

1953

# Norma Lois Cooper v. Lewis J. Evans et al : Brief of Appellant

Utah Supreme Court

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Moss & Hyde; Attorneys for Plaintiff and Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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NORMA LOIS COOPER, )

Plaintiff and )  
Appellant, )

-vs- )

LEWIS J. EVANS, )  
EARL A. EVANS, RAY )  
V. EVANS and )  
CULLIGAN SOFT WATER )  
SERVICE CO., )

Defendants and )  
Respondents. )

APPELLANT'S

BRIEF

Case No. 7937

- - -oOo- - -

MOSS & HYDE

Attorneys for Plaintiff  
and Appellant  
430 Judge Building  
Salt Lake City, Utah

RECEIVED TWO COPIES THIS \_\_\_\_\_ DAY OF MAY, 1953.

**FILED**

MAY 20 1953

Hurd & Hurd

Attorneys for Defendants

Clerk, Supreme Court, Utah and Respondents.

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fall in the business establishment of  
 the city, alleging that said fall was caused  
 by the negligence of defendants in (1) pl  
 ne which in the area may have been ex  
 posed to the public over which the trip

IN THE SUPREME COURT  
OF THE STATE OF UTAH

- - -oOo- - -

NORMA LOIS COOPER, )

Plaintiff and )  
Appellant, )

APPELLANT'S BRIEF

-VS-

Case No. 7937

LEWIS J. EVANS, )  
EARL A. EVANS, RAY )  
V. EVANS, and )  
CULLIGAN SOFT WATER )  
SERVICE CO. )

Defendants and )  
Respondents. )

2 POINTS

- - -oOo- - -

STATEMENT OF FACTS

Plaintiff filed her Complaint praying for damages for injuries suffered by her in a fall in the business establishment of defendants, alleging that said fall was occasioned by the negligence of defendants in (1) placing objects in the area way where she was compelled to walk, over which objects she tripped and also for (2) causing the floor on which she walked to be slippery and dangerous. (Tr. 20) Defendants denied negligence on their part



(Tr. 20). The matter was tried to a jury and submitted to them on interrogatories for a special verdict. (Tr. 85) The jury answered Question 2 that plaintiff was contributorily negligent "in failing to observe and see the merchandise platform over which she claims to have tripped." (Tr. 86) On the basis of the answers to the special interrogatories the Court entered judgment on the verdict "No cause of action." (Tr. 89).

### STATEMENT OF POINTS

#### I

QUESTION NO. 2 OF THE SPECIAL VERDICT ASSUMES CERTAIN FACTS NOT SUPPORTED BY THE EVIDENCE OR AT LEAST ABOUT WHICH THERE IS A CONFLICT OF EVIDENCE.

#### II

QUESTION NO. 2 OF THE SPECIAL VERDICT ASKS THE JURY TO FIND A CONCLUSION OF LAW.

#### III

QUESTION NO. 2 OF THE SPECIAL VERDICT IS AMBIGUOUS AND MISLEADING.

servation nor did he ask them to find whether or not she saw the platform. Instead he told the jury that she did not either observe or see the platform and put to them the abstract question: Was she guilty of contributory negligence? This most certainly is reversible error. The jury should have been asked to determine two separate facts on this subject:

1. Did Mrs. Cooper make observation of the floor and the abutting objects to determine whether or not there were things over which she might trip?

2. Did Mrs. Cooper fail to see the objects which were there to be seen?

But the court did not submit either of these questions to the jury. Instead the Court stated as a fact that Mrs. Cooper neither observed nor saw the merchandise platform.

It should be noted that the Court used the words "observe" and "see" conjunctively. In so doing he distinguished between these verbs. He did not use them to mean the same thing or else the use is redundant and one of the words



is meaningless. He used the <sup>word</sup> "observe" in the sense of "look". (Did Mrs. Cooper look?) And he told the jury that she failed to look. Secondly, he told the jury that she failed to see the platform. In so doing he invaded the province of the jury. He told them that certain facts existed which were the very facts that should have been submitted to the jury for their determination. "The trial court . . . should never . . . give an instruction to the jury which assumes as true the existence or non-existence of any material fact in issue in respect to which the evidence is conflicting." 53 Am. Jur. 477, Sec. 605. To do so invades the province of the jury. Still v. SF & NWR Co. 154 Cal 559; 98 P. 672; 20 LRA (NS) 322; Lyon v. United Moderns 148 Cal. 470; 83 P. 804; Am. Cent. Ins. Co. v. Ehrlich 65 Colo. 545; 177 P. 978; 15 RCL 738.

