1998

Alexander Gomez v. Salt Lake Community College District : Brief of Appellee

Utah Court of Appeals

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Mark Dalton Dunn; Robert J. Debry & Associates; Attorneys for Appellant .

IN THE UTAH COURT OF APPEALS

ALEXANDER GOMEZ,	:	DOCKET NO. 980239-CA
Plaintiff/Appellant,	:	
v.	:	Case No. 980239-CA
SALT LAKE COMMUNITY COLLEGE DISTRICT, THE STATE OF UTAH,	:	Priority No. 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE

Appeal from Judgment on Jury Verdict of the
Third Judicial District Court in and for
Salt Lake County, State of Utah,
Honorable Tyrone E. Medley, Presiding

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ORAL ARGUMENT NOT REQUESTED BY DEFENDANT/APPELLEE

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Plaintiff, a student at Salt Lake Community College (SLCC) when the cause of action arose, brings this appeal from a judgment (R. 578-80) entered on a jury verdict favoring SLCC in a negligence action brought in the Third Judicial District Court (R. 1-4). Jurisdiction lies within this Court under Utah Code Ann. § 78-2a-3(2)(j) (1996), as the case was poured over from the Supreme Court of Utah by order dated April 28, 1998.

ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue in this case is whether the district court abused its discretion in precluding the testimony of plaintiff's proposed expert witnesses. In determining whether the preclusion of expert testimony constitutes reversible error, the Supreme Court of Utah has held that "[t]he trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion

standard. Under this standard, we will not reverse unless the decision exceeds the limits of reasonability." State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted). Further,

> trial judges are to be given a wide measure of discretion in determining whether a particular witness qualifies as an expert. Trial courts are accorded this discretion because they are "in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole."

Butler, Crockett and Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 233 (Utah 1995) (quoting State v. Pena, 869 P.2d 932, 936 (Utah 1994)) (citations omitted). Finally, under rule 61 of the Utah Rules of Civil Procedure, the exclusion of evidence cannot be grounds for disturbing an order or judgment unless the reviewing court finds that substantial injustice would otherwise result.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issue before the Court for decision is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff brought suit against SLCC on May 15, 1996 (R. 1-4), alleging negligence in SLCC's use, for a beginning basketball class, of a gymnasium facility that provided limited clearance

behind a cross-court basketball backboard. The complaint survived SLCC's motion for summary judgment (R. 170-78) and was set for trial. Plaintiff and SLCC each filed a motion in limine, supported by a memorandum, seeking to bar the other party's use of expert testimony (R. 466-71 (plaintiff); R. 261-91 and 366-96 (SLCC)); both motions were granted (R. 558-59 (plaintiff); R. 560-62 (SLCC)). The case was tried to a jury on October 22-24, 1997 (R. 507-09), which returned a unanimous verdict in favor of SLCC (R. 553-55 and 509), attributing no negligence or proximate causality to SLCC but finding plaintiff's injuries proximately caused by his own negligence. The court entered judgment on this verdict on December 18, 1997 (R. 578-81), and plaintiff filed a timely notice of appeal on January 16, 1998 (R. 582-83). Receiving the notice of appeal on January 22, 1998 (R. 589), the supreme court ordered it poured over to this Court some three months later (R. 592) for disposition.

B. Statement of Relevant Facts

In October, 1994, plaintiff attended the first session of a beginning basketball class held at an SLCC gymnasium (R. 2, ¶ 7). Plaintiff had previously taken the class at a different SLCC facility (R. 192), but believed he would receive additional class credit for repeating it (R. 193). Although he was not registered for the class, he was on a waiting list (R. 194). The instructor, a substitute, verified that plaintiff was on the waiting list and indicated that the class had space available

(R. 195). After having the students stretch, warm up, and "shoot around," the instructor divided the class into four teams for cross-court scrimmage games, with two teams on each cross-court (R. 198).

The cross-court on which plaintiff was playing had two feet of clearance behind the basket's backboard (R. 209, ¶ 4). Attached to the lower portion of the wall behind the backboard was a heating unit (R. 2, ¶ 7) which reduced the clearance by four-and-a-half inches to one foot, seven-and-a-half inches (R. 209, ¶ 4). In the course of the scrimmage, plaintiff attempted a lay-up shot and accelerated into the wall (R. 205-06), hitting his knee on the wall or the attached heating unit and sustaining injury (R. 2, ¶ 7). This lawsuit followed.

SUMMARY OF ARGUMENT

The trial court has broad discretion over the admissibility of expert testimony. If the court's decision falls within the limits of reasonability, an appellate court will not overturn it. Only if no reasonable person would adopt the trial court's view is its decision vulnerable to challenge.

Rather than showing the grounds of the court's ruling to be flawed, plaintiff merely recycles the arguments he advanced unsuccessfully below. By failing to demonstrate error in the court's reasoning, his argument falls short of articulating a viable challenge to the result. Moreover, by neglecting to

marshal the evidence supporting the ruling, plaintiff has neither provided this Court with a basis for reasoned decision-making nor established that his substantial rights have been violated. Rule 61 of the Utah Rules of Civil Procedure consequently forbids disturbing the trial court's evidentiary ruling.

ARGUMENT

I. THE PERMISSIVE LANGUAGE OF UTAH R. EVID. 702 DOES NOT MANDATE THE ADMISSION OF EXPERT TESTIMONY WHERE CONFUSION AND UNFAIR PREJUDICE ARE LIKELY TO RESULT.

