

1994

# John Corey Jensen v. Phillips Petroleum Company : Appellee's Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

DOCKET NO.

940280

IN THE UTAH COURT OF APPEALS

JOHN COREY JENSEN,	)	
	)	
Plaintiff/Appellant,	)	Case No. 940280-CA
	)	
vs.	)	Priority: 15
	)	
PHILLIPS PETROLEUM	)	
COMPANY,	)	
	)	
Defendant/Appellee.	)	

APPELLEE'S BRIEF

On Appeal from the Judgment of the  
Second Judicial District Court  
Davis County, State of Utah  
Honorable Rodney S. Page, Presiding

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**FILED**  
Utah Court of Appeals

**AUG 16 1994**

Marilyn M. Branch  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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Defendant/Appellee.	)	

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### JURISDICTION

The Court has jurisdiction of this case under Utah Code Ann. § 78-2-2(4).

### STATEMENT OF ISSUES

1. Whether plaintiff waived his objection to Jury Instruction No. 19.

2. If plaintiff did not waive his objection, whether the trial court erred in giving Jury Instruction No. 19.

3. If the trial erred in giving Jury Instruction No. 19, whether that error was harmless.

4. Whether the trial court abused its discretion in awarding as cost an appearance fee that defendant was required to pay plaintiff's expert for his deposition.

### STANDARD OF REVIEW

1. In order to preserve an objection to a jury instruction, "a party must object with specificity at trial." Morgan v. Quailbrook Condominium Company, 704 P.2d 573, 579 (Utah 1985).

2. Jury instructions are reviewed for correctness. Steffensen v. Smith's Management Corporation, 862 P.2d 1342, 1346 (Utah 1993).

3. An error in a jury instruction, even when properly preserved and presented on appeal, is considered harmless when "there is no reasonable likelihood that the error affected the outcome of the proceedings." State v. Verde, 770 P.2d 116, 120

(Utah 1989). An error which is not properly preserved cannot be considered on appeal unless it is "obvious." Id. at 121.

4. Cost awards are reviewed for abuse of discretion. Morgan v. Morgan, 795 P.2d 684, 686 (Utah App. 1990).

#### STATEMENT OF THE CASE

The jury found both plaintiff and defendant negligent. (RR. 180-81) The jury found that plaintiff's negligence exceeded defendant's (60/40) and on that basis ruled in defendant's favor. (R. 181)

Plaintiff is not arguing that the verdict is against the weight of the evidence. Plaintiff is complaining about one of the jury instructions given by the trial court. A factual statement would be helpful in evaluating that instruction. The facts stated in the light most favorable to the verdict are as follows:

1. The accident happened on the day after Christmas, 1990. (R. 292)

2. Plaintiff was driving a fuel tanker for Sunburst Transport. (R. 273)

3. Plaintiff slipped and fell on ice that had formed on the floor of the outdoor fuel loading bay owned and operated by defendant. (RR. 291, 292, 297)

4. Plaintiff knew the floor was slippery that day, but did not stop work. (RR. 291, 292, 297)

5. Plaintiff slipped and hurt himself while trying to force the fuel loading arm on the valve farthest from the pump. (RR. 277, 278, 290)

6. Plaintiff did not report his incident to defendant. (RR. 279, 332)

7. Defendant recognized that ice would occasionally form on the floor of the outdoor loading bay. (R. 334)

8. Defendant knew this was an area that needed to be salted in the winter. (R. 338)

9. Defendant knew that on occasion the area had to be hand-salted. (R. 339)

10. Defendant knew that on occasion the area had to be re-salted later in the same day. (R. 339)

11. It was the habit of the gentleman who was on duty the day of the accident (Paul Hatch) to supply the drivers with rock salt and a shovel so they could clear ice if they found it on the floor of the loading bay. (RR. 334, 335)

