

1994

Melvin Laws v. Blanding City : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary B. Ferguson; Carolyn S. Jensen; Williams & Hunt; Attorneys for Appellee.

Darwin C. Fisher; Fisher, Scribner, Moody & Stirland; Attorney for Appellant.

Recommended Citation

Petition for Rehearing, *Laws v. Blanding City*, No. 940415 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6066

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MELVIN LAWS,

Plaintiff/Appellant,

v.

BLANDING CITY,

Defendant/Appellee.

:
:
:
:
:
:
:
:
:

Case No. 940415-CA

Priority No. 15

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

BLANDING CITY'S
PETITION FOR REHEARING

UTAH COURT OF APPEALS
BRIEF

DARWIN C. FISHER
FISHER, SCRIBNER, MOODY &
STIRLAND
2696 North University Avenue
Suite 220
Provo, Utah 84606

Attorney for Appellant

UTAH
DOCKET
NO. 50
.A10
DOCKET NO.

940415

GARY B. FERGUSON (A1062)
CAROLYN S. JENSEN (6338)
WILLIAMS & HUNT
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678

Attorneys for Appellee

FILED

APR 18 1995

COURT OF

IN THE UTAH COURT OF APPEALS

MELVIN LAWS,	:	
	:	
Plaintiff/Appellant,	:	Case No. 940415-CA
	:	
v.	:	Priority No. 15
	:	
BLANDING CITY,	:	
	:	
Defendant/Appellee.	:	

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

BLANDING CITY'S
PETITION FOR REHEARING

CERTIFICATE OF COUNSEL

Counsel for Petitioner, Blanding City, pursuant to Rule 35
of the Utah Rules of Appellate Procedure, hereby certifies that
this Petition is presented in good faith and not for delay.

DATED this 18 day of April, 1995.

WILLIAMS & HUNT

By Carolyn S. Jensen
CAROLYN S. JENSEN
Attorneys for Appellee

TABLE OF CONTENTS

	<u>Page</u>
APPELLEE BLANDING CITY'S PETITION FOR REHEARING	1
FACTUAL BACKGROUND	1
ARGUMENT	3
POINT I.	
PLAINTIFF DID NOT PROPERLY OBJECT BELOW	3
POINT II.	
INSTRUCTION NO. 17 PROPERLY STATES UTAH LAW UNDER <u>ENGLISH v. KIENKE</u>	5
CONCLUSION	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984)	3
Beehive Medical Elec., Inc. v. Square D Co., 669 P.2d 859 (Utah 1983)	3
English v. Kienke, 848 P.2d 153 (Utah 1993)	1, 5, 7
Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47 (Utah 1974)	4
State v. Kazda, 545 P.2d 190 (Utah 1976)	3, 4
State v. Peterson, 240 P.2d 504 (Utah 1952)	4
State v. Valdez, 432 P.2d 53 (Utah 1967)	3, 4
State v. Villiard, 494 P.2d 285 (Utah 1972)	4
VanDyke v. Mountain Coin Mach. Distribs., Inc., 758 P.2d 962 (Utah App. 1988)	3, 5
 <u>Rules</u>	
Utah Rules of Appellate Procedure, Rule 35	1
Utah Rules of Civil Procedure, Rule 51	3

APPELLEE BLANDING CITY'S PETITION FOR REHEARING

Defendant Blanding City, pursuant to Rule 35 of the Utah Rules of Appellate Procedure, hereby petitions this Court for a rehearing. The basis for this petition is that the Court of Appeal's decision in Laws v. Blanding City, No. 941415-CA, slip op. (Utah App. April 4, 1995) (attached hereto as exhibit A), is inconsistent with well-settled Utah law requiring a party to object to a trial court's failure to give a jury instruction in order to assign error for such omission on appeal. Moreover, Jury Instruction No. 17 correctly states Utah law under English v. Kienke, 848 P.2d 153 (Utah 1993), and was therefore proper.