Rule 702 of the Utah Rules of Evidence states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, [sic] may testify thereto in the form of an opinion or otherwise." The permissive language of the rule gives the trial court wide discretion to determine both whether a witness is qualified to give testimony on particular subject matter and whether the proposed testimony will be helpful to the jury. See Anton v. Thomas, 806 P.2d 744, 746 (Utah App. 1991) ("The trial court has discretion to determine the admissibility of expert testimony, and to determine if the witness is qualified to give an opinion on a particular matter"); see also Dikeou v. Osborn, 881 P.2d 943, 947-48 (Utah App. 1994) (applying the Anton standard). In fact, "'[t]he exercise of discretion . . . necessarily reflects the personal

judgment of the court and the appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.'" State v. Brown, 948 P.2d 337, 340 (Utah 1997) (quoting State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)).

In the October 22, 1997 hearing on the parties' pretrial motions in this case, the district court judge made clear that he was granting SLCC's motion to exclude the testimony of plaintiff's proposed expert witnesses "upon each and every basis and analysis that is set forth in the Defendant's Memorandum in Support of their [sic] Motion in Limine. And the court is adopting the analysis and the authorities set forth therein as its ruling" (R. 602 (Tr. 6)).[1] While acknowledging that there were many reasons to exclude the testimony, the judge cited, as the primary basis for his decision, his lack of conviction that the experts' "proposed testimony satisfies the requirement in [rule 702] that their testimony would be helpful and would assist the trier of fact in understanding the evidence or in determining any fact in issue" (id.). Under Rule 403 of the Utah Rules of Evidence,[2] he also found a likelihood that the jury would become

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[1]SLCC's motion and memorandum are attached at the end of this brief as, respectively, Addendum A and Addendum B.

[2]Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

confused by the blurring of distinctions between instructing a basic physical education class and, for example, coaching competitive college basketball--the basis of proposed witness Roger Reid's expertise. See R. 603 (Tr. 7). (A similar potential for confusion is presented by a blurring of distinctions between instruction of physical education classes at the collegiate level and the organization of general recreational opportunities for children aged four through 18 years, the basis of the other witness' proposed testimony. See affidavit of Dee Oldroyd at R. 283-84). The judge concluded that "because it doesn't meet the helpfulness requirement in this court's opinion, and the problems with [Utah R. Evid.] 403" (R. 603 (Tr. 7)), the testimony must be excluded.

Plaintiff fails to address his argument to the basis for the district court's decision. Instead, he charges that the exclusion of his expert witnesses improperly "tilted the playing field decidedly in favor of the defendants" (Brief of Appellant at 10), "destroyed the plaintiff's cause of action against the instructor" (id. at 8), and improperly turned the case into "a standard premises liability action" (id. at 7). Notably, plaintiff's jury instructions, filed a day before SLCC's, contained three requested instructions on the issue of premises liability which were given by the trial judge at plaintiff's behest. See R. 432-35. Also notably, the complaint in this case neither names the instructor as a defendant nor articulates a

claim against him. Instead, it accuses SLCC, the sole defendant, of placing the backboard too close to the wall, installing the heating unit in a location dangerous to players, failing to provide padding, conducting physical education classes in this allegedly dangerous facility, failing to supervise its employees, and otherwise failing to use reasonable care (see Complaint at R. 2-3, ¶ 8a-f). As the court properly found, the proposed testimony of plaintiff's excluded experts would not have assisted the jurors in understanding the evidence or determining the facts relevant to his stated claims.

Plaintiff relies on State v. Larsen, 865 P.2d 1355 (Utah 1993), for the proposition that expert testimony may be helpful, and is consequently admissible under rule 702, even if the subject is not beyond the comprehension or experience of the jurors (see Brief of Appellant at 6-7). In Larsen, a securities fraud prosecution, the issue presented to the appellate court was whether the testimony of a securities expert as to the materiality of information that Larsen failed to disclose to investors should have been excluded because it expressed a legal conclusion. The supreme court, noting that "we will not reverse unless the decision exceeds the limits of reasonability" (Larsen, 865 P.2d at 1361), affirmed the lower court in permitting the testimony. However, it qualified its affirmance, in light of its limited scope of review, as follows:

> We do not suggest that the trial court must allow expert testimony regarding materiality, especially

> testimony utilizing the term "material." We simply hold that the trial court did not abuse its discretion in allowing the limited testimony in this case.
>
> We also note that an integral element of a rule 702 determination to admit expert evidence is a balancing of the probativeness of the evidence against its potential for unfair prejudice. This balancing mimics that under rule 403 and is necessary to a determination of "helpfulness." In the present case, Larsen did not specifically object to the use of "material" on the ground that the probative value of the usage was substantially outweighed by the potential for unfair prejudice or confusion of the issues. *See* Utah R.Evid. 403. Larsen's objections, although citing to rule 702, addressed only the contention that materiality in general was not a proper subject for expert testimony. Trial counsel must state clearly and specifically all grounds for objection. *See* Utah R.Evid. 103(a)(1). Inasmuch as Larsen failed to assert a claim of prejudice at the trial court, that issue is not properly preserved for appeal. If Larsen had made such an objection, it might have merited serious consideration by the trial court.

Id. at 1363, n.12 (citation omitted). This qualifying language suggests that neither a ruling to allow the testimony nor a decision to exclude it would have been an abuse of the trial court's discretion because either outcome would have been within the limits of reasonability. Larsen simply honors the principle that a single set of circumstances may give rise to more than one reasonable result. It does not support plaintiff's expansive interpretation of rule 702 as mandatory rather than permissive, entitling him to use expert testimony irrespective of its potential for unfair prejudice and confusion.

Moreover, the judge's determination in plaintiff's case, unlike that in Larsen, rests squarely on both rule 702 and rule 403. In the hearing on the pretrial motions, the judge mirrored

the language of rule 702 in holding that the proposed testimony would not "assist the trier of fact in understanding the evidence or in determining any fact in issue" (R. 602 (Tr. 6)). He also referred directly to "the problems with 403" (id. at 603 (Tr. 7)) in his evaluation of the potential for jury confusion. As the Larsen footnote suggests, Larsen does not stand as precedent for plaintiff here to obtain reversal of the trial court's ruling without demonstrating that the excluded testimony, even if permissible, would have been more probative than prejudicial under rule 403--a showing he has not made.

