

1986

Walter Wagoner v. Waterslide Incorporated, Burchcreek Waterslide : Brief of Respondent

Utah Supreme Court

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BRIEF

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CKET NO. 860092-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WAGONER,)
)
Plaintiff/Appellant,)
)
vs.)
)
WATERSLIDE INCORPORATED dba)
BURCHCREEK WATERSLIDE,)
)
Defendant/Respondent.)
)
vs.)
)
GREAT BASIN ENGINEERING,)
)
Third-Party Defendant.)

860092-CA
Case No. 20410

BRIEF OF RESPONDENT

Appeal from the Second Judicial District Court of
Weber County, State of Utah, the Honorable John F.
Wahlquist, District Judge

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FILED

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Clerk, Supreme Court, Utah

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Third-Party Defendant.))	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a negligence action by plaintiff against defendant in which plaintiff alleged he was injured while a business visitor at defendant's water slide. Defendant filed a third-party complaint for contribution against third-party defendant, Great Basin Engineering.

DISPOSITION IN LOWER COURT

This case was tried to a jury on October 2 and 3, 1984, Honorable John F. Wahlquist presiding. The court directed a verdict in favor of third-party defendant. The jury returned a verdict against plaintiff on the complaint, finding that defendant was not negligent, and the court entered judgment on the verdict for defendant. Plaintiff's motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the trial court judgment based on the jury verdict in its favor. Third-party defendant is not a party to this appeal.

STATEMENT OF FACTS

This is a negligence action by plaintiff Walter Wagoner against the owner/operator of the Burchcreek Waterslide in Ogden, Utah, for an injury to plaintiff's right large toe while he was using the water slide. This water slide is open similar to a bathtub, rather than being a closed tube. It is made of fiberglass sections bolted together to form a continuous slide. Neal Citte assembled it in 1979 and owned it with his father as a family business. He purchased the fiberglass sections from the manufacturer, Professional Fiberglass Products, Inc., an Oklahoma company. The sections are 52 inches wide at the widest part. The side wall extends up 34 1/2 inches to form a smooth lip rounded on three sides. Beyond the rounded lip or rim, the fiberglass extends out horizontally a few more inches. (Trial Exhibit 1P, pp. 12 and 14 of which are attached in the Addendum to this Brief) This fiberglass edge was not sharp, but was simply the unfinished end of the piece of fiberglass, unfinished so that it was not smooth to the touch. (R. p. 432; Trial Exhibits 20D, 21D, 22D. Trial Exhibit 20D is attached in the Addendum to this Brief.)

Plaintiff was 28 years old at the time of the accident.

He was using the water slide as a paying customer, along with his wife and children, his wife's adult brothers, and one of their friends. On the day of the accident, he had made five or six complete trips down the slide before the trip on which he was injured. Then as he was riding on his stomach on the plastic mat provided by defendant, he went around a curve on the slide and apparently allowed his right foot to hang over the side beyond the rounded lip, and cut the top of his right large toe as it scraped along the unfinished outside edge of fiberglass.

Plaintiff was treated as an out-patient at McKay-Dee Hospital and went home that night. About three weeks after the accident, he reinjured his toe. This subsequent injury greatly complicated his recovery.

The unfinished edge on which plaintiff cut his toe, is present on both sides of the slide for the entire length of the slide. The fiberglass sections were supplied in that condition from the manufacturer, and defendant assembled them according to the manufacturer's directions. There was nothing broken or out of repair which caused the accident. Defendant's employees inspected and maintained the slide conscientiously, and supervised its use by customers. Large signs were posted displaying safety rules.

There was substantial competent evidence that the unfinished fiberglass edge is open and obvious to anyone approaching the slide or using it; that riders are able to control their arms and legs in order to keep their hands and feet

from coming near the unfinished edge; and that riders do not get near the outside edge unless they engage in horseplay in violation of posted safety rules.

Two of defendant's former employees testified that they observed plaintiff engaging in horseplay on the slide, warned him to stop on more than one occasion, and observed him continue to misbehave.

In the six years this water slide had been in operation up to the time of trial, over one million rides had been taken and plaintiff was the only person ever to cut himself on the fiberglass edge.

Two witnesses testified as experts on the design and construction of the water slide. Both Val T. Stratford and Neal Citte gave the opinion that the fiberglass edge was not an unreasonable risk to users of the water slide.

The trial court instructed the jury fully on the applicable law, including the general definition of negligence (R. p. 358) and the application of that standard to the condition of the water slide as it existed at the time of plaintiff's injury. (R. p. 352)

The court instructed the jury to determine whether or not the defendant was negligent with respect to the unfinished fiberglass edge on the slide and thereby exposed plaintiff to an unreasonable risk of injury. (Interrogatory No. 1, R. p. 351) The jury answered this interrogatory in the negative, and according to the court's instructions in that event, the jury

returned a verdict without answering further interrogatories. Based on the jury verdict, judgment was entered for defendant. (R. pp. 389-390. A copy of the special verdict containing the court's instruction on reasonable risk and unreasonable risk, the instruction defining negligence, and the judgment on the jury verdict, R. pp. 350-358 and 389-390, are attached in the Addendum to this Brief)

STATEMENT OF ISSUES ON APPEAL

1. Whether plaintiff's claim that the trial court committed reversible error in not instructing the jury on the duty of a possessor of land to warn business invitees of conditions on the land which involve an unreasonable risk of harm, is a claim of harmless error.

2(a). Whether plaintiff waived his right to complain about the instruction given to the jury on the definition of "unreasonable risk" by his failure to object at trial and his failure to submit a proposed instruction.

2(b). Whether the instructions to the jury read together as a whole, adequately informed the jury about the legal concept of "unreasonable risk."