12. Mr. Hatch would have eliminated any dangerous or hazardous condition reported to or observed by him. (R. 337)

13. It was the habit of Mr. Hatch to perform a metering function on each of the pumps before opening for the day. (R. 327)

14. To do this, he had to stand directly in front of the pumps in the same place where the drivers stood to load fuel. (RR. 327-28)



15. Mr. Hatch would have remembered if there had been dangerously slick conditions on the floor of the loading bay on the day in question. (R. 337)

16. Though there were other drivers in the same area as plaintiff that day, none of them reported an incident. (RR. 337, 348)

17. Defendant made an attempt to roughen the surface of the loading bay floor to improve its traction. (RR. 344, 349)

18 Defendant considered but did not employ metal grates to improve traction. (RR. 342-43)

The trial court refused the jury instructions requested both by plaintiff and defendant on premises liability. (R. 354) Defendant requested an instruction that required plaintiff to prove defendant had "notice" of the hazardous condition complained of. (R. 46) The trial court rejected defendant's instruction because, as the trial court concluded, "this is one of those cases where the hazard essentially has been created by the owner, if in fact one has been created, and therefore he has notice of that and that's not required." (R. 354, lines 3-11)

Plaintiff requested an instruction doing away with the "notice" requirement. (RR. 352-53) The trial court considered plaintiff's instruction to be unnecessary since he was not giving a notice instruction. (R. 354, lines 18-20) In fact, the trial court determined that Instruction No. 19 (R. 108) went further than the instruction requested by plaintiff because "it

says if you actually have notice of the defect, then you have to post notice." (R. 354, lines 16-18)

Once informed of this, plaintiff made no objection to Instruction No. 19, except to say that the "business invitee" distinction should be abolished. (R. 355) The trial court invited plaintiff to show authority on the subject (R. 356), but after a brief search plaintiff reported he had found nothing. (R. 359-60)<sup>1</sup> Plaintiff made no further objection to Instruction No. 19. (R. 360)

#### SUMMARY OF ARGUMENTS

1. Plaintiff waived his objection to Instruction No. 19.
2. Since the trial court did not instruct on "notice," a Canfield instruction was unnecessary.
3. Failure to give a Canfield instruction made no difference in this case because the jury found for plaintiff on his negligence claim against defendant.
4. It was within the trial court's discretion to award as costs fees defendant was required to pay plaintiff's expert for his deposition.

#### ARGUMENTS

##### I. PLAINTIFF WAIVED HIS OBJECTION TO INSTRUCTION NO. 19.

It is a fact that plaintiff requested an instruction based on Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah App. 1992). However, plaintiff dropped (or appeared to drop) that request

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<sup>1</sup>In any event, plaintiff has dropped this point on appeal.  
Page 8, n.1.

once the trial court informed him there would be no need for it. It was incumbent on plaintiff to repeat his request, given the trial court's explanation, if in fact he thought a Canfield instruction was still necessary. Plaintiff never gave the trial court an opportunity to consider the argument he raises here. This is fatal to his appeal.

As is customary, the trial court distributed a set of jury instructions prior to the jury instruction conference with counsel. He started by eliciting exceptions to instructions he planned to give. (R. 352, lines 7-8) Plaintiff immediately turned to Instruction No. 19. (R. 352, lines 14-15) His exception was to the phrase "business invitee," a distinction which he said had been "abolished in Utah by higher courts." (R. 352, lines 17-21) He argued that a "comparative standard" of negligence should be used instead. (R. 352, lines 21-22) He went on to say that actual knowledge of a dangerous condition is not necessary "where expectable acts of third parties would create a dangerous condition,..." (R. 353, lines 2-3) He then asked for a Canfield instruction. (R. 353, lines 16-17)

