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Leroy Schultz v. Jose Quintana : Brief In Response To Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEROY SCHULTZ, :
Plaintiff-Respondent, :
-v- : No. 15134
JOSE QUINTANA, :
Defendant-Appellant. :

BRIEF IN RESPONSE TO
PETITION FOR REHEARING

Appeal from the Judgment of the
Third Judicial District Court of
Salt Lake County, State of Utah
Honorable Ernest F. Baldwin, Jr., Judge

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Clerk, Supreme Court, Utah

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CASES CITED

<u>Cummings v. Nielson</u> , 42 Utah 157, 129 P. 619	1
<u>Ducheneau v. House</u> , 4 Utah 483, 11 P. 618	1
<u>Jones v. House</u> , 4 Utah 484, 11 P. 619	1

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JOSE QUINTANA, :
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BRIEF IN RESPONSE TO
PETITION FOR REHEARING

ARGUMENT

POINT I

RESPONDENT'S PETITION FOR REHEARING
SHOULD BE DENIED INASMUCH AS NOTHING
NEW IS OFFERED FOR CONSIDERATION.

This court has long held that a petition for rehearing should not be granted unless the petitioner presents both new and important matters for the consideration of this court. Ducheneau v. House, 4 Utah 483, 11 P. 618; Jones v. House, 4 Utah 484, 11 P. 619; Cummings v. Nielson, 42 Utah 157, 129 P. 619. In the petition now before this court, plaintiff-respondent offers neither new facts nor new authority to buttress his request that this court rehear its original

decision entered February 27, 1978, and therefore the petition should be denied.

POINT II

BASED UPON THE INSTRUCTIONS PRESENTED TO THE JURY AT TRIAL, THE ONLY QUESTION BEFORE THE JURY WAS WHETHER OR NOT DEFENDANT WAS LIABLE TO PLAINTIFF FOR INJURIES SUSTAINED ON DEFENDANT'S PROPERTY, WHICH THIS COURT HAS ALREADY PROPERLY HELD HE WAS NOT.

The only instruction requested by the plaintiff concerning the duty of care was Instruction No. 13 which has been previously found to be improper in this court's original decision. That instruction refers to the standard of care which a landowner must exercise on his own property. Paragraph 1 of Instruction No. 13 refers to the rights of a person "to use and enjoy his property." Paragraph 2 specifically refers to the duty of an owner of property to those who "reasonably stray a short distance from the right-of-way for a casual purpose." Paragraph 3 again refers to the duty which the "owner of land" owes to a passerby. It is clear from the instruction, which was proffered by the plaintiff, that it instructs the jury on plaintiff's theory of the case, to wit: that the defendant breached a duty of care to the plaintiff after plaintiff had entered the "property owner's" property. In respondent's petition, he now asserts a separate theory unrelated to his originally proffered Instruction No. 13 which was given by the

court. It is now far too late for the respondent to assert a new theory of the case and to complain that even if Instruction No. 13 was improper, as this court has previously ruled, that this case should be remanded for further proceedings. Finally, as this court stated in its original decision, it is "questionable as to whether the stakes created an unreasonable danger in the first place as they were simply unsharpened survey stakes two inches by one inch in size."

CONCLUSION

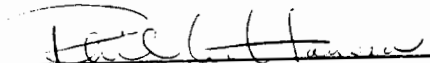
Respondent's petition for rehearing should be denied in that:

1. Respondent has presented no new and important facts or legal authority which would require a reexamination by this court, and
2. This court properly decided that respondent did not make out a case that entitled him to recover for the injuries he sustained under the facts and the law which were relied on at trial.

Respectfully submitted,

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By


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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief in Response to Petition for Rehearing was mailed to Stephen M. Harmsen, attorney for plaintiff-respondent, 350 South 400 East, #G-1, Salt Lake City, Utah 84111, this ~~29th~~ day of March, 1978.

Kay Ashby, PLS