SUMMARY OF ARGUMENT

The affirmative duty of a possessor of land to exercise reasonable care to protect invitees by warning or repair, extends only to conditions or activities on the land which present an unreasonable risk of harm. The jury found that the condition of

which plaintiff complains did not involve unreasonable risk of harm. Therefore, the jury was not required to reach the question of whether defendant breached a duty to warn, and any lack of instruction to the jury on duty to warn was harmless to the outcome.

In any event, there was no duty to warn of this condition which was as open and obvious to plaintiff as to defendant.

Plaintiff waived any claim of error in the jury instructions on the definition of unreasonable risk because he did not object to the instructions given by the court, nor did he request the instructions he urges for the first time on appeal.

The court instructed the jury properly and adequately on the definition of unreasonable risk and the definition of negligence.

ARGUMENT

POINT I

THERE WAS NO REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY ON DUTY TO WARN.

Plaintiff asserts that the trial court did not correctly instruct the jury on the duty to warn about hazardous conditions. Any claim of inadequate instruction to the jury on the duty to warn is a claim of harmless error, because having found the condition of the water slide not to be an unreasonable risk, the jury was not required to reach the separate issue of whether defendant had given adequate warning of the condition.

The standards for determining legal liability in this case are set forth in the Restatement (Second) of Torts (1965) as follows:

TITLE E. SPECIAL LIABILITY OF POSSESSORS
OF LAND TO INVITEES

§343. Dangerous Conditions Known to or
Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Jury Instruction Forms for Utah states the rule in substantially the same terms:

43.10

Duty Toward Business Visitor

One who extends to a business visitor [invitee] an invitation, express or implied, [is] obliged to refrain from acts of negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the business visitor [invitee] [and for any chattels brought to the premises by him [her] in the reasonable pursuit of a purpose embraced within the invitation].

In the absence of appearances that caution [him], or would caution a reason-

ably prudent person in like position, to the contrary, the business visitor [invitee] has a right to assume that the premises he [she] was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption.

But the responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon the work which the business visitor [invitee] is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner [occupant] has actual knowledge of them, or if they are discoverable by [him] [it] in the exercise of ordinary care, it is [his] duty to give reasonable warning of such danger to the business visitor [invitee]. The owner [occupant] is not bound to discover defects which reasonable inspection would not disclose, and [he] is entitled to assume that the business visitor [invitee] will perceive that which would be obvious to [him] upon the ordinary use of [his] own senses. There is no duty to give the business visitor [invitee] notice of an obvious danger.

Plaintiff's claim of error by the court in not instructing the jury on duty to warn is at best harmless error. Before the jury reached the question of the duty owed by defendant to its business patrons to exercise reasonable care to protect them by repair or warning of conditions on the premises which present an unreasonable risk of harm, the jury had to decide the question of whether the condition of the slide in fact amounted to an unreasonable risk. It found that the edge of the slide did not create an unreasonable risk, so that under the law there was no duty to repair or warn of the condition. Therefore,

any discussion of possible duty of the business proprietor to repair or warn is immaterial, and any possible error with respect to instruction on the duty of defendant to protect against unreasonable risk of danger is at best harmless error.

Rule 61, Utah Rules of Civil Procedure, provides:

No error . . . in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

It is well established that the refusal to give an instruction cannot be the basis for reversal unless the jury was insufficiently advised of the issue they were to determine, or it appears that they would have been confused or misled to the prejudice of the appealing party. In Re Richards Estate, 5 Utah 2d 106, 297 P.2d 542 (1956). Likewise, a jury verdict will be reversed only if the alleged error was substantial and prejudicial to the appellant's rights and there is a reasonable likelihood that injustice or unfairness has resulted. Ewell & Son, Inc. v. Salt Lake City Corp., 27 Utah 2d 188, 493 P.2d 1283 (1972). There must be shown a reasonable likelihood that in the absence of error, the result would have been different. Ortega v. Thomas, 144 Utah 2d 296, 383 P.2d 406 (1963).

Defendant's duties toward invitees like plaintiff are limited to those risks which are unreasonable. It is well

established that the owner of property is not to be regarded as an insurer for an invitee upon his property. His duties toward invitees are limited to those risks which are unreasonable. Steele v. Denver & Rio Grande, 16 Utah 2d 127, 396 P.2d 751 (1964). With respect to the duty of care required of owners and occupiers of land toward invitees, Professor Prosser observed that, "There is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated." Prosser, Law of Torts, 4th Ed., p. 393. These statements of the law point out the distinction between two types of risk of harm from activities or conditions encountered in daily life. On the one hand are risks of harm which under all the circumstances are not unreasonable, even though there may be a remote possibility of injury. With respect to these risks, there is no duty owed by the possessor of land. On the other hand, there are conditions which under all the circumstances present an unreasonable risk of harm, sometimes referred to in the cases as a dangerous condition or a hazardous condition. It is only with respect to such unreasonable risks of harm that the law imposes a duty on the possessor of land to exercise reasonable care to protect invitees against the danger by warning or repair. For this reason, the issue of reasonable care by the property owner becomes material only if the condition on the property presented an unreasonable risk of harm to invitees.

Restatement of the law, Torts §343 (1965) set forth above provides that a possessor of land is liable to a business

visitor only if he (a) knows or should know of the condition and should realize that it involves an unreasonable risk of harm; and (b) should expect that visitors will not discover the danger and protect themselves; and (c) fails to exercise reasonable care to protect them against the danger. If the jury finds as it did in this case that the requirement of part (a) was not proved, then it is entirely unnecessary for the jury to go on to consider the requirements of part (b) as well as part (c), which is the requirement of reasonable care to protect business visitors, and which would include the duty to repair or warn, which plaintiff claims was not presented to the jury by instruction.

