

1979

Paul T. Moore v. Burton Lumber & Hardware Company, A Corporation : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. RAYMOND M. BERRY, BRUCE H. JENSEN; Attorneys for Defendant-Appellant W. EUGENE HANSEN; Attorneys for Plaintiff-Respondent

Recommended Citation

Brief of Appellant, *Moore v. Burton Lumber*, No. 16672 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1969

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL T. MOORE,

Plaintiff-Respondent,

vs.

Case No. 16672

BURTON LUMBER & HARDWARE
COMPANY, a corporation,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the Third
District Court, Salt Lake County
The Honorable David K. Winder, Judge

RAYMOND M. BERRY
BRUCE H. JENSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant-
Appellant
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 521-9000

W. EUGENE HANSEN
HANSEN & THOMPSON
Attorneys for Plaintiff-
Respondent
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 533-0400

FILED

NOV 1 1979

Clark, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL T. MOORE,

Plaintiff-Respondent,

vs.

Case No. 16672

BURTON LUMBER & HARDWARE
COMPANY, a corporation,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the Third
District Court, Salt Lake County
The Honorable David K. Winder, Judge

RAYMOND M. BERRY
BRUCE H. JENSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant-
Appellant
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 521-9000

W. EUGENE HANSEN
HANSEN & THOMPSON
Attorneys for Plaintiff-
Respondent
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 533-0400

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I. THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THERE IS NO DUTY TO WARN IN THE FACE OF AN OBVIOUS DANGER. THE ERROR WAS COMPOUNDED BY FAILING TO INSTRUCT UPON ASSUMPTION OF RISK AND IN NOT INCLUDING ASSUMPTION OF RISK INTERROGATORIES IN THE SPECIAL VERDICT.	9
A. THE COURT'S INSTRUCTION ON THE DUTY OWED A BUSINESS VISITOR TOOK THE QUESTION OF OBVIOUSNESS OF DANGER FROM THE JURY, PRECLUDING A FINDING FOR DEFENDANT	10
B. ASSUMPTION OF THE RISK IS STILL A VIABLE DEFENSE IN UTAH AND THE TRIAL COURT'S REFUSAL TO SUBMIT THE DEFENSE TO THE JURY MATERIALLY PREJUDICED DEFENDANT'S CASE	18
POINT II. THE LOWER COURT ERRED IN NOT INSTRUCTING THE JURY THAT PLAINTIFF'S NEGLIGENCE IN NOT USING THE HOOD GUARD AND KEEPING HIS HANDS OUT OF THE CUT LINE WAS A PROXIMATE CAUSE OF HIS INJURIES.	34

TABLE OF AUTHORITIES

CASES CITED

	<u>Page</u>
<u>Becker v. Beaverton School District No. 48,</u> 551 P.2d 498 (Or.App. 1976)	28, 29, 30
<u>Black v. McKnight,</u> 562 P.2d 621 (Utah 1977)	14
<u>Bluejacket v. Carney,</u> 550 P.2d 494 (Wyo. 1976). . .	13
<u>Bradley Chevrolet, Inc. v. Goodson,</u> 450 P.2d 500 (Okla. 1969).	17
<u>Buck v. Del City Apartments, Inc.,</u> 431 P.2d 360 (Okla. 1967).	13
<u>Calahan v. Wood,</u> 465 P.2d 169 (Utah 1970)	21
<u>CeBuzz, Inc. v. Sniderman,</u> 171 Colo. 246, 466 P.2d 457 (1970)	13
<u>Chance v. Lawry's, Inc.,</u> 24 Cal.Rptr. 209, 374 P.2d 185 (1962)	13
<u>Clay v. Dunford,</u> 121 Utah 177, 239 P.2d 1075, (1952).	22-32
<u>Curtis v. Harmon Electronics, Inc.,</u> 575 P.2d 1044 (Utah 1978).	27
<u>Ellertson v. Dansie,</u> 576 P.2d 67 (Utah 1978). . . .	12
<u>Ferguson v. Jongsma,</u> 10 U.2d 179, 350 P.2d 404 (1960).	14
<u>Folda v. City of Bozeman,</u> 582 P.2d 767 (Mont. 1978).	13
<u>Foster v. Steed,</u> 23 U.2d 148, 459 P.2d 1021 (1969).	14, 33
<u>Gaston v. Hunter,</u> 588 P.2d 326 (Ariz.App. 1978) . .	17
<u>Grant v. Utah State Land Board,</u> 26 U.2d 100, 485 P.2d 1035 (1971).	26

CASES CITED - cont'd.

	Page
<u>Greenhalgh v. Payson City</u> , 530 P.2d 799 (Utah 1975)	26
<u>Johnson v. Maynard</u> , 9 U.2d 268, 342 P.2d 884 (1959).	32
<u>Kuchenmeister v. Los Angeles and S. L. R. Co.</u> , 52 Utah 116, 172 P.2d 725 (1918).	20, 22
<u>McGrath v. Wallace Murray Corp.</u> , 496 F.2d 299 (10th Cir. 1974).	33
<u>Power's v. Gene's Building Materials, Inc.</u> , 567 P.2d 174 (Utah 1977).	14
<u>Renner v. Kinney</u> , 373 P.2d 668 (Or. 1962)	32
<u>Rigtrup v. Strawberry Water Users Association</u> , 563 P.2d 1247 (Utah 1977)	27, 31
<u>Romero v. Kendricks</u> , 390 P.2d 269 (N.M. 1964)	13
<u>Rowley v. Graven Brothers & Co.</u> , 26 U.2d 448, 491 P.2d 1209 (1971)	18
<u>Sherman v. Arno</u> , 94 Ariz. 284, 383 P.2d 741 (1963).	13
<u>Sherry v. Asing</u> , 531 P.2d 648 (Haw. 1975)	17
<u>Snyder v. Clune</u> , 15 U.2d 254, 39 P.2d 915 (1965).	25
<u>State v. Ouzounian</u> , 26 U.2d 442, 491 P.2d 1093 (1971)	18
<u>Steele v. Denver & Rio Grande Western Railroad Company</u> , 16 U.2d 127, 396 P.2d 751 (1964)	12
<u>Thompson v. Weaver</u> , 560 P.2d 620 (Or. 1977)	29
<u>Tolar Construction Co. v. Ellington</u> , 225 S.E.2d 66 (Ct.App.Ga. 1976).	13

CASES CITED - cont'd.