The record is clear that Mrs. Cooper did look where she was going and that she exercised the degree of care of a reasonably prudent person under all the circumstances there existing,

in observing where she was going in Culligan's store. The evidence indicates that she did not see the platform before she tripped over it, but it was not because she did not make reasonable observation in advance. As Exhibits B and D show, the platform over which she tripped protruded from beneath an appliance placed along the areaway which she had to traverse to reach the window to pay her bill. The platform was close to the floor and in a location where the normal person would not expect to find it. Mrs. Cooper had never before been in Culligan's place of business (Tr. 31, 32). When she entered, she stopped to get her bearings, she saw the window where payments are made, and as she started to walk to the window, "I noticed the floor to be rather slippery, and I walked with caution to the window, made my payment . . ." (Tr. 32). She noticed that the floor was in blocks of two colors, that there was no mat or runner on the floor and that there was merchandise on the east side. (Tr. 33). She noticed television sets along the side, but

she did not observe that they were raised slightly off the floor on platforms until after she had fallen. (Tr. 34). The aisle or space in which she had to walk was lined with merchandise and was about four feet wide. (Tr. 36, 85, 98). As she left the window and started back to the door, she tripped. (Tr. 34, 36, 37 and 57). The floor was slippery so that she could not regain her balance and she fell into the refrigerator. (Tr. 38). She tripped over the crating that the sink was sitting on. (Tr. 62).

The evidence is clear that Mrs. Cooper made every observation that she reasonably could have been expected to make. Moreover, that Culligans were well aware of the hazard of the platforms and that they might not be seen by those persons who entered their store is well demonstrated by the testimony of Mr. Evans, one of the partners:

"Q. Do you keep all those articles on platforms?

A. Not all of them, no.

Q. Some you do and some you don't?

A. Some we don't. We purposely removed that first one because we thought it should be done in case

of people coming through.

Q. You thought people might trip on it?

A. We thought it would be best to remove it. That is why we removed it.

Q. But you didn't remove it from the others?

A. No. We didn't think it was necessary."

(Tr. 85)

So Culligans knew that people might not see those platforms next to the floor and they took some steps to protect their customers. Unfortunately for Mrs. Cooper they negligently failed to remove all of the platforms from beneath the merchandise. As she entered the strange store, Mrs. Cooper looked all around and then walked carefully to her place of business. She observed her surroundings, but she didn't see the hidden trap beneath the sink.

With this evidence before it, the jury never was asked to find the facts of failure or non-failure to observe where she was going. The jury was told that she did not observe. The Court usurped the province of the jury on finding the facts, and in turn asked the jury to determine a question of law.



## POINT II

QUESTION NO. 2 OF THE SPECIAL VERDICT ASKS  
THE JURY TO FIND A CONCLUSION OF LAW.

Question No. 2 asks the jury whether or not Mrs. Cooper was guilty of contributory negligence based on certain facts which the Court directed the jury were true. This clearly was error.

"A special verdict finding that one of the parties has been guilty of negligence, without finding the primary facts on which the inference is based, is a mere statement of a conclusion and will not support a judgment." 53 Am. Jur. 757, Sec. 1091; 24 LRA (NS) 30.

See: Chicago St. L. & P. R. Co. v. Burger 124 Ind. 275; 24 NE 981; Pittsburg, C. & St. L. R. Co. v. Adams 105 Ind. 151; 5 NE 187; Pittsburg C. & St. L. R. Co. v. Spencer 98 Ind. 186; Conner v. Citizens St. Ry. Co. 105 Ind. 62; 4 NE 441; Louisville NA & CR Co. v. Balch 104 Ind. 93; 4 NE 288.

"Nor is a statement in a special verdict that the defendant was negligent, or that he negligently did a designated act, or negligently omitted to do a certain thing, sufficient to sustain a recovery; the facts constituting the negligence and the ultimate conclusion must both be found."

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Cleveland CC & St. L. R. Co. v. Hadley  
12 Ind. App. 516; 40 NE 760.

