

1994

Melvin Laws v. Blanding City : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

APPELLEE'S BRIEF

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

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UTAH COURT OF APPEALS
BRIEF

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FILED

Utah Court of Appeals

SEP 13 1994

Marilyn M. Branch
Clerk of the Court

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STATEMENT OF JURISDICTION

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

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Appellee accepts appellant's characterization of the issues presented for review and the applicable standards of review, except to note that jury instructions are reviewed not only for correctness, but also to determine whether prejudice resulted. *Ames v. Maas*, 846 P2d 468, 471 (Utah App 1993).

STATUTORY PROVISIONS AND RULES

The following are rules, the interpretation of which are pertinent to this appeal:

Rule 16, Utah R Civ P, enclosed at Appendix 1.

Rule 37, Utah R Civ P, enclosed at Appendix 2.

STATEMENT OF THE CASE

This is an action in negligence brought by Melvin Laws who was injured when he fell into the Blanding City Dump. The action was initiated against Blanding City in November of 1991 and tried before a jury in February 1994.

During the course of discovery and after issuance of a scheduling order, Plaintiff failed to designate an individual who would testify as expert witness on his behalf. Defendant received notice of the designated individual substantially past the witness designation date and three days after the discovery cutoff date. Defendant filed a motion to strike plaintiff's expert witness which was granted by the court.

During the trial, plaintiff's counsel objected to the jury instructions, in particular instruction 17. The court overruled the objection. The jury found no negligence on the defendant's part and returned a verdict in its favor. Plaintiff filed a motion for a new trial which was denied and subsequently appeals to this Court.

STATEMENT OF FACTS

1. A complaint initiating this action was filed with the trial court on November 4, 1991. (R. 1-7)

2. On December 17, 1991, defendant served its first discovery requests on plaintiff. (R. 21-22) In those discovery requests were the following interrogatories:

Interrogatory No. 25: Identify each person who you expect to call as an expert witness at trial.

Interrogatory No. 26: State the subject matter on which each said expert is expected to testify, state the substance of the facts and opinions to which said expert is expected to testify, and state a summary of grounds for each opinion.

Interrogatory No. 27: Identify each expert who has been retained or specially employed in anticipation or [sic] litigation or preparation for trial but who is not expected to be called as a witness at trial.

(Appendix 1)

3. Plaintiff served replies to defendant's first discovery on January 16, 1992. (R. 23) Plaintiff's answers at that time did not designate an individual who would testify as an expert witness at trial.

4. On June 14, 1993, the trial court entered a scheduling order designating August 15, 1993 as the date for designation of

expert witnesses and October 3, 1993 as the cutoff date for discovery. (R. 288-89)

5. On August 31, 1993 plaintiff's counsel, Darwin Fisher, arranged a conference call with Judge Anderson and defense counsel and requested that the June 14, 1993 Scheduling Order be amended given the fact that Wayne Watson, counsel for plaintiff at the time of the June 14, 1993 scheduling conference had withdrawn. As a result of Mr. Fisher's request, the scheduling order was amended with the following new dates: Trial commencing February 21, 1994; Final Pretrial Conference on January 20, 1994; Dispositive Motion deadline as December 31, 1993; Discovery Cutoff as December 10, 1993; Witness Designation by all parties as September 30, 1993. On December 2, 1993, the trial court formalized this order by entering an amended scheduling order. (R. 358-59)

6. Defendant filed its designation of witnesses with the trial court on September 17, 1993. (R. 300-301)

7. Plaintiff filed his designation of witnesses with the trial court on October 1, 1993. (R. 302-304).

8. Plaintiff's designation of witnesses did not identify an individual who would testify as expert witness at trial. The following non-individuals were designated as witnesses:

- 12. Montgomery Engineering
- 14. Eckoff, Proctor & Watson
- 33. Lynn Haws & Sons
- 70. Mercy Medical Center
- 72. San Juan County Hospital

(R. 302-304)

9. No indication was given which non-individual would provide an expert and no information was provided which would indicate the identity or location of the witness.