Plaintiff attempts to bolster the need for expert testimony by asserting that

> [i]n order to teach at the collegiate level, instructors must obtain a certain level of knowledge and experience. Teachers must be certified to have classroom education and on the job training through student teaching. That knowledge and experience appropriately set the standard of care for the conduct to be followed in a classroom, or in this case, gymnasium, setting. The trial court was in error by finding that the testimony of experienced basketball instructors would not "assist the trier of fact to understand the evidence or to determine a fact in issue."

Brief of Appellant at 8. Plaintiff not only neglected to raise the issue of appropriate training and certification below, but failed to challenge SLCC's assertion that "[t]here is no requirement for substitute instructors in beginning basketball at Salt Lake Community College that instructors have any specialized or professional basketball training. [Substitute instructor] Carlson qualified simply because he has a college degree and is

familiar with primary basketball skills being taught in this class" (R. 268-69 and 373-74). Moreover, appellant does not appreciate that his proposed witnesses are not experienced basketball instructors familiar with the requisite standards for teaching a college-level basketball class and therefore do not possess the attributes he suggests would qualify them to testify on this issue.

While the trial court judge did not dwell on the qualifications of plaintiff's proposed expert witnesses, SLCC argued in the memorandum supporting its motion in limine, as adopted by the court, that the witnesses were not qualified to testify as to standards applicable to college physical education instruction. The memorandum notes that neither witness had been involved in a college teaching setting nor had any specialized knowledge, training, or experience germane to such a setting (R. 271 and 376). The record further shows that in addition to never having taught college basketball, plaintiff's proposed expert witnesses had never evaluated a gymnasium for reasonableness of layout nor were aware of any standards governing court layout for college basketball classes (see R. 265-66 and citations contained therein; R. 370-71 and citations contained therein). One witness acknowledged that his evaluation was not based on any particular standards (see R. 265 and citations contained therein; R. 370 and citations contained therein), and the other admitted that his opinion was nothing

more than the application of a "reasonable man" standard (see R. 266 and citations contained therein; R. 371 and citations contained therein).

The Supreme Court of Utah, in Steffensen v. Smith's Management Corp., specifically approved this Court's declaration in Davidson v. Prince that "'an expert generally cannot give an opinion as to whether an individual was "negligent" because such an opinion would require a legal conclusion.'" Steffensen v. Smith's Management Corp., 862 P.2d 1342, 1348 (Utah 1993), (quoting Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App. 1991)). As the Steffensen court explained, "Opinion testimony is not helpful to the fact finder when it is couched as a legal conclusion. These extreme expressions of the general belief of the expert witness tend to blur the separate and distinct responsibilities of the judge, jury, and witness." Steffensen, 862 P.2d at 1347-48. Yet by their own deposition testimony, plaintiff's experts admitted having nothing more than their general beliefs and conclusions of negligence to offer.

Roger Reid stated that his role was to "just look and give my opinion about would this be a safe situation to play basketball in. Do you feel like it's a safe environment, do you feel like a young man in this setting did have the clearance to play the game and could this help result in an injury" (R. 276 and 381). Asked whether he knew of any published standards governing the layout of a gym for beginning-level college

basketball classes, he opined that "whatever facility they have there would be what you would use" (R. 279 and 384) and noted that he had observed basketball played in facilities "from the most plush to gyms that didn't even have nets on them where they played organized basketball" (id.). Dee Oldroyd twice testified that in concluding SLCC's facility was dangerous for cross-court play, he was applying only his own understanding of reasonableness (see R. 290-91 and 395-96), which was not based on any governing standards or rules; in fact, he conceded, "I've never really seen any written material discussing cross-court play" (R. 289 and 394). The proposed witnesses' sweeping conclusions, based on no more than common experience, overreach the province of the jury as fact finder.

Plaintiff has not shown that the act of negligently colliding with a wall is beyond the comprehension or common experience of the jurors. Nor has he shown that the information possessed by his proposed experts would have assisted the jurors in determining a contested fact or understanding the evidence, as rule 702 requires. For these reasons, he has failed to demonstrate abuse in the court's decision to exclude their testimony. Because the decision was within the limits of reasonableness and therefore within the bounds of the trial court's discretion, it is entitled to this Court's affirmance.

II. PLAINTIFF HAS FAILED TO MARSHAL THE EVIDENCE SUPPORTING THE FINDINGS THAT UNDERLIE THE DISTRICT COURT'S RULING.

Plaintiff cannot successfully challenge the court's ruling on SLCC's motion in limine without challenging the factual findings that underlie it. To challenge to these findings, plaintiff must marshal the evidence in their support. Only by showing the findings to be nonetheless so lacking in support as to be clearly against the weight of the evidence can plaintiff establish error in the trial court's decision. See Robb v. Anderton, 863 P.2d 1322, 1327-28 (Utah App. 1993). As this Court has explained,

> To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty . . ., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced [in court] which *supports* the very findings the appellant resists." Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings.

Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994) (quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 and 1314 (Utah App. 1991) (citations omitted) (first three alterations in original)). Moreover, as the Court has recently held, it is insufficient to discharge the marshaling duty "by quoting each finding of fact

and then stating the evidence against it." Harper v. Summit County, No. 961486-CA, slip op. 17 (Utah App. July 23, 1998).