FACTUAL BACKGROUND

Plaintiff Melvin Laws was injured when he fell from a dumping platform at the Blanding City Dump. In November 1991, plaintiff initiated this action against defendant Blanding City, alleging that his injuries were caused by defendant's negligence in the construction and maintenance of the dump.

In February 1994, this case was tried to a jury. The trial judge gave both counsel a copy of his proposed jury instructions at the close of the parties' presentation of evidence. Plaintiff objected to Jury Instruction No. 17. Significantly, however, plaintiff did not ask the trial court to include a Jury Instruction regarding defendant's duty as set forth in section 343A of the Restatement (Second) of Torts. Nor did plaintiff object to the trial court's failure to give such a jury instruction. The court charged the jury as proposed, including

Instruction No. 17. Thereafter, the jury returned a verdict finding defendant not negligent.

Plaintiff appealed this ruling to the Utah Court of Appeals, contending that the trial court committed prejudicial error in giving Instruction No. 17. Jury Instruction No. 17 is taken substantially verbatim from the Restatement (Second) of Torts § 343 (1965), which delineates the duty a possessor of land owes to an invitee. Jury Instruction No. 17 reads:

Blanding City is subject to liability for physical harm caused to Melvin Laws by a dangerous condition at the Blanding City Dump if, but only if, Blanding City (a) knew of the dangerous condition or by the exercise of reasonable care should have discovered the dangerous condition, and should have realized that the dangerous condition involves an unreasonable risk of harm to Melvin Laws, and (b) should expect that Mel[vin] Laws will not discover or realize the danger or would fail to protect himself against it, and (c) Blanding City then failed to exercise reasonable care to protect Melvin Laws from the dangerous condition.

The Court of Appeals reversed and remanded the trial court's decision. Agreeing with plaintiff, the Court concluded that section 343 of the Restatement of Torts, which Instruction No. 17 was taken substantially verbatim from, should be read together with section 343A of that Restatement, which purportedly clarifies defendant's duty. Thus, the court concluded, Jury Instruction No. 17 alone was an incomplete statement of defendant's duty because an instruction regarding section 343A of the Restatement should also have been given. Laws, slip op. at 2-7.

ARGUMENT

POINT I.

PLAINTIFF DID NOT PROPERLY OBJECT BELOW

Utah Rule of Civil Procedure 51 provides, "No party may assign as error the giving or failure to give an instruction unless he [or she] objects thereto." Utah R. Civ. P. 51 (emphasis added); see Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984). Under Rule 51 and the attending case law, it is error for the Court of Appeals to reverse the trial court's decision on the basis that a jury instruction concerning the duties set forth in Section 343A was not given. This is because plaintiff failed to propose any such instruction and did not object to the trial court's failure to give any such instruction.^{1/}

If an objection is not made regarding the failure to give a jury instruction, the issue is deemed to be waived on appeal. VanDyke v. Mountain Coin Mach. Distribs., Inc., 758 P.2d 962, 965 (Utah App. 1988). It is well-settled in Utah that a party cannot assign error in the omission of an instruction that he or she failed to request at trial. State v. Valdez, 432 P.2d 53, 54

^{1/} The grounds for any objection to failure to give a jury instruction must be distinctly and specifically stated on the record. VanDyke v. Mountain Coin Mach. Distribs., Inc., 758 P.2d 962, 964 (Utah App. 1988); Beehive Medical Elec., Inc. v. Square D Co., 669 P.2d 859, 860 (Utah 1983). The requirement of a specific objection on the record ensures that the trial court will understand the basis of the objections and have an opportunity to correct any errors before the case goes to the jury. VanDyke, 758 P.2d at 964; State v. Kazda, 545 P.2d 190, 192-93 (Utah 1976).

(Utah 1967). Indeed, "[w]here no instruction was requested, there is no error in failing to give it." State v. Villiard, 494 P.2d 285, 287 n.6 (Utah 1972) (citing Valdez, 432 P.2d 53). Accordingly, "the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he [or she] is thereafter precluded from contending error." State v. Kazda, 545 P.2d 190, 192 (Utah 1976) (footnotes omitted). See also Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47 (Utah 1974); Valdez, 432 P.2d 53; State v. Peterson, 240 P.2d 504 (Utah 1952).