Warning is only one means available to the possessor of land to exercise reasonable care to protect invitees against the danger presented by a condition on the land which involves an unreasonable risk of harm. The occupier of land may also make the premises reasonably safe by repair. But repair or warning are necessary only where there is an unreasonable risk, and their purpose is to render the premises reasonably safe [Restatement (Second) of Torts §343 (1965) comment (d)] not absolutely safe from all possibility of injury whatsoever.

The jury found based on competent admissible evidence that the water slide did not present an unreasonable risk of injury. Thus it found the water slide was not so dangerous as to invoke a duty on defendant to exercise reasonable care to protect plaintiff, as by repair or warning.

Although plaintiff does not challenge directly the suf-

iciency of the evidence to support the verdict, plaintiff does point to testimony of Mr. Neal Citte, part owner and operator of the water slide at the time of the accident, as showing in plaintiff's view that the water slide was dangerous so as to require warning or repair. However, plaintiff overlooks substantial competent evidence on which the jury was entitled to reach the opposite conclusion which it did reach, that the water slide did not expose plaintiff to an unreasonable risk of injury. That evidence includes the following:

The fiberglass edge was not sharp or razorlike. It was simply the unfinished end of the piece of fiberglass, about one-eighth inch thick, unfinished so that it was not smooth to the touch. (R. p. 432) A person can rub the edge with his hand without being cut. (R. p. 567)

There was substantial evidence that riders of the water slide are able to control their arms and legs during the ride if they want to, in order to keep their hands and feet from coming anywhere near the unfinished edge. (Testimony of Neal Citte, R. pp. 471-472, 496; Testimony of former employee Barbara Lippold, R. pp. 518-519, 523, 529; Testimony of former employee Betty Durban Mayo, R. pp. 577, 578)

There was substantial evidence that in the absence of horseplay, riders' arms and legs do not come close to the outside edge, and plaintiff was guilty of horseplay in violation of posted written rules and repeated verbal warnings by employees. In particular, it is possible to hold back the gentle flow of

water down the slide by using the plastic mats as a dam or dike at the starting pool, thereby making the slide much more slippery, resulting in a faster ride. The speed of a faster ride throws the rider into the curves with more force, causing the rider to bank higher on the side of the slide. A large sign warned not to do this. Employees observed plaintiff and his group holding back the water in this way and warned them to stop. Plaintiff laughed at the employees, continued to misbehave, and acted as if he was not concerned. (R. pp. 449-451, 514-516, 523, 526-527, 543-544, 573-575, 585-586; Exhibit 26D)

The openness and obviousness of the fiberglass edge to users of the slide is evidence that it did not present an unreasonable risk of injury, in view of the evidence cited above that riders are able to control their arms and legs to avoid coming close to the edge if they wish to do so. This fiberglass edge is uniform along both sides of the slide along the full length of the slide from beginning to end. There was testimony the condition was open and obvious to any rider from the time he approached the entry pool to get on the slide. Plaintiff rode the slide from top to bottom on five or six rides before he was injured, and each time as he entered the slide and as he rode it, he saw what was there to be seen. (R. pp. 481-482, 497, 539-542)

Although the absence of prior injuries caused by the fiberglass edge is not controlling on the issue of whether the condition presented an unreasonable risk of injury, such evidence certainly may be considered by the jury. Typical injuries on the

water slide include occasional minor cuts and bruises from riders colliding with each other or with the side wall of the slide. However, in three and one-half years of operation before this accident, as many as 700,000 rides down the slide had not resulted in anyone being cut on the fiberglass edge. Since the accident, as many as another 400,000 rides have been taken in two years up to the time of trial without another such injury. (R. pp. 463, 467, 474-476, 554, 560, 561, 576)

The only expert opinion in evidence at trial on the issue of liability was that the fiberglass edge was not an unreasonable risk to users of the water slide. (Testimony of Val T. Stratford, R. p. 561; Testimony of Neal Citte, R. p. 476)

Plaintiff's brief quotes testimony by Mr. Citte that it is possible for persons riding the water slide to lose control of their arms or legs and allow them to hang over the edge of the slide. However, Mr. Citte also testified about his experience with the water slide and his familiarity with it, and that he did not recognize the risk of an arm or a leg being cut by the fiberglass edge as being a hazard, although it could happen. He did not post a warning about the fiberglass edge because he did not feel it presented a problem to users of the water slide, unless they held back the water in violation of the rules. (R. pp. 449-452, 481)

Based on the above evidence, the jury was entitled to conclude that the fiberglass edge did not amount to an unreasonable risk of harm to plaintiff. Consequently, defendant had no

legal duty to repair or warn of the condition. The absence of instruction to the jury on the duty to warn was harmless to the outcome of the trial, and is not a ground for ordering a new trial.

POINT II

THERE WAS NO DUTY TO WARN OF THE CONDITION
OF THE WATER SLIDE WHICH WAS AS OPEN AND
OBVIOUS TO PLAINTIFF AS TO DEFENDANT.

Even assuming the unfinished edge beyond the lip on each side of the water slide had amounted to a condition which was hazardous or dangerous, there is no duty to warn where the condition is as easily observable to the invitee as to the owner.

Restatement (Second) of Torts §343A (1965) states:

§343A. Known or Obvious Dangers.

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Comment (c) to that section adds:

The possessor's activities may involve a risk which is known or obvious to those who enter his land, either because the risk is inherent in the nature of the activity itself, or because they are aware that it is carried on in a manner which involves risks that are not necessarily inherent in such activities.

