

1994

Melvin Laws v. Blanding City : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MELVIN LAWS,

:

Plaintiff/Appellant,

:

vs.

:

Case No. 940415-CA

BLANDING CITY,

:

Defendant/Appellee.

:

Argument Priority: 15

BRIEF OF APPELLANT

APPEAL FROM JURY VERDICT FROM THE SEVENTH JUDICIAL
DISTRICT COURT OF SAN JUAN COUNTY, STATE OF
UTAH, THE HONORABLE LYLE R. ANDERSON

UTAH COURT OF APPEALS
BRIEF

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COURT OF APPEALS

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JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Annotated §78-2-2(3)(j) (as amended 1953).

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated §78-2a-3 (as amended 1953).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

- A. Did the trial court err in excluding the testimony of Plaintiff's expert witness?

This is a case management decision, and is therefore under an abuse of discretion standard. Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992). Dugan v. Jones, 615 P.2d 1239 (Utah 1980).

- B. Did the trial court correctly state the law concerning negligence in instructing the jury?

Challenges to jury instructions are reviewed on a "correctness" standard. Steffensen v. Smith's Management Corp., 862 P.2d 1342 (1993).

STATUTORY PROVISIONS AND RULES

The determinative statutes and rules whose interpretation is pertinent to this appeal are as follows:

Utah Rules of Civil Procedure 30 (1994). See appendix 1 attached.

Utah Rules of Civil Procedure 16 (1994). See appendix 2 attached.

Utah Code Annotated §78-27-38 (1994). See appendix 3 attached.

STATEMENT OF THE CASE

This is a civil case, which was commenced in March of 1991 to recover damages sustained by Plaintiff Melvin Laws, who was injured in a fall from a dumping platform at the Blanding City Dump. Plaintiff alleges that the injuries were caused by the negligence of Blanding City in the construction and maintenance of the dump, and the lack of safety equipment. (Rec. at 1-7). A jury demand was filed in November, 1994. (R. at 10).

In January of 1994, one month prior to trial, Defendant filed a motion to strike Plaintiff's expert witness. (R. at 364-65). The motion was granted. (R. at 413-16). Plaintiff filed a motion for a new trial which was denied. (R. at 453-54).

The case was tried to a jury in February 1994. Exception was taken by Plaintiff with the trial court's list of jury instructions. (Trial Transcript[Tr.] at 230-31). The trial court overruled Plaintiff's objection. (Tr. at 231). The jury returned a verdict in favor of Defendant, finding no negligence on the part of Defendant. (Tr. at 269-73).

STATEMENT OF THE FACTS

1. Plaintiff Melvin Laws lives at 1050 N. 850 W. in Blanding, Utah. (Tr. at 11).

2. On April 28, 1990, Plaintiff went to the Blanding City Dump to dispose of garbage. (Tr. at 14-15).

3. While at the dump, Plaintiff fell down a 30-40 foot precipice into the dump. (Tr. at 21).

4. On the day of the accident, strong winds whipped through the canyon, and smoke from several small fires in the dump clouded the sky. (Tr. at 132-33).

5. The dump had recently been bulldozed by the Defendant, creating a 30-40 foot precipice. (Tr. at 141-42).

6. A city ordinance requires city residents to subscribe to a garbage retrieval service. (Tr. at 151-152).

7. The city of Blanding does not provide garbage retrieval for citizens living within the county but outside city limits. (Tr. at 151-152).

8. A special arrangement must be made with a private contractor for a resident outside city limits to receive garbage retrieval service. (Tr. at 152).

9. Without a special arrangement, the only location provided for citizens, who live outside city limits, to dispose of garbage is the dump where the injury occurred. (Tr. at 151-152).

10. Blanding citizens are not allowed to dispose of garbage at any other location. (Tr. at 151-152).

11. Blanding citizens are not allowed to leave the garbage along the edge of the precipice, but are required to throw the garbage over the edge. (Tr. at 137).

12. A wall, 10-18" in height, separates a person and the edge of the cliff over which the garbage is thrown. (Tr. at 21, 151).

13. Before the date of Plaintiff's injury, Defendant was aware that others have been injured at the dump. (Tr. at 139).

14. Plaintiff filed a complaint against Blanding City in 1991.

15. On June 14, 1993, the trial court entered a scheduling order establishing a deadline for the designation of expert witnesses on August 15, 1993, as well as a deadline for the filing of discovery of October 3, 1993. (R. at 288-89).

16. This Court subsequently modified its scheduling order by extending the witness designation date to September 30, 1993, and the discovery cutoff to December 10, 1993. (R. at 358-59).

17. On or about September 30, 1993, Plaintiff filed his designation of witnesses in compliance with the court's scheduling order. (R. at 302-04).

18. Witness #14 on Plaintiff's list of witnesses designates "Eckoff, Proctor & Watson", an engineering firm in Salt Lake County, Utah. (R. at 302-04).

19. Due to a clerical error, the correct name of Eckoff, Proctor & Watson is Eckhoff, Watson & Preator.

20. Defendant was informed of the name of the individual who would testify for Eckhoff, Watson & Preator during the last week of November. (R. at 465).

21. In a letter dated December 6, 1993, Plaintiff affirmed Mr. Thorpe's cooperation. (R. at 413-14).

22. Plaintiff told Defendant that Mr. Thorpe still had to review materials and therefore had not yet formed an opinion. (R. at 414).

23. Plaintiff informed Defendant that he could depose the expert at any time, regardless of the discovery deadline. (R. at 465).

24. Defendant finally filed a motion in limine with the court on January 7, 1994, requesting exclusion of the witness. (R. at 364).

25. The trial court granted the motion excluding the witness on February 2, 1994. (R. at 413-16).

26. The trial court's grounds for excluding the witness were that the Plaintiff did not properly designate his expert witness until he provide the name of the individual. (R. at 414).

27. Plaintiff's expert testimony would have established the safety precautions that should have been instituted at the dump and would have evaluated the design, construction, and maintenance of the dump under the circumstances of this case. (R. at 361).

28. Prior to trial, both Defendant and Plaintiff filed with the trial court requested jury instructions. (R. at 423-24, 432-52).

29. The court determined the jury instructions to be used for trial. (R. at 504-32).

30. Plaintiff objected to instruction #17 prior to submitting them to the jury on the grounds that they were not indicative of the law. (Tr. at 230).

31. Plaintiff proposed that instructions #17-19 from Plaintiff's requested jury instructions be used. (Tr. at 230).

32. The court overruled Plaintiff's objection. (Tr. at 231).

33. Instruction #17 as given to the jury, confused the jury as to apportioning fault. (Tr. at 269-70).

34. The jury wanted to apportion fault to both parties, however the instruction did not allow it. (Tr. at 269-73).

35. The jury found that Defendant was 0% negligent. (Tr. at 273).

SUMMARY OF THE ARGUMENT

ISSUE 1

A scheduling order required the parties to exchange witness lists on September 30, 1993. (R. at 358). The trial court sanctioned Plaintiff on the grounds that he failed to comply with this order. (R. at 413). The trial court excluded Plaintiff's expert witness. (R. at 413-15). Contrary to the court's ruling, Plaintiff's designation of witness #14 was not in violation of the scheduling order of the court, nor did it prejudice the Defendant in the preparation of his case.

Plaintiff designated Eckhoff, Watson & Preator as witness #14 on Plaintiff's list of witnesses. (R. at 302). This designation complied with the trial court's order. (R. at 358-59).

Rule 30(a)(6) of the Utah Rules of Civil Procedure allows a party to notice the deposition of a corporation without the name of the specific individual. When the name is unknown, it is sufficient to provide a brief description of the matter on which deposition is sought. The Corporation or organization must designate a person to testify at deposition. The selected individual must formulate an opinion as of the date of the deposition. If an expert is not noticed for deposition, he is unconstrained from forming or changing his opinion up to the time of trial.

Eckhoff, Watson & Preator had not yet designated its expert as of September 30, 1993. (R. at 465). Still, it should be remembered that the Defendant could have deposed the witness at any time after September 30, 1993, as provided in Rule 30 of the Utah Rules of Civil Procedure. Defendant chose not to. Instead, Defendant waited until January 1994, when he filed a Motion in Limine to exclude the witness.

The trial court did not expressly require that the name of the individual be designated. The order only required a list of witnesses, obviously, to enable each party to depose the witnesses in preparation for trial. Plaintiff did not violate the order.

Plaintiff's designation of witness #14 did not prejudice Defendant in the preparation of its case. Defendant could have noticed the firm's deposition at any time. (R. at 465). Plaintiff informed Defendant on November 23, 1993, that Gregory Thorpe would be the representative of the firm at the time of trial. (R. at 465). This was not a designation of a new witness. Plaintiff merely identified the individual who would speak on behalf of Eckhoff, Watson & Preator. Defendant was always aware that the expert witness would be provided by Eckhoff, Watson & Preator. Defendant therefore, was not prevented from preparing its case.