Plaintiff has failed to meet even the flawed standard to which Harper refers. Instead of addressing "each and every basis and analysis" (R. 602 (Tr. 6)) contained in SLCC's memorandum supporting its motion in limine, plaintiff has ignored the facts cited by SLCC--and adopted by the court--to show that the proposed expert witnesses lacked knowledge and experience in the conduct of a beginning collegiate basketball class, in standards for appropriate layout of the physical facility, and in rules governing instructional cross-court play (see R. 265-66 and citations contained therein; R. 370-71 and citations contained therein). Plaintiff has not addressed or shown erroneous the fact that at SLCC, substitute instructors in beginning basketball are not required to have any specialized or professional training in the sport (see R. 268-69 and 373-74). He has not challenged the fact that the statements of plaintiff's proposed expert witnesses are nothing more than their own application of common-sense experience to the reasonableness of SLCC's actions (see R. 271 and 376).

Even if he were able to manifest error, plaintiff carries the further burden of proving that the error is so fraught with consequences as to be "inconsistent with substantial justice" under rule 61 of the Utah Rules of Civil Procedure, thereby

permitting the Court to disturb the judge's order.[3] He attempts to meet this burden by claiming that the effect of permitting the testimony of SLCC's substitute and assigned instructors "was to allow the defense to have expert testimony presented to the jury without the plaintiff having the opportunity to present rebuttal testimony" (Brief of Appellant at 9). However, he concedes that the testimony of these fact witnesses "was, of course, material, relevant, and proper" (id.), and cites no testimony that strayed from a necessary factual account of the witnesses' personal knowledge of and participation in the events surrounding plaintiff's injury. Moreover, he has identified no objection of record, on grounds of improper expert testimony, to the sworn statements of these fact witnesses below. He also neglects to mention the court's exclusion of all testimony, both factual and expert, by SLCC's sole designated expert witness, Bill Marcroft. See R. 603-04 (Tr. 7-8) re expert testimony; R. 612-13 (Tr. 16-17) re fact testimony; see also R. 558-59, Order Granting Plaintiff's Motion in Limine. The trial court precluded all

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[3]Rule 61 states,

> No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, 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.

expert testimony by both parties. Contrary to plaintiff's representation (see Brief of Appellant at 10), the "playing field" was level. Under these circumstances, plaintiff has not established that the court's decision adversely affected his substantial rights, as rule 61 requires.

This Court has explained that "[t]he deference we afford to trial courts' findings is based on and fosters the principle that traditional fact finders, whether judges or juries, are better equipped to consider, weigh, and assess the evidence that litigants bring before the courts." Oneida Cold Storage, 872 P.2d at 1053. Because the appellate court does not sit to retry the facts,

> [s]uccessful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence. These demonstrations in appellants' briefs not only avoid retrying the facts but also assist us in our decision-making and opinion-writing, thus increasing our efficiency.

Id. Plaintiff's failure to marshal the evidence with respect to the findings on which the court's exclusion of expert testimony is based, coupled with the absence of a showing of substantial injustice under rule 61, requires affirmance of the district court's order granting SLCC's motion in limine.

CONCLUSION

Plaintiff has neglected his duty to marshal the evidence on which the trial court's preclusion of expert testimony rests.

Nonetheless, he reargues his case as if the standard of review were de novo. Because the applicable standard is abuse of the considerable discretion vested in the trial court as to the admissibility of expert testimony, plaintiff's argument is misdirected. His failure to address the factual basis of the court's ruling is fatal to his appeal.

Plaintiff's failure to marshal the evidence in support of the trial court's ruling is, by itself, a sufficient ground for rejection of his appeal. However, even if plaintiff had met his marshaling requirement, his argument founders on the merits. He has not shown that the proposed testimony of his expert witnesses would have assisted the jury in understanding the evidence or determining a disputed fact pursuant to rule 702, nor has he established that the testimony would have been more probative than prejudicial under rule 403. Because he has not shown the district court's preclusion of the testimony to be outside the bounds of reasonability, his appeal cannot succeed.

For these reasons, as more fully explained above, defendant, Salt Lake Community College, respectfully requests the Court to affirm the decision of the court below.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION

Defendant does not believe oral argument is necessary to the proper disposition of this appeal, but desires to participate if oral argument is ordered by the Court. Defendant also believes

the law on admissibility of expert testimony to be sufficiently clear that a published opinion is not needed in this case.

Dated this 7th day of August, 1998.

NANCY L. KEMP
Assistant Attorney General
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of August, 1998, I caused to be mailed, postage prepaid, two true and accurate copies of the foregoing BRIEF OF APPELLEE to the following:

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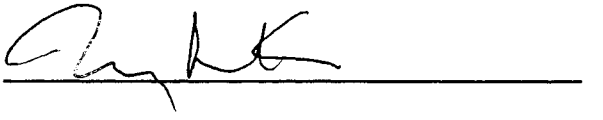

ADDENDUM A

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IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

ALEXANDER GOMEZ Plaintiff, v. SALT LAKE COMMUNITY COLLEGE DISTRICT, THE STATE OF UTAH Defendant.	:	**DEFENDANT SALT LAKE COMMUNITY COLLEGE'S MOTION IN LIMINE** Case No. 960903291 Judge Tyrone E. Medley

Defendant, Salt Lake Community College, by and through Raymond A. Hintze, Assistant Attorney General, moves the Court for an order excluding the testimony of Plaintiff's witnesses, Roger Reid and Dee Oldroyd, on the grounds that said witnesses are not properly qualified as experts and further, that expert testimony is not necessary or admissible on the issue of negligence or standard of care because there are no technical complexities involved in this determination and opinion testimony on this subject is

improper. This motion is supported by a memorandum filed herewith.

DATED this 16 day of Oct, 1997.

