

1981

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

Utah Supreme Court

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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 RESPONDENT

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

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PAUL T. MOORE,)	
)	
Plaintiff-Respondent,)	
)	BRIEF OF RESPONDENT
vs.)	
)	Civil No. 16672
BURTON LUMBER & HARDWARE)	
COMPANY, a Corporation,)	
)	
Defendant-Appellant.)	

NATURE OF THE CASE

This is a negligence action by a business invitee for damages sustained as a result of injuries suffered while using an unreasonably dangerous radial arm saw upon defendant's business premises.

DISPOSITION IN LOWER COURT

This case was tried to a jury before the Honorable David K. Winder, District Judge of the Third Judicial District Court of Salt Lake County, State of Utah, in July of 1978. The jury returned a verdict finding that both plaintiff and defendant were negligent but further finding that only defendant's negligence was a proximate cause of plaintiff's injuries. The jury awarded plaintiff \$34,892.00 in special damages and \$110,000.00 in general damages. Thereafter, on July 28, 1978, the court entered judgment in favor of plaintiff and against the defendant

Burton Lumber & Hardware Co. in accordance with the jury verdict. Defendant's motion for new trial was denied by the court on August 21, 1979.

RELIEF SOUGHT ON APPEAL

Respondent Paul T. Moore seeks affirmance of the lower court judgment.

STATEMENT OF FACTS

This appeal is primarily concerned with whether or not the court erred in refusing to give a portion of defendant's proffered instructions relating to (1) defendant's duty to warn a business invitee of obvious dangers associated with use of its radial arm saw, (2) plaintiff's alleged assumption of risks connected with use of the said radial arm saw, and (3) the proximate cause of plaintiff's injuries. Appellant's statement of facts omits much information of significance to this appeal and further contains certain errors which could prejudicially affect its outcome. Plaintiff therefore deems it necessary and appropriate to supplement and clarify said statement of facts as follows:

During approximately a two-year period from June 1973 to May 1975, plaintiff Paul T. Moore supervised a large building project for Deal Development Company at Salt Lake City, Utah. (R. at 669.) In connection with said building project, the Deal Development Company had an open account

with the defendant Burton Lumber Company which was used in charging hardware items and odds and ends purchased for the job. (R. at 645.) It was estimated by Buddy Prince, one of the employees of Deal, that prior to May 1, 1975, he had patronized the defendant Lumber Company about three times per week, spending an average of \$25.00 to \$50.00 per visit on needed items. (R. at 645.)

By May 1, 1975, the major carpentry work at the construction site had been completed and most subcontractors had left. (R. at 670.) However, some "pickup work" remained to be done, including enclosing some air conditioning ducts with wood blocks. (R. at 644, 670.) In order to complete this remaining work, Mr. Moore and Mr. Prince decided to ask Burton Lumber Company whether they could use the company radial arm saw to cut some two-by-fours into the size blocks they needed. (R. at 644, 671-672.) The two-by-fours were being stored at Intermountain Lumber Company near the railroad tracks where they had been off-loaded. (R. at 671.)

On May 1, 1975, shortly before noon, the two men drove in a pickup truck to Burton Lumber Company. While Mr. Prince picked up needed hardware items for the job, Mr. Moore inquired at the desk about the saw. (R. at 644, 673, 831, 838.) According to Mr. Moore, he was told by the employees at the desk, that if the yard man was not using the saw, it was all right for him to use it. (R. at

674.) The charge for cutting was left open and was to be added to the Deal Development Company account. (R. at 674.)

Appellant Burton Lumber claims that only employees were allowed to use its radial saw. (Brief of Appellant at 4.) Omitted is the fact that rebuttal witness Stanley Smith, who was not employed by defendant, testified to having used the radial arm saw in question six or seven times and to having done so with permission. (R. at 960-961.)

According to Mr. Moore, he went into the yard where he spoke with a yardman named Jessie, and explained that he had been given permission to use the saw if it was not being used. (R. at 675.) Since Mr. Moore did not know where the saw was, Jessie took him to the saw shed and showed it to him. (R. at 675.) At that time, the saw was in a ripping position, whereas Mr. Moore needed it set for crosscutting. He, therefore, arranged with Jessie to have the saw rotated while he and Buddy Prince went to get their two-by-fours. (R. at 676.) He agreed to give Jessie a six-pack of beer if the saw could be rotated while they were gone. (R. at 647, 676.) Mr. Moore and Mr. Prince then left the yard to get their lumber, promising to return in five or ten minutes. (R. at 676.)

Mr. Moore and Mr. Prince went immediately to Inter-mountain Lumber Company where they got the two-by-fours

that they needed. (R. at 647, 677.) On their way back to Burton Lumber, they stopped at a small store where they bought the six-pack of beer which Mr. Moore had promised to the yard man, Jessie. (R. at 647-648, 677-678.) The beer was placed in a bag in the back of the pickup truck. (R. at 677.) Mrs. Moore noticed that it was still there a week after the accident which is the subject of this law suit had occurred. (R. at 973.)

Mr. Moore and Mr. Prince returned to Burton Lumber Company and reentered the lumber yard the way they had left, whereupon they parked their pickup truck near the door to the shed where the radial arm saw was located. (R. at 648-649, 678-679.) (Attempts by appellant to infer a surreptitious motive in parking the truck so as to hide it [See Brief of Appellant at 6], are unsupported by the evidence.) Mr. Moore noticed that the saw had been turned from the ripping position to the crosscutting position. (R. at 679.) Therefore, while Buddy Prince brought lumber in, Mr. Moore measured the length he wanted to cut the boards and drove a nail into the table for use as a fixed gauge so that he would not have to measure each cut separately. (R. at 650, 651, 679-680.)

