factor. The first factor that Appellees state is the listing of a parent's home address, which Appellants did for the forwarding of their mail. R. at 119 and 123, *See Appellees' Br.*, p. 15. The second factor is that Appellants resided at the address of a parent at one point, which Appellants, as a married couple, never resided at the home of Appellant Jen Dressel's mother. R. at 91-92, ¶¶ 3-4, 94-95, ¶¶ 3-5, *See Ibid.* The third factor stated by Appellees is that Appellants failed to show they lived elsewhere, which Appellants submitted sworn declarations that they did live somewhere else. R. at 94-95, ¶¶ 3-5, 136, ¶ 2. Finally, Appellees state that Appellants received actual notice of the proceedings, which is established that Appellants only received the Notice of Entry of Judgment after the entering of the Default Judgment. R. at 91-92, ¶ 4, 95, ¶ 5. Likewise, even under the incorrect factors provided by Appellees, there is only one factor that is met concerning totality of circumstances.

While Appellees' quoting of *Reed* that "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" is accurate, one lone inconclusive factor is far too liberal to achieve "the just, speed, and inexpensive determination of every action" without assuring due process is actually met. *See Appellees' Br.*, p. 14, 806 P.2d at 1185. Therefore, the totality of circumstances, as applied in *Reed*

and otherwise, fails to establish that service was attempted upon Appellant's usual place of abode to provide Appellants proper due process as required by the United States Constitution.

**B. The District Court's Reliance Upon A Forwarding Address For Mail Is Not Clear and Practical in Determining a Usual Place of Abode.**

Appellees argue that the "District Court's ruling was not based solely on the Dressels' forwarding of their mail to 191 Moonlight Dr., but instead, it was based on the totality of the circumstances." *See Appellees' Br.*, p. 21. However, the District Court specifically stated in its Ruling:

In considering the circumstances in this matter, at the time of service, defendants claim to have left Utah, lived in a mobile home with no address. They provided an address in which they expected to be – have their deposit sent to that address. It was the 191 Moonlight Drive in Washington. That was the same address provided by the U.S. Postal Services as the defendants forwarding address.

And, finally, the notice of judgment was sent to that address as well. And that is the time period or at least the claim in which respondents are saying they became aware of the judgment. All roads point to the fact that his 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. Not only the least agreements and things were still due and owing on that. So I'm finding that there was effective service of process in this matter and it's more likely that the respondents were avoiding service in this matter.

R. at 213, ¶¶ 7-24.

The District Court clearly stated that it considered that Appellants claimed to have left Utah and lived in a motorhome, had mail forwarded to 191 Moonlight Drive, and received the Notice of Entry of Judgment at the same address for which they had their mail

forwarded. Based upon those facts, the District Court concluded that 191 Moonlight Drive was Appellants' usual place of abode.

Those very same facts of a party living in a motorhome, forwarding their mail to a parent's address, and receiving the Notice of Entry of Judgment in the mail gives support that a post office box is legally a party's usual place of abode. Appellees state that a determination of a post office box as a usual place of abode is "ridiculous", which Appellants agree. *See Appellees' Br.*, p. 22. However, Appellants prefer to characterize such basis for a usual place of abode, supported by the aforementioned facts, as not practical and in conflict with due process. To state simply, there really was not an application of any totality of facts, other than there was a forwarding address to receive mail, which could be used for service pursuant to Utah R. Civ. P. 4(d)(2)(A), provided that Appellants sign a document indicating receipt. Likewise, an address used for receiving mail can be used for service pursuant to Utah R. Civ. P. 4(d)(4)(A) if granted by the District Court for alternate service.

Nevertheless, it is not appropriate and not due process to rely solely on an address used for forwarding mail to personal serve Appellants the summon and complaint. This is especially true where the facts used to support a determination of usual place of abode also provides that a post office box can be determined as a usual place of abode. As such, it is impractical and likely not constitutional to determine that 191 Moonlight Dr. was Appellants' usual place of abode based upon an address that Appellants used to forward their mail.