JAN GRAHAM
Utah Attorney General

RAYMOND A. HINTZE
J. WESLEY ROBINSON
Assistant Attorneys General
Litigation Division

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **DEFENDANT SALT LAKE COMMUNITY COLLEGE'S MOTION IN LIMINE**, postage prepaid, this 16th day of October, 1997, to the following:

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IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

ALEXANDER GOMEZ Plaintiff, v. SALT LAKE COMMUNITY COLLEGE DISTRICT, THE STATE OF UTAH Defendant.	:	**DEFENDANT SALT LAKE COMMUNITY COLLEGES' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE** Case No. 960903291 Judge Tyrone E. Medley

Defendant, Salt Lake Community College, submits the following memorandum of points and authorities in support of its motion in limine:

FACTS

This case is brought by the Plaintiff, a student at Salt Lake Community College and is based upon an incident occurring in a

beginning basketball course at the South City Campus, formerly South High School. On the day of the accident the class was being taught by Kenneth Carlson, a substitute teacher. The issue presented by Plaintiff's case is whether the instructor was negligent in directing the students to play cross-court on the side baskets in the gymnasium when the backboards were fixed to brick walls allowing only approximately two (2) feet clearance between the backboard and the brick wall.

WITNESS ROGER REID

Roger Reid's credentials, as set forth in his deposition, are as follows:

He has never taught college basketball. (Dep. at 4). He has never been qualified as an expert witness in any proceeding. He has never been asked to evaluate a gym for reasonableness of layout before. (Dep. at 18). He has never done any research on basketball court design. (Dep. at 9). He has never had any experience with basketball court design. (Dep. at 10). He is not aware of any national standards governing basketball court layout for college gym classes (Dep. at 12 and 13).

Mr. Reid's experience as a professional college basketball coach has no bearing whatsoever on his ability to evaluate standards applicable to college physical education classes. His

opinion in this case is simply based upon a reasonable man standard and his own experiences and what he has seen. (Dep. at 26).

WITNESS DEE OLDROYD

Dee Oldroyd is a graduate of Brigham Young University in Recreation Management Administration and worked in Korea from 1987 to 1993, organizing activities in soccer, football and basketball for four to eighteen year olds. (Dep. at 4 and 5). His only experience is working with high school age children in football and basketball. (Dep. at 6 and 7). He has never served as an instructor in a physical education basketball class. (Dep. at 7). He has no certificate or credentials as an expert. He has never been qualified as an expert witness in a court proceeding. (Dep. at 8). He has never been asked to evaluate a gym or give expert opinions on gym layout. (Dep. at 25). He has never advertised or held himself as an expert witness. (Dep. at 8). He has never published any articles, papers or books and does not belong to any professional organizations. (Dep. at 11). He is not aware of any standards which apply to college physical education classes. (Dep. at 18). Most importantly, he admits his opinions are based simply upon a reasonable man standard. (Dep. at 26 and 28).

ARGUMENT

The issue presented by this case is whether the instructor of this particular physical education class, in which Plaintiff was injured, was negligent in instructing the participants to play cross-court in a gymnasium where the baskets and backboards were anchored to the gymnasium walls, allowing approximately two (2) feet between the backboard and the wall. The risk of injury and the issue of negligence in this case is merely whether it would be foreseeable that such condition would create an unreasonable risk of injury from collision of the players.

The standard of care "applied" in a case is an issue of law decided upon by the trial judge. The trial judge must also decide whether a particular expert is qualified and whether particular testimony would be helpful or suitable in a case. *Ostler v. Albina Transfer Co.*, 781 P.2d 445, 447 (Ut.App. Ct. 1989).

Normally, the reasonable man standard is employed, except in cases where the subject is highly technical or otherwise specialized in nature. In such a case, the standard of care is that which reasonable persons of comparable or like skills would reasonably employ in the same or similar circumstances. *See Pine Creek Canal No. 1 v. Stadler*, 685 P.2d 13 (Wyo. 1984). In a

recent treatise on Utah Evidence Law by Professors Edward L. Kimball and Ronald N. Boyce, it states:

> ***Requirement of helpfulness.*** The rule requires that the expert not only have special qualifications, but that the expert's knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue." (citations omitted). That means it is inappropriate for an expert to testify only to matters of common sense or to matters of law, as to which the court will give instructions. (citations omitted). Utah Evidence Law, p. 7-4.
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> * * * *
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> ***Expert evidence required.*** If the jury cannot properly make a decision without the help of an expert's specialized knowledge, the court will require that expert testimony be presented. Generally expert testimony is required to establish the elements of a medical malpractice case. *Id.* at 7-5.

Kenneth Carlson, the substitute instructor, had a Bachelor's degree in Economics, a minor in Communications and a Master's degree in Business. He had no specialized education in athletics and no professional training as a basketball coach. He played competitive high school basketball but was not involved in other competitive basketball training in college. He has had some volunteer experience coaching youth basketball and teaching primary basketball skills. There is no requirement for substitute instructors in beginning basketball at Salt Lake Community College

that instructors have any specialized or professional basketball training. Mr. Carlson qualified simply because he has a college degree and is familiar with primary basketball skills being taught in this class.

This is not an issue which requires expert testimony because a reasonable man standard is the appropriate standard to be used. Allowing Plaintiff to bring in the aforementioned witnesses, who have expertise and experience far in excess of that necessary for Defendant's instructor, would clearly be improper. The primary purpose of expert testimony is to establish standards for the benefit of the trier of fact when the facts are somewhat alien in terminology and when technological complexities would preclude ordinary triers of fact from rendering intelligent judgment. *See Juhnke v. Evangelical Lutheran Good Samaritan Society*, 634 P.2d 1132 (Kan. 1981). The Supreme Court of Arizona properly concluded that negligence is not so susceptible of objective and accurate perception as to be the proper subject of opinion evidence. *Dobbertin v. Johnson*, 390 P.2d 839 (Az. 1964). The Utah Supreme Court in *Day v. Lorenzo Smith & Son*, 408 P.2d 186, 17 Ut.2d 221, stated "Opinion testimony is admissible only when subject matter is such that jury cannot be expected to draw correct inferences from

the facts; there is no need for expert opinion with reference to facts involving common place occurrences."

