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Leroy Schultz v. Jose Quintana : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LERROY SCHULTZ,)	
)	
Plaintiff-Respondent,)	
)	
-v-)	No. 15134
)	
JOSE QUINTANA,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

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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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action in which plaintiff seeks to recover damages for personal injuries sustained on defendant's property due to the negligence of the defendant.

DISPOSITION IN THE LOWER COURT

This case was tried before an eight-person jury in the Third Judicial District Court in and for Salt Lake County, State of Utah, with the Honorable Ernest F. Baldwin, Jr. presiding. From a judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant asks that the judgment against him be set aside

and that the verdict be reversed in his favor as a matter of law, or in the alternative defendant asks for a new trial.

STATEMENT OF FACTS

Appellant, Jose Quintana, was defendant in a personal injury suit tried in the Third Judicial District Court on March 16 and 17, 1977. Plaintiff, Leroy Schultz, alleged that appellant was negligent in the placement of certain survey stakes on defendant's property, over one of which plaintiff claimed that he tripped, sustaining injuries which allegedly disabled him for 88 days. Plaintiff sought to recover special damages for medical treatment and lost wages as a railroad switchman in the amount of \$6,739.19. Plaintiff also claimed general damages for pain and suffering in the amount of \$40,000.00.

The survey stake, over which plaintiff claimed that he stumbled, was allegedly driven on or near the property line of defendant's property at 2422 Lake Street, Salt Lake City, Utah. The rear of appellant's property abutted land owned by the Utah State Road Commission on the date of the alleged injury, August 25, 1974. Appellant had received notice of his successful bid on the property August 21, 1974, having bid \$188.89 more than the unsuccessful bidder, his next door neighbor and the plaintiff Schultz. Plaintiff had a prescriptive easement in a coarsely graveled north-south right-of-way abutting defendant's property, by which right-of-way he gained access to parking and a

garage at the rear of his property at 2420 Lake Street. Appellant responded in an interrogatory that he drove the survey stakes on or about August 24, 1974, in such a line as to identify and preserve his neighbor's right-of-way which he believed to be between the west boundaries of the Lake Street lots and the east boundary of the property he acquired from the state. The stakes were installed to delineate the property line on which a fence was to be built later between defendant's property and plaintiff's right-of-way.

On the night of the alleged injury, plaintiff had backed his car south over the gravel driveway turning west onto a second east-west paved public right-of-way that would lead him to Lake Street and thence to work. Plaintiff stopped his car on the paved right-of-way and in the dark rushed across defendant's property to his residence to get his lantern. In his haste and in the dark, hurrying over the loosely graveled right-of-way, plaintiff stumbled and fell. Plaintiff brought this action to recover damages sustained in that fall. The jury on special verdict found the defendant-appellant 75 percent negligent and awarded damages to the plaintiff in the amount of \$3,342.26 plus costs.

Plaintiff's attorney introduced the case to the jury with the following opening remarks:

MR. HARMSSEN: . . . Ladies and gentlemen of the jury, the Judge has explained to you the nature of this

case and I am sure that many of you having owned homes or been involved in having friends who have been involved in lawsuits or just generally being aware of the problem of owning a home, the problems of life in general, may be [sic] have some what [sic] of a prejudice against personal injury cases, at least the idea that there is a lot of people running around that every time they get into an accident all of a sudden there [sic] neck starts to hurt and all of a sudden there [sic] back starts to feel sore and then they think that may be [sic] the excuse to go to the insurance company and get a large settlement-- (Reporter's transcript on appeal, page 3.)

The Court admonished plaintiff's attorney and said:

The jury will disregard everything Mr. Harmsen had to say up to this point. You may start again, Mr. Harmsen.

At the noon recess, the following conversation took place between the Court and Mr. Fratto, defendant's attorney of record at trial:

THE COURT: I was going to ask, did you have anything else on the opening statement you wanted to make in the record?

MR. FRATTO: Yes, I will say a few words.

THE COURT: Yes, but on Mr. Harmsen's?

MR. FRATTO: What was that?
I didn't get it.

THE COURT: Did you have any
motions to make concerning it?

MR. FRATTO: No.

THE COURT: All right, you have
waived them then. I would have
granted a mistrial if you had asked
for it.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY
INSTRUCTED THE JURY ON THE STANDARD
OF CARE A PROPERTY OWNER OWES TO
PERSONS INJURED ON HIS PROPERTY.

Over appellant's objection (Reporter's transcript of trial,
page 191), the Court gave the following instruction to the jury:

The rights of a person to use and
enjoy his property is qualified by a
duty to exercise reasonable care for
the safety of others who may pass
by his property.

The duty of an owner of property
adjacent to a right of way extends
not only to the user of the right of
way but also those who reasonably
stray a short distance from the
right of way for a casual purpose.
(Emphasis added.)