	<u>Page</u>
<u>Toma v. Utah Power & Light Co.</u> , 12 U.2d 278, 365 P.2d 788 (1961)	36, 37
<u>Velasquez v. Greyhound Lines, Inc.</u> , 12 U.2d 379, 366 P.2d 989 (1961)	36
<u>Wollan v. Lord</u> , 385 P.2d 102 (Mont. 1963)	17
<u>Worth v. Reed</u> , 79 Nev. 351, 384 P.2d 1017 (1963)	13

AUTHORITIES CITED

57 <u>Am. Jur. 2d</u> 676, Negligence §282	34
2 Harper & James, <u>The Law of Torts</u> , §21.1, p. 1162 (1956)	21
W. P. Prosser, <u>The Law of Torts</u> (4th ed. 1971) . . .	21, 31, 32

STATUTES CITED

<u>Or.Rev.Stat.</u> , §18.475(2)	29
<u>Utah Code Ann.</u> , §78-27-37 (1953) (as amended 1973)	24

IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL T. MOORE,

Plaintiff-Respondent,

vs.

Case No. 16672

BURTON LUMBER & HARDWARE
COMPANY, a corporation,

Defendant-Appellant.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action seeking damages for personal injuries sustained while operating a radial arm saw upon defendant's business premises.

DISPOSITION IN LOWER COURT

This case was tried to a jury in July of 1978. The jury returned a Special Verdict finding both parties negligent, but further finding that plaintiff's negligence was not a proximate cause of his injuries. The jury awarded plaintiff \$110,000.00 in general damages and \$34,892.00 in special damages. The lower court entered judgment in

plaintiff's favor and against defendant on July 28, 1978. Defendant's motion for a new trial was denied by the lower court on August 21, 1979.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment of the lower court and, an entry of judgment for defendant and against plaintiff, no cause of action, or in the alternative seeks to have the matter remanded for a new trial upon all issues.

STATEMENT OF FACTS

Shortly before noon on May 1, 1975, the plaintiff and his associate, Charles Albert (Buddy) Prince, drove to the business premises of defendant Burton Lumber & Hardware Company in plaintiff Moore's pickup truck. [R. 643, 672]. Their stated purpose in visiting Burton Lumber was to buy some odds-and-ends and to ask permission to use Burton Lumber's radial arm saw to cut several 2" x 4"'s, the blocks from which were to be used in finishing work at Foothill Place; a Deal Development Company project over which plaintiff served as project foreman. [R. 644, 671-72]. Deal Development was a customer of Burton Lumber and had an open account there. [R. 645]. The account, however, was only used to purchase minor items. Deal Development's lumber was bought from an out of state source and stored at Intermountain Lumber, several blocks away from defendant's business premises. [R. 671].

Upon arrival, the two men entered the store. While prince went about gathering the items on their "shopping list" plaintiff went to the front desk to inquire as to the possibility of using the radial arm saw. From this point on the evidence is in substantial conflict. Plaintiff claims that he spoke with Clair Bello, office manager for Burton Lumber. [R. 673]. Plaintiff maintains Bello quoted him a price per cut for the use of the saw. [R. 673]. The price seemed high and no set price was ever agreed upon. [R. 674]. Plaintiff testified that thereafter "someone" told him to check with the yardmen and if they weren't using the saw that it was all right for him to go ahead and use it. [R. 674]. While he remembers speaking with Clair Bello regarding the price per cut for use of the saw, plaintiff does not remember who instructed him to check with the yardmen. [R. 783].

Plaintiff's uncorroborated version of the conversation is substantially different than that recounted by the Burton Lumber employees. Testimony for the defendant showed that when plaintiff first went to the front desk he spoke to Richard Lindgren, one of the hardware salesmen. Lindgren answered "no" to plaintiff's request to use the saw and told him any cutting would have to be done by the yard people. Since he did not know what the price would be he referred Moore to Clair Bello. He subsequently heard the two discussing the price. [R. 830-31].

Clair Bello testified that while he did have a conversation with plaintiff, the substance of it was with regard to the price to have the lumber cut, and at no time was permission to use the saw even mentioned. Bello, too, agreed that no set price was ever established. [R. 838-39].

The Burton Lumber employees all testified to the fact that it was a standard recognized policy at the yard that no one was allowed to use the saw unless he was an authorized employee of Burton Lumber. [R. 823, 829-30, 838, 848, 866, 868].

Following the conversation with Mr. Bello, plaintiff claims he went out into the yard and spoke with a Mexican yardman whose name he later learned to be "Jessie". [R. 675]. Plaintiff claims the yardman told him that the saw was not being used and then led him to the saw shed. [R. 675]. Plaintiff noticed that the blade of the saw was set for ripping, whereas he needed it set for cross-cutting. He then offered the yardman a six-pack of beer if he would change the blade before plaintiff got back from Intermountain with the lumber. [R. 676]. The yardman allegedly agreed, whereupon plaintiff returned to his truck at about the same time Buddy Prince came out the west entrance of the store. [R. 675-76]. Prince testified to hearing Moore tell the yardman, "See you after awhile". [R. 647]. The two

men then left the lumber yard through its rear gate which led onto Main Street.

The Burton Lumber yardmen all controverted plaintiff's testimony. According to the testimony of Larry Hester and Jessie Garcia, plaintiff and Prince came out to the yard together and, after again being denied permission to use the saw, repeated plaintiff's version of the conversion at the front desk to them. Hester, who no longer works for Burton Lumber, told plaintiff that he would have to have an invoice and then the yardmen could do the cutting. Plaintiff told the yardmen that he had to go to Intermountain and would be back in a short time. Hester told plaintiff that he would check with the front office during the interim. Neither Hester nor Garcia remember taking plaintiff to the saw shed and promising to change the position of the blade. [R. 847-49, 867-68].

Shortly thereafter, the yard employees, including yard foreman Vernon Campos who had returned from lunch, heard the saw running and went down to investigate, arriving at approximately the same time that Paul Moore came out of the shed holding his bleeding hand. [R. 850-51, 869, 919-20].

After their initial conversation with Hester and Garcia, plaintiff and Prince had driven over to Intermountain Lumber and picked up the 2" x 4"'s they planned to cut into blocks at Burton Lumber. [R. 647, 677]. The two men

then drove back to Burton Lumber. Plaintiff claims they stopped at a small store on the way where they bought the six-pack of beer promised to the yardman. [R. 647-48, 677-78]. The two entered through the back gate and parked the pickup truck between the saw shed and an adjacent building in such a manner that only the end of the truck bed was visible from any other point in the yard. [R. 877-78].

