

2016

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VAL COOPER, an individual, and
RICHARD COOPER, an individual,

Plaintiffs-Appellees,

v.

NATHAN DRESSEL, an individual, and
JENNIFER DRESSEL fka JENNIFER
MCKELLAR, an individual,

Defendants-Appellants.

BRIEF OF APPELLEE

**Appeal of Defendants/Appellants Nate
and Jen Dressel**

Appellate Case No. 20150322

District Court No. 140401244

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

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UTAH APPELLATE COURTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. 78A-4-103(2)(h)

STATEMENT OF ISSUES FOR REVIEW

Cooper generally agrees with Dressels' statement of issues for review and with the applicable standard of review set forth on each issue. However, Dressels' brief fails to include citation to the record demonstrating that the issues stated were preserved for appeal. *See* Utah R. App. P. 24(a)(5)(A).

In addition, the Dressels raise other issues throughout their Brief as apparent bases for appeal, which are not addressed in Dressels' Statement of Issues for Review, and which issues should not be reviewed by this Court due to Dressels' failure to preserve those issues for appeal.

DETERMINATIVE STATUTES OR RULES

The following Rules are determinative as to this appeal:

Utah R. Civ. P. 4(d)(1)(A)

Utah R. Civ. P. 60(b)(1)

Utah R. Civ. P. 60(b)(4)

STATEMENT OF THE CASE

Nature of the Case

This case is predicated on a lease agreement in which the Appellants Nate and Jen Dressel were Tenants, and Appellees were the Landlords. The Dressels terminated the lease prior its term and abandoned the property. Accordingly, the Coopers sued for early termination fees, liquidated damages, and actual damages to the property pursuant to Lease's plain terms. The Coopers' process server left process with Jen Dressel's mother, Ms. McKellar, at 191 Moonlight Dr., Sequim, Washington. The 191 Moonlight Dr. address is the address that the Dressels gave to the Coopers for the Coopers to return the security deposit, and ostensibly, make other communications necessary after the Dressels' termination of the Lease. 191 Moonlight Dr. is also the location to which all of the Dressels' mail was forwarded. A Lexis-Nexis search indicated to the Coopers that 191 Moonlight Dr. was the Dressels' likely current address. Finally, the Dressels responded promptly to the Notice of Judgment that was mailed to 191 Moonlight Dr. by the Coopers, indicating that the Dressels were, in fact, receiving notices and documents delivered to that address.

The Dressels filed a motion to set aside the default judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. After review of the parties' affidavits and arguments, the District Court denied the Dressels' Rule 60 Motion.

Course of Proceedings and Disposition of the District Court

Appellees do not dispute Appellants' statement of the Course Proceedings and Disposition of the District Court at p. 3 of Appellants' brief.

Statement of Facts

1. Coopers and Dressels entered into a lease with respect to property located in Utah County (the "Property"). R. at 2, ¶ 4.

2. The Property consisted of a single family residence, which was furnished with Coopers' personal property items. R. at 2.

3. The term of the lease was to be from November 13, 2013 to November 30, 2014. R. at 10, ¶ 3.

4. The Lease provided a clear and express early termination fee of "three (3) months of rent;" which amounted to \$4050.00. R. at 3, ¶ 12; R. at 10, ¶ 3.3.

5. The Lease also contains a clear and express liquidated damages provision, which does not require an election of remedies, ie, the Landlord is not required to elect either liquidated damages or early termination damages:

If Tenant breaches any portion of this Agreement, including Tenant vacating prior to the completion of this Agreement ... Tenant understands the security deposit will be retained by Landlord as liquidated damages and any rent, late fees, past due utility and/or service bill or any other amounts still owing to Landlord shall be immediately due and payable.

R. at 10, ¶ 2.9.

6. On or about August 1, 2014, a letter addressed from and signed by both Nate and Jen Dressel was sent to the Coopers, which clearly and unequivocally declared the Dressels' intention to terminate the lease prior to its term date: "This is a written

notice to inform you that as of August 1, 2014, we are no longer your tenants at 672 Meadow Crest Way, Saratoga Springs, UT. We have vacated the property on the grounds of constructive eviction.” R. at 119.

7. The Dressels provided the following address where the Coopers could send items pertaining to the Lease: 191 Moonlight Dr., Sequim, WA 98382. R. at 119.

8. Based on the Dressels’ clear breach and actual termination of the Lease on August 1, 2014, the Coopers sent a letter to Dressels indicating that Coopers intended to exercise their rights and remedies under the Lease, namely, that the early termination fee of \$4050 would be charged pursuant to Section 3.3 of the Lease, and that Coopers would retain the security deposit as non-exclusive liquidated damages pursuant to Section 2.9 of the Lease. R. at 87.