Witness exclusion should only be used to sanction a party for willful noncompliance with a court order. Other methods are available when witness exclusion is not warranted.

In the case at bar, Plaintiff did not willfully disregard the court's scheduling order. Plaintiff simply did not understand the court's unexpressed expectations. Inasmuch as the Plaintiff did not violate any court order compelling him to provide the name of the expert, and inasmuch as the Defendant could have discovered the name at any time by noticing the deposition of Eckhoff, Watson & Preator, it was an abuse of discretion for the court to exclude Plaintiff's expert testimony.

Assuming, arguendo, that Plaintiff did violate the order, the court could have issued other sanctions. A motion to compel, on the court's own initiative, or on motion by Defendant, would have sufficiently notified Plaintiff of his error. Plaintiff

could then have complied with the court's expectations before it was excessively late in the discovery process. An order to exclude the witness, would not have been necessary.

Assuming, arguendo, that Plaintiff violated the scheduling order, Defendant failed to timely object. Following Defendant's receipt of Plaintiff's witness list, Defendant should have moved to compel the Plaintiff. Defendant did not. Instead, Defendant told Plaintiff to apprise Defendant as soon as possible of the designated representative of the firm. (R. at 413). Plaintiff advised Defendant of Mr. Thorpe at the end of November. (R. at 465). Defendant still did not object. Instead Defendant waited until January to file a motion to exclude the witness. Assuming, arguendo, Defendant had a right to object, Defendant was untimely and therefore should be held to have waived its right.

Plaintiff's case was sufficiently prejudiced by the court's exclusion of his expert witness. The expert testimony went directly to the issues on which the jury would base its decision. The expert would testify regarding design, construction, maintenance, and safety measures. (R. at 361). These are all important factors in determining whether Defendant had a duty and breached it. The court's exclusion, therefore, deprived Plaintiff of his right to present his entire case to a jury.

ISSUE 2

Jury instructions must instruct the jury as to the law of the jurisdiction and be appropriate given the facts of the case.

Instruction #17, (See Appendix 4) in the case at bar, failed to correctly instruct the jury as to the appropriate law of the jurisdiction given the facts of the case.

Instruction #17 reads as follows:

the defendant is negligent if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

(Tr. at 238-39).

The instruction is based partly on the Restatement Second of Torts, §343 as it was applied in English v. Kienke, 848 P.2d 153 (Utah 1993). The direct application of the undisputed facts, as they appeared in English, to Section 343, as it is written, was appropriate only because the case was decided on summary judgment. A direct application, as done in English, is inappropriate as an instruction to a jury which has the duty to weigh the evidence and apply principles of comparative negligence to the facts.

Instruction #17 substituted principles of comparative negligence with principles of contributory negligence. Instruction #17 calls for the harsh result of total victory or complete defeat. Such an outcome is characteristic of a contributory negligence system, which this state has abolished when it adopted comparative negligence.

Instruction #17 applies the open and obvious danger rule, which this state has also abolished. The rule requires the jury

to reach an all or nothing conclusion, as in a contributory negligence system. First, if the danger was open and obvious and Plaintiff unreasonably encountered it, Defendant is not at fault. Second, if the danger was not open and obvious and Plaintiff encountered it, Defendant is entirely at fault.

Comment (a) of the Reporter's Notes to Section 343 of the Restatement Second of Torts states:

this section should be read together with §343A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility.

Assuming, arguendo, that instruction #17 was correct, the court should have also given an instruction similar to Section 343A which would clarify the intent of the open and obvious nature of the dump. Section 343A also clarifies the duty which a landowner, that is a government agency, has to an invitee.

The misleading effect of Instruction #17 is clearly shown in the record. To the court, the jury expressed its desire to apportion fault to both parties and award damages to plaintiff but was confused at how to do that given the instructions it had. The judge instructed them to look to the instructions and special verdict form for an answer. However, the instructions and special verdict form did not allow the jury to act as they desired.

Any case dealing with injury to visitors upon land must be based upon principles of premises liability. In the state of Utah, the injured visitor is classified as either an Invitee, Licensee, or Trespasser. In the case at bar, the Plaintiff is

properly classified as an invitee. The duty that a landowner owes to an invitee is the duty to discover unreasonably dangerous conditions and remedy them or warn the visitor of them. This applies to landowners who have reason to believe that the invitee will proceed to encounter a danger despite the danger's obvious nature. Instruction #17 did not properly instruct the jury regarding the foregoing principles.

The instruction regarding Defendant's duty should have contained two elements. First, whether the defendant knew, or in the exercise of ordinary care should have known, that a dangerous condition existed. Second, whether sufficient time elapsed thereafter that action could have been taken to correct the situation. A separate instruction should have addressed plaintiff's contributory negligence.

The instruction given to a jury in a premises liability case should allow the jury to properly apply principles of comparative negligence. The Plaintiff has a right to have his fault compared to the fault attributable to Defendant. Plaintiff's requested instructions properly allowed the jury to perform its responsibility.

The use of instruction #17, in the case at bar, substantially prejudiced the Plaintiff's case by taking from the Plaintiff the right to have his fault compared to the fault attributable to the Defendant. The instruction caused the jury to revert back to principles of contributory negligence finding that if the Plaintiff was also negligent, recovery is barred.

The instruction sufficiently misled the jury as to the appropriate law applicable to premises liability. Had the proper instruction been given, a fair comparison of fault would have been made to make a proper determination of liability. Plaintiff would have recovered.

ARGUMENT

ISSUE 1

I. THE TRIAL COURT'S EXCLUSION OF PLAINTIFF'S EXPERT WITNESS WAS AN ABUSE OF DISCRETION THAT PREJUDICED THE PLAINTIFF'S CASE.

The trial court abused its discretion when it excluded Plaintiff's expert witness from testifying at trial. The court's exclusion prejudiced Plaintiff's case. The expert testimony would have went directly to the issues on which the jury would base its decision.

A. PLAINTIFF'S DESIGNATION OF ECKOF, PROCTOR & WATSON AS ITS EXPERT WITNESS IS A PROPER DESIGNATION IN ACCORDANCE WITH THE TRIAL COURT'S SCHEDULING ORDER.

In the case at bar, a scheduling order required Plaintiff to provide a witness list by September 30, 1993. (R. at 358). Plaintiff complied with the court's order. (R. at 302-04).

Witness #14 on Plaintiff's Witness list was "Eckof, Proctor & Watson," an engineering firm in Salt Lake City. (R. at 302). This engineering firm would provide Plaintiff's expert witness at trial. Due to a clerical error the correct name of the

engineering firm is Eckhoff, Watson & Preator. Plaintiff made the error known to Defendant as soon as it was discovered.

The court excluded Plaintiff's expert witness. The grounds for excluding the witness was that "Plaintiff did not properly designate his expert witness until he provided the name of an individual." (R. at 414). The court's reasoning for this was that: "it is unreasonable to expect a party to examine every member of a firm in order to make sure that the eventual witness has been deposed." (R. at 415).

Rule 30 of the Utah Rules of Civil Procedure provides that "after the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." The rule requires that:

a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

U.R.C.P. 30(b)(1) (1994).

In a notice of deposition, when the name of the witness is unknown, it is sufficient to give a description that will identify the witness or the particular class or group to which the witness would belong.

When dealing with the deposition of an organization or corporation, it is sufficient to simply name the organization and describe with reasonable particularity the matter on which

examination is requested. Subsection (6) of Rule 30(a) of the Utah Rules of Civil Procedure states that:

a party may in his notice and subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

To notice the deposition of an organization it is therefore, not necessary that the name of the individual who will represent the organization at the time of deposition be known. When the organization is a nonparty, a subpoena shall advise it of its duty to make a designation of the individual who will testify on its behalf.

The extension of this rule then, as it applies to the designation of witnesses who are corporations or organizations, is that a good faith, proper designation of a prospective witness to opposing counsel must provide the name of the corporation or, if known, the name of the person assigned to represent the firm. Obviously, if the person to represent the firm is not yet designated, it is the firm's responsibility to appoint an individual prior to the date of deposition. The fact that the individual selected to testify is not designated does not relieve Defendant from the obligation of noticing the deposition of Eckhoff, Watson & Preator.

In the case at bar, Plaintiff properly designated Witness #14 as Eckhoff, Watson & Preator. (R. at 302). The individual who would testify for the firm was not yet designated, and therefore not named specifically. The defendant was not prejudiced by the lack of the specific name of the individual because Rule 30 permits the Defendant to:

name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested.