10. On October 18, 1993, defendant requested that plaintiff supplement answers to interrogatories, restating the interrogatories No. 25 through 27 set forth in paragraph 2. above. (R. 309-310)

11. On November 24, 1993, nearly eight weeks after the witness designation date and approximately two weeks prior to discovery cutoff, defendant sent a letter to plaintiff's counsel requesting identification of plaintiff's expert witness on liability.

In the last several weeks, you told me that you would inform me of who would actually be your expert witness on liability. I still do not have that information. Since I do not have the information I cannot notice up that expert witness. This presents a problem for me given the December 10, 1993 discovery cutoff. Please advise me as soon as you can of the name of the liability expert witness you intend to use so that we can make arrangements to have that witness' deposition taken on or before December 10, 1993 it [sic] at all possible.

(R. 394-395, enclosed as Appendix 2)

12. On December 6, four days prior to discovery cutoff, and 67 days after the court ordered deadline, plaintiff's counsel wrote a letter to defendant's counsel stating that Greg Thorpe of ECKHOFF, WATSON & PREATOR would be his expert witness at trial. Had that information been immediately available to defendant (on

December 6), defendant could not possibly have taken Mr. Thorpe's deposition because he had not evaluated the case.

I am in the process of sending information to Mr. Thorpe for his evaluation and therefore he obviously has not had an opportunity to review the information and form an opinion.

(R. 392, copy enclosed as Appendix 3)

13. Because plaintiff's counsel used the wrong zip code in addressing the December 6 letter, it was not received by defendant until December 13, 1993, three days after discovery cutoff. (R. 388) The zip code used by plaintiff was appropriate for defendant's counsel's post office box. For the street address, the proper zip code is 84111.

14. On December 14, 1993, plaintiff filed with the trial court his supplementation of his answers to defendant's interrogatories, again designating Greg Thorpe as the expert witness. (R. 360-362, enclosed as Appendix 4)

15. On January 7, 1994, defendant filed a motion to strike plaintiff's designation of Mr. Thorpe as an expert witness and to exclude Mr. Thorpe's testimony from trial. (R. 364)

16. On February 2, 1994, the trial court granted defendant's motion to strike and issued a written ruling on the motion. (R. 413-415, enclosed as Appendix 5) The trial court's ruling was based on two conclusions. First, the court held that "Plaintiff did not properly designate his expert witness until he provided the name of an individual." (R. 414) Second, the court stated that even if it were technically sufficient to designate an expert who had not formed an opinion, "the expert must, at the

very least, be prepared with an opinion within a reasonable time before discovery ends." (R. 415, emphasis added.) The trial court then observed that exclusion of the expert evidence was not prejudicial. (R. 415)

17. At trial, plaintiff objected to jury instruction No. 17 claiming that the instruction did not accurately state the law. (T. 230).

18. Among the instructions issued to the jury were instructions No. 17 through 20 which instructed on negligence, including comparative negligence. (R. 520-523, enclosed as Appendix 6)

19. The trial court also issued to the jury a Special Verdict Form which provided for a finding of comparative negligence. (R. 501-502, enclosed as Appendix 7).

20. The jury completed the Special Verdict Form indicating that defendant was not negligent. (R. 502)

SUMMARY OF ARGUMENT

Plaintiff has the burden of moving his case forward and of complying with procedural rules and court orders. He cannot shift this burden to the court, the defendant or his retained engineering firm.

The fact that plaintiff misunderstood the meaning of the term "witness" does not excuse his failure to comply with the trial court's scheduling order. Designation of witnesses required the designation of an individual and that designation was not timely made.

The trial court has the discretion under Rule 16, Utah R Civ P to exclude witness testimony for failure to comply with a scheduling order. Given that the plaintiff's designation of an individual as expert witness was made after the designation date and effectively after discovery cutoff, the trial court's exclusion of plaintiff's expert witness testimony was not an abuse of discretion.