9. Regardless of whatever communications occurred between the Dressels and the subsequent purchaser of the Property, the Dressels plainly terminated the lease on August 1, 2014, which the Property was owned by the Coopers. R. at 119.

10. The Coopers filed a lawsuit in the Fourth District Court on August 22, 2014 alleging damages and the right of recovery as follows:

- a. The Early Termination Fee of \$4050;
- b. Liquidated Damages of \$1,650;
- c. Additional damages to the property of at least \$4,000;
- d. Attorneys fees of at least \$1,500.

R. at 5-6, ¶ 28-31.

11. Coopers' Complaint did not seek any past due rent for the months of August, September, October, or November. *See generally* R. 4-7.

12. In Coopers' efforts to serve the Complaint on the Dressels, the Coopers subpoenaed the U.S. Postmaster in Saratoga Springs, Utah, who provided information that the Dressels' mail was forwarded to the same address, 191 Moonlight Dr., Sequim, WA, as was previously provided to the Coopers by the Dressels. R. at 123.

13. Coopers' counsel also obtained a Comprehensive Report from Lexis-Nexis, which listed 191 Moonlight Dr. as a possible current address for the Dressels. R. at 100.

14. On attempting to serve the Complaint at Nate Dressel's last known place of business, the Utah National Guard, Coopers' counsel was informed that he no longer worked at that location, and had moved to Washington. R. at 100.

15. Based on the information from the Dressels themselves, the U.S. Postmaster, the Lexis-Nexis Comprehensive Report, and Mr. Dressel's employer, Coopers effected personal service at 191 Moonlight Dr., which service of process was left with Ms. Dressel's mother, Ms. McKellar, on September 26, 2014. R. at 124, 127.

16. The Dressels failed to file any responsive pleading to the Complaint within the allowed time to do so, and accordingly, the Coopers filed a Default Certificate for both Nate and Jen Dressel, which were entered by the Court Clerk, Raelene Christensen, on November 5, 2014. R. at 45-46.

17. Judgment was thereafter entered by the Court against the Dressels on November 14, 2014. R. at 47-48.

18. Notice of Entry of Judgment was sent to the Dressels on or about December 5, 2014, at the same address where service was effected: 191 Moonlight Dr. R. at 59-60.

19. Shortly thereafter, the Dressels filed a Motion to Set Aside Judgment pursuant to Rule 60 of the Utah Rules of Civil Procedure. R. at 70-98.

20. In Dressels' Motion to Set Aside, only the following arguments were raised:

- a. The Default Judgment was void for insufficiency of service. R. at 76-78.
- b. The Default Judgment should be set aside under Rule 60(b). R. at 76-78.
- c. The Complaint should be dismissed pursuant to Rule 12(b)(6). R. at 76-78.

21. The Dressels' Motion did not raise any other issues as a basis to set aside the default judgment. R. at 76-78.

22. The Declarations filed by the Dressels and Ms. McKellar claimed that the Dressels did not reside at the 191 Moonlight Dr. address. R. at 91, ¶ 3; 94 at ¶ 3, 97 at ¶ 4-5.

23. However, the Declarations did not provide any address or evidence of any place of abode for the Dressels. R. at 91-98. Rather, the Declarations alleged that the Dressels had no place of abode, but had resided in a motorhome at the time the Complaint was served. R. at 136, ¶ 4.

24. As to the Dressels' Motion to Set Aside pursuant to Rule 60(b), the Dressels did not assert any grounds for excusable neglect, except that defendants had no notice of the proceeding. R. at 77. As to the Dressels' meritorious defense, the Dressels argued only that the property had been sold after the Dressels unilaterally terminated the

lease and vacated the Property on August 1, 2014, and therefore the Coopers had no standing. R. at 77.

25. With respect to the Dressels' contention that service at 191 Moonlight Dr. was ineffective, the Court reviewed the Dressels' Motion and supporting Declarations and found as follows:

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.

R. at 212.

26. The District Court also found it instructive that the notice of judgment was sent to the 191 Moonlight Dr. address as well, which undisputedly did reach the Dressels and caused an immediate response from the Dressels. R. 212.

27. As a result of the facts and circumstances surrounding service, the District Court correctly concluded that "all roads point to the fact that this 191 Moonlight Dr. in Washington is their usual place of abode and that is where they expected to receive notifications regarding any mail that was received." R. at 212.

28. With respect to the Dressels' Rule 60(b) defense, the District Court correctly concluded that there was no showing of mistake, surprise or excusable neglect, as service at the 191 Moonlight Dr. address was valid. R. at 213.

29. The District Court also correctly concluded that since the motion to set aside judgment was denied, the District Court had no reason to rule on the Motion to Dismiss. R. at 213.