It is submitted that in Question No. 2 the Court erroneously told the jury what the basic facts were and gave them no opportunity to make a finding on them; then the Court compounded the error by asking the jury to draw the conclusion of law -- was Mrs. Cooper contributorily negligent -- which was the sole and exclusive function of the Court.

"Since negligence is usually a mixed question of law and fact, a special verdict in a negligence case should deal only with facts; in such a case, when the principal or ultimate facts are determined by the jury, it then becomes the function of the Court to decide as a question of law, on the facts found, whether or not negligence can be predicated upon the facts ascertained." (Italics supplied)

53 Am. Jur. 756, Sec. 1091; Louisville NA & CR Co. v. Lynch 147 Ind. 165; 44 Ne 997.

In negligence cases where questions on a special verdict are put to the jury, the jury has no concern with the law; it is the duty of the Court to declare the law. "There is a marked difference with reference to the duties of the court in dealing with a special and a general verdict in actions for negligence, negligence



being usually a mixed question of law and fact. A general verdict may cover questions of both law and fact. Not so with a special verdict. It is the duty of the court to declare the law." Toledo, St. L. & NCR Co. v. Trimble 8 Ind. App. 333; 35 NE 716; Huntington County v. Bonebrake 146 Ind. 317; 45 NE 470; Alexandria v. Young 20 Ind. 672; 51 NE 109.

In the case of Smith v. Ireland 4 Utah 137; 7 P. 749, this Court discussed both general and special verdicts using the following language:

"This statute gives three classes of verdicts: (1) general; (2) special; (3) general and special; a general verdict is a direct statement of a conclusion of law and an indirect statement of the facts from which the conclusion is drawn; it expressly affirms the law and inferently the facts. The jury are directed by the court to indicate the facts found from the evidence by a statement of a conclusion of law. If they believe certain facts, they are told to state a certain conclusion; and if they do not believe such facts, to state another conclusion. The court states the law applicable to the facts which the evidence tends to prove and if the jury finds the facts they state the conclusion as charged. In case of a general verdict, the court states the law applicable to the facts before they are found by the jury, and in a special verdict the jury find the facts first and the court declares the laws applicable to them afterwards. In either case the jury judge of the facts and the court

The law in Utah is in accordance with the general rule in the other states. If a case is submitted to the jury for a special verdict, the jury is limited to a finding of the facts and is precluded from making a finding as to the law. When special verdicts are used, only the court may declare the conclusion of law to be drawn from the facts found by the jury. 53 Am. Jur. 736, Sec. 1063. In the case of Howard v. Beldenville Lumber Company, 129 Wis. 93; 108 NW 48; the Supreme Court reversed the lower court because the question in a special verdict simply asked, 'Was defendant guilty of negligence which caused plaintiff's injuries?' The Court held that the questions should have inquired about specific facts upon which a conclusion of law, to-wit: That defendant was or was not guilty of negligence, could be based. See Cameron v. Oberlin, 19 Ind. App. 142; 48 NE 386; Rowley v. Chicago M. & St. P. R. Co., 135 Wis. 208; 115 NW 865; Connor v. Citizens Street R. Co., 105 Ind. 62; 4 NE 441; Archer v. Chicago M. & St. P. R. Co., 215 Wis. 509; 255 NW 67; 95 A.P.R. 251.

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In the case of Luhr v. Michigan Central R. Co. 16 Ind. App. 562, 45 NE 796, the court held that a special verdict merely finding that a railroad "negligently" allowed combustibles to accumulate and remain on its right-of-way and "negligently" communicated fire to it, and "negligently" suffered the fire to escape to plaintiff's property, without stating facts from which a conclusion of negligence could be drawn, does not authorize a judgment against the railroad.

The cases are clear that it is error to ask the jury to draw the conclusion of law regarding negligence or non negligence when the case is submitted to them on a special verdict. In such instances the jury is limited strictly to findings of fact and the burden is on the court to draw the conclusions of law. In this case before the Court the procedure was completely reversed, in that the court stated the facts and asked the jury to draw the conclusions as to contributory negligence on the part of the plaintiff.



### POINT III

QUESTION NO. 2 OF THE SPECIAL VERDICT IS  
DUPLICATIONOUS, AMBIGUOUS AND MISLEADING

"Special interrogatories should be so clear and concise as to be readily understood by the jury and when practicable each question should be so framed as to call for a simple and categorical answer."