The trial court responded by stating that he was not going to give defendant's instruction, which asked for a notice requirement. (R. 354, lines 3-5) He thought this was one of those cases "where the hazard essentially has been created by the owner, if in fact one has been created, and therefore he has notice of that and [notice is] not required." (R. 354, lines 9-11) Since he was dispensing with the notice requirement, there

was no need to instruct on law excusing the notice requirement. Reasonable care was the only relevant consideration, and the trial court deemed his Instruction No. 19 not to be "essentially...different than that of Canfield as far as [reasonable care is] concerned." (R. 354, lines 12-14)

Plaintiff voiced no objection to the foregoing. He said nothing more about Canfield or about the notice requirement.<sup>2</sup> In fact, plaintiff expressed agreement with the substance of what the trial court was doing in Instruction No. 19:

THE COURT: I think the instruction [No. 19] fairly states the status of the law. I think the old distinction is gone, you're right. I think the reasonable care standard is the one that's applicable and that's what makes it different from the old standard.

MR. COOK: That I accept, your Honor, that it is the reasonable care standard. (R. 355, lines 16-22)

That was the end of the discussion on exceptions to instructions that the court was planning to give. The trial court then opened discussion on instructions he was not planning to give, though requested by the parties. (R. 357, lines 20-21) Plaintiff said nothing further about his Canfield instruction or the notice requirement. (R. 358) It is clear from the foregoing he had ample opportunity to do so throughout the jury instruction conference.

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<sup>2</sup>Though he did repeat his previous objection that the "business invitee distinction has been abolished in our state." (R. 355, lines 3-4)

It goes without saying that "objections [to jury instructions] must be made before the instructions are given to the jury;..." Rule 51, U.R.C.P. What follows from this is "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto." Rule 51. It is obvious that plaintiff failed to inform the trial court of the objection he raises here. The trial court had no way of knowing that plaintiff still wanted a Canfield instruction. Given the nature of the discussion, the trial court could safely assume that plaintiff had abandoned his request for a Canfield instruction. Once the trial court informed plaintiff that since there would be no "notice" instruction there was no need for a "Canfield" instruction, it was incumbent upon plaintiff to state his disagreement so the error, if there was one, could be corrected.

To preserve an objection on appeal, "a party must object with specificity at trial." Morgan v. Quailbrook Condominium Company, 704 P.2d 573, 579 (Utah 1985). "An objection to an instruction must be sufficiently precise to alert the trial court to all claimed error and to give the judge an opportunity to make any corrections deemed necessary." Pioneer Valley Hospital, 830 P.2d 270, 271 (Utah 1992). The purpose for this rule is obvious: "When the trial judge has such notice, he or she is able to correct an error before the jury retires." Id. (citing Beehive Medical Electronics, Inc. v. Square D Company, 669 P.2d 859, 860-61 (Utah 1983)). The error that plaintiff complains about is one that could have been raised before the

jury retired. It appears from the record that plaintiff had no objection to Instruction No. 19 other than to use of the term "business invitee." The trial court was never given an opportunity to consider what plaintiff raises here, that even in the absence of a notice instruction, the jury should be instructed that notice is excused in cases where the property owner created the hazardous condition. The rule on waiver has a practical purpose that would be frustrated if plaintiff were allowed to be heard on this point.

In certain cases, Rule 51 allows the appellate court, in the exercise of discretion, to excuse a waiver, but that is only where the error is (1) "obvious" and (2) of "sufficient magnitude that it affects the substantial rights of a party." State v. Verde, 770 P.2d 116, 122 (Utah 1989) (cited by Crookston v. Fire Insurance Exchange, 817 P.2d 789, 799 (Utah 1991) (and applied to Rule 51, U.R.C.P.)).<sup>3</sup> Suffice it to say that in all such cases, "it is incumbent upon the aggrieved party to present a persuasive reason for exercising that discretion...and this requires showing special circumstances warranting such a review." Crookston v. Fire Insurance Exchange, 817 P.2d at 799 (quoting Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988)). There has been no such showing here, so plaintiff's waiver cannot be excused.

