

1978

## Verona Wallace v. Cottonwood Mall Shopping Center, Inc. : Brief of Appellant-Plaintiff

Utah Supreme Court

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### Recommended Citation

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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VERONA WALLACE, )  
 )  
 )  
Plaintiff-Appellant, )  
 )  
vs. ) Case No. 240653  
 )  
COTTONWOOD MALL SHOPPING )  
CENTER, INC., a corporation, )  
 )  
Defendant-Respondent. )  
 )  
-----)

BRIEF OF APPELLANT - PLAINTIFF

-----

An Appeal from the Judgment of the District Court of the Third  
Judicial District, The Honorable Marcellus K. Snow, Judge

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IN THE  
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STATEMENT OF KIND OF CASE

This is an action in which Plaintiff seeks damages for injuries to her, suffered when she fell on a slippery substance left on the floor of Defendant's shopping center.

Plaintiff, while walking across the terrazzo floor of Defendant's Cottonwood Mall, slipped on a substance which was later identified as an Orange Julius drink, spilled on the floor presumably by another patron, but left on the floor for an indefinite period of time. (Tr. 2-4)

DISPOSITION IN THE LOWER COURT

The jury, after receiving forty-three (43) Instructions, and deliberating, returned a special verdict as follows:

SPECIAL VERDICT

"We, the jury in the above-entitled action, for our special verdict concerning part of the issues in this case, answer the questions submitted as follows:

1. Was the substance on the floor for such a length of time that the Defendant Cottonwood Mall in exercising reasonable care should have known of its presence and thereafter had a reasonable opportunity to remedy the condition and did not do so.

ANSWER: YES

2. If your answer to Question No. 1 is "yes" then was such conduct of defendant, Cottonwood Mall, a proximate cause of Plaintiff's injuries?

ANSWER: YES

3. At the time and place in question and under the conditions as shown by the evidence, was the Plaintiff, Verona Wallace, negligent?

ANSWER: YES

4. If your answer to Question No. 3 is "yes", was such negligence of the plaintiff a proximate cause of her own injuries?

ANSWER: YES.

5. Considering all negligence that caused the accident at One Hundred Percent (100%), what percentage of that negligence is attributable to:

(a) Defendant, Cottonwood Mall	<u>10</u> %
(b) Plaintiff, Verona Wallace	<u>10</u> %
(c) Others	<u>80</u> %
(d) Total	<u>100</u> %

6. Set forth the amount of damages that you find Plaintiff, Verona Wallace, has suffered as a result of the injuries received in the accident in question:

Medical Expenses

(Medications, X-ray, Doctor bills, and etc.) \$ 300.00

Other Special Damages \$ 1760.00

(Expenses for Housekeeping bills, and Etc.)

General Damages

(Mental & Physical Pain and Suffering, and etc.) \$ 0

TOTAL \$ 2,060.00

Dissenting Jurors:

No. of Questions To Which Juror  
Dissented

7

1



DATED this 3/23 day of March, 1978.

ROSE N. KRAMER  
\_\_\_\_\_  
Foreman or Forelady

(Tr. 117-118) .

Later the Court entered Judgment on the Special Verdict in favor of the Defendant and against Plaintiff "No Cause of Action" and awarded costs to Defendant. (Tr. 125-127) .

It is from this Special Verdict and the Judgment on the Verdict and the Instructions which Plaintiff-Appellant alleges were confusing to the jury, that she appeals.

RELIEF SOUGHT ON APPEAL

ARGUMENT

POINT I

INSTRUCTION NO. 30 IS VERY CONFUSING AND CANNOT BE SQUARED WITH ANY OF THE PREVIOUS INSTRUCTIONS.

The words and construction -- "In answering the parts of the damage question, be careful not to include or duplicate in any parts amounts included in any other part answered by you." That part of the Instruction Appellant submits is so unintelligible as to thoroughly confuse the jury.

This confusion is born out by the unintelligible answers found in the Special Verdict.

POINT II

THE SPECIAL VERDICT AND ANSWER TO QUESTION NO. 1 FOUND DEFENDANT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURIES.