Viewed in context of all instructions issued to the jury and along with the interrogatories of the special verdict form, the jury instructions properly advised the jury as to the applicable law in this case.

Even if error were found in excluding the expert witness testimony or in using the allegedly offending jury instruction, such error does not amount to reversible error because plaintiff has failed to show that the alleged error prejudiced his case.

ARGUMENT

POINT I

IT IS THE PLAINTIFF'S BURDEN TO UNDERSTAND THE LAW AND PROCEDURAL RULES AND TO PROSECUTE THE CASE WITH DUE DILIGENCE. PLAINTIFF CANNOT SHIFT THAT BURDEN TO THE DEFENDANT, THE COURT, OR ANY OTHER PARTY.

Plaintiff argues that "Plaintiff did not willfully disregard the court's scheduling order. Plaintiff simply did not understand the court's unexpressed expectations." Brief of Appellant, p. 8. He would shift the responsibility for this failure to understand to the court or the defendant. "A motion

to compel on the court's own initiative, or on motion by Defendant, would have sufficiently notified Plaintiff of his error." Brief of Appellant, p. 8. Further, "Following Defendant's receipt of Plaintiff's witness list, Defendant should have moved to compel the Plaintiff. Defendant did not." Brief of Appellant, p. 9. Alternatively, plaintiff would shift the burden to the engineering firm to designate the individual who would testify as an expert. "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." Brief of Appellant, p. 15, emphasis added. Apparently, plaintiff believes that it is the responsibility of the trial court and of defendant to assure that plaintiff is properly interpreting the rules of civil procedure and properly prosecuting his case. Plaintiff also believes that the engineering firm he has retained has the duty to comply with the rules of civil procedure and the scheduling order.

Our legal system is an adversary system in which the judge traditionally is not an active participant. The judge's role is to decide disputed procedural and legal questions and, in appropriate cases, act as the finder of fact. In the adversary system, attorneys for each party are charged with conducting their cases in the best interests of their clients. As stated in a leading handbook on civil procedure,

Issues not raised, objections not mentioned, and points not made are, with very few exceptions, waived. The case proceeds only in response to the demands of the litigants.

Necessarily, then, the adversary model places enormous emphasis and responsibility on the lawyers; the court maintains a relatively passive role throughout the proceedings.

Friedenthal et al., *Civil Procedure* (1985) § 1.1, p. 2.

With the burden on the attorneys, it becomes important for an attorney to understand how an adversarial proceeding is conducted.

[I]t remains true that for the vast majority of civil cases, the ultimate responsibility remains with the attorneys and it is imperative that they be fully familiar with all the applicable procedural rules so as to ensure the most effective representation of their clients.

Id. at p. 3, emphasis added.

The plaintiff has the burden to prosecute his case with due diligence. *E.g.*, *Charlie Brown Construction Co., Inc. v. Leisure Sports Incorporated*, 740 P2d 1368, 1370 (Utah 1987). Delays or failures of a law office to move forward procedurally are unacceptable excuses for failing to meet this burden. *Id.* at 1371.

If, as argued by plaintiff, he failed to understand the meaning of the scheduling order, it is not the responsibility of either the court or the opposing party to cure that misunderstanding. Plaintiff's lack of understanding of the court system causes him to argue that the court should have issued an order to compel soon after filing of the witness designation. The court has neither the time nor the responsibility for reviewing witness designations to assure a party's understanding

of what a witness is. Likewise it was not the defendant's duty to make a motion to compel.

Plaintiff argues that he should not be sanctioned for "Defendant's lack of diligence" or "plaintiff's failure to act." Brief of Appellant, pp. 16-17. It is, however, plaintiff's lack of diligence and failure to act which is in question. Plaintiff has the burden of advancing his case in compliance with procedural rules and for looking out for his best interests. It is plaintiff's burden to assure the proper answering of interrogatories and compliance with court scheduling orders. He cannot shift this burden to other participants in the adversary system or to a consulting firm he has retained.