Mr. Moore started the saw and cut the first two-by-four by placing the end of the board against the nail gauge, pulling the saw toward him and returning it, then knocking the cut block out of the way, and moving his two-

by-four up to the nail gauge to repeat the process. (R. at 757-758.) This procedure was duplicated approximately seven to nine times without Mr. Moore letting go of the saw. (R. at 758.)

When he finished cutting the first two-by-four as described above, Mr. Moore pushed the saw all the way back to its return position, released it, and went to the end of the table to get the second two-by-four. (R. at 757, 760.) He took hold of the second two-by-four with both hands and moved it along the table in front of a one-by-four which served as a guide, toward the nail gauge which he had earlier placed in the table. (R. at 760-762.) He testified that while he was moving the board past the blade, [the board] remained in front of the one-by-four guide at all times. (R. at 760.) His hands never slipped nor moved from the one-by-four, and his thumb did not raise off the board at any time. (R. at 761.) While thus working, Mr. Moore momentarily directed his attention to the nail gauge on the table to make sure his board abutted it, when suddenly he felt the saw grab his thumb and yank it into the blade. (R. at 762.) Before he could pull his hand away from the saw, the thumb, index and middle fingers of his right hand had been completely amputated, and his right and little fingers had been severely cut, though not completely separated from his body. (R. at 733.)

Plaintiff called as his expert witness, Mr. Louis

C. Barbe, a safety engineer and certified safety professional whose credentials were presented to the court. (R. at 599-601; 609.) Contrary to the statement in appellant's brief that Mr. Barbe had no experience in operating similar radial arm saws, (Brief of Appellant at 7), Mr. Barbe testified that he had operated and tested such equipment all his life. (R. at 609.)

Mr. Barbe testified that he examined and observed the saw in question subsequent to the injury to Mr. Moore. (R. at 602.) It was established through his testimony, and through the testimony of Mr. Robert Burton, Vice President of Burton Lumber, that the radial arm saw in question had not been tilted or equipped to prevent the cutting head from moving out on the arm away from the column as a result of gravity or vibration. (R. at 604-606; 618-619; 814.) It was also clearly established that the saw blade had not been equipped with proper safety guards. (R. at 604; 607-610; 616-618; 814-815.) Expert witnesses for both plaintiff and defendant agreed that these conditions violated minimum safety standards and made the saw defective and unreasonably dangerous. (R. at 611-622, 956-958.)

Appellant suggests in its brief that Mr. Barbe thought the saw was dangerous for lack of guards alone. (See Brief of Appellant at 6.) Such was not the testimony. Mr. Barbe testified that the danger was a result of the absence

of guards and the violation of minimum safety standards, including those designed to prevent spontaneous movement of the cutting head. (R. at 604-606; 618-620; 621-622.) The latter condition resulted in the saw having a tendency to spontaneously creep or drift out from its return position. Mr. Barbe testified that this was so. (R. at 604-606.) Vernon Campos, employee of Burton Lumber, corroborated the fact that the saw had a tendency to creep when running. (R. at 931-933.)

Paul Moore testified that he was not aware of this tendency. (R. at 762, 792.) No one testified that the creeping tendency of the saw was open, obvious, plain-to-be-seen, or in any way apparent to a first time user. In fact, the majority of defendant's employees testified that they did not know the saw crept. (R. at 823, 824, 826, 854, 856; 871.)

After several days of testimony, the matter was submitted to the jury on special interrogatories. The jury found that both parties were negligent but that plaintiff's negligence was not a proximate cause of his injuries. (R. at 1024.) Defendant's negligence was found to be the proximate cause of the injuries and damages were assessed accordingly. (R. at 1024-1025.)

Judgment was entered for plaintiff as aforesaid in accordance with the jury verdict. (R. at 428-429.) Following unsuccessful posttrial motions, defendant Burton

Lumber brought this appeal alleging error in the Court's instructions and error by the Court for failing to direct a verdict against plaintiff on the proximate cause question.

ARGUMENT

POINT I

THE COURT'S INSTRUCTIONS TO THE JURY ON DEFENDANT'S DUTY TO ITS BUSINESS INVITEES WERE NOT ERRONEOUS, NOR WERE THEY PREJUDICIAL IN LIGHT OF THE FACTS AND CIRCUMSTANCES OF THE CASE.

Burton Lumber Company first argues for a reversal of the trial court's judgment in this case based on alleged errors by the Court in instructing the jury as to the duty of the lumber company toward a business invitee. Burton claims that the jury should have been told there was no duty to warn of an obvious danger.

In deciding an appeal based on such a claim, three factors must be taken into consideration: (1) It must be established that the court's instruction was in fact erroneous; (2) Once established as erroneous, the instruction must be shown to have been prejudicial to the outcome of the case and to the rights of the appealing party; and (3) The party claiming error and prejudice must meet the burden of proof as to both aspects of such a claim. The Utah Supreme Court has stated this general proposition of law as follows:

What the parties are entitled to and the law seeks to afford is an opportunity for one claiming a grievance which would justify legal

redress to present it to a court or jury and to have a fair trial. When this is done, and the verdict and judgment are entered, all presumptions are in favor of their validity. The burden is upon the appellant not only to show that there was error, but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result.

Joseph v. W. H. Groves Latter-day Saints Hospital, 10 Utah 2d 94, 348 P.2d 935, 938 (1960); Cf. Gilhespie v. DeJong, 520 P.2d 878, 880 (Utah 1974); Ewell and Son, Inc. v. Salt Lake City Corporation, 27 Utah 2d 188, 493 P.2d 1283, 1288 (1972); Simpson v. General Motors Corporation, 24 Utah 2d 301, 470 P.2d 399, 402 (1970).

In the present case, defendant/appellant, Burton Lumber Co. has not met its burden of proof of showing error in the instructions, nor of showing prejudice to its rights or to the outcome of the case. These points are more fully discussed hereinafter.

A. The Court did not err in refusing to instruct the jury on defendant's responsibility to a business invitee concerning an obvious danger because there was no evidence that the dangerous condition of the saw in question was obvious.