30. The Dressels never made a motion for an evidentiary hearing, either pursuant to their Motion to Set Aside, at the hearing, or thereafter. *See* R. at 77-78.

SUMMARY OF ARGUMENTS

1) The District Court Properly Determined that Service on the Dressels was Proper and Effective Under Rule 4.

The District Court correctly determined that service of the summons and complaint on the Dressels at 191 Moonlight Dr. was proper and effective under the totality of the circumstances. A review of the affidavits and facts before the District Court makes clear that the following facts were undisputed: 1) the Dressels affirmatively provided 191 Moonlight Dr. as the address to which the Coopers could provide notices with respect to the Lease; 2) the Dressels had their mail forwarded to 191 Moonlight Dr.; 3) the Summons was left with Ms. McKellar, the Dressels' close relative, at 191 Moonlight Dr.; 4) the Dressels provided no evidence or actual address of a location which could be determined to be their abode or dwelling place; and 5) the Dressels responded promptly to the Notice of Entry of Judgment that was mailed to 191 Moonlight Dr. Based on the totality of the circumstances, the District Court correctly concluded that "all roads" pointed to the fact that 191 Moonlight Dr. was the Dressels' usual place of abode for the purposes of service of the Summons and Complaint.

2) The Dressels Failed to Make Any Showing of Excuse, Surprise or Excusable Neglect Pursuant to Rule 60(b)(1).

The Dressels' affidavits and testimony is silent as to the elements required to set aside a judgment pursuant to Rule 60(b)(1) of the Utah Rules of Civil Procedure. The entirety of the Dressels argument as to Rule 60(b)(1) was that service is invalid, and there is "clearly mistake, surprise or excusable neglect." However, as no facts were provided to the District Court from which the court could have concluded that such was the case, the District Court properly determined that the Dressels had failed to make the required showing under Rule 60(b)(1). Because there was no showing of mistake, surprise or excusable neglect, the District Court had no cause to review the Dressels' allegation of a meritorious defense to the Coopers' claims.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THAT SERVICE ON DRESSELS WAS PROPER AND EFFECTIVE UNDER RULE 4.

A. Service at 191 Moonlight Drive Was Appropriate and Effective Under the Totality of the Circumstances.

The clear and undisputed facts of this case demonstrate that service on the Dressels was proper and effective under Rule 4 and the case law defining Rule 4's requirement that a person be served at their "dwelling house or usual place of abode." *See Utah R. Civ. P. 4(d)(1)(A)*. There is no dispute in this case that the Summons was left with Ms. McKellar at 191 Moonlight Dr., who is a person of suitable age and

discretion. The only question is whether 191 Moonlight Dr. was the Dressels' "usual place of abode" pursuant to Rule 4(d)(1).

"The determination of 'usual place of abode' is a mixed question of fact." *Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991). The "district court's determination of whether, under the facts presented," the place of service "fits within the definition of the usual place of abode is a question of law." *Id.* As such, the determination of whether the place of service meets Rule 4's requirements is a legal conclusion, and is not a factual allegation that is properly made in a party's affidavit. That a party may state in his or her affidavit merely that the place is not the person's abode is of no consequence. Instead, it is for the district court to review the facts asserted in the affidavits to draw the legal conclusion that the place of service does or does not fit within the definition of "usual place of abode" for purposes of service of process.

As the Dressels' Brief concedes, the Dressels' bear the burden of showing that service was improper. *See Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1074 (Utah 1998). The invalidity of service can be shown by clear and convincing evidence. *Carnes v. Carnes*, 668 P.2d 555, 557 (Utah 1983). To overcome this burden, a party seeking to set aside service is required to provide "competent evidence showing that service of process was not completed or was improper." *Zions First Nat. Bank v. Christensen*, 2000 UT App 76, 1, 2000 WL 33243623 (citing *Skanchy*, 952 P.2d at 1075).

As the parties' respective burdens on the issue of determination of "usual place of abode" and the legal basis for such determination are in place, the significant question is now what does "usual place of abode" mean under Utah law. The Utah Supreme Court

reviewed this issue in *Reed v. Reed*, 806 P.2d 1182 (Utah 1991). In that opinion, the Court reviewed jurisprudence from Utah and Federal law. The opinion makes clear 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’ within the Rule’s meaning.” *Id.* at 1185. Rather, “*the practicalities of the particular fact situation determine whether service meets the requirements of 4(d)(1).*” *Id.* (emphasis added). Pertinent, and indeed, critical, to the determination of the ‘usual place of abode,’ is whether the place of service is best calculated to afford actual notice of the proceedings, which analysis “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.” *Id.* Additionally, Rule 4’s requirement of service at the usual place of abode must be “liberally construed and applied to achieve the just, speed, and inexpensive determination of every action.” Utah R. Civ. P. 1.