The Defendant was not precluded from noticing Eckhoff, Watson & Preator for deposition at any time after September 30, 1993. Defendant chose not to. Plaintiff should not be sanctioned for Defendant's lack of diligence.

B. AN EXPERT WITNESS MUST BE PREPARED WITH AN OPINION AS OF THE DATE OF DEPOSITION.

The trial court stated, in its Ruling on Motion to Strike Plaintiff's Designation of Expert Witness, that:

the expert must, at the very least, be prepared with an opinion within a reasonable time before discovery ends.

(R. at 415).

Clearly, in coming to this conclusion, the court assumes that the witness will be deposed by opposing counsel. However, it is not always the case that an opinion be formed before discovery ends. If the opposing party decides not to depose the witness, the expert is not prevented from forming or changing his opinion up to the time of his testimony at trial. The correct assumption would be that the expert witness must form an opinion prior to

the recording of his expert testimony, whether that means by deposition or at trial, for the witness will be held to his opinion as of that date.

In the case at bar, clearly it would have been in the Defendant's best interest to depose the expert immediately. Rule 30(a)(6) of the Utah Rules of Civil Procedure provides the correct procedure for doing so when dealing with an organization such as Eckhoff, Watson & Preator. Defendant could have limited the opinion of the expert to that at the time of deposition. Defendant chose not to.

Plaintiff should not be penalized for Defendants failure to act. If the delay by Defendant's counsel was to allow Plaintiff sufficient time to prepare, Defendant's counsel should have taken the deposition of the expert when the expert was prepared. If the delay by Defendant's counsel was to lead Plaintiff along until discovery cutoff and then move to exclude the witness, Defendant's counsel acted in bad faith and should not be rewarded for it. Neither reason warrants the court's sanction, which it issued against Plaintiff.

C. WITNESS EXCLUSION SHOULD ONLY BE UTILIZED AS A SANCTION FOR A WILLFUL NONCOMPLIANCE OF A COURT ORDER.

In Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992), the court quoted Nickey v. Brown, 454 N.E.2d 177 (Ohio App. 1982) stating that:

[witness] exclusion is a severe sanction which should be invoked only to enforce willful noncompliance.

In the case at bar, Plaintiff did not willfully disobey the court's scheduling order.

In Whitehead v. American Motors Sales Corp., 801 P.2d 920, (Utah 1990), the plaintiff objected to Defendant's use of certain films on the grounds that the films were withheld by Defendants in violation of the court's discovery order. The trial court sustained the objection. The Supreme Court held, however, that it was improper to sanction the defendant for not producing the test films during discovery because they did not fall within the express terms of the order.

The significance of the foregoing is that a sanction should only be issued when a party willfully disregards the express provisions of an order. In Berrett, the trial court held a hearing in which it "had an unexpressed expectation that the pre-trial order would contain the final witness list". Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992). When plaintiff failed to comply, the court sanctioned him by excluding an expert witness. However, this Court reversed the decision holding that:

absent an order creating a judicially imposed deadline, a trial court may not sanction a party by excluding its witnesses under rule 37(b)(2).

Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992). See also Inner City Wrecking Co. v. Bilsky, 367 N.E.2d 1214, 1218 (Ohio App. 1983).

In the case at bar, Plaintiff complied with the Court's scheduling order when it listed Eckhoff, Watson & Preator as

Witness #14. The scheduling order required simply that a final list of witnesses be provided. The list was to enable each party to begin to depose the witnesses. It wasn't until the Court's memorandum Ruling on the Motion to Strike Plaintiff's Designation of Expert Witness, that the court stated that: "Plaintiff did not properly designate his expert witness until he provided the name of an individual." (R. at 414).

Just as the court in Berrett had an unexpressed expectation as to what it meant in its hearing, the trial court, in the case at bar, had an unexpressed interpretation of what it meant when it ordered that witness lists be exchanged by September 30, 1993. Plaintiff did not attempt to be devious, nor did Plaintiff attempt to act in bad faith. Plaintiff complied with the express demands of the order in the manner he understood to be proper.

In Dugan v. Jones, 615 P.2d 1239 (1980), the trial court ordered the parties to exchange witness lists at least 15 days before trial. The order was never written down. The trial court subsequently excluded defendants' experts from testifying for violation of the order. The Utah Supreme Court reversed the decision. It held that even though there is no statutory requirement for reducing orders to writing it should be encouraged. "Written pretrial orders reduce the chances for confusion or memory lapses as to what actually was the agreement at the conference." Dugan v. Jones, 615 P.2d 1239, (1980).

Similar to Dugan, in the case at bar, the court's failure to expressly require what it expected caused confusion and

ultimately prejudiced the Plaintiff's case. It was improper to sanction the Plaintiff for not complying with the court's unexpressed expectations.

Had Plaintiff been in violation of the court's unexpressed expectation as to the scheduling order for the designation of witnesses, Defendant should have filed a motion to compel the Plaintiff to disclose the name of the expert witness in the proper form. This would have expressly notified Plaintiff that the court required Plaintiff to identify the names of each witness. If Plaintiff failed to comply, he would be willfully disregarding a court order. The court could then, properly sanction the Plaintiff by excluding his expert witness.

D. WITNESS EXCLUSION SHOULD NOT BE UTILIZED WHERE OTHER OPTIONS ARE AVAILABLE TO THE COURT.

The court in Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992), quoting Sexton v. Sugar Creek Packing Co., 311 N.E.2d 535, 538 (Ohio 1973), stated:

the necessary prerequisite to the imposition of a sanction is an order that 'brings the offender squarely within possible contempt of court.'
Absent an order a party may believe that the court has no objection to the information as supplied.

In the case at bar, Plaintiff did not willfully disregard the court's order. In fact, Plaintiff believed that its witness list was in accordance with the court's expectations. The lack of a motion to compel by Defendant confirmed Plaintiff's belief.

The court, on its own initiative, could have issued an order compelling Plaintiff to properly comply with the order long before an exclusion order would be necessary. Rule 16(d) of the Utah Rules of Civil Procedure provides:

If a party or a party's attorney fails to obey a scheduling or pretrial order...the court, upon motion or its own initiative, may make such orders with regard thereto as are just.

U.R.C.P. 16(d) (1994).

Justice demands that if Plaintiff had failed to comply with the scheduling order, the court should have issued an order to compel the Plaintiff to do so. It was an abuse of the court's discretion to forego a motion to compel and proceed directly to an exclusion of the witness.

In Dugan v. Jones the Supreme Court held that:

the court could have used means other than exclusion to sanction defendant's for their noncompliance with the order, including imposing costs incurred by the other parties in obtaining experts.

Dugan v. Jones, 615 P.2d 1239 (1980).

In the case at bar, rather than excluding Plaintiff's expert in February, the court, on its own initiative, could have issued an order compelling Plaintiff to properly comply with the witness designation soon after its filing in September. The court could also have imposed costs on Plaintiff which Defendant would incur in having to expedite the deposition taking and transcribing. The court's sanction was excessive for the error allegedly committed.

The court in Inner City Wrecking Co. v. Bilsky, 367 N.E.2d 1214, 1218 (Ohio 1983) held:

without an order compelling compliance with court rules, the sanction imposed by the trial court was beyond its authority.

In the case at bar, a motion to compel should have been made by Defendant in a timely manner for two reasons. First, a motion to compel would have properly notified Plaintiff of his error and provided an opportunity to correct it. Second, a motion would have prevented the needless expense of preparing the expert witness for trial. Instead, Defendant and the court allowed Plaintiff to proceed on the presumption that he was not in violation of the order.

E. PLAINTIFF'S CASE WAS PREJUDICED BY THE EXCLUSION OF PLAINTIFF'S EXPERT WITNESS.

Courts have broad discretion in managing cases that are before them. However, when a court's management amounts to an abuse of discretion the court has exceeded its authority.

In Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992), quoting Plonkey v. Superior, 475 P.2d 492, 494 (Ariz. 1970), this Court held that:

Excluding a witness from testifying is, however, "extreme in nature and...should be employed only with caution and restraint."

It is not sufficient for reversal that the court merely made an error in its case management decision.

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 a reasonable likelihood to believe that in its absence there would have been a result more favorable to him?
Rowley v. Graven Brothers & Company, Inc., 491 P.2d 1209, 26 Utah 2d 448 (1971).

This is a difficult evaluation. In Berrett, this court determined that:

If we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.

Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992).

In the case at bar, the court's exclusion of Plaintiff's expert witness sufficiently prejudiced Plaintiff's case. Plaintiff's expert testimony went directly to the issues that the jury had to decide. The expert testimony would have established the safety precautions that should have been instituted at the dump under the circumstances of this case. (R. at 361). The expert testimony would have gone to the design, construction, and maintenance of the dump. (R. at 361). The testimony would have gone to the duty of Defendant to maintain the dump in a reasonably safe condition. (R. at 361).