Comment (b) adds:

. . . "obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man,

in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

In Ellertson v. Dansie, 576 P.2d 867 (Utah 1978), this rule was applied to affirm summary judgment for defendant where plaintiff was injured when he tried to help free a horse which had become entangled in a chain because of defendant's alleged negligence in tying the horse to a post. In Steele v. Denver & Rio Grande Western Railroad Co., supra, this court affirmed dismissal as a matter of law of the claim by an automobile driver who was struck by a train in a railroad crossing after approaching under conditions which gave the driver a normal opportunity to see and hear the approach of the train.

Likewise in this case, there was no duty to warn of the fiberglass edge because of the obviousness of the condition, and plaintiff cannot complain of the court's decision not to give an instruction on the duty to warn.

The cases cited by plaintiff are not on point. In O'Dell v. Cook's Market, Inc., 432 S.W.2d 382 (Mo.App. 1968), the court in fact affirmed a directed verdict against plaintiff and in favor of defendant in a slip and fall claim, on the grounds that the substance on the floor of defendant's market was a condition which was as obvious and well known to plaintiff as to defendant. In that case, the court referred to the mixture of water and lettuce or cabbage leaves on the floor of a grocery market as being a dangerous condition which would invoke a duty by defendant to remove the substance or warn customers. While

the existence of slippery foreign substance on the floors of retail stores may in some cases create an unreasonable risk of danger toward invitees, nevertheless the fiberglass edge of the water slide is an entirely different condition, and plaintiff's reliance on language in the O'Dell case about duty to warn of dangerous conditions begs the question of whether the edge of the water slide was a dangerous condition, which question the jury answered in the negative. Matthews v. Ashland Chemical, Inc., 703 F.2d 921 (5th Cir. 1983), was plaintiff's appeal from summary judgment in favor of certain defendants. Plaintiff was injured in a propane gas explosion caused by an electric spark from the motor of a water cooler leased by defendant Ozone Waters, Inc. and on the premises of defendant Ashland Chemical, Inc. The Court of Appeals affirmed summary judgment in favor of Ozone but reversed the summary judgment in favor of Ashland Chemical, finding there was a question of fact for the trier of fact on whether Ashland had created an unreasonable risk of harm to plaintiff. As it may apply to the instant case, this opinion is authority that an injured plaintiff is required to prove that "the risk from which his damage resulted posed an unreasonable risk of harm." 703 F.2d at 924. In the instant case, that question was presented to the jury which answered in the negative. In Moning v. Alfano, 254 N.W.2d 759 (Mich. 1977), the Michigan Supreme Court reversed summary judgment for defendants and remanded for trial, holding there was a jury question on whether defendants created an unreasonable risk of harm in

marketing slingshots directly to children. Again, this decision is authority that the issue of whether particular conduct amounts to an unreasonable risk of harm is a question of fact for the jury. Although the Michigan Supreme Court discussed the restatement factors of balancing the utility of conduct and the magnitude of the risk in determining whether the summary judgment should be reversed, nowhere did the court suggest that the factors bearing on utility of conduct and magnitude of risk must be presented to the jury in instructions at trial.

POINT III

PLAINTIFF MAY NOT COMPLAIN ABOUT THE JURY
INSTRUCTIONS DEFINING UNREASONABLE RISK
BECAUSE HE DID NOT MAKE A MEANINGFUL
OBJECTION TO THE INSTRUCTIONS GIVEN AND
DID NOT REQUEST THE INSTRUCTION HE URGES
ON APPEAL.

Point II of appellant's brief on appeal argues that the trial court failed to instruct the jury about the legal definition of unreasonable risk or the factors to be considered in deciding whether or not a risk is unreasonable, along the lines of the balancing test between social utility on the one hand and the magnitude of risk of injury on the other hand, of §§291 and 292, Restatement (Second) of Torts (1965).

However, at the trial of this case appellant offered to the court no proposed instructions to the jury which dealt with any such definition of reasonable risk and unreasonable risk. Further, the objections which plaintiff stated to the jury instructions given by the court do not contain any reference to

the supposed lack of instruction on the definition of reasonable risk and unreasonable risk. (R. pp. 500-503)

Rule 51, Utah Rules of Civil Procedure, provides that the court shall give the parties an opportunity to make objections, and they shall be made, out of the hearing of the jury and before the jury retires to consider its verdict.

No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection.

It is well established that a party on appeal may not assign as error either the giving or the failure to give an instruction unless he first proposes a correct instruction. If the court fails to give the requested instruction, the complaining party must then have made exception on the record in terms specific enough to give the trial court notice of every error in the court's instructions which is complained of on appeal.

E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., 665 P.2d 1320 (Utah 1983); Snyderville Transportation Co., Inc. v. Christiansen, 609 P.2d 939 (Utah 1980); DeBry & Hilton Travel Services, Inc. v. Capitol International Airways, Inc., 583 P.2d 1181 (Utah 1978); Kesler v. Rogers, 542 P.2d 354 (Utah 1975); Williamson v. Denver & Rio Grande Railway Co., 487 P.2d 316, 26 Utah 2d 178 (1971); State Road Comm. v. Kendell, 438 P.2d 178, 20 Utah 2d 356 (1968).

A claim of error, in regard to failure to instruct the

jury on a certain theory, cannot be claimed for the first time on appeal. Maltby v. Cox Constr. Co., Inc., 598 P.2d 336 (Utah 1979), cert. denied 100 S.Ct. 306, 444 U.S. 945, 26 L.Ed.2d 314.

This is not a case where the Supreme Court in its discretion and in the interests of justice, should review the failure to give this instruction in spite of appellant's failure to request the instruction and make any objection at trial. Certainly, this Supreme Court may exercise such review in its discretion. Rule 51, Utah Rules of Civil Procedure; Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859 (Utah 1983); E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., supra. Such review is limited to unusual circumstances where some gross injustice or inequity would otherwise result.