The entirety of the Dressels’ position appears to be that because they claimed in a declaration that they did not live at 191 Moonlight Dr., without providing any evidence to the contrary, they could not have been served there. In reality, the Dressels seem to argue that they could not have been served anywhere but personally, as they claim to have had no physical place of abode. In view of *Reed* and other Utah cases, the Dressels’ position is incorrect. A review of the facts of this case demonstrates that the District Court correctly concluded that the Dressels were served at their “usual place of abode,” considering the unique circumstances and practicalities of the case. The undisputed facts on the record and in the parties’ declarations are as follows:

1. The Dressels provided the Coopers with 191 Moonlight Dr. as the location which the Coopers were to use to provide communications with respect to the Lease.¹ R. at 119.
2. The Dressels instructed the U.S. Postmaster to direct all communications via mail to them at the 191 Moonlight Dr. address, thus indicating that *anyone* needing to send them something could do so to that address with the expectation that they would receive it. R. at 123.
3. Information in a trusted and widely used database to locate individuals indicated that 191 Moonlight Dr. was the Dressels' address. R. at 100.
4. The Dressels do not provide even the unsupported allegation, much less evidence, that they had another place of abode where service should have been effectuated. *See* R. at 91-96.
5. The Dressels received the Notice of Entry of Judgment that was mailed to the same address, and promptly acted on the same. R. at 91-95.

The facts of this case line up very well with the facts in the Utah Supreme Court's *Reed* opinion. In that opinion, the party seeking to set aside service: 1) had listed his home address as that of his parents; 2) had resided there at one point, 3) failed to show that he lived elsewhere, and 4) received actual notice of the proceedings. *Reed*, 806 P.2d at 1185. Based on these facts, the Supreme Court correctly concluded that the parent's address was the defendant's place of abode. In light of those facts, the court made the following statement, which is exactly applicable to the current case:

the likelihood of defendant appearing at the place of service in the near future, coupled with the absence of a permanent residence elsewhere, is sufficient to uphold service made at a residence maintained with a member of defendant's family even if defendant is seldom there.

¹ While the Coopers claim, and undoubtedly will argue in Reply, that the 191 Moonlight Dr. address was provided for the limited purpose of returning the Dressels' security deposit, that address must be construed as the location at which notices and information pursuant to the Lease, including a Complaint for breach, could be reliably delivered.

Id. at 1185.

The undisputed facts of this case are analogous to the *Reed* opinion. The Dressels provided Coopers with an address of a close relative to send any notice or information pertinent to the Lease, and indeed, by forwarding all mail to 191 Moonlight Dr., effectively told the entire world that 191 Moonlight Dr. was the location to which any important information could be delivered. That they did receive actual notice of important documents delivered to that address is made indisputably clear by the fact that they received and immediately responded to the Notice of Entry of Judgment mailed to that same address. Of equal significance is the fact that the Dressels have provided no other address or location that is their usual place of abode. Thus, the Dressels' position that they had no place of abode for service is overcome by the ruling of the *Reed* opinion. Obviously, the Dressels' argument cannot be correct under a fair reading of Rule 4's service requirements. Personal service on a party living without an address would be effectively impossible, and certainly impracticable and inefficient. A liberal and fair reading of Rule 4's service requirements cannot allow a person to become impossible to serve just because they choose to live in a motorhome without a permanent address.

Finally, while the Dressels provide the self-serving testimony that they did not receive actual notice of the Summons that was delivered to Jen Dressel's mother, they provide no evidence or testimony as to why they did not or could not have received actual notice by serving the Summons at 191 Moonlight Dr. The process server's affidavit attests that she left the Summons and Complaint with Ms. McKellar at 191 Moonlight Dr., which fact has never been disputed. R. at 124, 127. Ms. McKellar's declaration

does not state what she did with those documents, e.g., that she left them on the porch, threw them away, fed them to the dog, or otherwise did something making it impossible for the Dressels to receive them. R. at 97-98. Of no small consequence is the fact that, by appointing Ms. McKellar's address as the address to which the Coopers could send money, and the whole world could send mail, the Dressels obviously relied on and trusted Ms. McKellar to preserve any correspondence delivered to her and to provide such to the Dressels. Yet, there is no explanation as to why such did not occur, or could not have occurred, in this case. As the District Court noted, the Dressels asserted no testimony that they were out of the country, out of contact with Ms. McKellar, or in other circumstances that would have made it impossible for Ms. McKellar to notify them of the documents. R. at 213-14. The District Court is not required to give weight to self-serving testimony, particularly where it is not sustained by corroborating evidence; the District Court correctly disregarded such testimony by the Dressels here.

