

1958

## Zelph S. Calder v. Ralph Siddoway : Brief of Respondent on Appeal

Utah Supreme Court

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Colton & Hammond; Attorneys for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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AUG 1 2 1958

ZELPH S. CALDER,  
*Plaintiff and Appellant,*

— vs. —

RALPH SIDDOWAY,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

Case  
No. 8833

## RESPONDENT'S BRIEF ON APPEAL

COLTON & HAMMOND  
*Attorneys for Respondent.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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## RESPONDENT'S BRIEF ON APPEAL

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### PRELIMINARY STATEMENT

The Plaintiff and Appellant, hereinafter referred to as Plaintiff, began this action on the 14th day of September, 1953, by serving upon the Defendant and Respondent, hereinafter referred to as Defendant, a Summons and a copy of the Complaint, which contained three counts. Thereafter the Plaintiff, by a series of motions, amended his Complaint until there were 17 counts contained therein. A further attempt to amend was denied and the Plaintiff instituted another action against the Defendant for similar trespasses as contained in this

action. That case was tried and ended in each party receiving Judgment for \$1.00.

The Defendant in this action filed an Answer and Counterclaim against the Plaintiff, which action was tried before a jury. Plaintiff dismissed all of his counts but Count One, upon which the jury gave him Judgment against the Defendant for \$189.00 and Defendant dismissed all counts in his Counterclaim against the Plaintiff excepting Counts One, Two and Eight, upon which the jury gave Defendant Judgment against Plaintiff for \$415.80. From this Judgment Upon the Verdict of the Jury, the Plaintiff appeals.

The record discloses a long and circuitous route from its inception to trial. There is no valid reason for this Appeal. Defendant's Brief fails to disclose one reason for the Judgment of the jury being in error. The fact that Plaintiff failed to establish his case before the jury does not mean the Trial Court committed error per se as inferred in Plaintiff's Brief or relieve Plaintiff of the burden of proving his case and that error was committed.

Outside of the above statement of fact, as contained in the first paragraph of Plaintiff's Preliminary Statement, the balance of his statement is superfluous and without meaning, it being both argumentative and containing matter outside of the record. The Affidavit of Stewart, contained in Page 11 of Plaintiff's Brief under the heading of Preliminary Statement, is entirely improper, being brought in before this Court without any

opportunity on the part of the Defendant to cross-examine. Plaintiff did not even submit a copy of the Affidavit to the Defendant.

All other matters contained in Plaintiff's statement were found in favor of the Defendant by the jury. The fact that the jury did not believe the testimony of the Plaintiff, or of his other witnesses, certainly is not error but a finding of fact of the jury which should not be upset by this Court:

“The rule is well established that the verdict of a jury, based upon conflicting evidence, will not be set aside unless the evidence so strongly preponderates against the verdict as to indicate that the jury was moved by passion, prejudice, or some other improper influence. This general rule is one which no one would, of course, venture to deny.”  
(3 Am. Jur. Section 888 P. 444)

This rule was affirmed in the case of *Flinders v. Hunter* (60 Ut. 314, 208 Pac. 526), which held

“The credibility of witnesses and the weight to be given their statements is within the exclusive province of the trial court, and, where there is some substantial evidence in support of the findings made by the court, the appellant court cannot interfere.”

With reference to the Plaintiff's alleged points of error:

## POINT I.

PLAINTIFF CLAIMS THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS ONE AND EIGHT BECAUSE THEY ARE DIFFERENT ACTIONS THAT DO NOT ARISE OUT OF THE SAME CIRCUMSTANCES, OCCURRENCES OR TRANSACTIONS.

This certainly is not in error. Rule 13 (b) states:

“A pleading may state as a counterclaim *any* claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.” (Emphasis supplied)

## POINT II.

DID THE TRIAL COURT COMMIT ERROR IN DENYING PLAINTIFF'S MOTION FOR A SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM COUNT ONE?

No. It is elementary that a hearing on a Motion for Summary Judgment should not degenerate into a trial of the issues by affidavits. The burden is upon the moving party to establish the lack of a triable issue of fact: all doubts are resolved against him, and his supporting affidavits are carefully scrutinized (6 Moore's Federal Practice, p. 2070).

In ruling on a Motion for Summary Judgment the Court's function is to determine whether a genuine issue exists, and not to resolve any existing factual issues. If a genuine issue as to any material fact exists a trial is necessary. (6 Moore's Federal Practice, p. 2101) also (U. R. C. P. 56[c]).