This trial was conducted in a regular manner, and adequate opportunity was given to counsel to submit proposed instructions and state objections on the record. Plaintiff availed himself of both of these opportunities on other matters, but with respect to the error he now claims, he neither submitted a proposed instruction nor took exception.

In the present case, the fact that the court did not instruct the jury on the definition of reasonable risk and unreasonable risk now urged by plaintiff on appeal, in the absence of any suggestion from plaintiff at trial that such instruction should have been given, is certainly not a gross injustice or inequity, where the concept of reasonable risk and

unreasonable risk was discussed in the court's instruction in the explanation to Special Interrogatory No. 1, within the standard of whether the risk would have been acceptable to an ordinary prudent person exercising reasonable care. It should be noted that this instruction language is substantially similar to the wording of Restatement (Second) §343 which plaintiff did propose as his requested jury instruction No. 3, that an unreasonable risk of harm was one which would have been realized as such by a person in the position of defendant with the exercise of reasonable care. In other words, plaintiff obtained as much jury instruction on the definition of unreasonable risk, as he asked for.

Finally, plaintiff waived his right on appeal to claim error in the trial court instruction on unreasonable risk because he did not preserve that claim in his docketing statement. Rule 9, Utah Rules of Appellate Procedure, as well as its predecessor, Rule 73A, Utah Rules of Civil Procedure, provides that the mandatory docketing statement on appeal shall contain the issues presented by the appeal. Plaintiff filed an unsuccessful motion for a new trial and also filed a docketing statement in this appeal, and in neither document does he suggest that the trial court committed error in failing to define reasonable risk and unreasonable risk in instructions to the jury. Plaintiff's only claim up to that point was that the court failed to instruct the jury that defendant had a duty to remove or guard any dangerous condition or give warning, as plaintiff claimed the rule to be

under §343 of the Restatement (Second) of Torts. Defendant then filed a motion for summary disposition of this appeal, pointing out that the issue was harmless error because since the jury found that the condition of the slide did not amount to an unreasonable risk of danger under §343, there was no duty to repair or warn. It was only subsequent to the filing and denial of this motion for summary disposition that plaintiff for the first time raised the issue of instructions on the definition of unreasonable risk, in his appeal brief. Under these circumstances, plaintiff waived his right to make this argument on appeal.

POINT IV

THE COURT INSTRUCTED THE JURY PROPERLY
ON THE STANDARD OF REASONABLE RISK AND
UNREASONABLE RISK UNDER THE CIRCUMSTANCES.

Taking all of the instructions together as a whole, the jury was told that an unreasonable risk was one of such magnitude that an ordinary, prudent person exercising reasonable care would know the exposure was unacceptable. The jury was told that it should determine whether or not leaving the edge as it was left exposed the business patrons to an unreasonable risk of injury, or whether leaving the edge as it was left was reasonable and, therefore, not negligent. Negligence was properly defined as "the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under the circumstances would not have done. The fault may lie

in acting or in omitting to act."

Therefore, the jury was fully instructed not only on the negligence standard in abstract, but also on the application of that standard to the condition of the water slide as it existed at the time of plaintiff's injury. This guidance was adequate and appropriate. If plaintiff's counsel had felt the need to inform the jury of plaintiff's position that the condition of the water slide showed very low social utility and unacceptable risk of danger, he was free to do so in closing argument by urging that reasonable and prudent people in the position of defendant would not tolerate such a risk to customers.

This case was tried on a theory of negligence, and the jury was instructed on the basis of the negligence standard of care. In addition, the jury was given particular instruction applying that standard of care to the condition of the water slide. Plaintiff's argument that the court committed error in not giving additional instruction detailing the specific factors which are considered in determining the utility of an actor's conduct and the magnitude of risk under §§292 and 293, would require detail in the instructions which would be neither necessary nor reasonable, and would be more likely to confuse the jury than to provide further guidance.

Restatement (Second) of Torts, §282 (1965) defines negligence in the context of reasonable risk and unreasonable risk:

§282. Negligence Defined.

In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. * * *

It is evident that a proper definition of negligence by reference to the conduct of a reasonable and prudent person under the circumstances, which was the instruction given by the court, implicitly provides for a finding on the reasonableness of the risk of harm, since by definition, negligent conduct involves an unreasonable risk. Nowhere in the jurisprudence of this state has it been found necessary to offer additional instructions on balancing social utility and magnitude of risk in negligence actions, and the trial court in this case certainly did not abuse its discretion in instructing the jury as it did. Plaintiff has pointed to no decision in any jurisdiction which held it was reversible error to fail to give the instructions which plaintiff urges.

CONCLUSION

For the reasons stated above, defendant/respondent requests that the court affirm the judgment entered by the trial court on the jury verdict.

Dated this 17 day of June, 1985.

STRONG & HANWI

By 

Roger H. Bullock
Attorneys for Defendant/Respondent

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, this 17 day of June, 1985, to the following:

James R. Hasenyager
MARQUARDT, HASENYAGER & CUSTEN
Attorneys for Appellant
2661 Washington Boulevard
Suite 202
Ogden, Utah 84401



IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER WAGONER,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
WATERSLIDE INCORPORATED dba)	
BURCHCREEK WATERSLIDE,)	
)	Case No. 20410
Defendant/Respondent.)	
)	
vs.)	
)	
GREAT BASIN ENGINEERING,)	
)	
Third-Party Defendant.))	