In the present case, plaintiff did not request a jury instruction regarding the substance of section 343A of the Restatement (Second) of Torts. Nor did plaintiff object to the trial court's failure to give a jury instruction regarding the substance of section 343A. Thus, as argued by defense counsel at oral argument, there can be no error in failing to give an instruction regarding section 343A as no such instruction was requested and no objection was raised concerning its omission. Villiard, 494 P.2d at 827.

The Court of Appeal's determination that plaintiff properly objected to the trial court's giving of Jury Instruction No. 17 is insufficient to preserve for appeal the issue of the trial court's failure to give an instruction regarding the contents of section 343A of the Restatement. See Laws, slip op. p. 2-3 n.2. Plaintiff's objection to the giving of Instruction No. 17, which

concerns section 343 of the Restatement, is wholly separate from the court's failure to include an instruction regarding section 343A of the Restatement.

Accordingly, the Court of Appeals erred in overturning the trial court's decision in the Laws case on the basis that a jury instruction regarding the substance of section 343A was not given. Plaintiff did not object to this omission before the trial court and thus failed to preserve this issue for appeal. VanDyke, 758 P.2d at 964. The trial court in this case was not given the opportunity to consider giving a jury instruction regarding section 343A of the Restatement (Second) of Torts, nor did it have the opportunity to correct any claimed error before the case went to the jury. Without reversal of the Court of Appeal's opinion, plaintiff will have successfully challenged on appeal the trial court's failure to give a jury instruction without having objected to such failure or having requested such an instruction, contrary to Utah law.

POINT II.

**INSTRUCTION NO. 17 PROPERLY STATES UTAH
LAW UNDER ENGLISH V. KIENKE**

As the Court of Appeals acknowledges, the general rule as to a landowner's liability in Utah is set forth in English v. Kienke, 848 P.2d 153 (Utah 1993). Relying on the Restatement (Second) of Torts § 343, the court in English identified the areas in which a possessor of land owes a duty of reasonable

care.^{2/} Id. at 156. This excerpt from English identifying the duty owed by a possessor of land is virtually identical to Jury Instruction No. 17. Jury Instruction No. 17 is therefore a correct statement of defendants duty under Utah law as set forth in English.

Although section 343A of the Restatement (Second) of Torts 343A may clarify defendant's duty, it is not the Utah law regarding a landowner's duty of care. Restatements are not law. Moreover, section 343A of the Restatement (Second) of Torts has not been adopted in Utah. Indeed, the Court of Appeal's decision in Laws was the first occasion on which a Utah court has held that section 343A contains a correct statement of a land possessor's duty owed to an invitee.

Therefore, taken as a whole, the Jury Instruction No. 17 fully advised the jury on the appropriate standard for determining defendant's duty of care to the jury under Utah law and was thus proper.

^{2/} Those areas are:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she] (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.

English, 848 P.2d at 156 (quoting Restatement (Second) of Torts § 343).

CONCLUSION

Defendant respectfully requests the court to reconsider its decision in the Laws case as it is incorrect under Utah law. Specifically, it was error to overturn the trial court's decision on the basis that a jury instruction concerning the contents of section 343A of the Restatement (Second) of Torts was not given because plaintiff failed present such an instruction to the trial court and importantly, failed to object to any such omission of this instruction. In addition, Jury Instruction No. 17 properly stated Utah law as set forth in English v. Kienke, 848 P.2d 153 (Utah 1993). Accordingly, the Court of Appeal's decision should be reconsidered in order to correct these errors.

DATED this 18 day of April, 1995.

WILLIAMS & HUNT

By Carolyn S. Jensen
CAROLYN S. JENSEN
Attorneys for Appellee

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY THAT a true and correct copy of the foregoing instrument was mailed first-class, postage prepaid, this 18 day of April, 1995 to the following:

Attorneys for Appellant
Darwin C. Fisher, Esq.
Fisher, Scribner, Moody & Stirland
2696 North University Avenue, Suite 220
Provo, Utah 84606

By Carolyn S. Jensen
CAROLYN S. JENSEN

This opinion is subject to revision before
publication in the Pacific Reporter.