The Trial Court considered Plaintiff's Motion and denied it. The Plaintiff's Brief on Appeal shows no abuse of discretion and the Trial Court's decision should stand.

### POINT III.

#### PLAINTIFF'S STATEMENT ON THIS POINT CANNOT BE UNDERSTOOD.

Close study of the statement and argument following, fail to show what Plaintiff is claiming by this point. From the statement, "the Court erred in striking from Plaintiff's Reply and Counterclaim the false allegations . . .", it would appear Plaintiff is stating that his own Reply and Counterclaim contained false allegations. Adding the balance of this statement "of the Defendant's Counterclaim Count One" does not make sense. If the Plaintiff meant that the Court erred in striking from Plaintiff's Reply and Counterclaim the allegations that the Defendant's Counterclaim was false, then Rule 12(f) U.R.C.P. would cover the subject and substantiate the fact that the Court did not err.

This rule provides that the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.



An assertion in Plaintiff's Reply that allegations in Defendant's Counterclaim are false and sham are beyond doubt redundant and immaterial and raised no issue and were rightfully stricken by the Trial Court.

#### POINT IV

#### THE PLAINTIFF CLAIMS THE COURT ERRED IN GIVING INSTRUCTION NUMBER 7.

Defendant states the Court did not err in this Instruction. There can be no question but what there was an agreement between the parties hereto to fence. (Tr. p. 24) Plaintiff stipulated that there was an agreement between Mr. Siddoway and Mr. Calder wherein Mr. Siddoway was to furnish four spools of barbed wire and Calder was to make the fence. Plaintiff further stipulated that the cost of this wire was \$42.00, for which he owed the defendant. Plaintiff further stipulated that he did not use it as agreed by the parties hereto and was responsible for the wire.

The Defendant then testified (Tr. p. 25) that he constructed the fence and that it cost him \$80.00 for wire, plus \$1.00 per rod for labor for 80 rods. One-half of this cost, \$80.00, plus the cost of the wire Plaintiff admitted responsibility for, \$42.00, made a total of \$122.00 for which the jury gave him Judgment. Certainly Instruction 7 is proper wherein the jury was instructed that if there is no agreement as to the cost of a fence the expenses thereof should be born equally, in this case, by the parties.

## POINT V.

### THE COURT DID NOT ERR IN OVERRULING PLAINTIFF'S MOTION TO AMEND JUDGMENT.

If the Plaintiff was attempting to have the verdict set aside in his "Motion to Amend Judgment" in Rule 59, the statute sets up certain requirements which must be made in order that a new trial may be granted. However, in Plaintiff's above entitled Motion, he does not set forth any of the requirements which would entitle him to a new trial. The nearest would be Rule 59(3) "Accident or surprise, which ordinary prudence could not have guarded against." It is hard to understand how anyone could have been surprised since the Plaintiff filed this case in August of 1953 and it was not tried until August of 1957. Certainly Plaintiff could in no way be surprised or excused for his failure to be ready to try the case, four years after the same was filed. He had himself and at least five other attorneys which the record shows Plaintiff conferred with, to advise him in the matter and assist him in the preparation of this case. Certainly the Court did not err in overruling his Motion to Amend Judgment.

## POINT VI

### HAS NO PLACE IN THIS APPEAL.

Defendant hereby moves that Point VI and the whole thereof be stricken from the record. Motion for a New Trial should be timely presented to the Trial Court.

## POINT VII.

### COSTS WERE PROPERLY AWARDED TO THE DEFENDANT.

Plaintiff, under Point V. (plf. Br. p. 20) injects a paragraph with reference to costs being improperly awarded to Defendant. The Judgment in this case specifically awards costs to the Defendant by order of the Court. U.R.C.P. 54[d](1) also *Checketts v. Collings* (78 Ut. 93, 101).

The Defendant respectfully submits that the decision of the Trial Court herein should be affirmed.

COLTON & HAMMOND

First Security Bank Building  
Vernal, Utah

*Attorneys for Defendant  
and Respondent*

By Hugh W. Colton

I hereby certify that I mailed 2 copies of the foregoing Respondent's Brief to Zelfh S. Calder at 251 South 3rd West, Vernal, Utah, this 5th day of August, 1958.

S/ ANNA B. MORRISON