

1958

## Zelph S. Calder v. Ralph Siddoway : Petition and Brief for Rehearing

Utah Supreme Court

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Zelph Calder; In Person;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

NOV 24 1958

ZELPH S. CALDER,  
*Plaintiff and Appellant,*

Clerk, Supreme Court, Utah

vs.

Case No. 8833

RALPH SIDDOWAY,  
*Defendant and Respondent.*

PETITION AND BRIEF FOR REHEARING

ZELPH CALDER  
IN PERSON

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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ZELPH S. CALDER,  
*Plaintiff and Appellant,*

vs.

RALPH SIDDOWAY,  
*Defendant and Respondent.*

} Case No. 8833

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PETITION AND BRIEF FOR REHEARING

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PETITION

Comes now the appellant above and petitions the above court for a rehearing of the above entitled case on the grounds and for the reasons as follows:

1. That this court has assumed there is evidence arising out of representations made to the trial court which puts in issue the verified fact that the Siddoway sheep mixed with the Stringham

sheep in Calder's field when in truth and in fact there is no such evidence and appellant is entitled to summary judgment as a matter of law.

2. The court overlooked the fact in appellant's point 4 that the contract was for repairing an existing fence and not for constructing a new boundary fence. The latter was the court's instruction, which does not conform to the pleadings or the proof.

3. If this court finds facts sufficient to raise a genuine issue, then appellant believes that his point 5 should receive consideration and this court upon reading of the testimony would find that the damages caused by the mixing was fully paid for.

4. In case this court affirms the respondent, then a new trial should be given because of the surprise testimony given by Siddoway that ordinary prudence could not have guarded against.

## BRIEF

For clarity and brevity plaintiff and appellant, and defendant and respondent will be herein referred to as Calder and Siddoway respectively.

This court in its opinion held that the pleadings filed and the representations made to the trial court at the hearing disputed plaintiff's claim sufficient to raise an issue of fact to uphold the trial court in denying plaintiff's motion for summary judgment.

Calder believes this court in its short time of consideration of this case due to the small amount involved has overlooked and perhaps assumed that the representations made to the trial court at the time of the hearing contained evidenciary matter sufficient to comply with Rule 56 and raise a genuine issue of fact.

All that was before the trial court was Siddoway's unverified counter-complaint stating a bold conclusion that Calder unlawfully drove the Stringham sheep out of his field onto Siddoway's land, where they were mixed with his sheep. (R. p. 5) Calder first assailed this complaint (R. p. 10) on a motion to dismiss because said complaint "fails to state a claim upon which relief can be granted." The trial court denied said motion. (R. p. 11)

Does this complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief?" (See Rule 8)

Calder then assailed Siddoway's complaint with a motion for summary judgment on the grounds that it was "signed and filed to defeat the purpose of Rule 11 in that it is sham and false". (R. p. 22) Calder accompanied said motion with his affidavit showing said complaint was sham and false in that the Siddoway sheep were mixed with the Stringham sheep in Calder's field. (R. p. 23 and 24)

Siddoway filed no counter affidavit, deposition, admission or evidenciary matter.

Calder has searched again the designated record on file herein, also the non designated record on file with the Clerk of the Court of Uintah County and he finds no representations made to the late Judge Stanley Dunford by Siddoway or anyone else at the time of the hearing of Calder's motion March 31, 1954. (R. p. 28) He has searched through the notes of the then court reporter, Mr. Alden D. Hunter (who is now in California) and finds no notes taken dated at the time of the hearing except the minute entry, (R. p. 11) signed by him, reciting Judge Dunford's denial of Calder's said Motion for summary Judgment.

Calder challenges Siddoway to find a scintilla of evidenciary matter that was presented to the trial court at the time of the hearing on Calder's Motion for Summary Judgment.

It is noticeable that the trial court (R. p. 60) struck out Calder's responding pleading (R. p. 52) wherein he alleges that the Siddoway sheep were mixed in with the Stringham sheep in Calder's field and no time was given Calder to further plead.

Calder believes this court recognizes his right under Rule 11 to assail a sham and false pleading and force Siddoway to give satisfactory evidence

that Calder did mix the sheep or have the pleading stricken.

In a related trespass case between the parties, which was filed after the instant case and tried ahead of it, Siddoway's counsel on a pretrial refused to divulge his witnesses or what their evidence would be. (See this record, Case No. 3283).

Mr. Justice Crockett, during the argument of this case, suggested that the Motion for Summary Judgment should have been presented again. In all fairness, this should have been done and perhaps would have been had this case followed a normal course.

It will be observed that Calder retained attorney Wayne Black to represent him in this case. Due to the distance from Salt Lake to Vernal, it was agreed that Calder settle the pleadings. Considerable time was consumed in settling the pleadings. Calder retained Attorney Clyde S. (Bus) Johnson as associate counsel. Judge Stanley Dunford became deceased before the case was tried. Then attorney Johnson became deceased.

This case was set for a non-jury trial July 23, 1957 by Judge Maurice Harding on August 26, 1957. Siddoway demanded a jury trial August 13, 1957 (R. p. 62). On Saturday, August 17, Calder received a letter from Attorney Black to the effect



that he could not be out to try this case. Calder made a trip to Salt Lake to attempt to persuade Mr. Black to come to Vernal, but was unsuccessful. Then Calder sought the services of Attorney Ray Nash. He could not help because he had some unfinished legal business for Mr. Siddoway. Then on August 21, 1958 Calder retained Attorney George Stewart of Roosevelt, Utah, who requested Calder to get the court files to him as soon as possible. On said day Calder requested the files from the Clerk of the Court. They were with Siddoway's attorney, Mr. Colton, who promised to bring them to the Clerk that day. On August 22 Calder requested the files again. Attorney Colton said he would bring the files down. After repeated telephone calls, the Clerk received the files at noon Friday, the 23rd of August.