Plaintiff then entered the saw shed, measured the length he wanted to cut the boards, and drove a nail into the table to use as a gauge. [R. 650, 679-81]. He then started up the saw. Plaintiff claims he did not see the sign hanging up on the wall opposite the saw which said, in large yellow letters, "FOR USE OF AUTHORIZED PERSONNEL ONLY". [R. 786].

The radial arm saw at Burton Lumber had been in use on the premises for over thirty years without an accident. [R. 819]. Plaintiff's expert, Louis Barbe, stated that in his opinion the saw was "unreasonably dangerous" due to its lack of blade guards and a kickback guard, which guard would stop the saw from rolling forward. [R. 621]. Mr. Barbe admitted, however, that he had not operated this particular saw but had only observed it for approximately 15 minutes on one occasion and, during that time, did not see the saw move forward any measureable amount. [R. 602-03, 631]. Mr.

Barbe has also had no experience in operating similar radial arm saws.

Plaintiff, on the other hand, testified as having had experience operating such saws throughout his construction background. [R. 778]. While admitting that such saws are, by their very nature, extremely dangerous, and realizing the saw could injure him, plaintiff felt confident to operate the saw without any instruction or assistance from the lumberyard people in light of his prior experience with this type of saw. [R. 761, 779, 788].

While the radial arm saw did lack the guards described by Mr. Barbe, defendant's expert witness, Dr. Jay Hicken, as well as all of the Burton Lumber employees, testified that the upper hood guard attached to the saw could be rotated down until it almost made contact with any size of stock an employee might wish to cut. [R. 854-55, 914, 951]. As such, it is an almost impregnable guard. [R. 952]. Plaintiff testified that he was aware that the hood would rotate down, yet apparently chose not to make use of it. [R. 788].

Plaintiff had cut one 2" x 4" into 10" to 12" blocks without incident and had just placed the second 2" x 4" into position when the accident occurred. Plaintiff left the saw running while positioning the next board but claims he kept his eye on the saw blade while sliding the 2" x 4"

along the table. [R. 760]. With his hand directly in the line of the rotating blade, plaintiff shifted his gaze to the nail gauge he claims to have nailed in the table, 10" to 12" past the blade. [R. 762, 792]. While looking at the gauge, he felt his hand come in contact with the blade, although he is at a loss to explain how it happened.

In its Instructions to the Jury, the lower court failed to instruct the jurors that there was no duty to warn a business invitee in the face of an obvious hazard, yet instructed that there is no duty to warn a licensee in the face of an obvious hazard. [R. 325, 327].

The court also refused to submit either defendant's or plaintiff's proposed instructions as to the doctrine of assumption of the risk. The court's basis for its ruling was its opinion that assumption of the risk has been statutorily swallowed up by comparative negligence. [R. 899]. Over objection, no interrogatory as to assumption of the risk was included in the Special Verdict. [R. 1027-28].

Furthermore, the court refused defendant's proposed instruction that the jury return a verdict finding plaintiff negligent and that such negligence was a proximate cause of plaintiff's injury. [R. 398, 1028].

Defendant properly objected to each of the court's rulings and now respectfully submits that the trial court committed prejudicial error in making such rulings.

The jury returned a Special Verdict finding both plaintiff and defendant negligent. However, they found plaintiff's negligence not to have been a cause of the injury, which conclusion precluded the necessity for comparing one party's negligence against the other. The jury awarded plaintiff damages in the amount of \$144,892.00 and the court thereafter entered Judgment. Defendant's Motion for a New Trial was denied.

ARGUMENT

POINT I

THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THERE IS NO DUTY TO WARN IN THE FACE OF AN OBVIOUS DANGER. THE ERROR WAS COMPOUNDED BY FAILING TO INSTRUCT UPON ASSUMPTION OF RISK AND IN NOT INCLUDING AN ASSUMPTION OF RISK INTERROGATORY IN THE SPECIAL VERDICT.

From the outset of this litigation, defendant felt that plaintiff Paul Moore's actions in the face of the open and obvious danger posed by the unguarded radial arm saw obviated any duty which defendant owed him. In accordance with its belief, defendant presented ample evidence at trial (and was assisted by plaintiff's own presentation of evidence) to enable the jury to find either: (1) that due to the openness of the danger a duty to warn or protect plaintiff never arose thereby uprooting plaintiff's negligence action at its base; or (2) that plaintiff had voluntarily exposed himself to an

obvious danger and thereby assumed the risk of injury. By its action, the lower court denied defendant both theories of the case.

- A. The court's instruction on the duty owed a business visitor took the question of obviousness of danger from the jury, precluding a finding for defendant.

At the close of the evidence, defendant submitted the following instruction on the duty owed a business invitee:

INSTRUCTION NO. 20

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

In the absence of appearance that caution or would caution a reasonable prudent person in a like position, to the contrary, the business visitor or invitee has a right to assume that the premises and the equipment are reasonably safe for the purposes for which the invitation was extended and to act on that assumption.

The responsibility of the lumber yard is not absolute; is not that of an insurer. If there is danger attending the entry of the premises and the use of the equipment and if such danger arises from conditions readily apparent to the senses, the business visitor or invitee is under a duty to discover the danger.

The Defendant lumber yard had a right to assume that Mr. Moore would perceive that which would be obvious to him upon the ordinary use of his own sense of sight and was under no duty to

give Mr. Moore, if he is found to be a business visitor or invitee, any notice of an obvious danger.

[R. 417].

Although it is a proper statement of the law, the court refused defendant's proposed instruction and instead submitted, verbatim, plaintiff's proposed instruction on the point:

INSTRUCTION NO. 22

If you find by a preponderance of the evidence that, at the time of his injury, Mr. Moore was defendant's "business invitee" as that term is defined hereinafter, then defendant's duty to Mr. Moore was to refrain from any acts of negligence toward him; to exercise reasonable care to keep the premises, including the radial arm saw thereon, in a condition reasonably safe for purposes consistent with his presence there; and to warn him of any and all dangers involving the operation of said saw which were known to the defendant or should have become known to the defendant in the exercise of reasonable diligence and the performance of reasonable inspections.

[R. 327].

The issued instruction is seriously deficient in its statement of the law, as noted in defense counsel's objection to it.