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<sup>3</sup>Both of these issues are addressed in Sections II and III below.

II. SINCE THE TRIAL COURT DID NOT INSTRUCT ON "NOTICE," A CANFIELD INSTRUCTION WAS UNNECESSARY.

Both plaintiff and the trial court agreed that premises liability should be stated in terms of reasonable care. This appears to be consistent with Utah law on the subject. Dwiggins v. Morgan Jewelers, 811 P.2d 182, 183 (Utah 1991). Instruction No. 19 is stated in terms of reasonable care. (R. 108) In this appeal, plaintiff is saying that he wanted something in addition to what is stated in Instruction No. 19 (a Canfield instruction). This dispute centers on what has become known as the "notice" requirement of premises liability.

Defendant (the landowner) requested an instruction based on Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977), requiring plaintiff to prove that defendant "knew, or in the exercise of reasonable care should have known, that a dangerous condition existed,..." Plaintiff countered with an instruction based on Canfield v. Albertsons, Inc., 841 P.2d at 1226, dispensing with the notice requirement in cases where the "storeowner, its agents, or employees create or are responsible for the dangerous condition." The trial court refused to give defendant's notice instruction. He viewed this as a case where the property owner could not possibly contest notice, since it was the one who created the hazardous condition (assuming there was one). The trial court's decision not to give the notice instruction is not at issue here.

Once the trial court made that decision, a "no notice" instruction was totally unnecessary. When notice is satisfied, reasonable care is the only relevant question in these cases. The trial court was entirely correct to conclude that without a notice requirement, Instruction No. 19 states the sum and substance of the Canfield instruction requested by plaintiff, which is reasonable care. This is made clear from the Canfield decision itself.

Albertsons attempted to defend by arguing that it had no notice of the specific lettuce leaf upon which plaintiff slipped and fell. Canfield v. Albertsons, Inc., 841 P.2d at 1226. The Court of Appeals ruled that such notice was irrelevant because Albertsons had notice that customers were throwing lettuce leaves on the floor around the farmer's pack display Albertsons had assembled. 841 P.2d at 1227. At this point, Canfield was in the same posture as this case. With notice out of the case, the only "relevant question is whether Albertsons took reasonable precautions to protect customers against the dangerous condition it created." Id. Plaintiff agrees that the trial court's instruction on reasonable care was correct, so this Court may safely conclude that no error was made.

III. FAILURE TO GIVE A CANFIELD INSTRUCTION MADE NO DIFFERENCE IN THIS CASE SINCE THE JURY FOUND FOR PLAINTIFF ON HIS NEGLIGENCE CLAIM AGAINST DEFENDANT.

The jury was never told that "notice" was an issue. Therefore, it was totally unnecessary to tell them, in an instruction, that notice was not an issue. If notice had been



an issue, defendant might have escaped liability because of lack of notice. The fact that defendant was found liable signifies that whatever error was made in Instruction No. 19 was perfectly harmless.

Although the Court of Appeals was reversed the last time it applied this logic, the facts in that case were different from those here. In Steffensen v. Smith's Management Corporation, 862 P.2d 1342, 1346 (Utah 1993), the Court of Appeals reasoned that an error in an instruction on negligence was overcome by the jury's verdict, in plaintiff's favor, on negligence. The Supreme Court, however, concluded that the error in the instruction also went to proximate cause, and since the jury found against plaintiff on proximate cause, it could not be said the error was harmless (though the Supreme Court affirmed the Court of Appeals for other reasons). 862 P.2d at 1346. The Court of Appeals does not have the same problem here. The jury found defendant liable, which means it answered both the negligence and proximate cause questions in plaintiff's favor.