FILED

APR 04 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Melvin Laws,)	OPINION
)	(For Publication)
Plaintiff and Appellant,)	
)	
v.)	Case No. 940415-CA
)	
Blanding City,)	
)	
Defendant and Appellee.)	F I L E D
		(April 4, 1995)

Seventh District, San Juan County
The Honorable Lyle R. Anderson

Attorneys: Darwin C. Fisher, Provo, for Appellant
Gary B. Ferguson, Salt Lake City, for Appellee

Before Judges Billings, Davis, and Orme.

BILLINGS, Judge:

Melvin Laws (Plaintiff) challenges a jury verdict that Blanding City (Defendant) was not negligent in the construction and maintenance of the Blanding City Dump. We reverse and remand.

FACTS

After falling from a dumping platform at the Blanding City Dump, Plaintiff initiated this action against Defendant, alleging his injuries were caused by Defendant's negligence in the construction and maintenance of the dump. The case was tried to a jury in February 1994. Prior to trial, Plaintiff and Defendant submitted to the trial court their respective requested jury instructions. At the close of the parties' presentation of evidence and outside the presence of the jury, the trial judge gave counsel a copy of the instructions he proposed to give and returned the parties' requested jury instructions to them with his notations as to which would be given and which would not. Plaintiff took exception to the court's proposed Instruction No. 17, which set forth the duty Defendant owed Plaintiff. The court overruled the objection.

Thereafter, the court charged the jury as proposed, and the jury returned a verdict that Defendant was not negligent. Plaintiff appeals, contending the trial court committed prejudicial error in giving Instruction No. 17.¹

STANDARD OF REVIEW

Determining the propriety of jury instructions presents a question of law, which we review under a correction of error standard. Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). We review jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law. Id. "We reverse a trial court's decision on the basis of an instruction improperly submitted to the jury only where the party challenging the propriety of the instruction 'demonstrates prejudice stemming from the instructions viewed in the aggregate.'" Id. (quoting State v. Hastor, 811 P.2d 929, 931 (Utah App. 1991), rev'd on other grounds, 846 P.2d 1276 (Utah 1993)).

ANALYSIS

In support of his claim of error, Plaintiff argues that Instruction No. 17 is an incomplete and misleading statement of Defendant's duty.²

1. Because we reverse on this claim of error, we do not reach Plaintiff's additional claim of error, namely, that the trial court abused its discretion by excluding Plaintiff's expert witness in order to sanction Plaintiff for noncompliance with a scheduling order. We note, however, that the reasons for the trial court's sanction would seem to disappear on remand.

2. At oral argument, Defendant raised for the first time the issue of waiver, claiming Plaintiff did not adequately object to Instruction No. 17 and therefore cannot now complain about its insufficiency. Pursuant to our rules of civil procedure, "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection." Utah R. Civ. P. 51; see also Shurtleff v. Jay Tuft & Co., 622 P.2d 1168, 1175 (Utah 1980 (holding defendant's assignment of error failed because, in taking exception to instruction, defendant had not specified claimed error); VanDyke v. Mountain Coin Mach. Distribs., Inc., 758 P.2d 962, 964 (Utah App. 1988)

(continued...)

Instruction No. 17 reads in its entirety:

Blanding City is subject to liability for physical harm caused to Melvin Laws by a dangerous condition at the Blanding City Dump if, but only if, Blanding City (a) knew of the dangerous condition or by the exercise of reasonable care should have discovered the dangerous condition, and should have realized that the dangerous condition involves an unreasonable risk of harm to Melvin Laws, and (b) should expect that Mel[vin] Laws will not discover or realize the danger or would fail to protect himself against it, and (c) Blanding City then failed to exercise reasonable care to protect Melvin Laws from the dangerous condition.