ADDENDUM TO BRIEF OF RESPONDENT

The Court's Instruction No. 2 to the jury	R. pp. 350-357
The Court's Instruction No. 3 to the jury	R. p. 358
Judgment on the Jury Verdict.	R. pp. 389-390
Drawing of straight section of water slide.	Trial Exhibit 1P p. 12
Drawing of curved section of water slide.	Trial Exhibit 1P p. 14
Photograph of entry pool or starter pool at beginning of slide	Trial Exhibit 10D
Photograph of water slide	Trial Exhibit 13D
Photograph of water slide	Trial Exhibit 15D
Photograph of fiberglass edge	Trial Exhibit 20D

INSTRUCTION NO. 2

You will not render a general verdict as is sometimes done, but rather your function herein is to make findings of fact as to special interrogatories or questions which are herewith submitted to you. In making your findings of fact, you should bear in mind that the burden of proof in any disputed fact rests on the party claiming the fact to be true and he must prove it by a preponderance of the evidence.

Before you answer "yes" to any question submitted to you, you must find the same to be true by a preponderance of the evidence. This requires the agreement of six (three-quarters) of the jurors to answer any question and at least six (three-quarters) of the jurors must agree that the answer to the question should be "yes" or "no" before such an answer may be made.

A special verdict form is as follows:

INTERROGATORY NO. 1: Do you find it proven by a preponderance of the evidence that the defendant was negligent in the manner in which he used the slides with the edge as it was and did expose the plaintiff to an unreasonable risk of injury?

YES ____

NO ____

EXPLANATION: The jury is instructed that all parties invited to a business premise are entitled in law to presume that the premises are reasonably safe for the conducting of business activity. They may act on this assumption until something happens to put them on notice to the contrary. If they discover, or with the exercise of ordinary care should have discovered, that a hazard was present then they should act as a reasonably prudent person should act under the circumstances to avoid that hazard. The business has a right to assume that people will act safely for their concern. If the business discovers that its patrons are not exercising ordinary care, then he must take such action as a reasonably prudent person would under the circumstances.

The nature of the activity and the circumstances surrounding it may be discovered by the parties. In sports activity, a person assumes the ordinary risks that are well-known in the sport. An example of this is someone who sits himself in the right field bleachers in a baseball park. He is assumed to know, or hope, that a baseball may strike the area and he assumes

that risk. However, if the ball park manager allowed the bleachers to get in such a state of disrepair that they collapsed then this would not be an assumed risk. The jury should consider the nature of the activity on the defendant's premises and determine whether or not leaving the edge as it was left exposed the business patrons to an unreasonable risk of injury, or whether leaving the edge as it was left was reasonable and, therefore, not negligent. They would be entitled to assume that the guest knew the ordinary, accepted risk in the sport, but it would be unreasonable to expose the customers to a risk of such magnitude that an ordinary, prudent person exercising reasonable care would know the exposure was unacceptable.

The plaintiff alleges that leaving the edge as it was left exposed him to an unreasonable risk of injury. The defendant denies that this was an exposure to an unreasonable risk. The Court instructs the jury to determine whether or not the plaintiff has carried his burden of proof on this issue. If the plaintiff has carried his burden of proof, you should answer this question "yes". If you answer the question "no", return to the courtroom as you have disposed of the case. If you answer the question "yes", answer Interrogatory No. 1A, the following question.

INTERROGATORY NO. 1A: Do you find it proven by a preponderance of the evidence that the negligence referred to in Interrogary No. 1 was a proximate cause of the cutting of plaintiff's extension tendon on his right toe?

YES ____

NO ____

EXPLANATION: The phrase "proximate cause" is defined in a separate instruction. The plaintiff alleges that there was present an unreasonable risk of injury, and that that risk is the proximate cause of his injuries. The defendant alleges that even if the jury answers the first question "yes", their negligence was not a proximate cause of the injury. Further, defendant alleges that the plaintiff's misuse of the slide was the sole proximate cause of his injury. This issue is left for the jury to determine whether or not plaintiff has carried the burden of proof. If you answer Question 1A "yes", answer the following question, otherwise return to the courtroom.

INTERROGATORY NO. 2: Do you find it proven by a preponderance of the evidence that the plaintiff was contributorily negligent in that he misused the equipment at the time his toe was injured?

YES ____

NO ____

EXPLANATION: The burden of proof is upon the defendant on this allegation. Unless they carry it by a preponderance of the evidence plaintiff would be entitled to an answer of "no".

All persons are expected to use ordinary care to avoid injuring themselves. They are required to make the ordinary observations to adapt their conduct to that of a reasonably prudent person. The defendant alleges that the circumstantial evidence here presented demonstrates that the injury could not have occurred had the plaintiff not been misusing the equipment in holding back the water or taking other unreasonable risks. The plaintiff denies any misuse of the equipment. The burden of proof is on the defendant to prove that the answer to this question should be "yes".

INTERROGATORY NO. 2A: Do you find it proven by a preponderance of the evidence that the negligence found present in Question No. 2 was a proximate cause of the plaintiff's injuries?

YES _____

NO _____

EXPLANATION: The phrase "proximate cause" is defined elsewhere in the instructions. The defendant alleges that the circumstantial evidence proves that the accident occurred during improper use of the equipment, and also alleges that the circumstantial evidence shows that the proximate cause of the injury would have to be some misuse of the equipment. The burden

of proof is on the defendant to prove that the plaintiff's negligence was one of the proximate causes of the injury. Plaintiff denies this. The burden of proof is on the defendant.

If you have found that both of the parties were negligent and that their negligence was a proximate cause of plaintiff's injuries, then you must answer the following question.

INTERROGATORY NO. 3: Considering all of the fault that caused the injury to be 100%, what share of the percentage should be assigned to each of the parties?