A significant indication of the importance of Plaintiff's expert testimony is demonstrated by the actions of Defendant's counsel. The very fact that counsel for the Defendant moved to exclude the testimony at trial indicates that he thought the matter was of sufficient consequence.

The trial court held that circumstances at a dump are known to everyone and therefore an expert witness is not essential. (R. at 415). Plaintiff disagrees. An expert is necessary to establish duty. Plaintiff's expert was necessary to educate the jury as to the proper actions that should have been taken by the Defendant with respect to the Plaintiff. To exclude such testimony, sufficiently infringes on the rights of the Plaintiff to present his case in full to a jury of his peers. The court abused its discretion given it under the rules, and prejudiced the Plaintiff's case in the process.

F. DEFENDANT'S MOTION IN LIMINE WAS UNTIMELY.

Assuming, arguendo, that Plaintiff's designation of Witness #14 was insufficient, Defendant should have objected within a reasonable time after the service of Plaintiff's Witness List.

In In re Disciplinary Action of George McCune, 717 P.2d 701 (Utah 1986), the court held:

Counsel waived his right to object to the failure to add three days to the five-day notice period when notice of his two disciplinary hearings was mailed to him, since he did not object at the time of either hearing to the notice he received, and he showed no prejudice resulting from the shortened time period.

Although this case dealt with Rule 6 of the Utah Rules of Civil Procedure regarding service, the principles are applicable to the case at bar. Defendant's objection must be timely and must show prejudice to Defendant's case.

Upon receipt of Plaintiff's Witness List, Defendant was notified of Plaintiff's expert witness designation. Defendant

should have objected, within a reasonable time, to Plaintiff's designation of Eckhoff, Watson & Preator, as witness #14, if it was insufficient. Defendant, however, did not.

Plaintiff informed Defendant that the name of the expert was not known as of September 30, 1993, but would be designated soon by Eckhoff, Watson & Preator. Defendant did not object. Instead, Defendant told Plaintiff to contact him when Plaintiff was apprised of the expert's name.

Defendant was informed, by phone, of the expert's name on November 23, 1993, at least two weeks before discovery cutoff. (R. at 465). In a letter dated December 6, 1993, Plaintiff affirmed Mr. Thorpe's cooperation. (R. at 413-14). Defendant did not object.

Defendant, waited until January 7, 1994, when he finally objected to Plaintiff's expert witness by moving to exclude the witness. (R. at 364). Not only was Defendant's objection improper because it was untimely, but it also prejudiced Plaintiff's case. Due to Defendant's misrepresentations, Plaintiff continued to prepare his case and incur expenses for the preparation of his expert witness. Assuming, arguendo, that Defendant had a valid objection, due to his failure to timely object, it should be held that he waived his right to do so.

G. DEFENDANT'S CASE WAS NOT PREJUDICED BY THE DESIGNATION OF MR. THORPE AS AN EXPERT WITNESS.

In the Ruling on Motion to Strike Plaintiff's Designation of Expert Witness, the court found that the Defendant was prejudiced

because of the late designation of Plaintiff's expert witness.
(R. at 413).

Prior to the scheduling order, Plaintiff and Defendant were in frequent contact as to Plaintiff's difficulty in finding an expert that would testify against a city in Utah. (R. at 465). Plaintiff located Eckhoff, Watson & Preator, an engineering firm in Salt Lake, which was willing to provide an expert to testify at trial. Plaintiff properly listed the engineering firm in his Witness list to Defendant on September 30, 1993. (R. at 302-04).

On September 30, 1993, the only fact that Plaintiff knew was that Eckhoff, Watson & Preator would provide an expert. The firm had not yet selected the expert who would testify. Defendant, recognizing Plaintiff's position, expressed a willingness to cooperate. Defendant, in a letter dated November 24, 1993, requested that as soon as Plaintiff discovers who would testify for the firm, that he inform Defendant. (R. at 413). The fact that the name was not disclosed does not relieve Defendant of the duty to notice the deposition of the witness. Rule 30 of the Utah Rules of Civil Procedure outlines the manner for doing so and that it is the responsibility of the party seeking the deposition to notice the deposition.

Defendant was informed by phone, in late November, that Gregory Thorpe was selected to represent the engineering firm. (R. at 465). Plaintiff indicated to Defendant that Mr. Thorpe still had to review some materials and therefore had not yet

formed an opinion. (R. at 414). However, Defendant could depose him at any time. (R at 465).

Defendant never expressed a complaint with delaying the deposition of the expert. It appeared that his only worry was to not lose the opportunity to depose the witness after the discovery deadline. Plaintiff made it clear that he could depose the expert at any time. (R. at 465).

It was not a basis for surprise that Plaintiff did not inform Defendant until November of who would represent Eckhoff, Watson & Preator at trial. Defendant knew all along that an expert from Eckhoff, Watson & Preator would testify. Therefore, Defendant could not claim prejudice. Contrary to Defendant's claim, this was not a designation of a new witness. Plaintiff simply advised Defendant that Gregory Thorpe would represent Eckhoff, Watson & Preator, who was already designated as a witness.

Defendant's case was not prejudiced by the fact that the name of the expert was not given. Instead, this benefitted Defendant. Had Defendant noticed Eckhoff, Watson & Preator for deposition, the firm would have had to select a representative in time for the deposition. U.R.C.P. 30(a)(6). Furthermore, the expert would have been held, at the time of trial, to his opinion as of the date of the deposition. Had Plaintiff failed to provide the expert with the necessary materials to form an opinion, Defendant could have successfully crippled the expert witness' testimonial effect in the case. Defendant did not act

promptly. Instead, Defendant waited over a month after he was informed of Mr. Thorpe's willingness to testify, then moved the court to exclude Mr. Thorpe as a witness. (R. at 364).

In the case at bar, the parties cooperated with each other without petitioning the court for approval to deviate slightly from the schedule. Defendant's case was not prejudiced by this. Defendant always knew of the expert and could have noticed Eckhoff, Watson & Preator for deposition at any time.

In Hill v. Dickerson, 839 P.2d 309, 197 Utah Adv. Rep. 23 (Ct.App. 1992), the defendant agreed to allow the plaintiff to serve a list of witnesses after the April 19, 1991 scheduling date requirement. The agreement was to provide the list if settlement was not successful. June 28, 1991 settlement negotiations ended. Plaintiff provided the witness list on August 19, 1991. This court found that the plaintiff violated the scheduling order. Justice Orme, in the dissent, agreed with the result of the decision but not with the analysis.

Justice Orme stated:

counsel ought to have some flexibility to resolve minor matters between themselves. Indeed, limited judicial resources are preserved by not requiring counsel to bother the court for approval every time they perceive some need to massage the preliminary details of a scheduling order.

In the case at bar, the parties' cooperation should not be disregarded. To now apply the strict scheduling dates would be improper given the parties' own actions and representations.

The court in Berrett, quoting Jansen v. Lichwa, 474 P.2d 1020 (Ariz.App. 1970), stated:

the sanction was improper when complaining party consented to continuing discovery until trial.

Berrett v. Denver and Rio Grande Western R.R. Co., 830 P.2d 291, 184 Utah Adv. Rep. 49 (Ct.App.1992).

In the case at bar, the court's sanction, excluding Plaintiff's witness, was also improper.

ISSUE 2

INTRODUCTION

Jury instructions must not only instruct the jury as to the law of the jurisdiction, but the instructions given must also "be appropriate to the fact situation of the case as was revealed by the evidence." Schultz v. Quintana, 576 P.2d 855 (Utah 1978).

In the case at bar, instruction #17 failed to instruct the jury as to the law of the jurisdiction and was not appropriate to the fact situation of the case as revealed by the evidence.

Instruction #17 reads as follows:

the defendant is negligent if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

(Tr. at 238-39)

Instruction #17 is based, in part, on the Restatement of Torts section 343 as it was applied in English v. Kienke, 848 P.2d 153 (Utah 1993). Section 343 of the Restatement of Torts is a correct statement of the law regarding premises liability.

However, the direct application of the undisputed facts, as they appeared in English, to Section 343, as it is written, was appropriate only because the case was decided on summary judgment. Plaintiff objects to its use as an instruction to a jury which has the duty to weigh the evidence and apply principles of comparative negligence to the facts. Plaintiff properly objected to it's use during trial. (Tr. at 230).