Plaintiff asserts that subsection (b), which refers to whether Plaintiff should have realized the danger or protected himself against it, creates the misleading impression that if Plaintiff did not do so, Defendant's duty is abrogated.

Jury Instruction No. 17 is taken substantially verbatim from the Restatement (Second) of Torts § 343 (1965), which delineates the duty a possessor of land owes to an invitee. Plaintiff

2. (...continued)

("If a party fails to object to a jury instruction, the objection is deemed waived on appeal.").

In the present case, our review of the record reveals that the parties and the trial court, pursuant to Defendant's motion for directed verdict, discussed at length the proper standard of care with which to charge the jury. Defendant argued that "if the hazard is open and obvious and the type that Blanding City reasonably would believe people would avoid, then Blanding City has no duty to do anything." Plaintiff, on the other hand, argued that "there is a duty on the part of government to . . . take reasonable care to . . . ensure the safety of those that use their facilities, in this case, the dump." Moreover, Plaintiff submitted requested instructions to the court which, although not a perfect statement of the applicable duty, omitted the portion of Instruction No. 17 about which he now complains. When Plaintiff took exception to the trial court's proposed instructions, he referenced the prior discussion, as well as his proffered instructions, and the trial court overruled the exception "for the reasons stated[] when I ruled on the motion for directed verdict." We thus conclude that Plaintiff has properly preserved this claim.

concedes section 343 is a correct statement of Defendant's duty, but argues that it is not a complete statement of that duty and must be read together with section 343A.

We agree. The correct statement of the duty Defendant, a possessor of land, owed Plaintiff, an invitee, is contained in sections 343 and 343A of the Restatement. See Restatement (Second) of Torts § 343 cmt. a (1965) ("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."); English v. Kienke, 848 P.2d 153, 156 (Utah 1993) (stating duty of possessor of land to invitee is set forth in § 343 and § 343A).

Section 343A reads, in its entirety:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by an 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 the harm should be anticipated.

Restatement, supra, § 343A (emphasis added). Comment f to section 343A reads:

There are . . . 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 to 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 to expect harm to the visitor from known or obvious dangers may arise, for example, 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. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Id. cmt. f. Further, comment g 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, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. 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 and 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.

Id. cmt. g (emphasis added).

We hold that the trial court erred in giving Instruction No. 17 to the jury as it is an incomplete and thus misleading statement of Defendant's duty. Plaintiff has the right to have his theory of the case presented to the jury in a clear and understandable way, and the trial court has a duty to instruct the jury on the applicable law. Ames, 846 P.2d at 471. Section 343A substantially clarifies the duty Defendant, as both a public utility and a government entity, owes Plaintiff, a member of the public for whom the land Defendant possesses is held open. It also relates precisely to Plaintiff's theory of the case, which is that Plaintiff, who resides outside a public garbage pickup area and is required by ordinance to dispose of his garbage himself (or subscribe to a garbage pickup service), had no choice but to approach the thirty-foot precipice at the dump in order to throw his garbage over it. In these circumstances, Plaintiff claims, Defendant had a duty to protect Plaintiff because it should have known that a reasonable person would, recognizing the danger, nevertheless encounter it. See Donahue v. Durfee, 780 P.2d 1275, 1278 (Utah App. 1989).

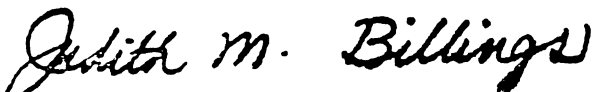
Moreover, we disagree with Defendant that the proffered comparative negligence instruction, together with the special verdict form, cured the deficiency in Instruction No. 17. If the jury determined that Defendant owed no duty of reasonable care to Plaintiff based on the incomplete statement of duty found in Instruction No. 17, then neither the comparative negligence instruction nor the special verdict form would have been helpful. "[T]here would be no negligence to compare--and, therefore, no recovery" if Defendant's duty were erroneously excused because the danger is known or obvious. See id. at 1279. We conclude that the instructions as a whole inadequately presented the law with respect to Defendant's duty of care and undermined Plaintiff's ability to present his theory of the case to the jury.