POINT II

UNDER ALL REASONABLE DEFINITIONS, A WITNESS IS AN INDIVIDUAL, NOT AN ENTITY. DESIGNATION OF A WITNESS, THEREFORE, REQUIRES DESIGNATION OF AN INDIVIDUAL, NOT AN ENTITY.

It is the responsibility of an attorney to "possess the legal knowledge and skills common to members of his profession and to represent his client's interests with competence and diligence." *Jackson v. Dabney*, 645 P2d 613, 615 (Utah 1982). Certainly the definition of "witness" should fall within the legal knowledge common to the legal profession.

A review of the Utah Rules of Evidence clearly leads to the conclusion that a witness must be a person, not an entity. Rule 601 states that, "Every person is competent to be a witness. . . ." Rule 601, Utah R Evid, emphasis added. There is no way to imply

that an entity, in this case an engineering firm, can be a witness. Rule 602 requires that a witness have *personal* knowledge to testify as to a matter. Rule 603 requires that a witness declare by oath or affirmation, an action which an entity cannot take.

Looking in a legal dictionary, one can find the following definitions relevant to this issue:

Witness A person whose declaration under oath (or affirmation) is received as evidence for any purpose. . .

Expert One who is knowledgeable in specialized field, that knowledge being obtained from either education or *personal* experience. One who by habits of life and business has peculiar skill in forming opinion on subject in dispute.

Expert testimony Opinion evidence of some person who possesses special skill or knowledge . . . Testimony given in relation to some scientific, technical or professional matter by experts, *i.e.*, persons qualified to speak authoritatively by reason of *their* special training, skill or familiarity. . .

Expert witness One who by reason of education or specialized experience possesses superior knowledge respecting a subject . . .

Black's Law Dictionary, 5 ed. (1979), emphasis added.

There is no question that only a person can be a witness. It follows, therefore, that a scheduling order specifying a date for designation of "witnesses" or "expert witnesses" requires designation of an *individual* who will testify at trial, not an entity who will provide that individual.

Plaintiff attempts to avoid responsibility for misunderstanding the word "witness" by shifting the focus to the

trial court, stating "the court's failure to expressly require what it expected caused confusion and ultimately prejudiced the Plaintiff's case." Brief of Appellant p. 20. The excuse is weak. "Witness" is a word commonly used in the legal community and routinely understood to be a person. This is a fundamental term which should be understood by all attorneys. That plaintiff failed to understand this common use in law does not excuse his failure to timely designate an individual as his expert witness.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING PLAINTIFF'S EXPERT FOR PLAINTIFF'S FAILURE TO COMPLY WITH THE SCHEDULING ORDER.

If a party fails to comply with the terms of a scheduling or pretrial order, sanctions specified in Rule 16(d) are appropriate: (1) the court may enter an order prohibiting the introduction of designated matters into evidence; and (2) the court may find the attorney or party in contempt of court. Rule 16(d), Utah R Civ P. There is no requirement in the rule or Utah case law that the noncompliance be willful, as argued by plaintiff.^{1/} Nor is there a requirement, as argued by plaintiff, that witness exclusion not be utilized where other options are available to the court.^{2/}

^{1/}Plaintiff relies on Arizona case law which imposes an express requirement that the disregard of a scheduling order be willful. Utah case law has left the decision to the discretion of the trial court to be made in the entire circumstances surrounding the failure to comply with the order.

^{2/} In all of the Utah cases upholding exclusion of witnesses for failure to comply with a scheduling order, "other options" were available. In none of these cases did the Court of Appeals or the Supreme Court require sanctioning by these other options in place of witness exclusion.