Well, that is not a complete instruction on the law. There is no duty to give an instruction or warning to a man where the danger is obvious and he should exercise his own common sense to perceive what the danger is. I think the facts are here that he should have perceived and, as such--we should have--the court should have

instructed the jury that there was no duty to be warning him when they found the hazard was obvious.

[R. 1019, lines 19-26].

Defendant admits that the jury's finding that plaintiff was a business invitee at the time of the accident [R. 1024] imposes a much heavier burden on the plaintiff to oversee plaintiff's safety than if the jury had found Mr. Moore to be a trespasser or licensee. But a property owner is not an insurer for even an invitee. A property owner's duties toward invitees are limited to those risks:

Which are unreasonable, Comment f., Restatement of the Law of Torts, Sec. 342, Gaddis v. Ladies Literary Club, 4 Utah 2d 121, 388 P.2d 785; which he has no reason to believe such persons will discover or realize the risk involved, Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210, 31 A.L.R.2d 177; and which he has reason to anticipate that persons acting with ordinary and reasonable care will encounter. Tempest v. Richardson, 5 Utah 2d 174, 299 P.2d 124.

Steele v. Denver and Rio Grande Western Railroad Company, 16 U. 2d 127, 396 P.2d 751, 753 (1964). However, one critical limitation must be added to this statement of the law. Where the dangerous condition on the premises is readily observable to the invitee, or is as observable to the invitee as to the property owner, the property owner has no duty to inspect and warn, but is only bound by the universal standard of reasonable care under the existing circumstances. Steele v. Denver and Rio Grande Western Railroad Company, supra; Ellertson v. Dansie, 576 P.2d 867 (Utah 1978).

The principle that a property owner is under no duty to warn even a business invitee of an obvious danger is controlling law in nearly all modern jurisdictions, e.g. Sherman v. Arno, 94 Ariz. 284, 383 P.2d 741 (1963); Chance v. Lawry's Inc., 24 Cal.Rptr. 209, 374 P.2d 185 (1962); CeBuzz, Inc. v. Sneiderman, 171 Colo. 246, 466 P.2d 457 (1970); Folda v. City of Bozeman, 582 P.2d 767 (Mont. 1978); Worth v. Reed, 79 Nev. 351, 384 P.2d 1017 (1963); Romero v. Kendricks, 390 P.2d 269 (N.M. 1964); Buck v. Del City Apts., Inc., 431 P.2d 360 (Okla. 1967); Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976). The rationale behind the rule is both simple and logical: since the duty of the property owner is only to warn or protect the invitee from hidden or unusual dangers, the duty is obviated where the obviousness of the danger serves as its own warning signal. Worth v. Reed, supra; Tolar Construction Co. v. Ellington, 225 S.E.2d 66 (Ct.App.Ga. 1976).

In line with the cited authority, the issue in a case of this type becomes whether or not the danger was obvious enough to absolve the landowner of any duty to protect or warn the invitee. But that is not the question presented by this appeal. The issue under consideration is much more limited; namely, whether there was sufficient evidence adduced at trial to raise the issue in a disputed posture

and mandate its submission to a jury. If there was competent evidence on the issue which raises a possible inference that plaintiff was warned of the danger by its open nature, then the trial court has an affirmative duty to submit the theory to a jury and not decide it as a matter of law. Black v. McKnight, 562 P.2d 621 (Utah 1977); Powers v. Gene's Building Materials, Inc., 567 P.2d 174 (Utah 1977); Cf. Foster v. Steed, 23 U.2d 148, 459 P.2d 1021 (1969) (similar holding in a directed verdict context).

The record is replete with testimony which would substantiate a finding that plaintiff must have been aware of the danger posed.¹ Plaintiff's only expert, Mr. Louis C. Barbe, testified that the cause of the accident was the fact that the circular saw did not have adequate safety guards. [R. 620-21]. The fact is the machine was equipped with a hood guard which could be rotated down so as to cover the saw blade to the width of the stock being cut. [R. 820-21, 854-55, 857, 921].

Plaintiff was not only an experienced carpenter but was familiar with the operation of the saw. [R. 778-79,

¹ In reviewing the record to determine whether the trial court erred in refusing to submit defendant's theory to the jury, it is important to remember that the evidence of facts and inferences to be drawn therefrom are to be examined in the light most favorable to the wronged party. Ferguson v. Jongsma, 10 U.2d 179, 350 P.2d 404 (1960).

788]. The saw shed contained a large sign which read "FOR USE OF AUTHORIZED PERSONNEL ONLY." Plaintiff did not ask for any instruction from any of the lumberyard employees in the use of the saw [R. 779] since he felt competent to operate the equipment. [R. 788]. Plaintiff knew of the danger attending the operation of such saws. [R. 788]. He was also aware that while the hood guard could be rotated down, that it had not been. [R. 788-89].

By his own admission, plaintiff was familiar with radial circular saws and their operation. As such he must also be charged with the knowledge of the relative dangers posed by a guarded or unguarded saw and, with such knowledge, he is also chargeable with knowledge of the condition of this saw since its condition was reasonably discoverable by a man of his background and experience. At the very least, an inference of knowledge can be drawn.

The fact of the matter is that this question, viz. whether there is credible evidence to warrant the submission of an instruction on this issue to the jury, has been rendered moot for purposes of this appeal by another instruction of the trial court. Instruction No. 20, as issued by the lower court, clearly shows that the trial court found that sufficient evidence had been adduced to send defendant's theory to the jury. That instruction reads:

INSTRUCTION NO. 20

The duty of the Defendant lumber yard to a licensee is to not wantonly or wilfully injure the licensee and to warn the licensee of a dangerous condition of which the lumber yard knows and should realize involves unreasonable risk of injury to the licensee and should also realize the licensee will not discover or realize the danger.

If the licensee knows or should know of the dangerous condition of the premises or equipment, there is no duty to warn him of the condition or of the equipment or to make the premises and equipment safe for the use of the licensee.

[R. 325]. The final paragraph of this instruction is a correct statement of the law and is the same type of language defendant requested in its proposed instruction on the duty owed a business visitor. [R. 417].

The instruction clearly illustrates that the trial court found enough credible evidence on this point to submit the issue of obviousness to the jury as it applies to licensees. As set out at length above, a similar limitation is imposed upon the duty owing an invitee. Whether the trial court's failure to include such duty limiting language in its instruction upon the duty owed an invitee is due to mere oversight or a mistake of law by the trial court is unclear on the record. But the fact that the trial court instructed the jury on the issue in a licensee context solidifies defendant's claim that the record justifies submission and supports defendant's contention that the

trial court breached its duty to submit defendant's theory to the jury; whether the failure was oversight or mistake of law is immaterial.