Stated in the affirmative, the Utah Supreme Court in *Edwards v. Dickerson*, 597 P.2d 1328, stated: "Where the subject of inquiry is a field beyond the knowledge general possessed by a layman, one properly qualified therein maybe permitted to testify to his opinion as an expert. *Id.* At 1330.

In *Davidson v. Prince*, 813 P.2d 1225, the Utah Court of Appeals considered a case wherein expert witness, Newell Knight, an accident reconstruction expert, was called to testify regarding a party's negligence. Opposing counsel objected when Mr. Knight was asked to express his opinion as to whether the defendant was negligent. The trial court sustained the objection and did not allow the testimony. Upon appeal, the Utah Court of Appeals held:

> The trial court's exclusion of this testimony, however, can be affirmed on the ground that it was a legal conclusion. Although Rule 704 abolished the per se rule against testimony regarding ultimate issues of fact, it does not allow all opinions. "The Advisory Committee notes [to Rule 704] make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions. (citations omitted) *Id.* at 1231.

The evidence offered by Plaintiff's witnesses Reid and Oldroyd does not fit within the proper subject of expert testimony. Their testimony is not based upon any specific scientific, technical or other data because both witnesses had denied either knowledge of any standards or their applicability to the specific situation. In each instance, these witnesses are simply being asked to testify that the decision of the instructor to allow these students to play cross-court under these circumstances was unreasonable. Neither of these witnesses offer any specialized knowledge, but are simply substituting their judgment for that of the Defendant and the jury. These witnesses have neither established by qualifications, training, or otherwise, any specialized knowledge applicable to college physical education classes because neither have been involved in a college teaching setting. Their testimonies are not based upon any standards, scientific or otherwise, but are merely statements of their own opinions as to the reasonableness of the conduct of the Defendant. As such, they must be excluded as improper expert testimony.

In *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), the Supreme Court of Utah outlined the trial court's approach to determining whether expert witnesses' testimony should be allowed. If the scientific evidence falls within the category of "inherent

reliability" because the scientific techniques are so well known and understood by everyone, then the trial court may allow the evidence. However, if the scientific evidence does not qualify for judicial notice, then the court must be satisfied of an initial foundational showing that convinces the court that the principles or techniques underlying the proper testimony are accurate and reliable. The court should carefully explore each logical link in the chain that leads to the expert testimony given and determine it's reliability. In the absence of such a showing by the proponent of the evidence and a determination by the court as to it's threshold reliability, the evidence is inadmissible. *Id* at 403. *See also, State v. Crosby*, 302 Utah Adv.Rep. 36 (Sup.Ct. October 29, 1996).

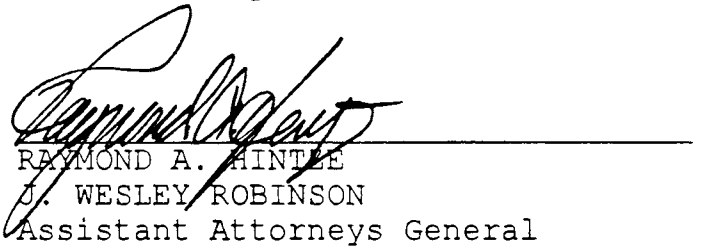
CONCLUSION

This case is governed by a reasonable man standard and it is prejudicial to the Defendant to allow Plaintiff to offer testimony of Roger Reid and Dee Oldroyd, who have greater experiences than are required for the Defendant's instructor in this case. This case can be ruled on by the jury under a reasonable man standard. Plaintiff has failed to demonstrate the need for experts or that

they would be helpful to the jury in arriving at a negligence issue in this case.

Dated this 15th day of October, 1997.

JAN GRAHAM
Utah Attorney General



RAYMOND A. HINTZE
J. WESLEY ROBINSON
Assistant Attorneys General
Litigation Division

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **DEFENDANT SALT LAKE COMMUNITY COLLEGE'S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE**, postage prepaid, this 16th day of October, 1997, to the following:

MARK D DUNN
ROBERT J DEBRY & ASSOCIATES
3575 SOUTH MARKET STREET SUITE 206
WEST VALLEY CITY UT 84119

Allison Griswold

Deposition of Roger Reid

just a little bit, then, if we could. Starting with high school graduation, what is your education?

A After graduating from high school, I went to BYU for one year and then transferred to College of Eastern Utah, and then spent my last two years, graduated from Weber State College, and that's as far as my schooling. I took some classes -- I went back to BYU to get my master's, and halfway through that, I was hired as the assistant basketball coach there.

Q What was your degree in, Roger?

A Physical education and physiology.

Q Did you ever do any teaching of physical education at any level?

A I did classes off and on in high school for seven years.

Q And what classes were they? Basketball classes?

A Not just basketball classes. They were all kinds of different activities that we performed, depending upon the time of the year. It might be volleyball, it might be softball. It was just different activities.

Q What high school was that?

A I did at Payson High School and also at Clearfield High School.

all, and anybody else that plays the game, they would be trying to score a basket.

Q What were you asked to do in this case as an expert witness?

A Basically, just look at the setting, the environment, and be truthful in what I say, which I would be, anyway, and just look and give my opinion about would this be a safe situation to play basketball in. Do you feel like it's a safe environment, do you feel like a young man in this setting did have the clearance to play the game and could this help result in an injury. Basically that kind of a setting.

Q I take it you've never done this task before in a case.

A No, I have not.

Q And did you, in fact, make that opinion?

A Yes. I have told him I have never done this before. I have also mentioned to him on numerous occasions that I have basically seen every level of basketball and how it's played from running clinics to camps to dealing with young men from preschool up to college level.