Respondent Paul Moore does not deny that, as a general proposition of law, an owner or occupier of land does not have a duty to warn his business invitees of dangers which are open or obvious. However, in order for a defendant to rely on such a doctrine as a defense to an action against

him, and be entitled to a jury instruction thereon, that defendant must present evidence to justify application of the theory. The Utah Supreme Court has said:

It is well recognized that the parties are entitled to have their theories of the case presented to the jury in the form of instructions, but only if they are supported by the evidence.

Powers v. Gene's Building Materials, Inc. 567 P.2d 174, 176 (Utah 1977).

The above principle was applied in Bruner v. McCarthy, 105 Utah 399, 142 P.2d 649 (1943). There, a railroad worker's leg was amputated when he fell from a train which his fellow worker had moved suddenly and unexpectedly. The defendant trustees of the railroad appealed the injured worker's successful action against them, claiming that the trial court's refusal to instruct the jury on the defense theory of contributory negligence was reversible error. Defendants postulated that they should have been entitled to such an instruction because plaintiff picked the most dangerous way he could have to do his task. The Supreme Court noted that "one difficulty with this position is that the record does not support it." Id. , 142 P.2d at 651. Judgment for plaintiff was affirmed.

The present case is analogous to Bruner. Here, Burton Lumber postulates that the radial arm saw in question was dangerous for lack of safety guards and safety guards alone. It reasons that since the absence of such guards

was open and obvious to a user of the saw, an instruction relating to its lack of duty was in order. As in Bruner, however, the record does not support Burton's position.

The record clearly shows that the real danger of the saw to Mr. Moore was the fact that its cutting head had a tendency to drift spontaneously out from the return position while the saw was running. (R. at 604-606; 931-933.) The absence of proper safety guards only compounded the danger that such a condition posed to an unsuspecting user of the saw, since there was nothing to keep vulnerable hands and fingers from being caught and cut by the drifting blade. (R. at 610.) Why Burton Lumber has so carefully omitted all reference to this danger from its brief is not known. Nonetheless, such an omission deprives its arguments of whatever validity and legitimacy they might otherwise have claimed.

Evidence showing the true nature of the danger posed by the saw was not sparse. Expert witness Louis Barbe testified that (1) the saw lacked appropriate guards and (2) was not mounted or equipped to control movement of the cutting head along the arm therefore resulting in a tendency for it to move spontaneously toward an operator while it was running. (R. at 604, 606, 618-619.) Defense witness Vern Campos agreed that the saw had a tendency to creep. (R. at 933.) Mr. Campos also indicated that such movement was rather erratic and inconsistent. (R. at 931-935.) Photographer Scott Heslop also testified that

even when not running, the saw drifted out from its return position. (R. at 965.)

Mr. Barbe testified that minimum safety standards in 1975 (including those promulgated by the American National Standards Institute) required, as a minimum, that radial saws be equipped with certain types of safety guards which defendant's saw did not have, (R. at 615-618), and that the saw be positioned or equipped so that the cutting head would not roll or move out on the arm away from the column as a result of gravity or vibration. (R. at 618-619.) It was clear from testimony of Robert Burton, Vice President of Burton Lumber, that no effort had been made to comply with either of these minimum safety requirements. (R. at 825-826.)

Mr. Barbe, as well as the expert testifying for the defense both stated that the condition of the saw in reference to the above safety requirements made it defective and dangerous. (R. at 620; 956-958.) Mr. Barbe added that in his opinion Mr. Moore's injuries were caused by the said defective condition of the saw. (R. at 621-622.) It is clear from the full text of Mr. Barbe's testimony that he was not isolating the absence of guards as being the sole factor causing injury to Mr. Moore, but, rather, was blaming the injuries on the lack of guards together with the fact that the saw had a tendency to creep.

Though there was ample evidence to show the creeping

tendency of the saw, there was no evidence introduced at any time to support an allegation that the danger therefrom to Mr. Moore was open or obvious. In fact, all evidence tended to show the latent nature of the danger.

Mr. Robert Burton, employee of Burton Lumber for thirty years, said he thought the saw stayed put when pushed back. (R. at 825-826.) Larry Hester, a yardman for Burton Lumber and user of the saw, testified that his impression was that the saw did not move even a fraction of an inch when pushed back. (R. at 856.) Jessie Garcia, yardman for Burton Lumber, said he had never seen the saw move. (R. at 871.) Paul Moore said the only way he knew the saw would move was "to grab the handle and pull it out." (R. at 762.)

On the strength of such evidence, and none showing the contrary, there was no way the jury could have found that the dangerous condition of the saw was open or obvious to a business invitee. In fact, an instruction including provisos relating to questions of obviousness may even have been confusing and misleading to the jurors. The Court did not err in instructing the jury as it did.

B. When the jury instructions are read as a whole, they show that defendant's duty to a business invitee was properly explained and no error was committed.

It is a clearly established proposition of law that

in determining whether or not a trial court has fairly presented the issues of a case to the jury, the instructions will not be examined fragmentally nor in isolation, but will be considered as a whole. Black v. McKnight, 562 P.2d 621, 622 (Utah 1977). The fact that a requested instruction, though it correctly states the law, is not given, does not constitute error, if the substance thereof was given in instructions of the court, (Hardman v. Thurman, 121 Utah 143, 239 P.2d 215, 219 (1951)), or if the jury is otherwise sufficiently advised of the issue it is to determine. In re Richards Estate, 5 Utah 2d 106, 297 P.2d 542, 545 (1956). See also Ewell and Son Inc. v. Salt Lake City Corporation, 27 Utah 2d 188, 493 P.2d 1283, 1288 (1972).

As stated by this Court in Gilhespie v. DeJong, 520 P.2d 878 (Utah 1974), the fact that a party is entitled to have the jury instructed in accordance with his theory of the case "does not mean that [the instruction] must be given in the exact language chosen by him. The requirement is met if the basic idea contended for is explained in ordinary, concise and understandable language." Id. at 880.