It is clear that the trial court erred. But defendant realizes that the strictures of law do not allow reversal for mere error or irregularity. Rule 61, Utah Rules of Civil Procedure. The error must be prejudicial. This error clearly was. In accord with the authorities cited infra, the trial court is under a duty to instruct the jury as to any theory of a party substantiated by the evidence. Both the trial testimony and the trial court's instruction on the duty owed a licensee show that the burden of evidence was carried. The trial court's failure to instruct similarly on the duty owing an invitee then operated to strip the defendant of a defense which could have possibly barred any recovery by plaintiff. The court's action constitutes fundamental, prejudicial, and therefore reversible error. Gaston v. Hunter, 588 P.2d 326 (Ariz. App. 1978); Bradley Chevrolet, Inc. v. Goodson, 450 P.2d 500 (Okla. 1969); Wollan v. Lord, 385 P.2d 102 (Mont. 1963); Sherry v. Asing, 531 P.2d 648 (Haw. 1975).

The Utah rule is not contrary. A refusal to give an instruction (or portion of one) to which a party is entitled is reversible error if the effect is to: (1) mislead the

jury to the prejudice of the complaining party; or (2) insufficiently advise the jury as to the law. State v. Ouzounian, 26 U.2d 442, 491 P.2d 1093 (1971). See also Rowley v. Graven Brothers & Co., Inc., 26 U.2d 448, 491 P.2d 1209 (1971).

This situation is the hand for the rule's glove. Not only was the jury insufficiently advised as to the full rule of law, but the fact that the instruction on another status category contained a proper statement on the law could seriously mislead the jurors and lead them to believe that a property owner is an insurer for any business invitee injured on his premises, contrary to the actual law.

B. Assumption of the risk is still a viable defense in Utah and the trial court's refusal to submit the defense to the jury materially prejudiced defendant's case.

At the close of the evidence defendant also submitted a proposed Special Verdict containing an interrogatory on assumption of the risk and proposed the following instructions:

INSTRUCTION NO. 11

There is a legal principal [sic] commonly referred to by the term "assumption of risk" which is as follows:

One is said to assume a risk when he voluntarily manifests his assent to a dangerous condition and voluntarily exposes himself to that danger when he knows, or in the exercise of ordinary care would know, that a danger exists in the condition

of the equipment or premises and uses the equipment and premises and voluntarily places himself or remains, within the position of danger.

INSTRUCTION NO. 12

Before the doctrine of assumption of risk is applicable, you must find: (1) the person in question must have actual knowledge of the danger, or the conditions must be such that he would have such knowledge if he exercised ordinary care, (2) he must have freedom of choice. This freedom of choice must have come from circumstances that provide him a reasonable opportunity, without violating any legal or moral duty to safely refuse to expose himself to the danger in question.

INSTRUCTION NO. 13

In considering whether Mr. Moore voluntarily assented to or assumed a risk so as to subject himself to the doctrine assumption of risk, you may consider his age, experience and capacity along with all other surrounding circumstances shown by the evidence in determining what he knew and what he should have appreciated about the risk involved.

[R. 408-10].

The trial court refused defendant's proposed interrogatory and did not instruct the jury as to assumption of risk, even though plaintiff also submitted proposed instructions on the issue. The court's rationale for its ruling was:

I [the court] think it is a negligence case, is what it is, a comparative negligence case. I think the instructions ought to be limited to that, excluding assumption of the risk which, under comparative negligence, is part of comparative [sic] negligence.

[R. 899, lines 20-24].

Defendant submits that both the court's ruling and reasoning are in error. While contributory negligence has been swallowed up within the ambit of comparative negligence, assumption of the risk remains a complete defense when properly plead.

Assumption of the risk and contributory negligence have long been recognized in this jurisdiction as distinctly separate defenses. Kuchenmeister v. Los Angeles and S.L.R. Co., 52 Utah 116, 172 P.725 (1918). However, just as an accident can give rise to recovery theories based upon negligence, warranty, and contract depending upon what the jury decides the facts actually were, so may such an accident have factual bases which sustain the defenses of both assumption of risk and contributory negligence, thereby creating an area of overlapping defense.

Many courts have been unable to distinguish between the two concepts in these overlapping situations, resulting in much confusion. To a large extent the problem has been caused by loose usage of the term "assumption of the risk," for the term covers two concepts. Harper and James explain the difference as follows:

(1) In its primary sense, the plaintiff's assumption of risk is the counterpart of the defendant's lack of duty to protect the plaintiff from the risk, and plaintiff may not recover for his injury, although he was quite reasonable in

encountering it. (2) In its secondary sense, a plaintiff may be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence.

2 Harper and James, The Law of Torts, §21.1, page 1162 (1956) [cited in Calahan v. Wood, 465 P.2d 169, 172 (Utah 1970)].

As stated, assumption of the risk in its primary sense is the counterpart of the defendant's lack of duty to protect plaintiff. Contributory negligence, on the other hand, is a matter of some fault or departure from the standard of conduct of the reasonable man however unaware, unwilling, or even protesting the plaintiff may be. Of course there will be many situations where the two doctrines intersect or overlap.

Obviously the two may co-exist when the plaintiff makes an unreasonable choice to incur the risk; but either may exist without the other. The significant difference, when there is one, is likely to be one between risks which were in fact known to the plaintiff, and risks which he merely might have discovered by the exercise of ordinary care.

Prosser, The Law of Torts (4th ed. 1971) at 441.

The distinction between the two defenses, as delineated by Professor Prosser, has long been established in this jurisdiction. As early as 1918, the Utah Supreme Court

noted the potential overlap of the defenses and the need for distinguishing them in Kuchenmeister v. Los Angeles and S.L.R. Co., 52 Utah 116, 172 P.725 (1918). Citing with approval the early English common law decision of Thomas v. Quartermain, L.R. 18, Q.B.Div., the court wrote:

But the doctrine of volenti non fit injuria [assumed risk] stands outside the defense of contributory negligence and is in no way limited by it. In individual instances, the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice.

* * *

It needs no argument, therefore, to demonstrate that while in a particular case facts may be such as to justify a finding of both contributory negligence and assumption of risk, yet contributory negligence does not necessarily arise from intelligent choice, and therefore is not necessarily included in assumption of risk. . . .

