

1994

John Corey Jensen v. Phillips Petroleum Company, A Delaware Corp. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN COREY JENSEN,	:	BRIEF OF APPELLANT
Plaintiff/Appellant	:	
vs.	:	Case No. 940280
PHILLIPS PETROLEUM COMPANY,	:	Priority No. 15
A DELAWARE CORP.,	:	

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, JUDGE PAGE

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940280

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II. TABLE OF AUTHORITIES

Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975).

Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah, App. 1992).

Frampton v. Wilson, 605 P.2d 771 (Utah 1980).

Koer v. Mayfair Markets, 431 P.2d 566, 569 (1967).

Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1319 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992).

Long v. Smith Food King Store, 531 P.2d 360, 361 (Utah 1973).

Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990).

Silcox v. Skaggs Alpha, Inc., 814 P.2d 623, 624 (Utah App. 1991).

U.C.A. Section 21-5-4

U.C.A. Section 21-5-8

III. STATEMENT OF JURISDICTION

Jurisdiction of this appeal is conferred on this Court by an Order of the Utah Supreme Court dated May 3, 1994, transferring this case to the Utah Court of Appeals in accordance with Utah Code Ann. Section 78-2-2(4) (1991)

IV. STATEMENT OF ISSUES

1. Whether the trial court erred in failing to give an instruction pursuant to Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah App. 1992), stating that a property owner may be held negligent when the property owner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect.

2. Whether the trial court erred in taxing witness fees against plaintiff in excess of the subpoena amount allowed by statute.

V. STANDARD OF REVIEW

The decision to give an instruction is a legal conclusion. It is examined by the appellate court for correctness, giving no deference to the trial court. Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1319 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992).

An award of costs is reviewed for an abuse of discretion. Morgan v. Morgan, 795 P.2d 684 (Ct. App. 1990).

VI. CONSTITUTIONAL PROVISION, STATUTES, ORDINANCES,
RULES AND REGULATIONS

Utah Code Annotated Section 21-5-4. Fees and mileage.

1. Every juror and witness legally required or in good faith requested to attend a trial court of record or not of record or a grand jury is entitled to:

(a) \$17 for each day in attendance; and

U.C.A. Section 21-5-8:

The fees and compensation of witnesses in all civil causes must be paid by the party who causes such witnesses to attend...

The fees of witnesses paid in civil causes may be taxed as costs against the losing party.

VII. STATEMENT OF THE CASE

A. Nature of the Case

1. Jensen brought this action to recover damages when he slipped and fell in a fuel loading dock at the Phillips Refinery on December 26, 1990, at approximately 8:30 a.m.

2. Mr. Jensen's treating physician was deposed by Phillips and the deposition was used at trial. Phillips paid the doctor a \$300.00 deposition fee. His fee was imposed as a taxable cost on Mr. Jensen after jury trial in an amended judgment.

B. Nature of the Proceedings

This case was tried to a jury on February 16, 1994. Jensen

requested the instruction contained in the appendix. After a defense jury verdict, a \$300.00 deposition fee was taxed against plaintiff over his objection.

C. Disposition of the Trial Court

The trial court refused to give the Canfield instruction, stating that Canfield requires an "itinerant kind of act."

Subsequent to the entry of judgment, Phillips asked that certain costs be taxed to plaintiff. The court allowed a \$300.00 deposition fee for the treating physician to be taxed despite the requirements of Utah Code Annotated Section 21-5-4, allowing only \$17.00 for each day in attendance of a witness in a trial court of record. This cost was included in an amended judgment.

D. Statement of Facts

In the light most favorable to the jury verdict:

1. On December 26, 1990, Mr. Jensen slipped on fluids in a fuel loading bay of the Phillips Refinery. (Transcript, herein after, "T", 34-35.)

2. Mr. Jensen fell while loading fuel into his truck. During loading he braced his leg and forced the fuel loading arm onto his truck. (T. 34,46).