The situation here is exactly the situation addressed by the *Reed* opinion, and the same outcome should obtain here as well. The practicalities of the undisputed facts of this case demonstrate that service of the summons and complaint at the relative's house, which had been held out by the Dressels themselves as the location to which important information could be sent, was the location best served to give notice to the Dressels that they were being served with process. *See Reed*, 806 P.2d at 1185. Even if the Dressels were not there at the specific time that the service was delivered, every indication is that the Dressels would be appearing at or in contact with such place in the future. Service was sufficient there, even if, as in *Reed*, the Dressels may have seldom been there. *See*

id. The fact that the Dressels have provided no other location where they could or should have been served, and in fact seem to claim that there was no such location, demonstrates that, under the analysis of the totalities of the circumstances, service was proper and effective at 191 Moonlight Dr.

B. Additional Arguments as to Service Are Not Preserved for Appeal.

The Dressels assert four additional arguments against the effectiveness of service of process, which are not properly preserved for appeal. (See Appellants' Brief at I.B – I.D, pp. 22-25). “To preserve an issue for appeal, the issue must have been presented to the trial court in such as way that the court has an opportunity to rule on that issue. 438 *Main St. v. Easy Heat, Incl*, 2004 UT 72, ¶ 51, 99 P.3d 801. “For a trial court to be afforded an opportunity to correct the error, (1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.” *Id.* “Issues that are not raised at trial are usually deemed waived.” *Id.*

All of the following issues could have, but undisputedly were not, raised before the District Court. The Dressels have not asserted that any of these issues could not have been raised, or that extraordinary circumstances exist which would have made it impossible or impractical for them to preserve the arguments. Accordingly, they should not be considered by this Court.

As will be briefly demonstrated below, however, those arguments are irrelevant to the determination of the issues on appeal, even if they had been raised and preserved.

1. AS THERE WAS NO DISPUTE OF FACT IN THE PARTIES' AFFIDAVITS REGARDING THE FACTS RELIED ON BY THE DISTRICT COURT, THERE WAS NO NEED TO HOLD AN EVIDENTIARY HEARING.

The Dressels' arguments that the District Court should have held an evidentiary hearing regarding service of process are misplaced. The facts before the court are relatively undisputed. As stated above, it was not disputed by the parties that: 1) the Dressels provided the Coopers with 191 Moonlight Dr. as the location to which notices under the Lease could be sent; 2) the Dressels forwarded their mail to 191 Moonlight Dr.; 3) the Dressels provided no address or evidence that another location was the Dressels' proper place of abode; 4) the Summons and Complaint were served to Ms. McKellar at 191 Moonlight Dr.; 5) the Dressels provided no testimony or evidence as to what Ms. McKellar did with the Summons and Complaint; and 6) the Dressels undisputedly received notices that were mailed to 191 Moonlight Dr.

Notably, the Dressels have failed to preserve this issue, as they did not request that the court hold an evidentiary hearing. Even if they had, the record is clear that the Dressels provided no affidavits refuting the facts asserted in the Coopers' declaration supporting their Opposition to the Rule 60(b) Motion, and that declaration focused solely on attesting to the facts pertaining to service and so forth. In reality, there is no dispute as to the facts alleged by the competing declarations. As *Reed* and other cases make clear, the District Court did not have to rely or assess credibility of the Coopers' uncorroborated statement that "they did not live" at 191 Moonlight Dr. in order to find that such was their usual place of abode and the best place to effectuate service under Rule 4. Rather, there was sufficient evidence provided by the Coopers, which was not refuted, from which the

District Court could have made the finding that it reached. Because of the lack of disputed facts, the District Court correctly stated that “in this case, it is 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. As such, there was no need for an evidentiary hearing to hear the credibility of any of the parties on the issues set out in the parties’ affidavits and supporting documents.

2. AFFIDAVITS OF SERVICE ARE EFFECTIVE PURSUANT TO RULE 4(e).

As stated above, the Dressels did not include defective affidavits as a basis for their Rule 60 Motion, and in fact have never raised this issue prior to their Appellants’ Brief. As such, the Appellate Court need not review or consider this issue.

Although the Dressels’ argument at I.B., p. 22 of their Brief does not cite to Rule 4 for support, but cites only a 2006 case in arguing that the Coopers’ service affidavits are defective, the law relied upon appears to be outdated.² The case cited appears to be based on a prior version of Rule 4. The current version of Rule 4, effective at least as of May 1, 2014, states only that “[t]he proof of service must state the date, place, and manner of service.” Utah R. Civ. P. 4(e)(1). This version was in effect at the time the Summons was served on the Dressels in September of 2014. Additionally, the relevant version of Rule 4(e) provides that “[f]ailure to make proof of service does not affect the validity of

² The case cited, *Southland Constr. v. Semnani*, 2001 UT 6, 20 P.3d 875, cites to Rule 5 of the Utah Rules of Civil Procedure, although that citation appears to be incorrect. Rule 5 deals with service of papers on parties to a case after Rule 4 Service of Process has been effected. At any rate, the current version of Utah R. Civ. P. 5 does not address the content or requirements for service affidavits.

the service. The court may allow proof of service to be amended.” Utah R. Civ. P. 4(e)(3).