Utah law has repeatedly supported trial court discretion in excluding expert witnesses for failure to comply with Rule 16. *E.g.*, *Arnold v. Curtis*, 846 P2d 1307 (Utah 1993). See also, *Hardy v. Hardy*, 776 P2d 917, 925 (Utah App 1989) ("The trial court does not abuse its discretion in refusing to admit evidence which is not timely provided to the opposing party contrary to the court's instructions.") The sanction of witness exclusion has been balanced against the needs of the parties and determined to be appropriate to ensure the efficacy of scheduling orders.

While scheduling orders should never be so inflexible as to not accommodate exigencies that may occur, they are necessary to expedite the flow of cases through the court system and should not be lightly disregarded.

Arnold at 1310.

The Utah Supreme Court has recently addressed this issue in *DeBry v. Cascade Enterprises*, 242 Utah Adv Rep 17 (Utah 1994). In *DeBry*, the plaintiffs argued that exclusion of their four expert witnesses for failure to timely designate them was an abuse of discretion because plaintiffs' supplemental responses to discovery had "put the defendants on notice that the DeBrys intended to call the four expert witnesses they later designated." *DeBry* at 21.

The Supreme Court rejected this argument, discussing the purpose of scheduling orders and the discretion of the trial court in enforcing those orders.

The DeBrys' supplemental responses to interrogatories stated that they had retained eleven experts to assist them in the litigation; the response did not specify any

witness who would testify at trial. The purpose of the scheduling order was to save the defendants from having to assume that all eleven witnesses would be called at trial and from incurring the expense of having to prepare for testimony that would not be presented.

A trial court has necessary discretion in managing cases by pretrial scheduling and management conferences. Utah R. Civ. P. 16. A requirement that parties designate their expert witnesses by a certain date before trial allows the parties to prepare for trial by deposing witnesses, planning for effective cross-examination, and obtaining rebuttal testimony. See *Turner v. Nelson*, 872 P.2d 1021, 1023-24 (Utah 1994); Utah R. Civ. P. 16(b); see also *Hardy v. Hardy*, 776 P.2d 917, 925 (Utah Ct. App. 1989).

DeBry at 21. Noting that the plaintiffs had submitted their witness designations after the date ordered and after the discovery cutoff date, the Supreme Court held that the trial court had not abused its discretion in excluding the four expert witnesses. *Id.*

In the present case, despite repeated requests to do so, plaintiff failed to designate an individual as his expert witness until well after the designation date and, effectively, after the discovery cutoff date. Plaintiff also failed to prepare his expert to testify. Defendant had no real means of properly deposing the expert without violating the court's scheduling order.

Attempting to shift responsibility to the defendant, plaintiff argues, without authority, that, "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." Brief of Appellant p. 15. In its ruling on defendant's motion, the trial court addressed this issue, noting 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. 414-15, Appendix 5. This is consistent with the Supreme Court's observation in *DeBry* that the purpose of the scheduling order is to prevent defendant from incurring the expense involved in this type of examination. Assuming, as plaintiff argues, that defendant was put on notice by his designation of an engineering firm as expert witness, the holding in *DeBry* would justify exclusion of the individual witness who was untimely designated.

The trial court's second basis for excluding the expert testimony is also supported by the Supreme Court's *DeBry* holding. As noted by the trial court and stated by plaintiff, plaintiff's designated expert was not prepared to offer an opinion in the case.^{3/} The untimely designation of the expert witness, combined with the fact that the witness was not prepared to offer deposition testimony, effectively prevented defendant from preparing "for trial by deposing witnesses, planning for effective cross-examination, and obtaining rebuttal testimony."

Plaintiff argues that he proposed to defendant that the expert be deposed at any time despite the discovery cutoff order.

^{3/} We may infer from the circumstances that if the individual at the designated engineering firm had not yet evaluated plaintiff's case, then no one there had; *i.e.*, that no one at the designated firm was prepared to testify or be deposed.