3. Plaintiff was aware the area was slick when he got out of his truck. (T. 49).

4. Phillips was aware that fuel spills occurred at the fuel

bays. (T. 89). Phillips provided a water hose to wash down the fuel spills. (Id). Phillips also provided a squeegee to push the water down the drain. (T. 90). However, this squeegee was kept in the office, not by the loading bay. (T. 98). Further, salt and a shovel were provided near the loading bay. Id.

5. At times, Phillips employees did observe ice on the ground at the loading bay. (T. 91). Phillips knew that this area of the refinery needed to be salted. (T. 94). Indeed, this dock where the accident occurred received first priority in snow removal and salting. Id. Phillips was aware that snow, ice, and petroleum products all cause slippery conditions. (T. 96). Phillips did not always wash the fuel down. (T. 97). Further, the water used to wash the fuel down caused additional slipperiness. (T. 97, lines 22 - 24). Additionally, that water can freeze in front of the pumps. (T. 98). Further, having a truck through the loading bay spreading salt is insufficient. (T. 95). Additionally, the area must be re-salted on occasion because of slippery conditions. (T. 95). Phillips had no set time requiring the areas to be rechecked. (T. 95-96).

6. No warning signs existed concerning slippery conditions. (T. 98). Additionally, an imbedded metal grate was considered to help with slippery conditions, but was not present when this accident occurred. (T. 98-99).

FACTS REGARDING THE REQUESTED INSTRUCTION

7. After submission of evidence, plaintiff requested the following Canfield instruction:

Where the landowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect, the landowner may be found negligent.

(R. 223-225, T. 110, instruction attached in Appendix A.

8. The defendant also submitted a Canfield instruction which was declined by the court. (T. 110, R. 46, copy of instruction in Appendix B). The defense instruction proposed the following:

In determining whether a business owner was negligent, the inquiry is whether the owner or its employees knew, or in the exercise of reasonable care should have known, that a dangerous condition existed, and whether sufficient time elapsed such that corrective action could have been taken to remedy the situation. Property owners are not insurers against all forms of actions that may happen to any who come.

Whether the business owner chooses a method of operation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition, an injured party need not prove either actual or constructive knowledge of the specific condition. In such a case, the relevant question is whether the business owner took reasonable precautions to protect customers against the dangerous condition.

9. In rejecting both Canfield instructions the court held:

First of all, let me just say, I don't think that this is a case for the Canfield

instruction as proposed by Mr. Dalton. For one thing, that case presupposes that it's an itinerant kind of act that's there that the owner would have notice of. I don't think this fits within that category. I think in fact that 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.

Now, I don't think instruction 19 from MUJI essentially is different than that of Canfield as far as the plaintiffs are concerned. First of all, the instruction places the burden on the owner to use reasonable care, and I think that's what the standard is. It goes somewhat further in that it says if you actually have notice of the defect, then you have to post notice. So I don't think this is a statement of the present standard of the law in the State of Utah of reasonable care, and that's what this is, it required that the owner of the property keep the premises in a condition reasonably safe for business invitees, and that the personal property of the business invitee be brought to the premises in reasonable pursuit of purposes embraced within the invitation. (T. 110).¹

10. Counsel for the plaintiff agreed to accept the defense Canfield instruction if his was declined. (T. 109).

11. Instead, the court gave the following instruction:

One who extends to a business 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 invitee and the personal property of the

¹. Jensen also objected to the "business invitee" language of the proposed instruction. That objection is not pursued on appeal.

business invitee brought to the premises in the reasonable pursuit of a purpose embraced within the invitation.

The business invitee has a right to assume that the premises to which the business invitee was invited are reasonably safe for the purposes for which the invitation was extended, unless the business invitee observes, or a reasonably prudent person in like position would observe, conditions that caution otherwise.

The responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger associated with the entry, or the work which the business invitee is to do on the premises, that arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of such danger, or if such danger is discoverable by the owner in the exercise of reasonable care, it is the duty of the owner to give reasonable warning of such danger to the business invitee. The owner is not bound to discover defects which reasonable inspection would not disclose. (Emphasis added). Appendix C.