Plainly, the requirements of the current version of Rule 4(e) are met by the Coopers’ service affidavits. The affidavits state the date (September 26, 2014), the place (191 Moonlight Dr., Sequim, WA) and the manner of service (“by then and there personally delivering one true and correct copy thereof, by then presenting to and leaving the same with Mr. McKellar ...”). R. 124, 127. In any event, even if the affidavits were defective, such is not a basis to challenge sufficiency of service under Rule 4(e)(3).

Finally, even if the affidavits were defective and were a basis to challenge whether the Dressels were properly served, there can be no harm or justified reliance on the language of the affidavits. That documents were personally served on Ms. McKellar at 191 Moonlight Dr. has never been challenged by the Dressels, and is not at issue in this appeal. The only issue for appeal is whether it was proper at that location. The content of the Affidavits, even if insufficient and actionable, has nothing to do with that issue.

3. THE DISTRICT COURT’S RULING IS CLEAR AND PRACTICAL.

Candidly, it is unclear what the Dressels attempt to argue in Section I.C. of their Brief. (See Appellants’ Brief at p. 23-24). Certainly, the court’s holding does not determine that an actual mailbox is or could be any party’s dwelling place. 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 outlined above. The argument that the District Court’s ruling invites the determination that a

“post office box could be held to be a usual place of abode” is ridiculous, and has no basis in the facts of this case.

4. THE DISTRICT COURT DID NOT GRANT ALTERNATIVE SERVICE, BUT INSTEAD RULED THAT SERVICE WAS EFFECTIVE AS CONDUCTED.

Again, the argument that the Court or the Coopers effectively sought alternative service of the Dressels has never been made in this matter, and cannot be considered for the first time in this case on appeal.

A review of Rule 4(d)(4)(A) makes clear that this was not a case wherein alternative service was, or should have been employed. Alternative service is appropriate where the whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence. Utah R. Civ. P. 4(d)(4)(A). The Coopers employed reasonable diligence in ascertaining what, for all intents and purposes, appeared to be the Dressels’ abode prior to effecting service at 191 Moonlight Dr. That is the address where the Dressels indicated to the Coopers that they could be contacted; that is the address where the Dressels’ mail was forwarded; that is the address that the Lexis-Nexis search provided as the Dressels’ likely domicile; and Nate Dressel’s employer indicated to the Coopers’ counsel that the Dressels had moved to Washington state. The only indication as to the claim that the Dressels may not live there was Ms. McKellar’s statement to the process server that the Dressels did not live there. R. at 98. Ms. McKellar did not provide an address where the Dressels lived, did not indicate that the Dressels were residing in a motor home without a physical address, and in fact, provided no additional information to indicate that service should not be effective at 191 Moonlight Dr. R. at

98. Certainly, a person's declaration that "they don't live here" is not sufficient evidence to believe that alternative service is necessary where all signs point to the fact that the address is correct.

Even if this argument were well taken, the Dressels have not identified any prejudice that they have suffered as a result. Had the Coopers had a reason to seek alternative service, they would have petitioned the District Court to allow personal and/or mail service at 191 Moonlight Dr. anyway, as that was the address that seemed most likely to reach the Dressels. In the event the Coopers were allowed mere publication and mailing to the last known address (where the Coopers knew the Dressels were not living, since that was the rental property), the mail would have been forwarded to 191 Moonlight Dr. Of course, it is ridiculous to argue that the Dressels would have received more effective notice by publication than by delivering the summons to the Defendant's Mother. In reality, such a motion would have only cost the Coopers significant additional attorney fees and other costs, while reaching the same outcome – delivery of the Summons and Complaint to 191 Moonlight Dr.

II. THE DISTRICT COURT CORRECTLY DENIED THE DRESSELS' RULE 60(b)(1) MOTION.

The appellate standard of review for denial of a Rule 60(b) Motion is abuse of discretion. *Heglesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981). The requirements for a Rule 60(b) Motion to Set Aside a judgment are clear, and it is similarly clear that the Dressels have no basis to argue that the District Court improperly denied their motion. While the Coopers would argue that the timeliness of the Dressels'

Rule 60(b) Motion, filed just a couple of weeks after notice was mailed to 191 Moonlight Dr., actually demonstrates that service and notice were effective, the Coopers do not dispute that the motion was timely filed under Rule 60(b). However, the Dressels completely failed to make any showing of mistake, inadvertence, surprise, or excusable neglect. *See* Utah R. Civ. P. 60(b)(1).