Any case dealing with injury to visitors upon land must be based upon principles of premises liability. Premises liability is well established in the State of Utah. The injured visitor is classified as either an Invitee, Licensee, or Trespasser. In the case at bar, the Plaintiff is properly classified as an invitee. According to Utah premises liability law, the duty that a landowner owes to an invitee is the duty to discover unreasonably dangerous conditions and remedy them or warn the visitor of them. Gregory v. Fourthwest Investments, Ltd., 82 Utah Adv. Rep. 24, 754 P.2d 89 (Ct.App.1988). Stephenson v. Warner et. al., 581 P.2d 567 (Utah 1978). Plaintiff offered proper instructions which applied the foregoing principles, however, the court refused to use apply them in the case at bar.

Use of instruction #17, in the case at bar, substantially prejudiced the Plaintiff's case by taking from the Plaintiff the right to have his fault compared to the fault attributable to the Defendant. The instruction caused the jury to revert back to principles of contributory negligence finding that if the Plaintiff was also negligent, recovery is barred. (Tr. at 273).

The instruction sufficiently misled the jury as to the appropriate law applicable to premises liability. It applied the "open and obvious" danger rule, which the State of Utah no longer recognizes. Had the proper instruction been given, a fair comparison of fault would have been made to make a proper determination of liability. Plaintiff would have recovered.

I. INSTRUCTION #17 WAS NOT THE PROPER INSTRUCTION.

Instruction #17 is taken from the Restatement Second of Torts Section 343 (1965). Section 343 is a correct statement of the law regarding landowner liability and was appropriately applied in English v. Kienke, 848 P.2d 153 (1993). However, in the case at bar, it is not a proper instruction when dealing with the weighing of evidence by a jury and the application of comparative negligence principles.

A. INSTRUCTION #17 IS NOT PROPER BASED ON THE FACTS OF THE CASE AS REVEALED BY THE EVIDENCE.

Subsection (b) of Instruction #17 absolves the defendant of any liability if defendant "should expect that they will not discover or realize the danger or will fail to protect themselves against it." (Tr. at 238-39). In other words, if the danger at the dump is obvious, a reasonable person would realize it. If Plaintiff nevertheless proceeds to encounter the danger, then defendant is not liable for plaintiff's resulting injuries. Such an instruction is not appropriate to the fact situation of the case as revealed by the evidence.

The site of the injury was a municipal dump. A city ordinance requires city residents to subscribe to a garbage retrieval service. (Tr. at 151-152). The City of Blanding does not provide garbage retrieval for citizens living within the county but outside city limits. (Tr. at 151-152). A special arrangement must be made with a private contractor for a resident outside city limits to receive garbage retrieval service. (Tr. at 152). Without a special arrangement, the only location provided for citizens, who live outside city limits, to dispose of garbage is the dump where the injury occurred. (Tr. at 151-152). Blanding citizens are required by law to use the dump to dispose of garbage that is not collected through a garbage retrieval service. Blanding citizens are not allowed to dispose of garbage at any other location. (Tr. at 151-152). Furthermore, Blanding citizens are not allowed to leave the garbage along the edge of the precipice, but are required to throw the garbage over the edge. (Tr. at 137). A wall, 10-18" in height, separates a person and the edge of the cliff over which the garbage is thrown. (Tr. at 21, 151). On the day of the accident, strong winds whipped through the canyon, and smoke from several small fires in the dump clouded the sky. (Tr. at 132-33). The dump had recently been bulldozed by the defendant, exposing those at the dump to a 30-40 foot precipice. (Tr. at 141-42).

Plaintiff, like all citizens of Blanding, was required, by city ordinance, to incur the risks inherent in the dump site to

dispose of his garbage. The Defendant, as a landowner, had a duty to Plaintiff, as an invitee, to discover unreasonably dangerous conditions at the dump and remedy them or give Plaintiff sufficient warning of them. Schultz v. Quintana, 576 P.2d 855 (1978). Defendant cannot require the Plaintiff to use the dump, then absolve itself of liability when the Plaintiff is injured at the dump. Subsection (b) of Instruction #17 produces such an effect. (Tr. at 238-39).

The instruction offered to the jury by the court should have reflected the facts of this case. The instruction should have reflected that Plaintiff was required by Defendant to use the dump and approach the edge of a 30 to 40 foot precipice, which had recently been created by Defendant's bulldozing. (Tr. at 141-42, 151-52). It should have reflected that strong winds whipped through the canyon on that particular day, and smoke from several fires rose up from the dump to the platform. (Tr. at 132-33). It should have reflected that others had been injured at the dump and the city was aware of it. (Tr. at 139). Instruction #17 did not reflect those facts and therefore was incorrect and prejudiced the Plaintiff. Had a proper instruction been given, which properly took into consideration those facts, Defendant would have been found negligent for not protecting the Plaintiff from those dangers.

B. INSTRUCTION #17 IS NOT THE CORRECT APPLICATION OF THE LAW OF THE JURISDICTION.

The effect of instruction #17 is to ignore principles of comparative negligence and to revert back to a contributory negligence system. The instruction states that the defendant was negligent only if it failed to protect the Plaintiff from a dangerous condition, which the Defendant knew or should have known existed and should have expected that Plaintiff would not realize it. (Tr. at 239). The corollary is that if the Plaintiff knew or should have realized the dangerous condition of the dump, yet proceeded to encounter the danger, he assumed the risk and recovery is completely barred.

This type of instruction is appropriate only in a contributory negligence system. The deceiving element is subsection (b) of the instruction, which is the determining factor of whether the defendant is liable to plaintiff entirely or not at all.

The State of Utah has abandoned its contributory negligence system. Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989). Utah Code Annotated §78-27-38 (1994), is titled "Comparative Negligence," and states:

the fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own.

The same section defines fault to mean:

any actionable breach of legal duty...including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk,...

This court held in Donahue that

the adoption of a comparative negligence system amounts to an expression by the Legislature that the harsh and

inflexible result of total victory or unconditional defeat compelled by the traditional contributory negligence system, including the open and obvious danger rule, is no longer acceptable.

Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989).

The use of an instruction, such as instruction #17, produces one of two results. First, if the jury determines that the plaintiff was not also negligent, the defendant is entirely liable for the injuries to plaintiff. Second, if the jury determines that the plaintiff was also negligent, regardless of the degree, defendant is absolved of any liability. Any instruction which is based on principles of contributory negligence is inappropriate.

What one would expect, when a jury is given an instruction based on principles of contributory negligence, occurred in the case at bar. (Tr. at 269-270). The jury could not weigh the evidence and apportion fault to the parties because instruction #17 did not allow it. Either the danger was open and obvious and Plaintiff assumed the danger by negligently encountering it, or it was not and Plaintiff could not be required to avoid it. The jury's actions were consistent with a jury bound to a contributory negligence system.

This result is clearly demonstrated by the fact that, under the instructions given, the jury was unable to apportion fault in the manner it desired. (Tr. at 269-70). The jury's frustration and confusion is apparent in its mid-deliberation petition to the court for further instruction. In desperation, the jury

questioned the judge, in writing, for additional instruction.

The jury asked:

Judge, the majority of us feel that both parties are at fault to some extent. Therefore, would it be allowable to compensate Mr. Laws a monetary amount for pain and suffering incurred for his injuries? If so, how can we go about this?

(Tr. at 269-270).

Clearly, instruction #17 restricted the jury from comparing fault and apportioning it accurately. The response from the judge was simply "the answers to your question is in the instructions and the verdict form." (Tr. at 271).

Without further instruction from the judge the jury was bound to follow the instructions and the verdict form, even though they did not allow the jury to compare fault as it desired. The jury's answers to the special verdict form depicts the prejudice to the Plaintiff that instruction #17 produced.

Question: Was the defendant, Blanding City, negligent as alleged by the plaintiff.

Answer: No.

(Tr. at 273).

Even after indicating that the majority of the jurors wanted to apportion fault to both parties and award damages, it had to answer the question "no". The jury was forced to respond in such a way because instruction #17 did not allow a comparative negligence analysis.

Clearly, the instructions, as a whole, were not sufficient to remedy the prejudicial effect of instruction #17, even when read in their entirety. Had the instructions, read in their entirety, been remedial to the misleading effect of instruction

#17, the jury would have apportioned fault and awarded damages as it indicated to the judge that it wanted to do. Or had a proper instruction on duty been given, the jury would have been able to properly apportion fault and award damages. This error prejudiced the Plaintiff's case because Plaintiff was not allowed the privilege of a comparison of his fault with that fault attributable to defendant. Consequently, Plaintiff was denied a recovery that the jury desired to award but couldn't.

C. INSTRUCTION #17 APPLIES THE OPEN AND OBVIOUS DANGER RULE, WHICH IS INAPPROPRIATE IN THIS STATE.

In effect, the result of Instruction #17 is to apply the open and obvious danger rule to premises liability. The traditional open and obvious danger rule held that the landowner had no duty to warn or protect the invitee of any dangerous condition that was open and obvious. Ellertson V. Dansie, 576 P.2d 867 (Utah 1978). The reasoning behind the open and obvious danger rule was stated by the court in Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989):

encountering an open and obvious risk is negligence as a matter of law and, at least under a contributory negligence system, a plaintiff who is even only slightly negligent is barred from recovery.