The instructions of the trial court in the present case, when read as a whole, show that though the court did not employ the precise language urged upon it by defendant concerning duties owed to a business invitee it did instruct on such duties with sufficient clarity to avoid committing error.

Burton complains of the Court's giving of Instruction No. 22, which reads as follows:

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. at 327.)

Instruction No. 22 was not the only one in which the court explained the nature of the defendant's duty to an invitee. In Instruction No. 21 (which was requested by Burton Lumber, R. at 416) the duty of a lumber yard toward its business invitees was explained as follows:

INSTRUCTION NO. 21

When a lumber yard is open for business, one who enters it to purchase some commodity or service, is a business visitor or invitee. Upon the owner of the lumber yard, Burton Lumber and Hardware Company, the law places the duty of exercising ordinary care to not unnecessarily expose the business visitor or invitee to danger or accident and keep in reasonably safe condition the portions of the premises and equipment therein impliedly or expressly made available for the business visitor or invitee to use.

* * *

(R. at 326.)

The court's Instruction No. 11 defined negligence as "the failure to do what a reasonably prudent person would

have done under the circumstances of the situation,"
(R. at 316.) Instruction No. 12 explained that a person's duty to exercise caution varies with the amount of danger reasonably to be apprehended:

INSTRUCTION NO. 12

Inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended increases.

(R. at 317.)

Upon examination of the whole of the instructions relative to Burton's duty toward an invitee, it cannot fairly be said that the jury was left to believe that said duty included an obligation to warn of dangers which were "readily available to the senses," or "perfectly obvious." Therefore, it was unnecessary for the court to have used the precise wording requested by defendant when giving its instructions.

In Rowley v. Graven Brothers & Co., 26 Utah 2d 448, 491 P.2d 1209 (1971), an injured plaintiff complained of an adverse verdict on the basis of alleged errors in the jury instructions relating to contributory negligence. This Court's opinion of the alleged errors is instructive:

If the language assigned as objectionable be

excerpted and looked at in isolation there is some plausibility to plaintiff's argument that it might have the [adverse] effect he suggests. However, it will be noted that it was coupled with the correct statement that he was obliged to take such precautions as a reasonable and prudent person would take under the same circumstances. Notwithstanding minor variants in the instructions, if they are all considered together, as they are required to be, we think they adequately set forth the duties of the parties and properly submitted the issues to the jury.

Id., 491 P.2d at 1210-1211.

Here, as in Rowley, supra, there is no error that was upsetting the jury verdict and judgment.

C. Comparison of the Court's instructions concerning defendant's duties to licensees as opposed to business invitees does not demonstrate error with respect to the latter.

Defendant points out that the court's instruction on duty to a licensee contains the type of language which it sought to have included in the proposed "invitee" instructions. Defendant then argues that if the court considered the language of the "licensee" instruction to be supported by evidence, it could not properly exclude such language from the "invitee" instruction. Such argument lacks merit for two reasons:

First, as has been shown above, the instructions, when read as a whole, make it clear that the jury was properly instructed concerning defendant's lack of

duty to warn of readily apparent and patently obvious dangers.

Second, even if the jury had not been so instructed, the fact remains that there was no evidence to support the alleged existence of an obvious danger. (Supra at 13-14.) In that sense, the Court's "licensee" instruction, as worded, may also have been unwarranted by the facts of this case. In light of the outcome, however, any such error in this regard must surely be classed as harmless. Rule 61, Utah Rules of Civil Procedure.

D. Even if the court's instructions concerning defendant's duty toward an invitee had been erroneous, defendant has failed to show that they were prejudicial.

Assuming, arguendo, that the trial court's refusal to give defendant's Requested Instruction No. 20 (R. at 417) was error, Burton Lumber still has the burden of showing that such error was prejudicial to it in the sense that it resulted in substantial injustice, or that it deprived the defendant of its substantial rights. Rule 61, Utah Rules of Civil Procedure. The Utah Supreme Court has further explained this rule as follows:

The mandate of our law is that we do not reverse for mere error or irregularity. We do so only if the complaining party has been deprived of a fair

trial. The test to be applied is: Was there error or irregularity such that there is reasonable likelihood to believe that in its absence there would have been a result more favorable to him? If upon a survey of the whole evidence this question must be answered in the negative, then there is no justifiable basis for reversal of a judgment.

Rowley v. Graven Brothers & Co., 26 Utah 2d 448, 491 P.2d 1209, 1211 (1971). Cf. Ewell and Son, Inc. v. Salt Lake Corporation, 27 Utah 2d 188, 493 P.2d 1283, 1288 (1972); Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664, 666 (1966).

In the present case the jury found the defendant negligent in its conduct toward Paul Moore. Negligence was defined for the jurors as being the failure to do what a reasonably prudent person would have done under the circumstances of the situation. (R. at 316.) The evidence showed that the creeping tendency of the saw could have been eliminated by such simple acts as placing blocks under the table legs, tilting the arm of the saw, or attaching a weight or spring to the cutting head. (R. at 605, 638, 825-826.) The evidence also showed that none of these things had been done, despite the fact that their accomplishment was a minimum safety requirement. (R. at 605, 618-619; 814-815; 957-958.) No evidence indicated that the creeping tendency of the saw was obvious. (Supra at 13-14.) There is, therefore, no reasonable likelihood that the giving of the language proposed by defendant in its requested instruction No. 20 concerning its lack

of duty to warn of an obvious danger would, with any reasonable likelihood, have changed the outcome of the case.

A portion of the language of defendant's requested instruction which the court refused to give spoke of the plaintiff's duty as follows:

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.

(R. at 417.)