Plaintiff: _____%

Defendant: _____%

TOTAL: _____100%

EXPLANATION: The law provides that if a plaintiff is more at fault in causing his own injuries, then he cannot use the courts and recover thereby. Therefore, if each of the parties is 50% to blame, there can be no recovery. If the defendant is more at fault than the plaintiff, then the plaintiff may recover to the extent that the injury was caused by the defendant. In other words, if the apportionment was 75% the defendant's fault and 25% the plaintiff's fault, the plaintiff recovery would be limited to 75%. The jury does not make this calculation but gives the judge the total figure and the judge reduces it appropriately.

The law provides no formula for figuring the percentage of fault, this is left to the discretion of the jury.

If you answer that the defendant was negligent and his negligence was a proximate cause of the injury, and that the plaintiff was not negligent or his negligence was less than 50% of the proximate cause of the injury, then you must determine the amount to award plaintiff, which is the basis of the next question.

INTERROGATORY NO. 4: What sum do you find it proven by a preponderance of the evidence is proper to award plaintiff in each of the following categories?

- a) past (before trial) special medical expenses \$_____
- b) past lost wages \$_____
- c) future medical expenses \$_____
- d) future lost earnings \$_____
- e) general damages (up to date of trial) \$_____
- f) future general damages \$_____
- TOTAL AWARD \$_____

EXPLANATION: You are instructed that if the plaintiff has proven that he is entitled to damages, they should be awarded to the degree that he has shown them to be present by a preponderance of the evidence, or with reasonable medical certainty will occur in the future.

The plaintiff alleges that all of the damages he has suffered were caused by the initial negligence of the defendant. The defendant contends that even if he is held responsible for the initial injury of the plaintiff, the award should be reduced and not include any damages brought on by a failure of the plaintiff to care for his own injury or injury resulting from an event that is sufficiently remote that in common sense should be a separate event. Defendant alleges that the breaking of the pin was not caused by the cut on the toe. The plaintiff alleges it was. The issue is left to the jury. The burden of proof is on the plaintiff.

INSTRUCTION NO. 3

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.

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WEBER COUNTY CLERK
- RICHARD A. JENSEN

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH

WALTER WAGONER,)
Plaintiff,)
vs.)
WATERSLIDE INCORPORATED dba) JUDGMENT
BURCH CREEK WATERSLIDE,)
Defendant,) Civil No. 83567
vs.)
GREAT BASIN ENGINEERING,)
Third-Party)
Defendant.)

The above entitled matter having come on duly for trial, Honorable John F. Wahlquist presiding, on October 2 and 3, 1984, with plaintiff represented by counsel, James R. Hasenyager, and defendant represented by counsel, Roger H. Bullock, and third-party defendant represented by counsel, Jack L. Schoenhals,

And a jury having been duly impaneled, and evidence having been adduced by all parties, and the court and jury having heard arguments of counsel, and the jury having been duly instructed in the law and having deliberated and returned its verdict in



130
422

answer to special interrogatories as follows:

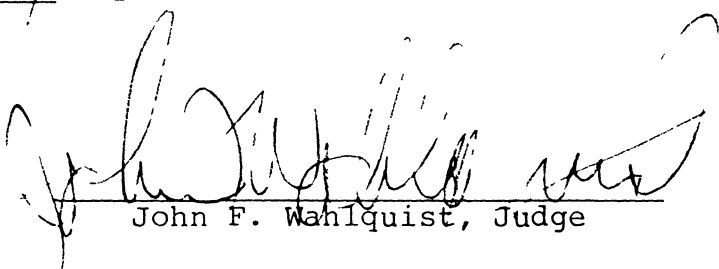
INTERROGATORY NO. 1: Do you find it proven by a preponderance of the evidence that the defendant was negligent in the manner in which he used the slides with the edge as it was and did expose the plaintiff to an unreasonable risk of injury?

YES _____

NO X

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that third-party defendant Great Basin Engineering does have and recover a directed verdict against defendant and third-party plaintiff on the third-party complaint, no cause of action; and defendant Waterslide, Incorporated dba Burch Creek Waterslide does and recover judgment against plaintiff on the complaint, no cause of action, together with costs.

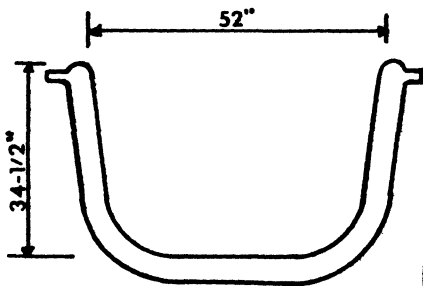
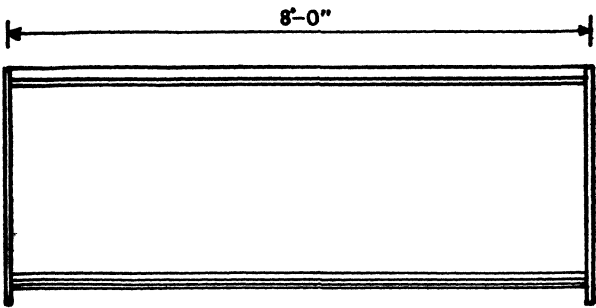
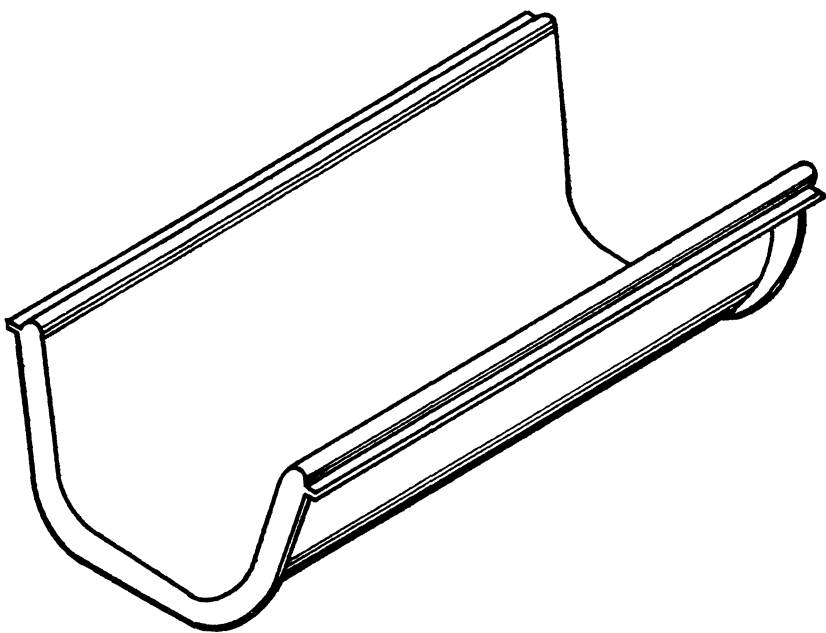
DATED this 17 day of October, 1984.