TAXING OF COSTS

12. Subsequent to the jury verdict and judgment, defense sought to tax costs against plaintiff.

13. The defense had taken the deposition of plaintiff's expert, Dr. Paulos. This deposition was read into the record at trial. (See T. 56).

14. Defendant paid Dr. Paulos \$300.00 for his deposition testimony.

15. The court granted the \$300.00 payment over the objection

of plaintiff in an amended judgment. (R. 241) (See Appendix C).

VIII. SUMMARY OF ARGUMENT

1. The court committed reversible error in issuing an instruction requiring plaintiff to show that the landowner knew, or in the exercise of reasonable care, should have known of the defect:

2. Plaintiff is not required to pay the \$300.00 witness fee for Dr. Paulos as it is in excess of the statutory amount.

IX. ARGUMENT

A. JENSEN DID NOT HAVE TO SHOW THAT PHILLIPS HAD ACTUAL NOTICE OF THE SPECIFIC DANGER ON THIS OCCASION.

In general, there are two legal theories in which a landowner may be found negligent and held liable for an invitee's injuries in Utah. The first theory involves situations where there is a temporary or transient hazard on the property which was not created by the landowner, its agents, or employees. Under this theory, in order to find a landowner negligent, it must be shown that the landowner "knew, or in the exercise of reasonable care should have known, of any hazardous condition and had reasonable opportunity to remedy it." See, Canfield, supra, Koer v. Mayfair Markets, 431 P.2d 566, 569 (1967); Accord, Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975); Long v. Smith Food King Store, 531 P.2d 360, 361 (Utah 1973); Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah App. 1991).

In this case, the trial court found that the conditions complained of by Jensen were not such "an itinerant kind of act that's there that the owner would have no notice of." (T.110) The court stated, "I think, in fact, 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 ..." Id.

Mr. Jensen agrees with this portion of the trial court's finding that the first theory of liability is not applicable.

The second theory, which governs this case, involves situations where the landowner, its agents, or employees create or are responsible for the dangerous condition. Under this theory, a plaintiff does not need to establish notice since a landowner is deemed to have notice of the dangerous conditions it creates. See, Canfield, supra.

This theory requires that the landowner, its agents, or employees actually create the dangerous condition or defect that results in an injury to a patron. However, there is no logical distinction between a situation in which the store owner directly creates the defect, and where the landowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect. Canfield.

It is evident from the facts in this case that the method of

operation at Phillips created a situation where it was reasonably foreseeable that the expectable acts of third parties would create a condition or defect:

(a) Phillips knew that the truckers spilled fuel. (T.89).

(b) Phillips provided water to wash the fuel down, creating the slippery condition. (T.89).

(c) The water would freeze, creating a slippery condition. (T.96).

The trial court found that "this is one of those cases where the hazard essentially has been created by the owner, if in fact one has been created . . ." (T. 110)

For the court to then require in its instruction, over the proposed instructions of both counsel, that the plaintiff must show that Phillips knew or should have known of the danger on that particular day, flies in the face of Canfield.

Indeed, defense counsel used this instruction to his advantage in arguing that the Phillips employee, Paul Hatch, had no notice of the problem. (T. 124, lines 6 - 12)

There was nothing for Paul [Hatch] to do in this situation because he didn't know there was a problem. You see, even after Mr. Jensen injured himself, he didn't go to Paul. He didn't report the situation. He didn't come and tell us, 'Look, you have got a problem over there.' He loaded up, called the dispatcher to say he was done, went on his way. We didn't know. How can we correct something if we didn't know about it? It's

his responsibility to come tell us if there is a problem. Somebody else might encounter it.

Defense counsel continued to argue this requirement that Phillips have notice, asserting contributory negligence on the part of plaintiff by stating plaintiff was required to, "Go tell somebody that there is a problem." (T. 126).

The purpose of Canfield was to remove this requirement of knowledge argued by defense counsel; "to relieve the plaintiff of the requirement of proving actual or constructive notice in such instances is to affect a more equatable balance in regard to the burdens of proof." See, Canfield at 227 (Citations omitted).