A. The Dressels Failed to Make Any Cognizable Argument as to Mistake, Surprise, or Excusable Neglect.

A review of the record indicates that the Dressels did not even attempt to raise any argument regarding a factual basis for Rule 60(b)(1) below. In the Dressels' Rule 60(b) motion, the entirety of their argument as to mistake and excusable neglect is as follows:

In this case, defendants were not served and had no notice of the proceeding until about a week ago. Clearly there was 'mistake, inadvertence, surprise or excusable neglect.

R. at 77.³ The Dressels' Reply in Support of Rule 60(b) Motion does not address Rule 60(b)(1) factors at all. R. at 133-135. All oral arguments before the court focused on whether service was effective and, to some extent, the Dressels' alleged meritorious defense. R. at 197-213.

Where the Dressels have failed to even attempt to make a showing of any of the Rule 60(b)(1) factors, there could have been no basis to set aside the judgment pursuant

³ While the Dressels accuse the District Court of disregarding the distinct separation between the rule (b)(1) elements and a (b)(4) void judgment, in review of the documents, it was the Dressels, and not the District Court, who appears to have attempted to conflate the requirements of a motion under Rule 60(b)(4) (void judgment) with the requirements for a Rule 60(b)(1) Motion (excusable neglect, mistake, or inadvertence). The Dressels' documents did not argue a basis to set aside the judgment under subpart (b)(1).

to that Rule. Accordingly, the District Court correctly concluded that there was no mistake, inadvertence, or excusable neglect.

B. The Facts of this Case Do Not Demonstrate Mistake or Excusable Neglect.

Again, the Dressels' Brief does not cite any argument made as to the Rule 60(b)(1) elements. Their Brief does not identify any facts which could demonstrate excusable neglect or inadvertence. But even if any of the Rule 60(b)(1) factors had been argued below, there are no facts that would support a finding of mistake, inadvertence, or excusable neglect on the part of the Dressels. Indeed, the Dressels' argument is primarily that default judgments are not favored and should be set aside, which is not the case here. "To qualify for relief under rule 60(b)(1), a party must show that he has used reasonable due diligence." *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 29, 321 P.3d 1080. "Due diligence is established where the 'failure to act was the result of ... the neglect one would expect from a reasonably prudent person under similar circumstances.'" *Id.*

Opinions such as *Sewell* and *Metropolitan Water Dist.* are instructive as to what could be considered excusable neglect. In *Sewell*, the appellant had provided a copy of the summons and complaint to his insurance agent for handling, relied on representations by his agent that the complaint had been forwarded to the insurance company for defense, and in general, acted quickly and diligently with respect to the summons and complaint. *See Sewell*, 2013 UT 61 at ¶ 30. In *Metropolitan Water Dist.*, although the defendant had been regularly served, he provided facts that indicated that he had not seen the complaint or summons. In that case, the testimony was that the Defendant was not home, the

person who received the documents threw them into the driveway, the documents were not in the driveway when the Defendant returned home, and the Defendant entered into discussions and negotiations with the Plaintiff after service, which discussions led the Defendant to reasonably believe that no lawsuit was pending.

Conversely, opinions such as *Black's Title v. Utah State Ins. Dept.*, 1999 UT App 330, 991 P.2d 607, indicate that a lack of facts demonstrating reasonable diligence and/or excusable neglect support the District Court's refusal to set aside a judgment. In *Black's Title*, the court stated that the movant merely indicated that he was under a doctor's care and unable to work. *Id.* at ¶ 10. He did not describe the illness, nor did he explain how it prevented him from taking the steps required to contest the petition. *Id.*

In this case, the Dressels provided no facts nor made any argument that their actions were reasonable and diligent if service was proper – the court cannot tell if their Rule 60(b)(1) motion is to be evaluated as surprise, excusable neglect, or mistake. Regardless of which Rule 60(b)(1) basis the Dressels' claim, no facts are set out from which the District Court could have concluded that their actions were reasonable under any 60(b)(1) grounds. The declarations in support of the Dressels' motion do not state what happened with the summons and complaint after it was served; no indication is made by Ms. McKellar as to what she did or did not do with the complaint. Ms. McKellar does not aver that she disregarded the summons because she deemed it improperly served, or otherwise precluded the Dressels from finding out about it. Similarly, no facts are averred as to any interaction or non-action by any party from which a determination of reasonable action could be concluded. The Dressels merely

provide a self-serving statement that they were not aware of the lawsuit until they received the Notice of Entry of Judgment. Assuming service was valid, which the District Court concluded it was, the Dressels have failed to make any showing as to how their neglect, or the neglect of Ms. McKellar, was excusable in any respect. If such were sufficient to set aside a judgment, virtually any default judgment could be easily set aside, and Rule 60(b)(1)'s requirements become meaningless.