The only reponse favorable to defendant which the giving of the above instruction could have evoked from the jury, even if there had been evidence that the creeping tendency of the saw was obvious, would have been a finding that plaintiff, Paul Moore, was negligent. Since the jury in actuality found Paul Moore negligent, it cannot be said that the outcome of the case was prejudicially affected. In the absence of a showing of such prejudice the verdict of the jury and judgment of the court should not be disturbed.

POINT II

THE COURT'S REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS ON ASSUMPTION OF THE RISK WAS NOT ERRONEOUS NOR WAS IT PREJUDICIAL IN LIGHT OF THE FACTS AND CIRCUMSTANCES OF THE CASE.

The second error of law which defendant Burton Lumber claims was committed by the trial court stems from the court's refusal to give defendant's requested instructions on

the doctrine of assumption of the risk. (R. at 408-410.) The same general legal principles discussed in Point I, supra, apply here. That is, the burden is on Burton Lumber to show that the court's action in this regard was erroneous and that said erroneous conduct, if any, was prejudicial to the outcome of the case and to defendant's substantial rights. (See supra at 9-10, for authorities cited.)

As will be discussed below, the court did not err in refusing defendant's proffered instructions because (1) the evidence does not support the application of the assumption of risk doctrine; (2) the Utah Comparative Negligence Statute authorizes the court's rejection of the assumption of risk doctrine under the circumstances of this case; and (3) even if defendant's primary/secondary assumption of risk approach were to have been adopted, the evidence would not have warranted its application in this case.

Furthermore, even if the failure to instruct on assumption of risk principles had been error, no prejudice resulted from such failure because of the state of the evidence presented and the lack of any reasonable likelihood that the outcome of the case would have been changed.

A. The court did not err in refusing to instruct the jury on the doctrine of assumption of risk, due to the fact that there was insufficient evidence presented to have sustained such a defense theory.

Before the affirmative defense of assumption of risk can be applied, the defendant relying thereon must introduce evidence that the plaintiff intelligently and deliberately, (sometimes referred to as freely and voluntarily), consented to assume a risk which was both known to him and appreciated by him. See Smith v. Clayton & Lambert Manufacturing Co., 488 F.2d 1345 (10th Cir. 1973); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979); Hindmarsh v. O. P. Skaggs Foodliner, 21 Utah 2d 413, 446 P.2d 410 (1968); Ferguson v. Jongsma, 10 Utah 2d 179, 350 P.2d 404 (1960); Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884 (1959); Kuchenmeister v. Los Angeles & S.L.R. Co., 52 Utah 116, 172 P. 725, 729 (1918)¹; Restatement (Second) of Torts §§496D, 496G (1965).

It is important to note that in Utah, for a plaintiff to be held to have assumed a risk, he must be shown to have been aware of it specifically. In Foster v. Steed, 23 Utah 2d 148, 459 P.2d 1021 (1969), the Utah Supreme Court approvingly quoted Dean Prosser in saying that "'The fact that the plaintiff is fully aware of one risk * * * does not mean

¹The language of the Kuchenmeister case is illustrative of the language generally used by the Court: "[B]efore he may be charged with having assumed the risk, [a plaintiff] must not only have fully understood and appreciated the danger, but he, in the very face of danger, must voluntarily have assumed the risk of injury." Kuchenmeister, 172 P.2d at 729.

that he assumes another of which he is unaware * * *. " Id. at 1022-1023, n.4, [citing W. Prosser, Handbook of the Law of Torts 464 (3d ed. 1964).] Similarly, in Ferguson v. Jongsma, supra, the court said, "Assumption of risk requires knowledge by plaintiff of a specific defect or dangerous condition " Id. at 411. (Emphasis added.) Such principles apparently grew out of the decision in Johnson v. Maynard, supra, wherein the court held that it was error to instruct on assumption of risk where the evidence did not show "that plaintiff was aware of the particular danger involved " Id. at 887. (Emphasis added.)

The particular danger out of which Paul Moore claims his injury arose was not that of being cut by the blade of an unguarded radial arm saw, as defendant would have this court believe. Rather, it was the danger of being cut by such a saw because of its unknown tendency to creep out spontaneously and unexpectedly from its return position.

The saw's tendency to creep out from its return position has already been discussed. (Supra at 12-13.) Also discussed above was the absence of any evidence indicating that this creeping tendency was known to or observable by Paul Moore. Most of Burton Lumber's officers and employees said they were unaware of the creeping tendency of the saw, despite their history of using it. (Supra at 14.) Mr. Moore, who had only used the saw to cut one board, and

in so doing had held onto the handle of the saw the whole time, could not have been expected to know about or discover the drifting tendency. (See R. at 757-758.) Rather than show that Mr. Moore knew of the saw's dangerous propensities, such evidence tends to show affirmatively that he did not know and could not have known of them.

In the absence of evidence that Mr. Moore knew of the saw's dangerous tendency to creep, it cannot be alleged that he appreciated that danger. Neither can it be said that he intelligently or deliberately consented to assume the resulting risks associated with the saw's operation. Thus, assumption of risk principles do not apply in this case.

A question similar to the one discussed above was raised in a diversity case tried in the United States District Court for the District of Utah. McGrath v. Wallace Murray Corp., 496 F.2d 299 (10th Cir. 1974). There, the plaintiff was injured when an abrasive disc mounted on a grinding wheel which he was using, disintegrated. Plaintiff had not been using the guard which had been furnished with the wheel. From a jury verdict and judgment for the plaintiff, defendant appealed. One of the grounds for the appeal was the commission of alleged error by the trial court in failing to submit the case to the jury with instructions on assumption of risk. Though the case was reversed on other grounds, with respect to the assumption of risk question the Tenth Circuit Court of Appeals ruled

that "the trial court properly refused to give the instruction on assumption of the risk, since there was no evidence that McGrath [the injured plaintiff] had knowledge of a specific defect in the disc, which seems to be required as the basis for the defense in Utah." Id. at 302.