Q Now, you're aware that this gymnasium was once the South High School, aren't you?

advice on a situation and I didn't even know the circumstances of what it was all about, to be honest with you, and he said to me, you know, we plan on -- I think on the second visit. I mean, I was just going to give my comments on what I felt, and then he asked me, you know, "Do you want to get paid?" And I said, "Well," you know, "do you usually pay people?" And he said, "Yeah, we do." And he said, "Well, what do we need to pay you?" And I said, "I could care less," to be honest with you. And then he said, well, so much an hour, or something like that.

Q Do you remember what the rate is?

A If I'm not mistaken, I think he said something like 90 something or 100 dollars or hour or something like that, I think he said.

Q Do you know approximately how many hours you've put in on this case to date?

A Well, by reading the materials that were sent to me, driving up and looking at the scene where the accident occurred, and today, probably -- oh, I would say roughly six, seven hours, something like that.

Q I take it you haven't ever done any research on basket court design at all, have you?

A As far as me just doing research on it, no,

I have not.

Q Do you belong to any professional basketball organizations?

A Yes. I belong to the National Association of Basketball Coaches. In that context, I've served on many, many different committees. I'm also on the Basketball Congress, which is a -- they had 20 coaches picked across the country that represents college basketball coaches, and that's called the Basketball Congress Committee.

Q In that capacity, have you done any work at all with respect to planning court design?

A No, I have not.

Q I take it that committee works with other standards and --

A Yes.

Q -- rules and scheduling and all those kinds of things?

A Right.

Q Tell me what you were provided in this case, Roger, for your review. What have you read?

A The depositions of the instructor that took over the class, Carlson; the athletic trainer, Vernon; and also a gentleman by the name of Ballard, I think his name was. I've read those. And also

A Well, I would think that -- I've seen many -- if you're teaching a class, it doesn't matter if it's intermediate or beginning, there's usually a syllabus that would outline what you would do in that class. I've never seen anything as far as the structure of a gym. Usually it's just a facility that you're coaching at or you're teaching at, and whatever facility they have there would be what you would use.

Q Okay. So there aren't any national standards that apply to gymnasium design for a basketball class?

MR. GRAY: I would object to the question as misstating his testimony, but go ahead and answer.

Q (BY MR. HINTZE) I'm not trying to misstate. I'm just asking a question about that.

A I would say that there's so many different kinds of different facilities that I have seen in this country from the most plush to gyms that didn't even have nets on them where they played organized basketball.

Q So I take it your answer is no, there aren't any standards?

A Right. Well, let me just state that there are standards as far as college basketball, NCAA.

There's standards there. And usually if you're talking about a standard high school gym that's being built, there's usually standards as far as the length and width of the court now, but a lot of facilities were built that I've been in way before that and so forth, but on the other hand, you know, to answer that question, to be honest, yes, there's dimensions for college courts and high school courts, if they were building new ones, for an example, or building courts, yeah.

Q But those dimensions apply only for the competitive athletics, don't they? In other words, they aren't designed for gym classes, necessarily. The high school rule book has a dimension for courts so that all the courts are at least a standard size?

A Right.

Q But there's nothing that makes that applicable to gym classes, is there?

A No.

Q Thank you. How do you understand this accident occurred, Roger?

A From looking at the scene itself and from reading over the depositions of what's been provided me, it looks like a young man was in a PE class, playing crosscourt on a basket and, through that

would hinder his ability to recognize that risk, are you?

A Other than just the skill level that I can imagine in a class like that, what that handicap would be.

Q Is your evaluation of this case simply based upon your overall experience in basketball and not based upon review of any standards or --

A Right. What I basically am judging what I -- is because of my experiences, dealing and coaching and working with young men and playing the game. My expertise -- I mean, whatever expertise is. I mean, some people think you might be an expert basketball coach and some people don't think you know anything about it. But in my opinion, that's how -- I've based my judgments on what I've seen, yeah.

MR. HINTZE: That's all the questions I have.

MR. GRAY: I have no questions.

(Whereupon the taking of the deposition was concluded at 10:30 a.m.)

* * * *

Deposition of Dee Oldroyd

trying to ask vague or trick questions in any way, so if you don't understand the question, if it's inartfully framed, go ahead and tell me to rephrase it so you can understand it. Okay?

A Okay.

Q Would you state your full name for the record.

A Dee Victor Oldroyd.

Q And your address?

A 514 West 1120 North, Orem, Utah 84057.

Q I want to first go into your background and qualifications to serve as an expert witness in this case. Do you have a resume or a curriculum vitae that you normally use?

A I have a resume. I didn't bring one.

Q Okay.

A I sent one, I think, to Jordan's department.

MR. GRAY: I don't have it.

THE WITNESS: I did send one to them.

Q (BY MR. HINTZE) Tell me just a little about your background and education, if you would, Dee.

A I graduated from BYU with a recreation management administration degree. 1987, April, is

when I graduated. I was immediately hired, actually before I graduated, to work for the government as a civilian in government service as a sports director in Korea from 1987 to 1993, six-and-a-half years, somehow in there. I think it was early '97, late '93.

Q Were you a civil servant?

A Uh-huh. GS is what it's referred to.

Q Okay.

A And I did a number of things besides being a sports director, but that was my primary job. Prior to that, and one of the reasons the government wanted me was because I worked for the Utah County Youth Detention Center in Provo and I ran a lot of their recreational programs there in the safe and secure facility there in Provo.

Q So what age --

A That is 9 to 18.

Q Okay.

A In that place.

Q And I guess in the military you had --

A The military was primarily ages 4 to 18, but I did deal a lot with the soldiers, the military personnel.

Q Tell me just briefly what you did in

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Korea.

A I mainly organized all the main sports of soccer, football, basketball. I was the football commissioner for Korea-wide, and that involved tournament play and play in and out of the country. I organized, for the first time, a baseball league that was with Korea and Japan, Soviet Union, before it was broken up. That was the Pacific Rim Championship for the pony league, 13, 14 year olds, a big to-do. But, anyway, that sort of stuff.