You are instructed that the Cottonwood Mall is subject to liability for the harm caused to the plaintiff by a condition on the floor at the Cottonwood Mall if, but only if, you find from a preponderance of the evidence that:

1. The presence of the substance constituted a dangerous and unsafe condition, and

2. That the defendant, Cottonwood Mall, by or through its agents had actual notice of the presence of the substance prior to the accident, and thereafter had a reasonable opportunity to remedy the condition and did not do so, or that if the Defendant did not know of the presence of the substance causing plaintiff to fall that it had been on the floor so long that the defendant in exercising reasonable care should have known of its presence and thereafter had a reasonable opportunity to remedy the condition and did not do so."

The jury in answer to No. 1 found in substance that Defendant was in fact negligent and that the negligence was the proximate cause of the injury. In other words by the jury's answer to No. 1 it found Defendant did have an opportunity by exercising reasonable care to discover the slippery substance in time to avoid the accident.

Again, in answer to Question No. 2, the jury again found the conduct of Defendant the proximate cause of the injury.

POINT III

THE INSTRUCTIONS WERE SO INCONSISTENT THAT THE JURY WAS CONFUSED.

Instruction No. 9 tells the jury Plaintiff was an invitee with a duty on the part of Defendant to keep the premises in a safe condition for Plaintiff to enter and take care of the business that brought her to Cottonwood Mall.

Again, in Instruction No. 10, the jury was instructed in substance that the duty to make the premises safe for Plaintiff extended to all portions of the premises.

Instruction No. 11 again tells the jury that if the substance remained on the floor long enough for Defendant to have discovered it, the jury must find in favor of Plaintiff and assess damages accordingly. This is exactly what the jury did by answers to both No. 1 and No. 6 of the Special Verdict wherein it found in No. 1 that the substance was on the floor for a reasonable time to give Defendant an opportunity to remedy the peril.

In its answer to No. 6 of the Special Verdict it assessed the damages accordingly. The jury also in response to Instruction

No. 11 assessed the damages accordingly.

Again, in Instruction No. 12 the jury is told again in substance of the duty of Defendant to keep the premises safe for its patrons.

However, starting with Instruction No. 16 the jury is suddenly instructed in another direction. The 16th Instruction appears to the Appellant to be further confusing to the jurors.

Coming to Instruction No. 20, the Court instructed the jury, we submit, in direct conflict to the earlier instructions - "In the exercise of its duty the Cottonwood Mall must use reasonable and ordinary care, but under the law it is not an insurer of, nor does it guarantee the safety of users of the premises."

Instruction No. 21 is in direct conflict with the earlier instruction regarding its duty to make the premises safe.

Again, the jury answered Instruction No. 22 that the slippery substance remained on the floor long enough to give Defendant, in the exercise of reasonable care, an opportunity to remedy the condition before the injury. However, the emphasis this time tends to excuse Defendant, with the further resultant confusion to the jury.

Instruction No. 24 regarding "Defendant having the right to assume that users of the Mall have normal eyesight and that they use the same in exercising ordinary care for their own safety

unless, in the exercise of due care, Defendant observes or should observe something to warn him to the contrary."

We respectfully submit this Instruction is meaningless and again confusing to a jury.

We further submit that Instruction No. 25 is in direct conflict with the earlier instructions in which the Court in Instructions No. 9, 10, and 11 tells the jury Plaintiff is an Invitee and that the Defendant has a duty to make the premises safe for her in the transaction of her business at Cottonwood Mall. However, at Instruction No. 25 the Court places Plaintiff in the category of a licensee and that she is required "to observe" and be aware of the existing conditions then and there present, and to keep a lookout for obstacles or other conditions reasonably to be anticipated." Again, the jury was, we submit, left with a confused definition of what the duties of each Plaintiff and Defendant were and wherein the liability lay. Under the Instructions the Court left the jury in a conflicting position as to whether Plaintiff was an invitee or licensee which we submit utterly confused them.

#### POINT IV

THE ANSWERS IN THE SPECIAL VERDICT ARE SO INCONSISTENT AS TO WARRANT A NEW TRIAL.

We have pointed out the various inconsistencies in the Instructions to the jury. The verdict bears out the fact that not only were the Instructions misleading and confusing, but also that the answers in the Special Verdict bear out the confusion. It is apparent that the jury intended to award damages to Plaintiff and the jurors even set out the amount (Answer No. 6).

POINT V.

THE COURT HAD A DUTY TO CLARIFY THE APPARENT CONFUSION OF THE JURY WHEN THE VERDICT WAS RETURNED.