Plaintiff argues (in his brief) that the jury might have been persuaded by arguments that plaintiff did not report the incident. (Page 12) Plaintiff has read these arguments completely out of context. They were permissible for two very important reasons. First, there was a question as to whether there was a hazardous condition in the loading bay on the day in question. There was substantial evidence that other drivers worked in that same spot and had no problems that day. (RR. 337,

348) Defendant was entitled to suggest that plaintiff's failure to report the incident bore on whether a hazardous condition existed: "You would think if there had been a big problem, [plaintiff] would have told us, even after the fact." (R. 368, lines 15-17) Second, contributory negligence was definitely an issue in the case. Defendant used the fact that plaintiff failed to report the incident as an indication of contributory negligence: "If it was slippery, you should have stopped what you are doing. You don't have to move your truck, that's fine, but go get some help. Go tell somebody that there is a problem. That's what Paul's job is to do. It would have been the simplest thing in the world to do this. Go tell him." (R. 370, lines 15-20)

Defendant did not argue for dismissal based on lack of notice. The arguments that were made were perfectly appropriate for the issues that were legitimately in the case. In any event, plaintiff failed to object to the arguments, so this issue cannot be considered here. The jury was not confused. Notice was not an issue in the case. The trial court was entirely correct in the way it instructed the jury on this important point.

IV. IT WAS WITHIN THE TRIAL COURT'S DISCRETION TO AWARD AS COSTS FEES DEFENDANT WAS REQUIRED TO PAY PLAINTIFF'S EXPERT WITNESS.

Plaintiff reads the provision for costs too narrowly. Frampton v. Wilson, 605 P.2d 771 (Utah 1980) states that costs are "generally allowable only in the amounts and in the manner

provided by statute." 605 P.2d at 773 (emphasis added). The decision goes on to say: "Subject to the limitation expressed above, this Court has taken the position that the trial court can exercise reasonable discretion in regard to the allowance of costs;..." Id. at 773-74 (emphasis added). Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990) is also read too narrowly: "Witness compensation in excess of the statutory schedule is generally inappropriate as a cost." 795 P.2d at 687 (emphasis added).

What is significant is that Utah Rule of Civil Procedure 54(d)(1) is considered to be the "basic statutory provision" when it comes to awarding costs. Frampton v. Wilson, 605 P.2d at 773 (emphasis added). Defendant's claim for the \$300 appearance fee to Dr. Paulos is based another Utah Rule of Civil Procedure, 26(b)(4)(C)(i): "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule;..." Rule 26(b)(4)(A)(ii) governs "discovery by other means," which includes depositions. In other words, defendant was required by Rule 26 to pay Dr. Paulos a fee for attending his deposition. It is difficult to see how the trial court abused his discretion in awarding this as cost.

There is an important distinction between this and the two cases cited by plaintiff. The Courts in those cases denied as costs expenses associated with the expert witnesses of the

prevailing parties. That would be like defendant trying to recover the expenses associated with its own expert witnesses, assuming it had expert witnesses. Neither Court had to deal with the situation presented here, where the prevailing party had to pay a fee to the expert witness of the other party in order to take that witness' deposition. It is important to note that plaintiff "does not contest whether the deposition was taken in good faith or essential for the development and presentation of the case." (Pages 13-14) Plaintiff offers no good reason why defendant should not recover all expenses necessarily incident to the deposition he agrees was necessary for the development and presentation of the case.

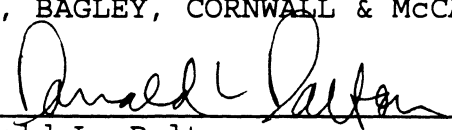
#### CONCLUSION

Plaintiff has waived his objection to Instruction No. 19. His objection is not well taken because notice was not an issue in this case. Since plaintiff prevailed on his negligence claim against defendant, it is clear whatever error was done was harmless. The trial court was well within his discretion when it awarded plaintiff's expert witness fee as cost.

Respectfully submitted this 12<sup>th</sup> day of August, 1994.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing BRIEF OF APPELLE to be mailed, postage prepaid, this 12<sup>th</sup> day of August, 1994, to the following:

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