Instruction #17 misleads the jury as to Defendant's duty. According to the instruction, if the danger at the dump is open and obvious, yet plaintiff unreasonably chooses to encounter the danger and is injured, then defendant is absolved of any duty to protect the plaintiff.

The consequences of such a rule are that an open and obvious danger rule does not differentiate between those facts relevant to the landowner's duty of care and those facts establishing a total or partial defense to liability. Under comparative negligence principles, a plaintiff's unreasonable encounter of a known danger should be relevant to establishing a defense to liability. Defendant's duty of care is the same whether the plaintiff was unreasonable or not. However, under instruction #17, Plaintiff's unreasonable encounter is used to establish Defendant's lack of a duty of care.

The use of an instruction such as instruction #17 is no longer the law in Utah. Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989). The facts in Donahue are similar to the case at bar. The plaintiff was working on the roof of a building where a high voltage wire hung near the roof. "Donahue was not warned about the powerline but saw it and perceived the potentially fatal danger which it posed." This court held that:

the Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery. Our conclusion is premised on two grounds.

First, the open and obvious danger rule is fundamentally incompatible with a comparative negligence scheme, which requires the finder of fact to allocate liability for an injury based on the relative responsibility of the parties involved.

Our second point of analysis is premised upon the fact that the assumption of the risk doctrine has been expressly abandoned in Utah as a complete bar to recovery due to its incompatibility with our comparative negligence system. See Utah Code Ann. §78-27-37(2) (1987). See also Moore v. Burton Lumber & Hardware Co., 631 P.2d 865, 870 (Utah 1981).

Jacobson Constr. Co. V. Strutco-Lite Eng'g, Inc., 619 P.2d 306, 309 (Utah 1980).

Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct. App. 1989).

Principles of comparative negligence demand that:

a plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon plaintiff's own negligence; it should not affect the defendant's duty.

Parker V. Highland Park, Inc., 565 S.W.2d 512, (Tex. 1978).

In the case at bar, instruction #17 caused that the Plaintiff's contributory negligence affect the establishment of Defendant's duty. The jury, determined that both parties were negligent. (Tr. at 269-70). The jury, however, was compelled to find that Defendant lacked a duty to protect the Plaintiff due to the Plaintiff's contributory negligence. Plaintiff's rights demand that the jury "allocate liability based on the relative responsibility of the parties involved." Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989).

Separate instructions should have been given to the jury which would have properly separated the determination of Defendant's duty from the analysis of Plaintiff's contributory negligence. Plaintiff's Instructions numbers 17-19 were appropriate instructions in this case. (R. at 423).

Plaintiff's Instruction #19 properly instructed the jury on a landowner's duty of care to an invitee. Instruction #19 stated:

Blanding City is subject to liability for physical harm caused to Melvin Laws by a dangerous condition at the Blanding City Dump if Blanding City:

- a) Knew of the dangerous condition, or in the exercise of ordinary care should have known, that a dangerous condition existed; and
- b) That sufficient time had elapsed to take corrective action.

Several Utah Courts have applied a landowner's duty of care instruction in the same manner. Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623 (Ut.Ct.App.1991). Williams v. Melby, 699 P.2d 723, 726 (Utah 1985). Stephenson v. Warner, 581 P.2d 567, 568 (Utah 1978). Martin v. Safeway Stores, Inc. 565 P.2d 1139, 1140-41 (Utah 1977). Ohlson v. Safeway Stores, Inc., 568 P.2d 753 (Utah 1977). Long v. Smith Food King Store, 531 P.2d 360 (Utah 1973). Hampton v. Rowley Builders Supply, 10 Utah 2d 169, 350 P.2d 151 (1960). Lindsay v. Eccles Hotel Co., 3 Utah 2d 364, 284 P.2d 477 (1955). Erickson v. Walgreen Drug Co. et al., 232 P.2d 210, 120 Utah 31 (1951).

Upon reversal and remand of Donahue, the court stated:

at trial the finder of fact must compare the reasonableness of Donahue's conduct under all the circumstances in encountering the power line with the reasonableness of DVF's, Durfee's, and Howell's conduct in creating and allowing the potentially deadly power line to remain so near the warehouse roof, in an activated state, while work was being done on the roof.

Donahue v. Durfee, 780 P.2d 1275, 118 Utah Adv. Rep. 64 (Ct.App.1989).

Similarly, in the case at bar, the finder of fact should have compared the reasonableness of Plaintiff's conduct in encountering the dangers of the dump with the reasonableness of Defendant's conduct in creating and maintaining the dump in a

dangerous condition. All the circumstances should have been considered in the comparison. Such circumstances would include the fact that Plaintiff was not allowed to dispose of garbage except at the dump site and was required to throw the garbage over the edge of a 30 to 40 foot precipice, where a low 10 to 18 inch wall was the only guard to prevent falling. (Tr. at 21, 151-153). While, the Defendant had taken no steps to protect individuals from the dangers of the dump. (Tr. at 140).

Defendant argues that Section 343 of the Restatement Second of Torts allowed the jury to properly decide the case and, therefore, was properly applied in the case at bar just as it was applied in English v. Kienke, 848 P.2d 153 (1993). This is incorrect. Although Section 343 was correctly applied in English, its application is limited to the facts of that case.

English was decided on summary judgment. On summary judgment, the rule is clear that the court is prohibited from weighing the evidence and determining negligence. The court in English determined whether there were any genuine issues of material fact. In its analysis it applied uncontested material facts to the law applicable to the matter. A weighing of the evidence and comparison of fault was prohibited; therefore, a direct application of the law to the facts was apropos.

In the case at bar, it was not appropriate for the jury to do the same because the responsibility of the jury is to weigh the evidence and apportion fault. In the case at bar, a direct application to the rule, as done in English, took that

responsibility away from the jury. The instruction misled the jury because, as written, it caused the jury to make its determination based upon principles of contributory negligence. The jury was compelled to determine the case based on the open and obvious danger rule and assumption of the risk. The jury decided that, because the danger was open and obvious, Plaintiff assumed the risk and therefore, Defendant had no duty to protect him. (Tr. at 269-73). This, the jury decided, even though they desired to apportion fault to Defendant and award Plaintiff damages. (Tr. at 269-73).

D. AN INSTRUCTION ON SECTION 343 OF THE RESTATEMENT SECOND OF TORTS IS ONLY PROPER WHEN GIVEN IN CONJUNCTION WITH AN INSTRUCTION ON SECTION 343A.

Assuming, arguendo, that instruction #17 was the correct instruction according to the law of the jurisdiction, then an additional instruction was necessary for clarification. An instruction similar to Section 343A of the Restatement Second of Torts was necessary to clarify the intent of subsection (b) of Section 343, from which the instruction was taken. Comment (a) of the Reporter's Notes to section 343, states:

this section should be read together with §343A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility.

Restatement Second of Torts, §343 cmt. a (1965).

Section 343A of the Restatement Second of Torts states

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless

the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement Second of Torts, §343A (1965).

The importance of this section in conjunction with Section 343 is that it clarifies the duties of the possessor and invitee when an open and obvious dangerous condition exists on the land of a public utility, government, or government agency.

Comment (a) to Section 343A states that this rule applies to all invitees, including "members of the public making use of the land of the government or government agency which is held open for the use of the public." Most significant in comment (a) is:

as is stated in Subsection (2), such a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

If the court determined that instruction #17 was necessary and appropriate under the circumstances of this case, the court should have included an instruction mirroring Section 343A. The facts of this case warranted such a clarifying instruction.

Comment f. of the Reporter's Notes to Section 343A states:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or take other reasonable steps to protect him, against the known or obvious condition or activity, if

the possessor has reason to expect that the invitee will nevertheless suffer physical harm. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Comment g. of the Restatement Second of Torts Section 343A states:

In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe. There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render services to members of the public.... The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry of use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

The foregoing comments to Section 343A were written for the case at bar.

Here, the Plaintiff was required by city ordinance to dispose of his garbage at the dump. (Tr. at 152-153). Plaintiff was not allowed to leave the garbage near the edge of the precipice, but he was required to throw the garbage over the edge of a 30 to 40 foot precipice. (Tr. at 137, 152-153). A low 10 to 18 inch wall was the only guard to prevent falling. (Tr. at 21,151). The Defendant had recently bulldozed the dump creating the 30 to 40 foot precipice. (Tr. at 141-42). Clearly, Defendant was in a position to realize that even though the

Plaintiff may have realized the dangerous condition of the dump, Plaintiff would nevertheless proceed to encounter them. Defendant nevertheless, failed to take any steps to protect individuals using the dump. (Tr. at 140).