John F. Wahlquist, Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Judgment was mailed, postage prepaid, this 9th day of October, 1984, to:

James R. Hasenyager
Attorney for Plaintiff
635 Twenty-Fifth Street
Ogden, Utah 84401

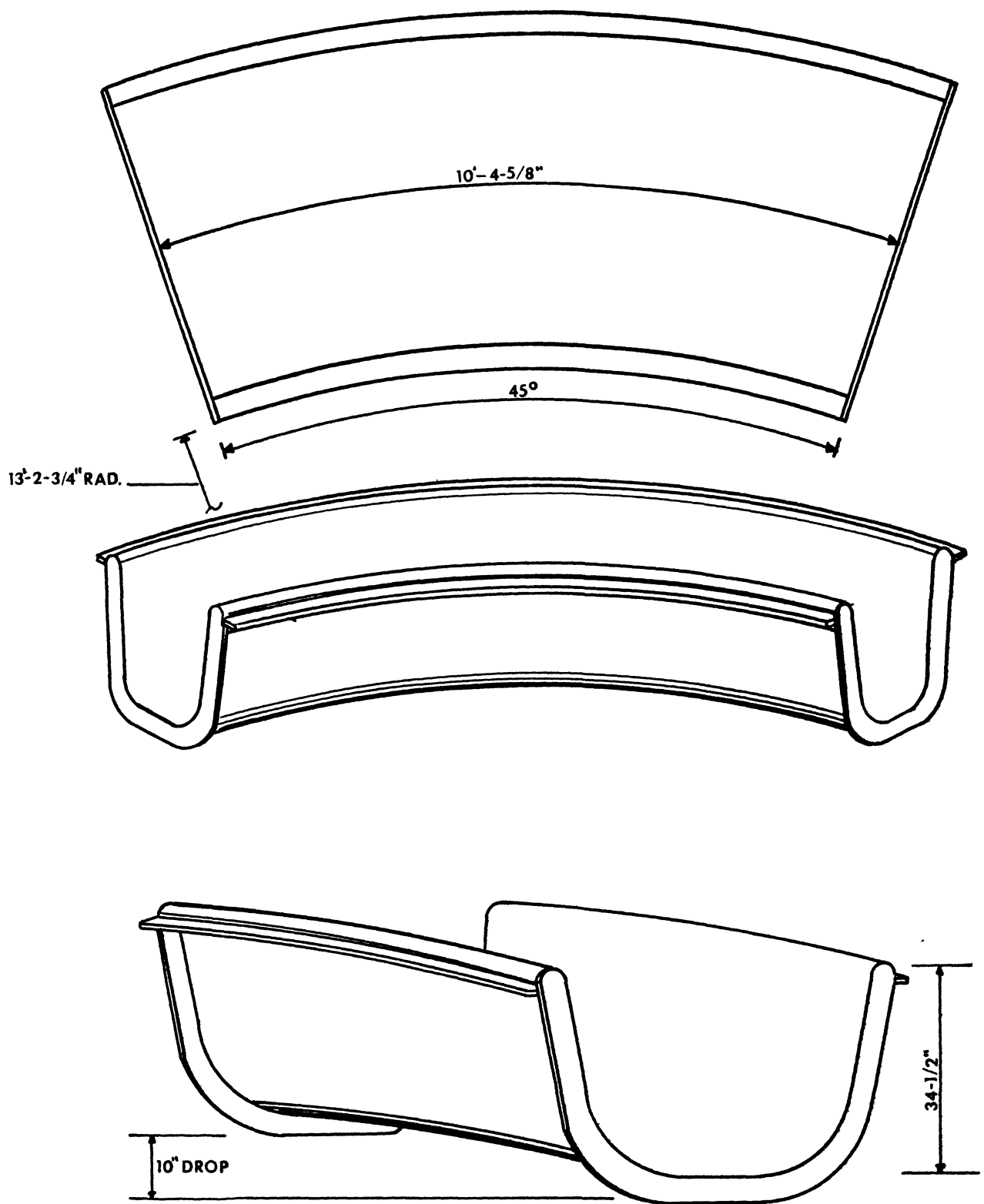


Trial Exhibit 1P
page 12



Professional
fiberglass
Products, Inc.

ITEM: 8'- STRAIGHT	
SCALE 3/8"=1'	DATE 2/23/79
DRAWN BY: D.J. LAFON	DWG. NO. 3



Trial Exhibit 1P
page 14



Professional
fiberglass
Products, inc.

ITEM: 45° RIGHT CURVE

SCALE 3/8"=1'

DATE 2/23/79

DRAWN BY: D.J. LAFON

DWG. NO. 4



Trial Exhibit 10D



Trial Exhibit 13D



Trial Exhibit 15D



Trial Exhibit 20D