Plaintiff, Paul Moore, submits that in the instant case there was no evidence presented that he had knowledge of the specific dangers associated with use of the defendant's radial arm saw and that, therefore, the doctrine of assumption of risk was properly excluded by the trial court.

B. The Utah Comparative Negligence Statute authorizes the court's refusal to specially instruct on the doctrine of assumption of risk under the circumstances of this case.

One of the trial court's reasons for refusing to instruct the jury on the doctrine of assumption of the risk was its conclusion that the doctrine was comprehended within contributory negligence concepts in a comparative negligence case such as the present one. (R. at 899.) In reaching its conclusion, the court relied upon the following statute passed by the 1973 Utah State Legislature:

COMPARATIVE NEGLIGENCE - DIMINISHMENT OF DAMAGES-
"CONTRIBUTORY NEGLIGENCE" INCLUDES "ASSUMPTION OF THE
RISK" -- 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 in 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 damage

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 the risk."

§78-27-37, Utah Code Annotated 1953, as amended. (Emphasis added.)

Notwithstanding the express language of the foregoing statute that "contributory negligence shall not bar recovery" in a negligence action, and that "'contributory negligence' includes 'assumption of risk,'" defendant argues that assumption of risk is still a complete defense in Utah. See Brief of Appellant at 20. The thrust of defendant's argument is that there are two types of assumed risk, a primary type and a secondary type. It is argued that the legislature intended to include only the secondary type as a form of contributory negligence in comparative negligence cases. The reasoning then follows that if the primary type was not included, it must still be a complete bar to recovery. (See infra at 31-33 for a discussion of the distinction between primary and secondary type assumption of the risk.)

When the legislature enacted the comparative negligence statute, it made no effort to define what it meant by assumed risk nor did it indicate that the term was used in any specialized or limited sense. Multiple earlier pronouncements of this court, however, had defined the term as consisting simply of the voluntary and intelligent

consent to assume a particular risk which was both known and appreciated. (See supra at 23.) Though it is true that in a footnote to one of its cases² this court acknowledged that some commentators had recognized the primary/secondary assumption of risk dichotomy, the court appears never to have adopted the approach in Utah. Indeed, the fathers of the approach have themselves advocated its abandonment.³

In light of the foregoing it must be assumed that the legislature used "assumed risk" in its simple single-tier sense and that its intent in so doing was to eliminate the harsh effects of allowing affirmative defenses to serve as complete bars to a plaintiff's recovery for injuries produced in howsoever small a way

² Calahan v. Wood, 24 Utah 2d 8, 465 P.2d 169, 172, n.8 (1970).

³ "[Q]uite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found, perhaps, in those cases where there is an actual agreement.

* * *

"Except for express assumption of risk therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion, "2 F. Harper & F. James, The Law of Torts §21.8 (1956).

by his own fault. Dean Prosser would agree:

It can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his peril at all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgment in proceeding to encounter the danger after it is known.

W. Prosser, Handbook of the Law of Torts 457 (4th ed. 1971)

Defendant has attempted in its brief to bolster its primary assumption of the risk argument by citing a 1976 Oregon Appeals Court case which construed Oregon's comparative negligence statute in a way favorable to defendant's position. (See citation of Becker v. Beaverton School District No. 48, 551 P.2d 498 (Or.App. 1976), Brief of Appellant at 28-30.) Defendant argues that because of similarities between Oregon's and Utah's comparative negligence laws, this court should rule after the fashion of the Oregon Appeals Courts.

In 1973 the Oregon and Utah comparative negligence statutes contained the following language:

OREGON

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 * * * .

UTAH

Contributory negligence 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 * * * . As used in

Or. Rev. Stat. §18.470
(1973). (Emphasis added.)

this act, "contributory
negligence" includes
"assumption of the risk."
§78-27-37 Utah Code Ann.
1953, as amended. (Emphasis
added.)

The Becker court reasoned that the term "assumption of the risk," as used in the Oregon statute was, because of its grammatical location in the sentence, intended to refer to secondary assumption of risk only, and that, therefore, primary assumption of risk remained a complete bar to recovery by plaintiff. Becker, supra at 502.

Several factors make interpretation of Utah's statute much different than Oregon's. First, the Becker court was constrained to apply the primary/secondary approach to the assumption of risk doctrine because said approach had been adopted as the law of Oregon in 1962 by the Oregon Supreme Court. See Renner v. Kinney, 231 Or. 552, 373 P.2d 668 (1962). Utah has never adopted this confusing approach and should not do so now.

Second, Utah's Legislature placed the term "assumption of the risk" in a different portion of the statute than did Oregon's. Thus, in Utah's statute, the term was not limited in its scope by a confining equivalent antecedent.

Third, Oregon has now, interestingly enough, abolished the doctrine of primary assumption of the risk except in its express sense, thus indicating general dissatisfaction with the approach taken in Becker, supra. See 1975 Or. Laws,

ch. 599 §4; Or.Rev.Stat. §18.470 (1974).

The Utah Comparative Negligence Act has declared the assumption of risk doctrine to be included as a form of contributory negligence. Therefore, in a comparative negligence case, a trial court is not obligated to instruct on more than one of the doctrines. Though it may not be error for a court to give separate instructions on both doctrines in a proper case, (see Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977)), neither is it error for a court to refuse to give assumption of risk instructions in a case where proper contributory negligence instructions have already been given. Since such instructions were given in this case, there is no reason to disturb the jury verdict.

C. The evidence in this case does not support the application of primary assumption of risk principles even if the primary/secondary assumption of risk approach were to be adopted as the law in Utah.

Under the primary/secondary approach to the assumption of risk doctrine, secondary type assumption of risk is a mere form of and is legally considered identical to the doctrine of contributory negligence. 2 F. Harper & F. James, The Law of Torts §21.1 at 1162 (1956); 57 Am.Jur.2d Negligence §279 (1971). The elements of secondary assumption of risk are acknowledged to be comprehended

within a proper set of instructions on negligence and contributory negligence. Since such instructions were given in this case, defendant cannot, and presumably does not claim, that error was committed in this respect.