Had an instruction similar to Section 343A been given, a proper analysis of the facts could have been made by the jury. Without this instruction, the jury was misled and Plaintiff's case was prejudiced. The jury was left to decide only that the dangerous condition of the dump should have been known or obvious to the Plaintiff. Consequently, any injuries sustained from encountering the danger were due to the Plaintiff's contributory negligence.

II. PROPER INSTRUCTION MUST BE FOUNDED ON TRADITIONAL PREMISES LIABILITY PRINCIPLES.

Given the facts of the case at bar, proper instruction should have been based on traditional premises liability principles, which are well established in the State of Utah.

A. DEFENDANT HAS DUTY TO PROTECT PLAINTIFF FROM UNREASONABLY DANGEROUS CONDITIONS ON PREMISES.

"The duty of care owed by a possessor of land is determined by the status of the person who comes onto the property." Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169 (Utah 1991). The relationship between the parties (injured and possessor) determines the status of the plaintiff at the time of the injury, as a trespasser, a licensee, or an invitee. Gregory v.

Fourthwest Investments, Ltd., 754 P.2d 89, 82 Utah Adv. Rep. 24 (Ct.App.1988). Such status determines the measure of duty owed by the landowner to the injured, and therefore the landowner's liability, if his breach of such duty caused the injury. Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 82 Utah Adv. Rep. 24 (Ct.App.1988). Tjas v. Proctor, 591 P.2d 438, (Utah 1979).

Under the facts of this case, Plaintiff is considered an invitee.

Sections 343 and 343A of the Restatement Second of Torts properly explain premises liability as applied to invitees.

Section 343 states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Section 343A states:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement Second of Torts §343A .

B. THE JURY INSTRUCTION MUST CORRECTLY STATE DEFENDANT'S DUTY WITHOUT ABROGATING THIS STATE'S COMPARATIVE NEGLIGENCE SYSTEM.

Although Section 343 of the Restatement Second of Torts is the law applicable to premises liability, as an instruction, it supplants comparative negligence with contributory negligence. To preserve principles of comparative negligence, Section 343 must be divided into separate instructions. One instruction must address the landowner's duty as described in Section 343A and Subsections (a) and (c) of Section 343. The second instruction must address the visitor's contributory negligence as written in Subsection (b) of Section 343.

The method of determining a landowner's breach of duty as stated in Section 343A and Subsections (a) and (c) of Section 343 has been, and continues to be, as stated in Martin v. Safeway Stores Inc., 565 P.2d 1139 (Utah 1977). Although this and subsequent cases are "slip-and-fall" cases, the principles of premises liability are the same.

In Martin, the court stated:

the essential inquiry relating to defendant's negligence is whether the defendant's employees knew, or in the exercise of ordinary care should have known, that a dangerous condition existed, and whether sufficient time elapsed thereafter that action could have been taken to correct the situation.

Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977).

The same analysis continues to be made by the courts in determining a landowner's breach of duty. Gregory v. Fourtwest Investments, Ltd., 754 P.2d 89, 82 Utah Adv. Rep. 24 (Ct.App.1988). Deats v. Commercial Security Bank, 746 P.2d 1191, (Utah Ct.App. 1987). Canfield v. Albertsons, 841 P.2d 1224, 200

Utah Adv. Rep. 61 (Ct.App. 1991). Allen v. Federated Dairy Farms, 538 P.2d 175 (Utah 1975).

In fact, in Gregory, the court held that in order to find the defendant liable:

the plaintiff must demonstrate that defendant knew, or in the exercise of ordinary care should have known, that a dangerous condition existed and that sufficient time had elapsed to take corrective action.

Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 82 Utah Adv. Rep. 24 (Ct.App. 1988).

In the case at bar, the jury should have been instructed on the foregoing principles of premises liability. The first inquiry should have been whether the Defendant knew or should have known of the dangerous condition. The second inquiry should have been whether sufficient time elapsed that Defendant could have taken corrective action to remedy the situation. Plaintiff's Instructions #17-19 instructed the jury accordingly. Plaintiff objected to the courts refusal to use the appropriate instruction. (Tr. at 230).

A separate instruction should have addressed the Plaintiff's contributory negligence as written in subsection (b) of section 343 of the Restatement Second of Torts. The inquiry should have been whether a reasonable person would have realized the dangerous condition and avoided it. Taken into consideration should have been the circumstances surrounding Plaintiff's encountering the danger as noted in Section 343A of the Restatement Second of Torts.

The danger of combining the two instructions is that the Plaintiff's contributory negligence may be held to abrogate Defendant's duty. The court said in Parker V. Highland Park, Inc. 565 S.W.2d 512 (Tex. 1978):

a plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon plaintiff's own negligence; it should not affect the defendant's duty.

If the Plaintiff's negligence is analyzed under an instruction similar to Instruction #17, the determination of Defendant's duty is affected. In other words, what happened in the case at bar is the outcome. Even though the majority of the jurors desired to apportion fault to both parties, they were forced to abrogate Defendant's duty because the instruction did not allow the jury to apportion and compare fault. (Tr. at 269-273).

An example of the correct approach in applying the Restatement to jury instructions is found in Erickson v. Walgreen Drug Co. et al., 232 P.2d 210, 120 Utah 31 (1951). In Erickson, the court quoted the Restatement of Torts and acknowledged it to be the correct rule of law governing premises liability. The instruction given to apply that rule was as follows:

it was the duty of [the appellant] to exercise reasonable care to keep the entranceway to its store reasonably safe for the use of its customers; and in this regard you are instructed that if you shall find from a preponderance of the evidence that the entranceway was not reasonably safe in that the floor of the entranceway had become wet from rain water and slick and slippery and that [the appellant] knew or in the exercise of reasonable care should have known of said condition, and failed to exercise reasonable care to remedy said condition and make said entranceway reasonably safe for the use of its customers, by means of warning signs to advise of the slick condition or by covering the terrazzo

entrance with rubber mats or other substances to prevent slipping, then [the appellant] was negligent;

The court stated in Ohlson v. Safeway Stores Inc., that

the jury was properly instructed that the defendant could not be held liable for any injury suffered by plaintiff, a business invitee, resulting from a dangerous condition not caused by acts of the defendant itself and of which the defendant had no knowledge, unless that condition existed for such a length of time that if the defendant exercised ordinary care it would have discovered the condition and could and would have remedied it before the time of the injury.

Even though the foregoing courts adhered to the Restatement rule of premises liability, their jury instructions reflect the correct approach in applying the rule. It is the same approach petitioned by the Plaintiff in the case at bar.

CONCLUSION

Plaintiff's designation of Eckhoff, Watson & Preator as witness #14 on Plaintiff's list of witnesses was a proper designation. Plaintiff did not violate the court's scheduling order. The court's exclusion of Plaintiff's expert witness therefore, was an abuse of discretion.

Plaintiff's expert testimony applied directly to the issues on which the jury was to base its decision. The design, construction, maintenance and safety precautions were important elements in deciding whether Defendant had a duty and breached it. Exclusion of the witness, prevented the Plaintiff from presenting his entire case to a jury, which substantially prejudiced Plaintiff's case.

Instruction #17 in the case at bar supplanted this state's comparative negligence system with contributory negligence principles. The jury was misled by the instruction and compelled to determine that Plaintiff's contributory negligence abrogated Defendant's duty. The record clearly indicates that the jury desired to apportion fault to both parties, yet it was compelled to abrogate Defendant's duty because the instruction did not allow the jury to apportion and compare fault. (Tr. at 269-273).

The misleading instruction was not remedied by a reading of the instructions in their entirety. Instead, the jury was compelled to act within principles of contributory negligence and abrogate the Defendant's duty and find the Plaintiff entirely at fault, thereby denying Plaintiff any recovery.

Plaintiff contends that the instruction given was incorrect. Plaintiff further contends that the misleading effect of the instruction substantially prejudiced the Plaintiff's case and affected his rights. Had this error not been committed, the result of this case would have been different.

Plaintiff respectfully requests that this Court reverse the decision of the trial court and remand this case for a new trial.

DATED this 7th day of August, 1994.

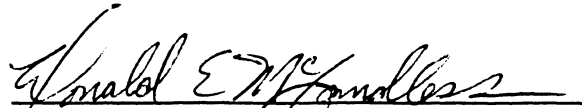
FISHER, SCRIBNER, MOODY & STIRLAND, P.C.