Id. at 729 (*italics omitted*).

The distinction continued. In Clay v. Dunford, 121 Utah 177, 239 P.2d 1075, 1077 (1952), the court noted the correctness of the converse of the proposition:

Furthermore, plaintiffs' failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.

Yet however clear the distinction may appear in theory it has been muddled in application. For many people the buzzword "assumption of risk" was much easier to conceptualize and understand in the abstract than would be the

dichotomy of lack of duty and unreasonable response. And, since assumption of risk and contributory negligence both operated as complete bars to a plaintiff's recovery, there was no pressing need to adequately distinguish between the theories. Hence the loose application of the term continued with predictable results. Some cases found the plaintiff to have assumed the risk when he failed to use reasonable care to discover the danger. In others, a faulty assumption of risk defense still was found sufficient to comprise contributory negligence and therefore bar recovery. In short, one man's assumption of risk became another's contributory negligence. The results were, understandably, confused and oftentimes irreconcilable.

It was upon this backdrop that the Utah legislature authored the Utah Comparative Negligence Act. Apparently distraught with not only the injustices wrought by the Contributory Negligence Doctrine, but also with the chameleon-like manner in which assumption of risk became contributory negligence in many of the overlap cases, the Utah Legislature attempted to remedy the confusion. By doing so, it engendered more confusion.

The Utah Comparative Negligence Statute reads:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or injury

to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of risk".

Section 78-27-37, Utah Code Ann. (1953) (as amended 1973). The question now arises whether the legislature intended to totally abolish assumption of the risk as a defense in this jurisdiction, or only to the extent that it tracks comparative negligence. The statute itself is susceptible of either interpretation.

Plaintiff argues that the statutory language is clear. And, in order to give each word meaning, assumption of the risk (as used in the statute) must be held to include primary assumption of risk since secondary assumption of the risk has always been equated with contributory negligence and would fall within the statutory ambit even without the specific statutory inclusion of assumption of the risk. [R. 545-46].

Plaintiff's reasoning is in error. The language in question is operative even without including primary assumption of the risk. A proper reading of the statute shows a legislative intent to clarify the lawmakers' position as to a muddled area of the law and to prohibit any potential end runs around the import of the statute by disguising contributory negligence arguments under the guise of assumption of

the risk as has been done in the past. Therefore, when given the reading contended for by defendant, the language in question is not mere surplusage as plaintiff contends but is an important clarification of legislative purpose.

Plaintiff's literal reading of the statute, on the other hand, leads to an incongruous result which defendant contends was clearly not intended by the Utah Legislature. In its primary sense, assumption of the risk is a distinct method for showing a lack of duty on defendant's part to protect plaintiff because of plaintiff's own actions. If comparative negligence is now read to encompass primary assumption of the risk then the basic element of any negligence action--breach of a legally recognizable duty--is now made a mere factor in apportioning negligence, rather than in deciding whether or not negligent activity actually exists. Defendant believes plaintiff should not urge that the statute be read to produce such a ludicrous and certainly unintended result.

Such incongruity results, however, when attempts are made to give statutes universal and literal application. When it is obvious such result was not intended, the statute should not be so applied. Snyder v. Clune, 15 U. 2d 254, 39 P.2d 915 (1964).

Instead, "where there is ambiguity or uncertainty in a portion of a statute, it is proper to look to the entire act

in order to discern its meaning and intent; and if it is reasonably susceptible of different interpretations, the one should be chosen which best harmonizes with its general purpose". Grant v. Utah State Land Board, 26 U. 2d 100, 485 P.2d 1035, 1037 (1971).

The oft stated general purpose behind Utah's Comparative Negligence Act is to eliminate the former harsh and often times unjust workings of the doctrine of contributory negligence. To the extent that assumption of the risk does nothing more than tract contributory negligence principles, it must surely be included within the act's coverage. However, the purpose of the Utah Comparative Negligence Act was clearly not to abrogate the defense that no duty was owed to a plaintiff in a situation where the plaintiff was aware of the risk of injury and voluntarily undertook to assume such risk. This was clearly not the purpose and legislative intent behind the Comparative Negligence Act, despite plaintiff's insistence to the contrary. While the subject matter area is quite complex, the legislature is presumed to understand the area of law within which it legislates and thus to use terms knowledgeably and advisedly. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975); it is also presumed to intend that the statutes it promulgates will be given a reasonable and sensible construction and not one which

results in absurd consequences. Curtis v. Harmon Electronics Inc., 575 P.2d 1044 (Utah 1978).

Defendant's position is also supported in the case law. The Utah Supreme Court, recognizing the different concepts of the term "assumption of the risk" has specifically stated that the use of assumption of the risk in some cases amounts in substance to nothing different from a defense of contributory negligence, but that in other cases, the defense is entirely separate and distinct from contributory negligence. The controlling case in this area is Rigtrup v. Strawberry Water Users Assoc., 563 P.2d 1247 (Utah 1977). In this case, plaintiff-appellant Rigtrup contended on appeal that the trial court had erred by instructing the jury as to assumption of risk after it had adequately instructed on contributory negligence. In affirming the trial court's action, the Supreme Court stated:

Though there have been some differences in view as to the defense of assumption of risk in its relation to other aspects of contributory negligence, it has since time immemorial been regarded as a valid defense in the law of this state. It has sometimes been said to be but a specialized aspect of contributory negligence in that it can be intermingled and confused with other aspects thereof in certain circumstances. It is also sometimes said to be something separate from contributory negligence, as it undoubtedly can be in some circumstances.

Id. at 1250.

The Rigtrup case clearly holds that assumption of risk is still a viable defense in this jurisdiction. The issue then becomes whether the defense operates as a complete bar to a plaintiff's recovery or whether its component elements are to be weighed in the computation of comparative fault along with the component elements previously giving rise to a contributory negligence defense. While some dicta in the opinion suggests that the latter is the rule, case holdings suggest the former is correct. The Supreme Court held that the trial court in Rigtrup acted properly in issuing the assumption of risk instructions. Those instructions [R. 491-46] establish assumption of risk as a complete bar to recovery in a negligence action where a plaintiff voluntarily assumes the risk of a known danger.

