

1978

Leroy Schultz v. Jose Quintana : 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.)

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

Pursuant to Rule 76 (e) U.R.C.P., plaintiff-respondent
hereby petitions this court to reconsider its original decision
filed February 27, 1978 and to:

- 1) remand this case to the trial court for further
proceeding consistent with the opinion of this court; or to,
- 2) find as a matter of law that the facts presented
at the trial justify the judgment of the jury below.

FILED

MAR 17 1978

ARGUMENT

Clerk, Supreme Court, Utah

BASED ON THE FACTS PRESENTED AT TRIAL A JURY
COULD REASONABLY FIND THAT THE DEFENDANT ERRONEOUSLY PLACED
THE STAKES IN THE RIGHT-OF-WAY AND THAT AT THE TIME OF THE

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INCIDENT THAT PLAINTIFF REMAINED A USER OF A HIGHWAY AND THAT DAMAGES COULD BE AWARDED.

As this court correctly reasoned, the status of the plaintiff at the moment of injury is crucial to recovery. If plaintiff was a trespasser, then according to the current law in Utah, the decision of this court is correct. Plaintiff, contends, however, that the evidence relating to the improper placement of the pegs, presents at least a jury question at the time of the injury. If plaintiff was in the roadway when he tripped over the stakes, then the instruction of the lower court was clearly correct and the lower court should be affirmed.

On page 4 of plaintiff-respondent's brief, filed with this court, the issue of whether or not defendant properly placed the stakes was addressed in the following language. "Plaintiff's testimony shows that plaintiff never left his lawful right-of-way and that in fact the defendant had erroneously placed the survey stakes not on the boundary line, but in plaintiff's rightful right-of-way."

The evidence consists of the following. On page 107-108 of the official reporter's transcript of the trial, Mrs. Leroy Schultz testified that the fence later built along the right-of-way, delineating the actual boundary line was 1-1 1/2 feet away from where the survey stakes had been driven by the defendant. Since the stake in question was a corner stake at the very beginning of defendant's property, this would mean that plaintiff had at no time encroached on defendant's

property, but rather was in the lawful right-of-way at the time of the accident. Plaintiff's exhibits 6 and 7 further buttress this conclusion.

Thereafter, defendant's own witness, Dale William James on page 149-150 of the official transcript, in a dialogue with the trial court, admitted that the east boundary of the stakes may have been erroneously placed. Mr. James is a professional surveyor and laid out the survey for the fence which was later installed.

CONCLUSION

As such, since the facts are such that a jury could have found liability of the defendant consistent with the opinion of this court announced February 27, 1978, plaintiff respectfully requests that this court remand this case to the trial court for proceedings consistent with that opinion, if the court is unable to determine as a matter of law that the decision of the lower court was proper.

RESPECTFULLY SUBMITTED,

STEPHEN M. HARMSSEN
350 South 400 East, #G1
Salt Lake City, Utah 84111
Attorney for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing petition for rehearing and supporting brief were served on Phil L. Hansen, PHIL L. HANSEN AND ASSOCIATES, attorneys for the defendant-appellant, 250 East Broadway, Suite 100, Salt Lake City, Utah 84111, this _____ day of March, 1978.