We must next determine whether the error was prejudicial. To require a new trial, we must conclude not only that the trial court erred, but that the error was prejudicial, that is, "that it 'tend[ed] to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advise[d] the jury on the law.'" Summerill v. Shipley, 259 Utah Adv. Rep. 19, 20 (Utah App. 1995) (quoting Biswell v. Duncan, 742 P.2d 80, 88 (Utah App. 1987)). Moreover, the jury's application of an erroneous duty owed by a defendant to a plaintiff is, in all but the clearest cases, necessarily prejudicial. Id. at 20-21.

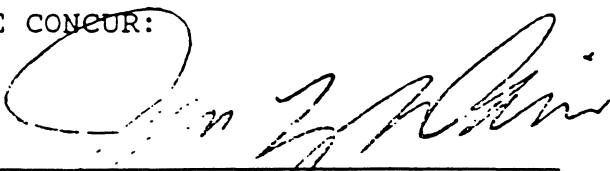
We have in this case an unusual insight into the jury's deliberative process. Midway through deliberations, the jury asked the trial court the following question: "Judge, the majority of us feel that both parties are at fault to some

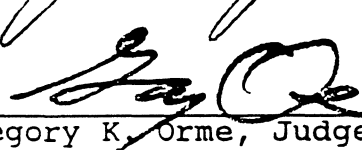
extent. Therefore, would it be allowable to compensate Mr. Laws a monetary amount for pain and suffering incurred for his injuries? If so, how can we go about this?" After conferring with counsel on both sides, the court sent back the following response: "The answer to this question is in the jury instructions and the special verdict form." The jury thereafter returned with a verdict. In response to special verdict question no. 1--"Was the defendant, Blanding City, negligent as alleged by the plaintiff?"--the jury stated, curiously in view of their inquiry, "No."

Given these facts, we cannot say the jury was not misled by Instruction No. 17's incomplete statement of Defendant's duty. Rather, Instruction No. 17 may well have led the jury to erroneously conclude that, because Plaintiff should have realized the dangerous condition at the dump and protected himself against it, Defendant owed Plaintiff no duty of care. Accordingly, we conclude that Plaintiff was prejudiced, and we reverse and remand for a new trial.


Judith M. Billings, Judge

WE CONCUR:


James Z. Davis, Judge


Gregory K. Orme, Judge

COVER SHEET

CASE TITLE:

Melvin Laws,
Plaintiff and Appellant,
v.
Blanding City,
Defendant and Appellee.

Case No. 940415-CA

April 4, 1995. OPINION (For Publication).

Opinion of the Court by JUDITH M. BILLINGS, Judge; JAMES
Z. DAVIS, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

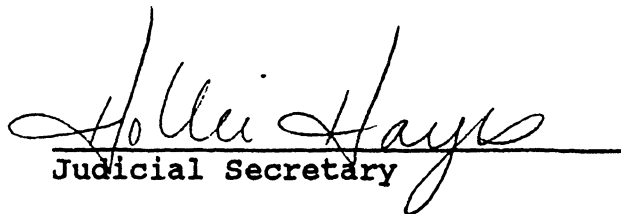
I hereby certify that on the 4 day of April, 1995, a true
and correct copy of the foregoing OPINION was deposited in the
United States mail to the parties listed below:

Darwin C. Fisher (Argued)
Fisher, Scribner, Moody & Stirland
Attorneys at Law for Appellant
2696 No. University Ave., Suite 220
Provo, UT 84606

Gary B. Ferguson (Argued)
Williams & Hunt
Attorneys at Law for Appellee
257 East 200 South, #500
P.O. Box 45678
Salt Lake City, UT 84145-5678

and a true and correct copy of the foregoing OPINION was deposited
in the United States mail to the district court judge listed below:

The Honorable Lyle R. Anderson
Seventh District Court
San Juan County Courthouse
P.O. Box 68
Monticello, UT 84535


Judicial Secretary

TRIAL COURT:

Seventh District, San Juan County #5396