This construction of the Utah Comparative Negligence Act finds further support in Becker v. Beaverton School District No. 48, 551 P.2d 498 (Or.App. 1976). In Becker, the Oregon Court of Appeals held that the Oregon Comparative Negligence Statute did not bar the defense of assumption of risk absolutely. The court stated:

We hold that the . . . comparative negligence statute . . . applied only to assumption of the risk in its secondary sense. The wording of this statute suggests this. As noted above, the statute provided:

"Contributory negligence, including assumption of the risk, shall not bar

recovery in an action . . . if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought" ORS. 18.470 (1973).

The choice of the term "such negligence" in the second clause of the statute required the term "contributory negligence" or its equivalent as an antecedent. Therefore, we conclude that the phrase "including assumption of the risk" was merely used as synonym for "contributory negligence," the words immediately preceding the phrase. See V. Schwartz, Comparative Negligence, 160, §9.2, (1974). Since the statute did not apply to assumption of the risk in its primary sense and since the defendant pleaded assumption of the risk in that sense, it would not have been proper for the trial court to give plaintiff's requested instructions on comparative negligence. Under ORS. 18.470 (1973), assumption of the risk in its primary sense remained a complete bar to a negligence action.

Becker v. Beaverton School Dist. No. 48, supra, at 502.

The reasoning of Becker applies just as readily in Utah. Utah's Comparative Negligence Statute differs from the Oregon statute only in that the inclusion of assumption of the risk within the term "contributory negligence" is stated in a separate sentence rather than in a clause. Otherwise the language is identical.

The Oregon statute has since been amended. It now flatly declares: "The doctrine of implied assumption of the risk is abolished." Or. Rev. Stat. §18.475(2).

As pointed out in Thompson v. Weaver, 560 P.2d 620, 623 (Or. 1977), the new statute abolishes assumption of the

risk as a basis for barring recovery. The Oregon legislature felled the doctrine in toto. However, the passage of the amendment itself would seem to indicate that the legislature recognized that the pre-amendment statute did not abolish assumption of the risk except as it overlapped contributory negligence, in accord with the reasoning of Becker.

The Becker-Thompson constructions of the Oregon Comparative Negligence Statute are clearly analogous to the case at hand. The court in Rigtrup recognized that an instruction stating that assumption of the risk in its proper sense may still act as a complete bar to a plaintiff's recovery is proper. The reasoning in Becker suggests that Utah's Comparative Negligence Act is as reasonably susceptible to differing interpretations as was Oregon's. While a change in Utah law may, arguendo, be beneficial, such change is to be brought about legislatively, as in the Oregon situation, and not judicially. This fact was properly recognized by the Rigtrup court.

[W]e decline the invitation to so change our law. One of the important values in our system which tends to produce confidence in and respect for the law is that the law as it is declared and known has sufficient solidarity and continuity that it can be relied on with assurance. We think that those objectives are best served by the judicial branch refraining from legislating any abrupt or dramatic changes of a substantial nature in the law and by leaving any such changes therein to the legislature, whose constitutional prerogative it is.

Rigtrup v. Strawberry Water Users Ass'n., 563 P.2d 1247, 1250 (Utah 1977).

Until the Utah legislature chooses to abolish the defense of the assumption of risk as a complete bar in a negligence action, it should be maintained and upheld by the state trial courts. The doctrine is not a confusing duplication of contributory negligence where properly analyzed, but is a separate and distinct legal concept. As Prosser states:

Where the plaintiff acts unreasonably in making his choice, it is said that their [sic] is merely one form of contributory negligence which is certainly true; and from this it is argued that there is, or should be no distinction between the two defenses and that there is only useless and confusing duplication. But this is a distinctive kind of contributory negligence, in which the plaintiff knows the risk and voluntarily accepts it; and it has been held to differ from contributory negligence which merely fails to discover the danger in several minor respects. Thus assumption of risk is governed by the subjective standard of the plaintiff himself, whereas contributory negligence is measured by the objective standard of the reasonable man.

Prosser, The Law of Torts, (4th ed. 1971) at 456.

Assumption of risk in its primary sense is still a viable defense in this jurisdiction. Therefore, as shown supra at page fourteen, if there was credible evidence from which a jury might draw an inference that the plaintiff assumed the risk of injury, the trial court committed prejudicial error

in denying defendant its instructions and special verdict interrogatory on the subject.

In order to ascertain whether or not the record contains evidence supporting an application of the doctrine in this case, it is necessary to understand the doctrine's requirements. To be barred from recovery, plaintiff must encounter the risk knowingly and voluntarily, Johnson v. Maynard, 9 U.2d 268, 342 P.2d 884 (1959); he must look, see, and know the danger. Clay v. Dunford, 121 Utah 177, 239 P.2d 1075 (1952).

The standard to be applied is, in theory at least, subjective. However, our experience with the criminal branch of law has demonstrated the propensity for injustice which results where a plaintiff can absolve himself from fault by testifying to his own lack of knowledge. Consequently, elements of knowledge and intent are usually proven through circumstantial evidence. A similar process has evolved in tort law, injecting an objective element into assumption of risk. A plaintiff is not to be believed when he asserts that he didn't comprehend a risk which is obvious. Prosser, The Law of Torts, page 448 (4th ed. 1971); Renner v. Kinney, 373 P.2d 668 (Orc. 1962).

In his Memorandum in Opposition to Defendant's Motion for a New Trial, plaintiff focuses his analysis on the

assumption of risk requirement that before one can assume a risk he must be aware of the specific danger involved. [R. 548], Foster v. Steed, 23 U.2d 148, 459 P.2d 1021 (1969); McGrath v. Wallace Murray Corp., 496 F.2d 299 (10th Cir. 1974). Generally speaking, this is a proper principle. Certainly one who senses the potential bruises and broken bones attending contact football does not, by his participation in the game, consent to be stabbed by an opponent; that is outside the risk contemplated by the rules.

Plaintiff knew the rules attending the use of this piece of dangerous equipment. He knew its condition could injure him. [R. 761]. He didn't ask for instructions. [R. 761, 779, 788]. Lack of certain machine guards was said to cause the injury [R. 621] yet their absence was obvious. Use of the rotatable hood guard would have prevented the injury, and expert testimony said the guard's use was standard operating procedure. [R. 951-52]. Plaintiff knew the hood would rotate, yet he made no attempt to use the guard, blaming his failure on a yardman's failure to rotate the guard for him. [R. 789]; yet, he never asked the yardman to adjust the hood. [R. 789].