The owner of land abutting the right
of way may be negligent creating an
unsafe condition thereon.

An unsafe condition as that term is used in these instructions, means a condition on the land in question involving an unreasonable risk of injury to persons properly using such area.

While the instruction given may be proper in some cases, it was clearly improper under the facts of this case. The duty of care which a property owner owes to others who are injured on his premises is determined by classifying the injured party as either an invitee, licensee, or trespasser. This court defined the classes of persons in Stevens v. Salt Lake County, 25 Utah 2d 168, 478 P.2d 496 (1970). The court defined an invitee as a person who goes onto the premises of another at the invitation of the owner, a licensee is one who goes on the land of another without invitation but with the landowner's permission, and a trespasser is one who goes on the land of another without the permission or invitation of the landowner.

Under the facts of this case, even read in the light most consistent with the jury's verdict, the plaintiff could not qualify as an invitee or licensee, as the defendant neither invited nor gave permission to the plaintiff to enter his premises. Furthermore, the plaintiff did not introduce any evidence to show that he was on the defendant's premises at the invitation or with the permission of the defendant. Therefore, when the plaintiff tripped over the surveyor's stake on defendant's

property, he was a trespasser, for the burden of proof to prove a higher standard of care rested on the plaintiff, which burden he failed to meet by failing to introduce any evidence of the facts necessary to charge defendant with the higher standard of care.

The fact that a person's entrance onto another's property was innocent or the encroachment was very slight is not sufficient to render a trespasser an invitee or licensee, nor does the motive, state of mind, or reasonableness of the actor alter a property owner's liability. 62 Am. Jur. 2d Premises Liability § 55, at 297-9.

The general rule governing the duty of an owner is that the observance of due care by an owner toward a trespasser requires no affirmative conduct to render the premises safe for his use, but only that the possessor must refrain from injuring the trespasser unnecessarily by willful, wanton, or reckless conduct. Martin v. Jones, 122 Utah 597, 253 P.2d 359 (1953). The holding of Martin, supra, was succinctly restated by the Utah State Bar in the form of two jury instructions in JIFU, Instruction Nos. 45.3 and 45.10, which state:

45.3 Duty of Owner of Land Toward Trespasser. A trespasser cannot recover for failure of the possessor of land to do acts to facilitate the trespass or to render it safe; nor can he recover for failure of the possessor to exercise care in his management of the premises or in maintenance of conditions or his activities thereon.

45.10 Liability of Owner for Artificial Conditions on Land. [If you believe from a preponderance of the evidence that] plaintiff was a trespasser as that term is herein defined, he would be entitled to recover from defendant only if you find from preponderance of the evidence the following:

- (a) that plaintiff's injury, if any, was proximately caused by an artificially created condition on the premises, and
- (b) the condition was such that it involved a risk of serious bodily harm to persons coming in contact therewith, and
- (c) the defendant knew or from facts within his knowledge, should have known of the presence of trespassers in dangerous proximity to the condition referred to, and
- (d) the condition was such nature that in the exercise of reasonable care the defendant should have anticipated that trespassers would not discover it or realize the risk involved therein, and
- (e) the defendant failed to use reasonable care to warn of the said dangerous condition.

The comparison of the instruction which the trial court judge gave over defendant's objection to the state of the law in Utah clearly demonstrates that the given instruction was erroneous. Paragraph 2 of the given instruction reads:

The duty of an owner of property adjacent to a right of way extends not only to the user of the right of way but also those who reasonably stray a short distance from the right of way for a casual purpose. (Emphasis added.)

In effect, the instruction imposes upon a landowner a duty to a trespasser far in excess of what is required under Martin v. Jones, supra. Furthermore, the trial court's failure to instruct the jury on the different classes of persons who enter another's premises and the respective duties owed to each class constituted plain error.

POINT II

THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT WAS ERROR.

There can be no doubt that the burden of proving each and every element of negligence was upon the plaintiff, including the burden of establishing a duty of care owed by defendant to plaintiff. It was plaintiff's burden to show under what class of individuals (invitee, licensee, or trespasser) he claimed a duty owed. Since at the close of plaintiff's case he had introduced no evidence that he was on defendant's property at the invitation of the defendant (invitee) or with the permission of the defendant (licensee), the only question which remained under defendant's motion for directed verdict was whether plaintiff could recover as a trespasser. As previously stated, Martin v. Jones, supra,

requires the following in order for a trespasser to recover for injuries sustained on the property of another:

- (1) the plaintiff's injuries, if any, must be proximately caused by an artificially created condition on the premises, and
- (2) the condition was such that it involved the risk of serious bodily harm to persons coming in contact therewith, and
- (3) the defendant knew or from facts within his knowledge should have known of the presence of trespassers in dangerous proximity to the condition referred to, and
- (4) the condition was of such nature that in the exercise of reasonable care the defendant should have anticipated that trespassers would not discover or realize the risk involved therein, and
- (5) the defendant failed to use reasonable care to warn of the said dangerous condition.