53 Am. Jur. 741, Sec. 1070

See: Freedman v. NY, NH & HR Co. 81 Conn.

601; 71 A 901; John Schroeder Lumber Co. v. Chicago and NW R Co. 135 Wis. 575; 116

NW 179. Question No. 2 is duplicationous and ambiguous.<sup>14</sup> It states that Mrs. Cooper failed to "observe and see" the platform. The jury really had no choice to find any fact. However, suppose that a juror agreed with the court that Mrs. Cooper did not see the platform,<sup>15</sup> but he believed that she made reasonable observation of her surrounding? Since the two questions are tied together, he cannot separate them. Therefore, if he agrees with one of the propositions, he is compelled to agree with the other and therefore would believe that he must find Mrs. Cooper contributorily negligent. That this Question was misleading and misunderstood is clearly demon-

strated in the affidavit of one of the jurors which is part of the record. Mrs. Newlin, who signed the affirmative answer to Question No. 2 stated afterward under oath that she did not understand the meaning of the question, that she believed that plaintiff was acting as a normal and reasonably prudent person would act under all the circumstances and that she did not intend her answer to indicate that she believed plaintiff was negligent in any respect in her conduct at that time. (Tr. 92, 93). Mrs. Newlin was forced to answer "yes" to Question No. 2 because there was no conflict in the evidence that Mrs. Cooper did not see the platform before she tripped. Since the court's instructions prefacing the questions limited the jurors to a "yes" or "no" answer, it was impossible for Mrs. Newlin, or the other jurors, to find the uncontradicted fact that Mrs. Cooper did not see the platform and yet to find that she used reasonable care to observe her surroundings. The question is duplications and yet the court allowed only one answer. To submit a question involv-

ing two propositions of fact that can only be answered by a yes or a no answer is reversible error. Emery v. Raleigh & OR Co. 102 NC 209; 9 SE 139. It is submitted that the court erred in submitting this ambiguous and duplicative question to the jury. From the error of the Court in not asking the jury to find whether or not plaintiff made an observation of the floor and abutting objects such as a reasonably prudent person would do under like circumstances before and during her walk to the window and return, but, instead, telling the jury that plaintiff did not "observe and see," stemmed the misunderstanding which followed. **Point III.**

**POINT IV, ~~claiming that the jury~~**  
**THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT AND IN REFUSING TO GRANT PLAINTIFF'S ALTERNATIVE MOTION FOR A NEW TRIAL.**

After the jury had returned to the court room with their special verdict, the Judge informed them that their affirmative answer to Question No. 2 precluded the plaintiff from any recovery.



Members of the jury immediately protested. After some discussion, the jury was discharged, but the jurors gathered in the hall and returned in a body to the judge's chambers. There at they again said that they had not understood Question No. 1 and insisted that they believed that plaintiff should recover damages. However, the court refused to return the jury to the jury room for further deliberation. Thereafter, plaintiff moved the Court to set aside the verdict and judgment and to direct a verdict for plaintiff, or, in the alternative, to grant a new trial. In support of this motion, plaintiff filed the affidavit referred to in Point III. At that point it was amply clear that the jury had been misled and did not understand the question which they had answered. That the question was in fact erroneous has been fully demonstrated above. Therefore, the Court should have set aside the verdict of the jury and should have granted a new trial. His refusal to do so was error.

Salt Lake City, Ute

## CONCLUSION

Question No. 2 of the Special Verdict was erroneous in that it assumed certain facts not supported by the evidence or at least about which there was a conflict of evidence, yet the Court informed the jury that said assumed facts were true. But an even more striking error in Question No. 2 is that it invaded the province of the jury and instructed them that certain facts were true which were the very facts, which the jury should have been free to find, then, having so stated the facts, the Court called upon the jury to find a conclusion of law. Question No. 2 was duplications, ambiguous, and misleading and when this was clearly demonstrated to the Court it was error for him to refuse to set aside the verdict and judgment and to refuse plaintiff's motion for a new trial.

Respectfully submitted,

MOSS & HYDE  
Attorneys for plaintiff  
and appellant  
430 Judge Building  
Salt Lake City, Utah