We respectfully submit that the Judge presiding at the trial had a duty to reinstruct the jury, or set aside the verdict when it was returned with such an apparent confused Answers and Findings.

53 Am. Jur 440 #554: "If a case should go to the jury at all, it should go under proper instructions correctly declaring the legal principles involved. Instructions which are erroneous and misleading constitute grounds for a new trial or reversal of the judgment, unless the error is harmless."

Again, at 53 Am. Jur. 442 #557: "Instructions as a whole must be consistent and harmonious, not conflicting and contradictory. Where instructions given to the jury for their guidance, contradictory and conflicting rules which are unexplained and where following one might lead to a different result than would obtain by following the other, the instructions are inherently defective.....Inconsistent

the jury are thereby left in doubt and without any certain guide as to the law arising upon the evidence.

88 C.J.S.: Inconsistent and Contradictory Instructions:

"Instructions must not be conflicting, inconsistent or contradictory. It is, therefore, proper to refuse, and error to give, conflicting and contradictory instructions, and this is particularly true where the conflicting and contradictory instructions are on a material point or issue, since a charge containing two distinct propositions conflicting with each other tends so to confuse the jury as to prevent their rendition of an intelligent verdict.

"The jury cannot be required to determine what part of a contradictory charge is correct, and it is not for the jury to select from contradictory instructions those that correctly express the law, and they should not be left to reconcile conflicting points of law. Where inconsistent and contradictory instructions are given, it ordinarily cannot be determined from the verdict which rule was adopted by the jury, and the court is thus left in doubt and uncertainty as to the facts actually found by the jury as a basis for its verdict, and where instructions are inconsistent with, or conflict each other, it is usually impossible to say whether the jury were controlled by the one or the other.

"It may, consequently, be ground for reversal where contra-

it has been said that the mere fact that an instruction conflicts with another instruction is in itself no reason for condemning it, and correct instructions do not become erroneous merely because they are in conflict with incorrect instructions given for the opposite party. An inconsistent instruction cannot be sustained on the theory that a defendant was entitled to a peremptory instruction. Judgment will not be reversed where the inconsistency is only apparent, and not actual, or if it is apparent from reading the charge as a whole that the jury could not have been misled, and charges should not be examined with a legal microscope for technical flaws and contradictory statements. In determining whether there is a conflict, the decisive question is whether the instructions read as a whole and in light of the circumstances of the request in which they are given, are apt to confuse a person of ordinary intelligence.

Simpson vs. General Motors Corp. 24 Utah 2nd 301, 470 P 2nd 399: "Specific jury instructions should be considered in its entirety along with all other instructions." (No such instruction was given in the instant case).

See DeMille vs. Erickson, 23 Ut 2nd 278, 462 P2nd 159.

In Barton vs. Jensen, 19 Ut 2nd 196 (429 P2nd 44) Tuckett, J.: "A majority of the members of the Court are of the opinion that in



the case to the jury upon a general verdict. It appears that the best efforts of trial judge to make interrogatories simple, concise, and understandable still result in juries misunderstanding what is intended."

Badger vs. Clayson 18 Ut 2nd 329, 422 P 2nd 665.

Brunson vs. Strong, 17 Ut2nd 364, 412 P2nd 451.

Wellman vs. Noble, 366 P2nd 701, 12 Ut 2nd 350.

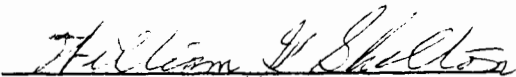
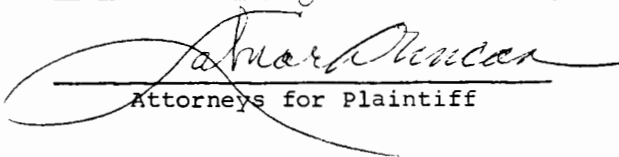
Ivie v.s Richardson, 9 Ut2nd 5, 336 P2nd 781.

Joseph vs. W. H. Groves LDS Hospital, 318 P2nd 330, 7 Ut2nd 39.

SUMMARY

In conclusion we respectfully submit the inconsistencies of the Instructions, and particularly the conflicting instructions as to whether Plaintiff was a licensee or an invitee were incorrect and resulted in the confused and hardly intelligible verdict. Plaintiff is entitled to a new trial.

Respectfully submitted,

  
  
Attorneys for Plaintiff