While arguably the plaintiff could satisfy some of the requirements of Martin, it was clear as a matter of law that driving 12-inch surveyor's stakes into the ground did not involve a risk of serious bodily harm to others, nor was the condition of such nature that he would anticipate that strangers would not discover it or realize the risk involved therein. And finally as a matter of law, the trial

court should have ruled that placing 12-inch surveyor's stakes on defendant's own property line was not unreasonable and that if a duty were owed the defendant did not breach that duty.

POINT III

THE DELIBERATE MISCONDUCT OF PLAINTIFF'S ATTORNEY BY INTERJECTING THE ISSUE OF WHETHER OR NOT DEFENDANT HAD HOMEOWNER'S INSURANCE SO PREJUDICED THE JURY THAT IN THE INTERESTS OF FAIRNESS AND JUSTICE, THE JUDGMENT FOR PLAINTIFF SHOULD BE REVERSED OR REMANDED FOR NEW TRIAL.

Appellant recognizes the mere mention of insurance does not in all cases lead to the conclusion that the jury was prejudiced or likely to be to such an extent that a fair trial could not be had. Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965). However, in the instant case there can be no doubt that the interjection of insurance by plaintiff's attorney into the trial was deliberate and calculated as the plaintiff's attorney knew that the defendant did not in fact have any insurance on the property nor was insurance available to pay off any recovery by the defendant. (Answer to interrogatories, dated the 9th day of June, 1975, answer to question number 4.) Furthermore, the trial court made it clear that if defendant's attorney had have asked for a mistrial, a mistrial would have been granted. (Transcript of trial, page 34.)

It is therefore clear that the interjection of insurance

coverage as an issue in the trial by plaintiff's attorney is sufficient to require a mistrial if the defendant's request for a new trial has not been waived or otherwise lost.

Rule 59, Utah Rules of Civil Procedure states that:

- (b) Time for Motion. Motion for a new trial shall be served not later than ten days after the entry of the judgment.

At the noon recess on the first day, the judge informed the defendant that he had waived any motion for a mistrial or a new trial by failing to then ask for it. Such a ruling was clearly in contradiction of Rule 59. It is defendant's position that the trial court judge cannot by virtue of his own declaration reduce the allowed time for a motion for a new trial from the ten days allowed under Rule 59 and require such a motion be made during trial. By virtue of the trial court's ruling, the defendant has been deprived of his right to petition for a new trial under Rule 59, and therefore this court should correct the error by granting a new trial.

Even if defendant's former counsel waived any legal objections to the introduction of the prejudicial statement, the judgment against defendant should be set aside under Rule 60. Rule 60 provides that a court may in the furtherance of justice relieve a party or his legal representative from a final judgment for mistake, inadvertence,

surprise, or excusable neglect. In the instant case, defendant's former counsel inadvertently failed to raise his objection to the introduction of the evidence by plaintiff's counsel during trial. Rule 60 further provides that the procedure for obtaining any relief from a judgment shall be either by motion or, as in the instant case, by an independent action. Since the trial court has already expressed its views as to the fact that defendant's counsel had waived any objection to the prejudicial statements, it is now proper in the interests of fairness and justice to relieve the defendant from the judgment on appeal.

Prejudicial misconduct of plaintiff's attorney affected the substantial right of appellant to a fair trial. The judgment and verdict of the jury appear inconsistent with substantial justice. The allowance of vacation of judgment is a creature of equity designed to relieve against harshness of enforcing the judgment which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or a defense. Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953). The instant case is a clear example of where equity will prevent the plaintiff from benefiting from the deliberate misconduct of his counsel and will at the same time afford to a defendant a fair and equitable trial.

CONCLUSION

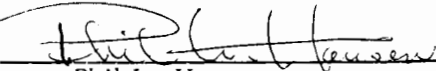
The judgment against the defendant should, as a matter of

law, be reversed or in the alternative remanded for a new trial. From the facts presented at trial, it is clear that the plaintiff failed to sustain its burden of proof as to the duty of care owed by the defendant to the plaintiff. Furthermore, the trial court improperly instructed the jury on the duty owed to a trespasser by the owner or occupier of land. Finally, in the interests of equity, the judgment should be reversed or remanded due to the deliberate prejudicial misconduct of plaintiff's attorney.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served on Stephen M. Harmsen, attorney for plaintiff-respondent, 350 South 400 East, #G-1, Salt Lake City, Utah 84111, this 15th day of August, 1977.