The doctrine of primary assumption of risk, which defendant claims should have been applied in this case, is not a form of contributory negligence. It does not involve questions of a plaintiff's conduct, but, rather, is generally considered to be but an alternate way of expressing the idea that the defendant owes no duty to the plaintiff. See Harper & James, supra; 57 Am.Jur.2d, supra at §276; 6 UCLA-Alaska L.Rev. 244, 249-50 (1977).

There are two types of primary assumption of risk. One which arises from a plaintiff's express consent to relieve a defendant of a duty of care, and another which arises from an implied consent to do the same. Express consent is given by agreement such as when two prize fighters agree to a bout, or when two businessmen agree to the sale of a piece of equipment with a known or acknowledged defect for which the seller wishes to assume no responsibility.

Implied consent, on the other hand, does not involve an agreement between parties, but arises from circumstances indicating a willingness on the part of one party to relieve another of certain responsibilities toward him. Because the effect of claiming "no duty" can be harsh, in order to imply such consent as is required to trigger application of this

doctrine, one must establish special circumstances. The courts and commentator's have rather uniformly required a danger to be "open and obvious;"⁴ "fully comprehended or perfectly obvious;"⁵ "obvious, . . . customary and . . . commonly known . . . ;"⁶ or "palpable,"⁷ before they have been willing to imply a person's consent to relieve another of a duty of care toward him. An example of such an assumption would be where an adult puts his fingers into an electrical outlet, or enters a line of fire on a target range during the shooting.

Burton Lumber does not contend that Paul Moore expressly consented to assume the risk of injury to his hand. Its allegations are that the danger of an unguarded saw is so obvious that a consent which would eliminate duty should be implied. In making such an argument, defendant ignores the fact that the danger associated with this saw was not its mere lack of guards, but, rather, the tendency for its blade to creep spontaneously away from the return position and toward an unsuspecting operator. As has been pointed out, supra at 14 , such a condition was anything

⁴Becker v. Beaverton School District No. 48, 551 P.2d 498, 500 (Or.App. 1976.)

⁵Renner v. Kinney, 231 Or. 552, 373 P.2d 668, 671 (1962).

⁶Harper & James, The Law of Torts, §21.2 at 1170 (1956).

⁷53 Or. L. Rev. 79, 81 (1973).

but obvious.

No evidence of obviousness was introduced at trial. The evidence that was introduced with respect to the saw's tendency to creep showed this dangerous tendency to be latent. There simply was no basis upon which a question concerning obviousness could be argued to have arisen in the present case. The court, therefore, acted properly in instructing the jury as it did.

Defendant's citation of this Court's holding in Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977), as authority for its position, is inapposite. The facts in Rigtrup are wholly different from those of the present case. There, the plaintiff had been specifically informed of the inadequacy of his electrical system, had been warned of the likelihood of power interruptions and the need for backup generators, had experienced power outages as a result of such interruptions, had been told that his system was improperly wired, and had even had his system fail due to such faulty wiring. The risks connected with a power outage could be said to have been so obvious to him under the facts of the case, as to absolve the power company of any duty to prevent outages to him.

In the present case, however, there was no evidence that Paul Moore knew of the radial arm saw's tendency to creep. Neither was there any evidence to show that Mr. Moore had been informed of the saw's tendency to creep or

had witnessed or experienced the phenomenon before. Minimum standards for radial arm saws required that they be so mounted or equipped as to prevent any independent or spontaneous forward motion of the cutting head. Undisputed evidence showed violations of those minimum standards. Clearly it cannot be said under the circumstances of this case that defendant was entitled to have the court instruct the jury on assumption of the risk in its primary sense.

D. Even if the Court's refusal to separately instruct the jury on the assumption of risk doctrine had been erroneous, defendant has failed to show that said refusal was prejudicial.

As has been fully discussed above, in advocating reversal of a jury verdict because of alleged errors in the instructions, an appellant must show not only error, but also prejudice. (Supra at 19-20.) The measure of prejudice is whether there is a reasonable likelihood that in the absence of the "error" the result would have been more favorable to the complaining party. Rowley v. Graven Brothers & Co., 26 Utah 2d 448, 491 P.2d 1209, 1211 (1971).

Assuming that the court had instructed the jury on assumption of risk, the result of this case would only have been altered if the jury had found that the dangerous creeping tendency of the saw was known or should have been known to Paul Moore. The absence of any evidence to

support such a conclusion has already been pointed out. (Supra at 13-14.) It cannot be said that there is any reasonable likelihood that the outcome of this case was prejudicially affected by the actions and decisions of the Court. The jury's verdict should stand.

POINT III

THERE IS NO EVIDENTIARY BASIS TO SUPPORT DEFENDANT'S CONTENTIONS THAT PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OR EVEN A PROXIMATE CAUSE OF HIS INJURIES AS A MATTER OF LAW.

Burton Lumber claims that Paul Moore was negligent in (1) using its radial arm saw without first adjusting the hood guard, and (2) placing his hands in the line of cut of the blade.⁸ Brief of Appellant at 34-37. Whether the jurors relied on these factors in reaching their verdict will never be known. Suffice it to say that they found Mr. Moore negligent. However, the jury also found that Mr. Moore's negligence was not a proximate cause of his injuries. Defendant says the jury's latter finding was incorrect. It argues that plaintiff's negligence should

⁸It is important to note that the blade guards which Mr. Barbe referred to as being minimum safety requirements were in addition to what defendant refers to as the hood guard. Concerning said hood guard, Mr. Barbe testified that it was not an adequate machine guard and may or may not have been able to keep a hand away from the saw blade.

(R. at 632.)

have been ruled to be a proximate cause of his injuries as a matter of law. In fact, says defendant, Mr. Moore's negligence should have been ruled to be the sole proximate cause of his injuries as a matter of law. Such a position finds no support in law or logic.