Defendant admits that, upon the evidence, a jury may find that Mr. Moore did not assume the risk of his injuries. On the other hand, it may so find. The fact in issue is

that the lower court's belief that assumption of the risk had been swallowed up into comparative negligence denied the defendant the opportunity of having the defense even considered. There was, at the least, a fact question for the jury.

If the evidence shows that the plaintiff was aware of facts which might have put him on notice of a hazard, but falls short of establishing an obvious danger of which he must have been aware, a question of fact for the jury may nevertheless be presented as to whether the plaintiff had a conscious awareness and appreciation of the inherent dangers he choose to encounter.

57 Am. Jur. 2d., 676, Negligence, §282.

The two principles discussed above--lack of duty and assumption of risk--are very similar in nature and effect, yet have been applied differently in concept. Defendant submitted instructions on both theories to the court, not knowing how the court would choose to characterize the defense. The court's failure to issue the assumption of risk instruction only compounded its mistake in failing to properly instruct the jury on the duty owing an invitee. The result was to completely strip the defendant of a defense to which it was entitled.

POINT II

THE LOWER COURT ERRED IN NOT INSTRUCTING THE JURY THAT PLAINTIFF'S NEGLIGENCE IN NOT USING THE HOOD GUARD AND KEEPING HIS HANDS OUT OF THE CUT LINE WAS A PROXIMATE CAUSE OF HIS INJURIES.

The Special Verdict returned by the jury found plaintiff negligent. There is a great deal of factual support for that

finding. It is certainly prima facie negligence for a person to undertake to operate a dangerous piece of machinery, in this case a radial arm saw, without using a guard provided for and attached to the saw. Further, expert testimony indicated it is a cardinal rule of safety that while using such a machine, an operators hands should never be within the cutting area of the saw and the operator's eyes should always be on the cutting blade while it is in motion. [R. 952].

In light of such evidence, defendant proposed that the jury be instructed to answer "Yes" to the special interrogatory asking whether plaintiff was negligent and whether plaintiff's negligence was a proximate cause of his own injury. [R. 398]. The court refused the proposed instruction and defendant took exception. [R. 1028].

Defendant submits that the court erred in failing to give the instruction since upon the facts herein, plaintiff's action was, as a matter of law, a proximate cause of the injury and, indeed, could be found to be, as a matter of law, the sole proximate cause of his injury.

Proximate cause has been defined as the cause next in relation to cause and effect. That which in natural sequence, unbroken by any efficient, intervening cause produces the injury, without which the result would not have occurred. That which is nearest in the order of causation. The last negligent act contributory to an injury without which such injury would not have resulted. The dominant cause, the moving or producing cause, this cause must be an act or omission.

Toma v. Utah Power and Light Co., 12 U. 2d 278, 365 P.2d 788, 794 (1961)(emphasis added).

There can be no doubt that plaintiff's actions fall within the ambit of this definition. Even if we assume, arguendo, the defendant breached a duty owed plaintiff by failing to warn plaintiff of the danger posed by the circular saw, the accident and resulting injury could not have occurred if plaintiff had either: (1) made use of the hood guard, or (2) kept his hand out of the line of the cut. Plaintiff's placing his hand in the line of the cut is certainly the nearest act in the order of causation.

The lower court's error was compounded by the fact that, upon the evidence, the court could easily have instructed the jury that not only was plaintiff's conduct a proximate cause of his injury, but, as a matter of law, his actions constitute the sole proximate cause of his injury.

The rationale for finding that plaintiff's actions constitute the sole proximate cause of his injury is that his negligence occurred later in time. However, defendant realizes that the mere fact that one actor's negligence postdates another actor's negligence does not automatically relieve the first of liability. Velasquez v. Greyhound Lines, Inc., 12 U. 2d 379, 366 P.2d 989 (1961). "But this is true only if both negligent acts are in fact concurring

proximate causes of the injury; and it is not true if the later negligence is an independent, intervening sole proximate cause of the incident." Id. at 991; Toma v. Utah Power and Light Co., 12 U. 2d 278, 365 P.2d 788, 794 (1961).

The distinction then is one of concurring cause versus independent intervening cause.

[T]his is the test to be applied; did the wrongful act, in a natural and continuous sequence of events which might reasonably be expected to follow, produce the injury? If so, it could be said to be a concurring proximate cause of the injury even though the later negligent act of another * * * cooperated to cause it. On the other hand, if the latter's act of negligence * * * was of such character as not reasonably to be expected to happen in the natural sequence of events, then such later act of negligence is the independent, intervening cause and therefore the sole proximate cause of the injury.

Velasquez v. Greyhound Lines, Inc., supra at 992.

It is certainly not "reasonably expected" that an experienced wood-worker would not only fail to use the standard hood guard on a dangerous circular saw but, in addition, will run his hands across the cut line of the rotating blade. In line with the afore-cited authorities, plaintiff's actions were the sole proximate cause of his injury and the trial court erred to defendant's prejudice in not so instructing the jury.

CONCLUSION

The errors of law committed by the lower court cannot be brushed aside as being harmless. They are both substantial and damaging. The court's failure to instruct the jury

that there is no duty to warn a business invitee in the face of an obvious danger, while so instructing as to the duty owed a licensee, resulted in confusion of issues and allowed the jury to find the defendant negligent for breach of a duty not recognized by law.

The court's failure to instruct the jury as to assumption of the risk, based on the court's opinion that assumption of risk has been engulfed by comparative negligence, worked to deprive the defendant of a defense still recognized in Utah law, which if decided in defendant's favor, would have operated as a complete bar to plaintiff's action.

In instructing the jury on proximate cause, the lower court acted contrary to law and policy. Under principles of Utah law, plaintiff's negligence was a proximate cause (and possibly the sole proximate cause) of his injury. The court's denial of defendant's proposed instruction deprived defendant of a verdict to which it was entitled upon the applicable law and facts.

Taken as a whole, the lower court's mistakes of law are not merely harmless error. The cumulative effect was to deprive defendant of its theory of the case by removing defenses to which defendant was entitled by law. The result

was to deny defendant a fair trial of the issues. Justice demands that these errors be corrected.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By Raymond M. Berry
Raymond M. Berry

By Bruce H. Jensen
Bruce H. Jensen
Attorneys for Defendant-
Appellant Burton Lumber &
Hardware Company
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 521-9000

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Appellant to W. Eugene Hansen, Attorney at Law, 2020 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, 84111, postage prepaid, on this 1st day of November, 1979.

Patricia W. Hardy