BY: Donald E. McCandless
DONALD E. McCANDLESS
DARWIN C. FISHER
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of
the foregoing, with postage prepaid thereon, to the foll, this
17th day of August, 1994:

Gary B. Ferguson
Attorney for Defendant/Appelle
P.O. Box 45678
Salt Lake City, UT 84145-5678


DONALD E. McCANDLESS
Attorney for Plaintiff/Appellant

APPENDIX 1

resent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) **Order and examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of Rule 26(d) [Rule 32(a)].

(b) **Pending appeal.** If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) **Perpetuation by action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28. Persons before whom depositions may be taken.

(a) **Within the United States.** Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) **In foreign countries.** In a foreign country, depositions may be taken (1) on notice before a person

authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name of country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) **Disqualification for interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action. (Amended effective Jan. 1, 1987.)

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(2) modify the procedures provided by these rules for other methods of discovery.

(Amended effective Jan. 1, 1987.)

Rule 30. Depositions upon oral examination.

(a) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of examination; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular

class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this Subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving, and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under Subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in Subdivision (e), and the certification of the officer required by Subdivision (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be

taken by telephone. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(c) **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence. The officer before whom the deposition is to be taken shall put the witnesses on oath and shall personally or by someone acting under his direction and in his presence record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion to terminate or limit examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to witness; changes; signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) [Rule 32(c)(4)] the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and filing by officer; exhibits; copies; notice of filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness shall, upon the request of the party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(Amended effective Jan. 1, 1987.)

Rule 31. Depositions upon written questions.

(a) **Serving questions; notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of a subpoena as provided by Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the

name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) **Officer to take responses and prepare record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) **Notice of filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Rule 32. Use of depositions in court proceedings.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of [a] deponent as a witness or for any other purpose permitted by the Utah Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

APPENDIX 2

In any action so certified to the district court, when any responsive pleading is required or permitted or a motion is allowed under these rules, the time in which such responsive pleading or motion shall be made shall commence to run from the time notice of the filing of the cause in the district court shall be served on the party making such responsive pleading or motion.

Rule 14. Third-party practice.

(a) **When defendant may bring in third party.** At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) **When plaintiff may bring in third party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) **Pretrial conferences.** In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted for lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation;
- (5) facilitating the settlement of the case; and
- (6) considering other matters as may aid in the orderly disposition of the case.

(b) **Scheduling and management conferences.** In any action, in addition to any pretrial conferences that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held. The court may direct the attorneys or unrepresented parties to appear before the court. Scheduling or management conferences may also be held by way of telephone conferencing between the court and counsel as the particular case may require. Decisions and agreements reached at scheduling and management conferences may be formally made an order of the court. At the conference, the court may consider the following matters:

- (1) the formation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or advisability of joining additional parties or amendment of pleadings;
- (3) the completion of outstanding discovery;
- (4) the time for filing and hearing of motions;
- (5) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authentic-

to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

(Amended effective Sept. 4, 1985; April 1, 1990.)

Rule 13. Counterclaim and cross-claim.

(a) **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) **Permissive counterclaim.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.

(c) **Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim

relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) **Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(f) **Cross-claim against co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) **Additional parties may be brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(h) **Separate judgments.** Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

(i) **Cross demands not affected by assignment or death.** When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

(j) **Claims against assignee.** Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.

(k) **Claim in excess of court's jurisdiction.** Where any counterclaim or cross-claim or third-party claim is filed in an action in a city court or justice's court, and due to its limited jurisdiction, such court does not have the power to grant the relief sought thereby, it shall suspend all proceedings in the entire action and certify the same and transmit all papers therein to the district court of the county in which such inferior court is maintained, upon the payment by the party filing such counterclaim, cross-claim or third-party claim of the fees required for certifying the record on appeal from such court and for docketing the same in the district court. The fees herein required to be paid, shall be deposited with the clerk of the inferior court at the time of filing such counterclaim, cross-claim, or third-party claim. For failure so to do, the court may, upon motion of the adverse party, after notice, strike such counterclaim, cross-claim, or third-party claim.

APPENDIX 3

charge of this person from any hospital or sanitarium in which the injured person is confined as a result of the injuries sustained in the occurrence, is voidable by the injured person, as provided in this act.

(2) Notice of cancellation of the release or settlement agreement, together with any payment or other consideration received in connection with this release or agreement shall be mailed or delivered to the party to whom the release or settlement agreement was given, by the later of the following dates:

- (a) within fifteen days from the date of the occurrence causing the injuries which are subject of the settlement agreement or liability release; or
- (b) within fifteen days after the date of the injured person's discharge from the hospital or sanitarium in which this person has been confined continuously since the date of the occurrence causing the injury.

1973

78-27-33. Statement of injured person — When inadmissible as evidence.

Except as otherwise provided in this act, any statement, either written or oral, obtained from an injured person within 15 days of an occurrence or while this person is confined in a hospital or sanitarium as a result of injuries sustained in the occurrence, and which statement is obtained by a person whose interest is adverse or may become adverse to the injured person, except a law enforcement officer, shall not be admissible as evidence in any civil proceeding brought by or against the injured person for damages sustained as a result of the occurrence, unless:

- (1) a written verbatim copy of the statement has been left with the injured party at the time the statement was taken; and
- (2) the statement has not been disavowed in writing within fifteen days of the date of the statement or within fifteen days after the date of the injured person's initial discharge from the hospital or sanitarium in which the person has been confined, whichever date is later.

1992

78-27-34. Release, settlement or statement by injured person — When rescission or disavowal provisions inapplicable.

This act shall not apply in the following circumstances:

If at least five days prior to signing the settlement agreement, liability release, or statement, the injured person has signed a statement in writing indicating his willingness that the settlement agreement, liability release, or statement be given or signed.

1992

78-27-35. Release, settlement, or statement by injured person — Notice of rescission or disavowal.

Notice of cancellation or notice disavowing a statement, if given by mail, is given when it is deposited in a mailbox, properly addressed with postage prepaid. Notice of cancellation given by the injured person need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the injured person not to be bound by the settlement agreement, liability release, or disavowed statement.

1973

78-27-36. Right of rescission or disavowal of release, settlement, or statement by injured person in addition to other provisions.

The rights provided by this act are intended to be in addition to, and not in lieu of, any rights of rescis-

sion, rules of evidence, or provisions otherwise existing in the law.

1973

78-27-37. Definitions.

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person immune from suit" means:

(a) an employer immune from suit under Title 35, Chapter 1 or 2; and

(b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30, Governmental Immunity Act.

(4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

1994

78-27-38. Comparative negligence.

(1) The fault of a person seeking recovery shall not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

1994

78-27-39. Separate special verdicts on total damages and proportion of fault.

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(2) (a) If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to

APPENDIX 4

1 for it. You are not bound by such an opinion. Give it the
2 weight you think it deserves. If you should decide that the
3 opinions of an expert witness are not based upon sufficient
4 education and experience, or if you should conclude that the
5 reasons given in support of the opinions are not sound, or
6 that such opinions are outweighed by other evidence, you may
7 disregard the opinion entirely.

8 **Instruction No. 15:**

9 Certain charts and summaries have been shown to you, or
10 will be shown to you, in order to help explain the facts
11 disclosed by the books, records, and other documents which
12 are not in evidence in the case. However, such charts or
13 summaries are not in and of themselves evidence or proof of
14 any facts. If such charts or summaries do not correctly
15 reflect facts or figures shown by the evidence in the case,
16 you should disregard them.

17 **Instruction No. 16:**

18 A fact may be proved by circumstantial evidence.
19 Circumstantial evidence consists of facts or circumstances
20 that give rise to a reasonable inference of the truth of the
21 facts sought to be proved.

22 **Instruction No. 17:**

23 Blanding City is subject to liability for physical harm
24 caused to Melvin Laws by a dangerous condition at the

1 Blanding City Dump if, but only if, Blanding City (a) knew
2 of the dangerous condition or by the exercise of reasonable
3 care should have discovered the dangerous condition, and
4 should have realized that the dangerous condition involves
5 an unreasonable risk of harm to Melvin Laws, and (b) should
6 expect that Mel Laws will not discover or realize the danger
7 or would fail to protect himself against it, and (c)
8 Blanding City then failed to exercise reasonable care to
9 protect Melvin Laws from the dangerous condition.

10 **Instruction No. 18:**

11 Reasonable care is what an ordinary, prudent person
12 uses in similar situations. The amount of care that is
13 considered reasonable depends on the situation. You must
14 decide what a prudent person with similar knowledge would do
15 in a similar situation. Negligence may arise in acting or
16 failing to act.

17 **Instruction No. 19:**

18 Approximate cause of an injury is that cause which in
19 natural and continuous sequence produces the injury and
20 without which the injury would not have occurred.
21 Approximate cause is one which sets in operation the factors
22 that accomplish the injury.

23 **Instruction No. 20**

24 If you find that the defendant, that's Blanding City,