### **C. The Disputed Facts Presented Required an Evidentiary Hearing**

Appellees argue that that the Appellants “provided no affidavits refuting the facts asserted in the Cooper’s declaration” and that the facts presented to the Court concerning service of process are “relatively undisputed.” *See Appellees’ Br.*, p. 19. The statement made by Appellees is simply not true. A major disputed fact that was supported by declaration, executed under oath, is the mother of Appellant Jen Dressel, Ms. McKeller.

Ms. McKeller testified in her declaration that she informed the process server that neither of the Appellants lived at her residence and that she “refused to accept any papers from the process server.” R. at 98, ¶¶ 6-7. The testimony of Ms. McKeller clearly establishes relevant evidence, if admitted, directly competing with the representation of facts presented by Appellees. It would likely be beneficial to the District Court to hear Ms. McKeller’s testimony in person and to have such testimony cross examined.

Further, Appellees argue that Appellants “provides no address or evidence that another location was the [Appellants’] proper place of abode.” *See Appellees’ Br.*, p. 19 (bracket added). Appellants, through their own declarations, dispute such fact by stating that they resided in a motorhome outside the State of Washington, where they were in California at the time of the alleged service. R. at 94-95, ¶¶ 3-5; 136, ¶ 2. Clearly this is evidence that should be presented to the District Court in an evidentiary hearing.

The District Court is a trier of fact and it is difficult for the District Court to come to a conclusive conclusion without having been present with evidence of disputed facts to make proper findings. Therefore, in order for the District Court to make conclusive findings based upon the actual submission of evidence, including testimony of witnesses under oath who are cross examined, an evidentiary hearing should have been and needs to be held.

**D. Appellees Chose Not To Seek Alternative Service And The District Court's Finding That Appellants Avoided Service Was an Improper Granting of Alternative Service After the Fact.**

Appellees argue that “[Appellants’] position that they had no place of abode for service” is not accurate since Appellants testified that they resided in their motorhome in California. *See Appellees’ Br.*, p. 16; R. at 94-95, ¶¶ 3-5; 136, ¶ 2 (bracket added). Further, Appellees argue that “[p]ersonal service on a party living without an address would be effectively impossible, and certainly impracticable and inefficient.” *See Appellees’ Br.*, p. 16 (bracket added). Finally, Appellees contend that Appellants “provide no evidence or testimony as to why they did not or could not have received actual notice to be served the Summons at 191 Moonlight Dr.” *See Ibid.*

Utah R. Civ. P. 4(d)(4)(A) provides that when the “identity or whereabouts of the person to be served are unknown” alternative service can be obtained. Further, Utah R. Civ. P. 4(d)(2)(A) provides that service can be processed by mail, as long as the “defendant signs a documented receipt.”

The District Court found that Appellants avoided service, although disputed by Appellants, which provides that Appellees were eligible for alternative service. The problem is that it was granted after the fact and should have been sought prior to granting Appellees a default judgment. R. 213, ¶¶ 7-24.

Appellants agree with Appellees that personal service upon a party without an address is virtually impossible, which is why there is alternative service that can be obtained by showing the unknown whereabouts of a party. Appellees knew that 191 Moonlight Dr. was not the usual place of abode for Appellants since Ms. McKeller

informed that process server that Appellants did not reside with her and refused to accept the service. R. 98, ¶¶ 6-7. Instead of then seeking alternative service, Appellees attempted to push through their defective service, which was granted by the District Court. It was improper for Appellees to attempt proper service without any verification that Appellants actually resided at 191 Moonlight Dr., other than having knowledge that Appellants caused to have their mail forwarded to that address. As such, Appellees should have sought alternative service, which was granted after the fact, and Appellants were not properly served and the District Court's Ruling should be reversed as to proper service.