B. THE TRIAL COURT'S AWARD OF COSTS IN EXCESS OF THOSE ALLOWED FOR BY STATUTE IS AN ABUSE OF DISCRETION.

The court awarded costs for Dr. Paulos' deposition in the amount of \$300.00. The statutory witness fee is \$17.00 plus mileage. (See, Utah Code Annotated, Sections 21-5-4, 21-5-8.)

An award of costs in excess of those expressly allowed by statute for service of subpoena and witness fees is improper. Frampton v. Wilson, 605 P.2d 771 (Utah 1980). Witness fees, travel expenses, and service of process expenses are chargeable only in accordance with the fee schedule set by statute. Morgan v. Morgan, 795 P.2d 684 (Utah Ct. App. 1990).

Mr. Jensen does not contest whether the deposition was taken in good faith or essential for the development and presentation of

the case. He does not contest that the deposition was reasonable and necessary. He does contest the amount awarded for the deposition.

As explained in Frampton, where expert witnesses were paid in excess of the subpoena rate.

There is a distinction to be understood between the legitimate and taxable 'costs' and other 'expenses,' of litigation which may be ever so necessary but are not properly taxable as costs. Consistent with that distinction, the courts hold that expert witnesses cannot be awarded extra compensation unless the statute expressly provides. Frampton, at 774.

The Supreme Court has expressly forbidden taxing expert fees in excess of that allowed by statute.

This court followed Frampton in 1990, in holding that witness fees, travel expenses, and service of process expenses are chargeable only in accordance with the fee schedule set by statute. See, Morgan v. Morgan, supra.

Further, it is not sufficient that the party be required to pay costs to present its case. The "Utah Supreme Court has defined costs to mean those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment. Morgan, citing Frampton, at 774 (emphasis added).

Thus, it is a two part test requiring statutory authorization to be taxed as costs. Not only must the fees be required, the

statute must authorize them to be included in the judgment. The statute does not authorize Dr. Paulo's expert fee to be included in the judgment as held in Frampton.


CONCLUSION

It was foreseeable that the acts of third persons created a hazardous condition. The requirement that notice on the part of Phillips be shown by plaintiff, as stated in the court's instruction, is error.

The court also erred when it allowed a witness fee in excess of that allowed by statute.

For the foregoing reasons, plaintiff/appellant John Jensen respectfully requests that this court reverse the lower court's decision granting the cost of \$300.00 and reverse the jury verdict due to the court's erroneous instruction.

DATED this 30 day of June, 1994.



GLEN A. COOK
of and for
COOK & LAWRENCE, L.L.C.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing BRIEF OF APPELLANT to the following on this ____/____ day of June¹⁴, 1994:

Donald Dalton
VanCott, Bagley, Cornwall & McCarthy
50 South Main #1600
Salt Lake City, Utah 84144



XI. APPENDIX

- A. Plaintiff's Requested Instruction
- B. Defendant's Requested Instruction
- C. Court's Instruction
- D. Amended Judgment

INSTRUCTION NO. ____

Where the landowner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect, the land owner may be found negligent.

Canfield v. Albertsons, 841 P.2d 1224 (Ct. App. 1992)

Instruction No. __

In determining whether a business owner was negligent, the inquiry is whether the owner or its employees knew, or in the exercise of reasonable care should have known, that a dangerous condition existed, and whether sufficient time elapsed such that corrective action could have been taken to remedy the situation. Property owners are not insurers against all forms of accidents that may happen to any who come.

Where the business owner chooses a method of operation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition, an injured party need not prove either actual or constructive knowledge of the specific condition. In such a case, the relevant question is whether the business owner took reasonable precautions to protect customers against the dangerous condition.

INSTRUCTION NO. 19

One who extends to a business 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 invitee and the personal property of the business invitee brought to the premises in the reasonable pursuit of a purpose embraced within the invitation.

The business invitee has a right to assume that the premises to which the business invitee was invited are reasonably safe for the purposes for which the invitation was extended, unless the business invitee observes, or a reasonably prudent person in like position would observe, conditions that caution otherwise.

The responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger associated with the entry, or the work which the business invitee is to do on the premises, that arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of such danger, or if such danger is discoverable by the owner in the exercise of reasonable care, it is the duty of the owner to give reasonable warning of such danger to the business invitee. The owner is not bound to discover defects which reasonable inspection would not disclose.

BY DEPUTY CLERK

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

JOHN COREY JENSEN,)	
)	
Plaintiff,)	AMENDED JUDGMENT ON SPECIAL
)	VERDICT OF JURY (TAXING
)	COSTS)
vs.)	
)	
PHILLIPS PETROLEUM COMPANY,)	Civil No. 920700394
)	
Defendant.)	Honorable Rodney S. Page
)	
)	

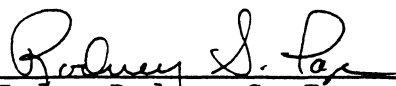
This action was tried before a jury in the above-entitled Court, the Honorable Rodney S. Page presiding, on February 16, 1994. The jury entered its special verdict finding that plaintiff's negligence exceeded that of defendant and awarded him no damages. Based on the jury's special verdict, the Court hereby orders that judgment be and is hereby entered in favor of defendant and against plaintiff.

Within the time required by Rule 54(d)(2), U. R. C. P., defendant filed its verified memorandum of costs to which plaintiff objected. For the reasons stated in a ruling on defendant's motion to tax costs, the Court taxes costs against plaintiff in the amount of \$704.00.

JUDGMENT ENTERED

00242530

DATED this 25th day of March, 1994.




Judge Rodney S. Page
Second Judicial District Court

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing AMENDED JUDGMENT ON SPECIAL VERDICT OF JURY (TAXING COSTS) to be mailed, postage prepaid, this 22nd day of March, 1994, to the following:

Glen A. Cook
Morris & Morris
4001 South 700 East #240
Salt Lake City, Utah 84107



STATE OF UTAH) ss.
COUNTY OF DAVIS)
I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND CORRECT COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE
THIS 25th DAY OF April 19 94

PAULA CARR, CLERK

BY: 

00242531

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

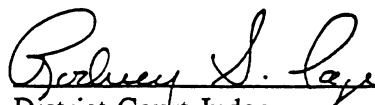
JOHN COREY JENSEN, plaintiff, vs. PHILLIPS PETROLEUM COMPANY, defendant.	RULING ON DEFENDANT'S MOTION TO TAX COSTS Case No. 9207 00394
--	---

Comes now the Court and having reviewed defendant's motion to tax costs, the memorandum in support thereof, plaintiff's memorandum submitted in opposition thereto and being fully advised in the premises, the Court hereby rules as follows:

The plaintiff does not object to the costs of plaintiff's deposition as being a reasonably necessary expense in defense of the case in question. The Court finds that it is was reasonable and necessary and therefore grants the same. As to the costs of the deposition of Dr. Lonnie Paulos, the Court finds that Dr. Paulos was plaintiff's expert and that his deposition was reasonably necessary for the development of defendant's case. The Court further finds that each of the parties relied upon the deposition of Dr. Paulos and allowed it to be used in place of the personal appearance of Dr. Paulos. The Court therefore concludes that the cost of his deposition together with the fee paid him to testify are both reasonable and therefore allows the same. The Court denies the \$100.00 appearance fee as there appears no adequate explanation for the same and it appears unreasonable.

Defendant's counsel is to prepare an amended judgment which includes these costs and submit the same to plaintiff's counsel at least five days prior to the time it is submitted to the Court for signature.

Dated this 21st day of March, 1994.

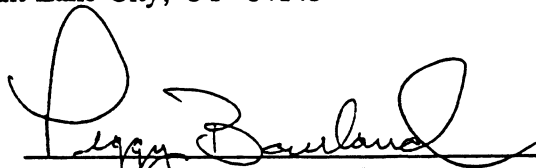

District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ruling, on the 21st day of March, 1994, postage prepaid to the following:

Glen A. Cook
4001 South 700 East, #240
Salt Lake City, UT 84107

Donald L. Dalton
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, UT 84145


Peggy Bauland, Deputy Clerk