Some of the side things that I dealt with were haunted houses, 4th of July carnivals, the community events on the base of Yongsan Garrison in Seoul, Korea, and I dealt with fitness centers and had a number of facilities, as well as ball fields, and we had to make sure that the youth in the military were able to get equal participation on these fields because they were in high demand.

Q Have you ever worked in any school setting, high school or college?

A High school, I'd have to say yes, even though I never was paid by the high school. I worked in a high school setting for the military in Korea. As the football commissioner, it was for the high school age kids, and I also dealt with basketball

program for high school age kids.

Q That was, again, the interschool competitive leagues?

A Correct.

Q Ever had any experience as an instructor just in high school basketball PE classes?

A No.

Q And I guess for college age kids neither?

A No.

Q Do you have any other degrees or certificates that you've obtained?

A Not completely. I have almost a master's degree in recreation management. It was paid half by the military and half by me while I was in Korea, but I ended up leaving the military before I was done. It was through the University of Oregon.

Q Do you have any licenses or special certification or any professional accreditation at all?

A The only thing I really would think would relate to this was I was certified through the National Sports Coaches Association to instruct and train coaches, and I did that for at least five years while in Korea.

Q That was working with coaches rather than

with players?

A Correct. And that was back during about the '88 to '93 time frame.

Q Okay. Have you ever testified in a lawsuit before as an expert witness?

A No.

Q Approximately what percentage of your annual income is derived from expert opinions in cases?

A Zero. This is the first time.

Q This is the first case you've ever been employed for?

A Uh-huh.

Q So do you advertise your services as an expert witness in any way?

A I haven't.

Q Do you know how you got involved in this case?

A The attorney is somehow related Jordan Christensen, knows me from college, high school, and knew that I had some experience in recreation and he called me and got my background and said, "I think you're," you know, "experienced enough that I'd like to talk more." And so we did, and he said, "I think you'd work out."

Q (BY MR. HINTZE) I said Mr. Gray because we're on the record. Off the record he's just Al. Okay?

A Yeah.

Q Okay. Now, tell me, when Mr. Gray hired you to be an expert witness, what did he ask you to do in the case?

A Basically just to review the material. Asked my background, as you did alt the beginning, and then state my opinion of what I thought took place.

Q Have you ever done this before?

A No.

Q Did you do what you were asked to do in the case?

A I think so. We're in the process of that.

Q Have you done anything beyond what you were asked to do?

A No.

Q In your evaluation, did you determine that there were some defects in the layout of the gym?

A I think that those baskets are way too close to the wall, defect or not. I don't know exactly your definition of that, but I know that that's the issue here at hand. The heater causing,

we're talking about here in this accident.

Q And I guess the results of that were just for your own benefit so you haven't published any other results of that research?

A That's correct. Until we had the money or the bond or the sponsors to put together the facility and location, we couldn't proceed, even though all the other things are in place.

Q Are there any professional organizations that you belong to?

A No. I don't know if it's considered a professional organization, but right now I'm an investor and a company worker of a company called Sports Nuts, but that's, you know, just my current job right now.

Q What does that involve?

A It's a multilevel company that me and a few other people have started up back in October of '96. We officially started taking money and registration January 10th of '97, and it involves four lines of product, so to speak. One is a health line, one is apparel, equipment, and then the fourth one is collectibles, signature autographs from Mohammad Ali, Steve Young, and we're fully underway in that.

Q That doesn't involve actual sports

A The regulations. And, again, I don't have these measurements off the top of my head that would apply to a regulation high school, college full court basketball gym. I've looked them over a number of times in the past and I would assume that they would have applied to a --

Q You're just assuming they apply. Is there anything in the standards themselves that say that it's a violation of these standards to play crosscourt on a smaller court with lesser dimensions in any of the areas?

A I've never really seen any written material discussing crosscourt play. And if they varied on a regular full court play on the makeup of that gym, if they varied, then it wouldn't be in regulation.

Q What is your understanding of how this accident happened?

A It seems pretty clear as to how it happened, and I think the accident happened because there was full court or crosscourt play towards the baskets that were on the wall without enough room from underneath that backboard.

Q You say you visited the site.

A I did.

Q Is it fairly obvious to you as you enter

again, more of a physical problem to the facility. If the heater is -- needs to be that close to the wall so the people up in the stands up above can see a full court game going on, then they need to be a different type of backboard, an adjustable one that moves, but, I mean, I -- there was also some badminton rings or some kind of rings that held up a net or something on the wall that were maybe part of your definition of defect of the facility. They are just, in my opinion, used or should be used for just foul shooting, set shots only. Half court would be dangerous on that basket.

Q Is that just based on a reasonable man's standard? In other words, a reasonable standard of care?

A I would think so. Whether it's youth or whether it's adult, again, the better the skilled player, the -- maybe -- how can I say it? The better the skilled player, the more aware they are of the surrounding facilities because of their ability, but there's just not proper enough room, no matter how good they are, with that just being as close as it is to that backboard.

Q Now, do you base that on any particular standards again or is that just your overall

lot more talent and coordination to play basketball well.

Q Now, it sounds to me like the article you're referring to is, again, elementary age or perhaps junior high school age.

A It was geared more for adults in teaching kids, youth, how to play the game.

Q Okay.

A And some of those same principles would apply to people who are teaching beginner classes, even if they're adults.

Q Now, do you understand that Mr. Gomez had had the beginning basketball class once already?

A I think I recall reading that, uh-huh.

Q So this was the second time through the same class?

A Okay. Yeah.

Q So, again, the standards you're applying in this case, are they based simply upon your general understanding of reasonableness?

A Yeah. A general understanding through my experience at the time I was with the military and the time I've played of reasonable safety, and that there's much more needed room the lousier the player. We had some facilities in Korea, for