**II. APPELLANTS PROVIDED PROPER SUPPORT TO DEMONSTRATE MISTAKE, SURPRISE, OR EXCUSABLE NEGLIGENCE TO WARRANT THE DEFAULT JUDGMENT TO BE SET ASIDE.**

Appellees contend that Appellants did not provide any facts to support a claim of mistake, surprise, or excusable neglect. *See Appellees' Br.*, p. 25. Further, Appellees argue that Appellants failed to attempt to show the application of Utah R. Civ. P. 60(b)(1), although Appellees provide a direct quote from Appellants brief specifically citing the elements of Utah R. Civ. P. 60(b)(1). *See Ibid.* Despite Appellees' argument, it is clear that Appellants sufficiently preserved an argument to set aside the Default Judgment pursuant to Utah R. Civ. P. 60(b)(1).

In contrast to Appellees argument that Appellees did not provide any support for a claim of mistake, surprise, or excusable neglect, Appellants and Ms. McKeller testified through their Declarations that Ms. McKeller never accepted service of the Summons and Complaint and she did not have anything to forward onto Appellants to establish actual

notice. *See* 91-92, ¶ 4; 94-95, ¶¶ 3-5; 136, ¶ 2; 97-98, ¶¶ 2-7. These testimonies demonstrate that at the very least there was excusable neglect, if not surprise or mistake.

In *Metro. Water Dist. Of Salt Lake v. Sorf*, where the wife of a party being served threw the summons and complaint on the ground and the remains of the documents were gone when the party arrived at home, the Court specifically stated that it disagreed with any finding that excusable neglect for setting aside a default judgment is negated by the fact that proper service of the summons and complaint were perfected. 2013 UT 27, ¶ 16. The Court 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.*

The holding by the Court in *Metro. Water Dist.*, is in direct conflict with the District Court’s Ruling:

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 213-14, ¶¶ 25, 1-10. The District Court states that excusable neglect or mistake are not obtainable where it was found that Appellants were served. This conflicts with the Court’s holding that excusable neglect is not negated by a perfected service of the summons and complaint. *Id.* Therefore, since the District Court’s Ruling is inconsistent with



precedent set by the Utah Supreme Court, Appellants should be allowed to claim at least excusable neglect, if not surprise or mistake.

In the present case, since Ms. McKeller did not accept service, she did not have the summons and complaint to provide to Appellants. Due to either her excusable neglect, surprise, or mistake, or even excusable neglect, mistake, or surprise by Appellants, there was no notice of the service, which absent such mistake Appellants would have responded and the default would not have occurred. *See Id.* This is evident due to the fact that Appellants responded immediately upon receiving the Notice of Entry of Judgment. R. at 91-92, ¶ 4; 95, ¶ 5.

Appellants sufficiently preserved an argument for Utah R. Civ. P. 60(b). Appellants provided sufficient support that there was excusable neglect, mistake, or surprise concerning their inability to file an answer to the Complaint, which resulted in a default judgment. Therefore, the District Court's Ruling denying Appellants to set aside the default judgment should be reversed.

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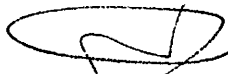
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### **CONCLUSION**

Based upon the foregoing, the District Court erred in determining usual place of abode and denying Appellants to set aside the Default Judgment and Appellants respectfully request for the Court to reverse the District Court's Ruling and Default Judgment.

DATED this 7th, day of March, 2016.

**LAKEY HOGELIN, PLLC**



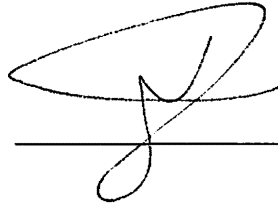
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Jon M. Hogelin  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of March, 2016, two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF**, were mailed, postage prepaid, to the following:

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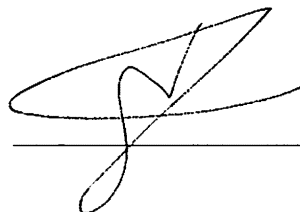


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**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)**

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3,214 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman style.

DATED AND SIGNED this 7th day of March, 2016.



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A handwritten signature in black ink is positioned above a horizontal line. The signature is stylized, featuring a large, sweeping loop on the left side and a series of sharp, intersecting strokes on the right side.