C. Because the Dressels Failed to Show Excusable Neglect, There Is No Need to Consider Whether a Meritorious Defense Can Be Demonstrated.

"In 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." *Menzies v. Galetka*, 2006 UT 81, ¶ 64, 150 P.3d 480. "These considerations should be addressed in a serial manner." *Id.* "In other words, there is no need to consider whether there is a basis for setting aside a default judgment if the motion was not made in a timely manner, and no need to consider whether there is a meritorious defense if there are not grounds for relief." *Id.* Thus, it is unnecessary, and moreover inappropriate, to even consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown." *State Dept. of Social Services v. Musselman*, 667 P.2d 1053, 1056 (Utah 1983).

Because the Dressels did not make a showing of excuse, inadvertence or neglect under Rule 60(b)(1), there was no reason for the District Court to reach the issue of whether the Dressels had asserted a meritorious defense. Indeed, the Dressels could not have made a showing of such, as they asserted absolutely no fact, evidence, or affidavit

testimony addressing the issue. Accordingly, the District Court correctly denied the Rule 60(b)(1) Motion without review of whether the Dressels had or had not asserted a meritorious defense.

D. Arguments Regarding Damages and Evidentiary Hearing Were Not Preserved Below, and Are Insufficient Under Rule 55.

Although the Dressels argue at p. 33 of their Brief that the District Court erred in failing to hold an evidentiary hearing as to damages, that argument was not made below by the Dressels, and has not been properly preserved for appeal. While the Dressels do complain about the amount of the default judgment in their Rule 60(b)(1) motion, such is only toward an attempted showing of meritorious defense. Nowhere in the Dressels' briefing or oral argument did they assert that the court should have held an evidentiary hearing as to damages under Rule 55 of the Utah Rules of Civil Procedure.

Rule 55 is clear that no such hearing is necessary in this case, even if it had been requested by the Dressels. Rule 55(b) states as follows:

Judgment may be entered as follows: (b)(1) by the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if: (b)(1)(A) the default of the defendant is for failure to appear; (b)(1)(B) the defendant is not an infant or incompetent person; (b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and (b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

Utah R. Civ. P. 55(b). Rule 55(b)(2) provides that an evidentiary hearing can be held by the court if it is necessary to ascertain certain facts pertaining to the judgment. Utah R. Civ. P. 55(b)(2).

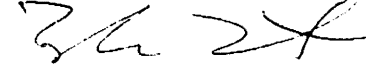
The circumstances of this case meet all of the elements of Rule 55(b)(1), and therefore default and judgment were properly entered. The Dressels' default was for failure to appear. The Dressels are not persons who are infants or incompetent. The Dressels were served pursuant to Rule 4(d)(1). The Coopers' claim was for an amount certain. Accordingly, even if the Dressels had preserved this argument below, it is not well taken. Default was properly entered as required by Rule 55(b)(1).

CONCLUSION

Based on the foregoing, the court should dismiss the Dressels' appeal and enter an order enforcing the Amended Judgment. The Dressels have failed to show that the default judgment should be set aside under Rule 60(b) of the Utah Rules of Civil Procedure. As the Coopers are entitled to recover attorneys fees pursuant to the attorney fee provision in the Lease, R. at 15, the Coopers request leave to augment their Judgment in the amount of their costs and attorneys' fees on appeal, which will be provided to the District Court by affidavit.

DATED this 1st day of February, 2016.

OLSEN SKOUBYE & NIELSON, LLC



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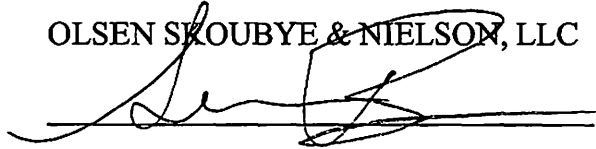
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2016, I caused to be delivered two (2) true and correct bound copies of the foregoing BRIEF OF APPELLEE to each of the following by the method indicated below.

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() Facsimile
() Email:

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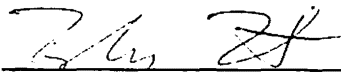
RULE 24(f)(1) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF OF APPELLEE complies with the Type-Volume Limitation and Typeface Requirements in Utah R. App. P. 24(f)(1)(A) and 27(b).

1. This brief complies with the Type-Volume Limitation of Utah R. App. P. 24(g)(5) because this brief contains 8,034 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 2013; Times New Roman Font; double-spaced; size 13.

DATED this 12 day of February, 2016.

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