Attorney Stewart told Calder he could not prepare the case in such a short time and suggested that he apply to the court for an extension of time. Because of the expense incurred in calling the jury, Calder persuaded Attorney Stewart to go ahead with the case. (R. p. 79)

No pretrial was had. The case took three days to try. About the last hour of the last day Siddoway testified that Calder told him that he, Calder, drove the Stringham sheep from the Calder field into the Siddoway field. This came as a complete surprise to

Calder, which ordinary prudence could not have guarded against. (R. p. 80)

## ARGUMENT

At best, one would expect the proof to conform to the pleading, that is, that someone saw Calder drive the Stringham sheep onto the Siddoway land. This would leave a wide latitude for a cross-examiner to bring out the truth.

Had Siddoway's testimony been presented through a counter-affidavit or otherwise at the hearing on summary judgment, it would have given some basis to raise a genuine issue of fact to be presented to the jury. However, it is doubtful if such Siddoway testimony would have met the requirements of Rule 56e, because such rule provides that "Supporting and opposing affidavits shall be made on personal knowledge." Also, *Parkham vs. Romico Corp.*, 10 Fed. Rules Service 56f 1, case 1 holds that "an affidavit in opposition to a motion by defendant for summary judgment which states merely that plaintiff and his counsel have good reason to believe and do believe the allagations of the complaint to be true is insufficient to raise an issue of fact." This is a fraud case and quite applicable to the instant case because Calder assails Siddoway's complaint as being false and sham.

Calder has made quite an exhaustive search of

the authorities of the question involved on this summary judgment proposition. The many cases read are unanimous in holding that a genuine issue of a material fact is not raised by unverified averments in a complaint controverted by affidavits to which no counter-affidavits are filed. (See 4 Fed. Rules Digest Rule 56 C 41).

*Preveden vs. Croatian Fraternal Union of America*, 19 F.R. Service 7 A 21, Case 1, 120 F. Supp. 33 holds "Averments of fact contained in affidavit accompanying motion for summary judgment will be taken as true when opposing affidavits were not filed."

To avoid burdening the court with citation of a number of cases we have selected the leading case of *Wilkinson v. Powell*, 8 Fed. Rules Ser., 56 C 41, Case 5, 149 Fed. 2nd, 335, which we think is most applicable to the instant case. It is short and very well written. We invite this court to read it.

Plaintiff was a conductor in defendant's railroad. He brought action, alleging he received injuries due to the failure of the railroad to keep its right-of-way in repair. Defendant denied the complaint and set up that the complaint failed to state a claim upon which relief could be granted. Defendant filed a motion for summary judgment, accompanied by an affidavit to the effect that a third party not

connected with the railroad built a fire about 40 feet off the railroad right-of-way, and that plaintiff was warming himself at the fire when he had a spell and fell into the fire and was burned. No counter-affidavit was filed nor was evidence submitted by plaintiff controverting defendant's affidavit. Question 1. Did the pleadings and affidavit disclose that there was a genuine issue of fact? 2. Are the appellees entitled to a summary judgment as a matter of law? The appellate court held no genuine issue of fact was raised and affirmed the lower court.

At p. 337 the opinion reads:

“The very object of a motion for a summary Judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings.”

Before the adoption of the new rules, counterclaims were limited to contract actions only. The purpose was one of public policy to discourage litigation, to prevent a defendant in the spirit of retaliation from bringing unfounded claims.

The new rules permit counterclaims of any nature, such as in the instant case, involving circumstances entirely unrelated to Calder's original

trespass action, which happened six months before said trespass when Calder and Siddoway were on good neighborly terms. Siddoway represented to Calder that his ewes and lambs were mixed with Stringham's ewes and lambs and he could not move them without 'bumming' or causing orphan lambs. In the spirit of neighborliness, Calder permitted the sheep to stay on his grain field, but later found that Siddoway's representations were mainly made for the purpose of getting a good and free pasture for his and Stringham's sheep, as they were both out of feed.

Under the new rules many safeguards are provided to prevent retaliatory and unfounded counter-claims from coming to issue, some of which Calder unsuccessfully attempted to use to expose Siddoway's false and sham claim, rule 11 and rule 56.

To deny Calder the right to expose Siddoway's claim is tantamount to nullifying Rule 11 and Rule 56.

Calder respectfully submits that the trial court committed error affecting his substantial rights, as it should have as a matter of law granted Calder's motion for summary judgment.

With respect to Calder's second point. This is not very important, because Calder received some benefit from Siddoway placing combination wire

on the already existing six-wire partition fence. The six wire partition fence served well between Calder and Siddoway's predecessor many years before Siddoway came down with sheep.

It seems this court took the instruction of the trial court to the jury as the evidence of this case because the trial court in substance instructed the jury that when a new boundary fence was built by one of the adjacent owners, the other had to pay one-half the cost of its construction. (Tr. p. 28-29)

Whereas the pleadings and facts showed the contract was to repair the existing boundary fence, Siddoway testified that his furnishing the combination wire was no part of the contract.

The general rule is that instructions should be confined to the issues raised by the pleadings, 88 C.J.S. p. 977.

Respectfully submitted,

ZELPH CALDER  
251 South 3rd West  
Vernal, Utah

This is to certify that I have mailed this  
----- day of November, 1958 two copies of the  
foregoing petition and brief to Colton and Hammond,  
Uintah State Bank Building, Vernal, Utah.

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