In Utah, in order for someone's negligence to be deemed a proximate cause of injury it must meet certain criteria: (1) it must be the primary moving cause without which the injury would not have been inflicted, (2) it must operate in a natural and probable sequence of events to produce injury without intervention of what would be classed as a supervening cause, and (3) it must be a substantial or material factor in bringing about such injury. See Cox v. Thompson, 123 Utah 81, 254 P.2d 1047 (1953); Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966).

It is apparent from their verdict that the jurors believed the evidence that Paul Moore's hand never slipped or moved into the saw blade when his fingers were amputated (R. at 761.) It is also apparent from their verdict that the jurors believed the evidence that the saw spontaneously and unexpectedly drifted forward from its return position and sliced into Mr. Moore's hand while he was sighting down the board he was preparing to cut. It is true that if plaintiff's hand had not been in the line of cut of the blade, the drifting saw would not have contacted it. Such a fact, however, does not compel the jury to find, as a matter of

law, that plaintiff's hand position was a proximate cause of his injuries, any more than the fact that a person's ignorant use of a car with faulty brakes compels a finding that he is therefore a proximate cause of any collision he might be in, no matter what the drivers of other vehicles do.

In order for the jury to have been directed to find plaintiff's hand position to be a proximate cause of his injury as defendant urges, it would have to appear from the evidence that reasonable minds could not differ in concluding that by such conduct Mr. Moore played a substantial role in causing the saw to move forward and grab his hand; and further that said saw's movement was the natural and probable consequence of his hand being placed where it was. If the evidence admitted any other reasonable conclusion, the questions were for the jury. Given the state of the record, the court's submission of the issues to the jury was proper.

Defendant's contentions that plaintiff's negligence (in whatsoever form the jury found it to exist) was the sole proximate cause of his injuries, as a matter of law, cannot pass muster. When a jury of concededly reasonable men and women conclude, on the basis of proper instructions, that plaintiff's negligence was not even a proximate cause of his injuries; and where the jurors are not alleged to have acted on the basis of passion or prejudice, and no evidence

of passion or prejudice is put forth, it stretches the imagination to suppose that a court should declare the opposite to be the case and then bootstrap such a declaration into a directed verdict that the negligence was the sole proximate cause thereof. Defendant's argument in support of its position is very short. It merits only a very short response.

The case of Velasquez v. Greyhound Lines, Inc., 12 Utah 2d 379, 366 P.2d 989 (1961) (relied upon by defendant) says that before the negligent perception of a danger can be the sole proximate cause of an injury, the danger must be so obvious that it cannot fail to be observed and avoided. Id. 366 P.2d at 991. In the present case the dangerous creeping tendency was latent. No evidence of its obviousness was presented to even raise a jury question thereon, let alone require a determination in defendant's favor as a matter of law.

CONCLUSION

An examination of the whole record in this case shows that defendant's appeal for reversal of the trial court's decision should be denied. The trial was conducted fairly and properly. The jurors received appropriate instructions on the law applicable to the case and their verdict was supported by the evidence. In any lawsuit of several days duration, counsel can usually find something

to complain about. Ewell and Son, Inc. v. Salt Lake City Corporation, 27 Utah 2d 188, 493 P.2d 1283, 1288 (1972). Nevertheless, absent a showing of real error resulting in substantial prejudice, in the sense of there being a reasonable likelihood of unfairness or injustice, the decision of the trial court will be sustained. Id.

As has been pointed out above, the Court's instructions on defendant's duty to a business invitee were neither erroneous nor prejudicial for several reasons: (1) There was no evidence that the dangerous tendency of the saw to creep forward spontaneously from its return position while running was or should have been obvious to a user such as Paul Moore; therefore, the court did not err in omitting defendant's proffered language concerning such dangers from its instructions. (2) A reading of the whole of the jury instructions shows that jurors were properly instructed concerning the duty of defendant to warn business invitees of dangers connected with use of the saw; therefore, there was no error. (3) There was no showing that defendant's rights were substantially affected or that the outcome of the case would, with any reasonable likelihood, have been different; therefore there was no prejudice.

The Court's refusal to separately instruct the jury on assumption of the risk was also not prejudicially erroneous for several reasons: (1) No evidence was introduced to prove the essential elements of the assumption

of risk theory; therefore, the jury should not have been instructed thereon. (2) The Utah Comparative Negligence Statute authorized the actions of the trial judge in declining to give defendant's proffered assumption of risk instructions. (3) Even if the Court were to have adopted defendant's theory concerning the two-tier approach to assumption of risk, there was no evidence to support its application in this case. (4) There was no showing that the refusal to separately instruct on assumption of risk affected defendant's substantial rights or changed the probable outcome of the case.

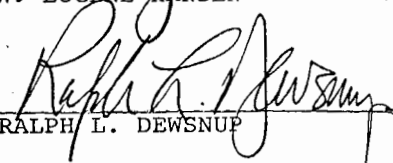
Defendant's last complaint of error, that the evidence was so plain against the plaintiff that the court should have directed a verdict against him on the proximate cause issue, is groundless. The evidence showed not just that plaintiff's hand was cut in a radial arm saw but also that said saw had a latent and very dangerous tendency to spontaneously creep forward from its return position while running. This dangerous condition existed as a result of admitted violations of what both parties recognized to be minimum safety standards. The evidence further showed that plaintiff had no way of knowing that this dangerous tendency existed, and that while he was operating the saw, the whirling blade unexpectedly drifted forward and grabbed his hand, amputating three of his fingers and severely cutting two others. In the face of such evidence and more,

defendant's argument that reasonable men and women could reach the decision that they did is untenable.

In light of the foregoing, Plaintiff/Respondent Paul Moore respectfully submits that the verdict and judgment of the court below should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of January, 1980.


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