Brief of Appellant, p. 5 ¶ 23, citing R. 465. This simply reflects plaintiff's attitude toward court scheduling orders in general. Attitude issues aside, parties may not stipulate to set aside a court-ordered deadline without a subsequent court order, especially where the stipulation interferes with the court's control of its own calendar. *Charlie Brown* at 1371.

Given that (1) the expert was not timely designated and (2) when designated, the expert was not prepared to participate in pretrial discovery before the cutoff date, the trial court's exclusion of that expert's testimony was clearly not an abuse of discretion.

POINT IV

EXCLUSION OF THE EXPERT WITNESS TESTIMONY IN THIS CASE WAS NOT PREJUDICIAL.

Even if this Court were to find the trial court's exclusion of expert witness testimony to be an abuse of discretion, plaintiff has made no showing that exclusion of that testimony was prejudicial to plaintiff's case. The simple fact that the jury decided against plaintiff does not indicate prejudice.

As noted by the trial court,

It is not essential to the plaintiff's case that he have an expert on the design, construction, maintenance and operation of dumps. Dumps are something within the ken of ordinary citizens. Though expert testimony may be helpful, the Court expects that the members of the jury will be able to determine whether defendant negligently operated the dump without the assistance of an expert.

R. 415, Appendix 5. Where other witnesses are able to testify as to the facts and circumstances surrounding alleged negligence,

exclusion of expert testimony is not prejudicial. *Shurtleff v. Jay Tuft & Co.*, 622 P2d 1168, 1173 (Utah 1980). In this case, plaintiff has not demonstrated that exclusion of his expert's testimony worked to his prejudice.

On the other hand, allowing plaintiff's expert to testify would clearly have prejudiced defendant's case. Plaintiff argues, without supporting authority, that defendant's case was not prejudiced by his failure to designate the expert witness. The Utah Supreme Court in *Debry*, however, has taken the opposite position. Noting that the trial court found that permitting the experts to testify despite the failure to designate would work prejudicially against defendants, the Supreme Court stated, "For the trial court to have ignored the deadline would have compounded that abuse for which the [plaintiffs] were in no small measure responsible." *DeBry* at 21.

Plaintiff has failed to provide evidence in support of his claim of prejudice, making any error in excluding the expert testimony harmless, non-reversible error.

POINT V

THE TRIAL COURT'S ISSUANCE OF JURY INSTRUCTION NO. 17 WAS NOT REVERSIBLE ERROR.

Jury Instruction No. 17 states:

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 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

A. JURY INSTRUCTION NO. 17 IS CONSISTENT WITH APPLICABLE CASE LAW.

Plaintiff exhibits some confusion as to how the appropriate statement of the law is determined. He states, "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 revealed by the evidence." Brief of Appellant p. 29. The law is, in fact, determined by the facts. In the area of premises liability, different facts may dictate a different law. For example, the duty of a landlord in maintaining his premises with respect to a tenant is somewhat different from the duty of a possessor of land with respect to an invitee. *E.g., English v. Kienke*, 848 P2d 153 (Utah 1993).

The language of Instruction No. 17 is taken substantially verbatim from the Restatement (Second) of Torts, § 343, dealing with the duty owed by a possessor of land to an invitee, which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land 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.

This section of the restatement imposes on a landowner in possession a duty to warn an invitee of two categories of hazards: "(1) those that are present on the land when the invitee enters which the possessor should expect that the invitee will not discover or realize, and (2) those that the possessor creates after the invitee's entry. . ." *English* at 156, emphasis added.

Plaintiff acknowledges that this is a correct statement of the law regarding premises liability. Brief of Appellant, p. 29. He somewhat incongruously argues that this correct statement of the law is applicable only in determining summary judgment and is improper for use in instructing the jury as to the law of premises liability and that the facts of this case justify an instruction other than this correct statement of the law. Brief of Appellant, p. 30. However, plaintiff cites no authority in support of this unusual position. Certainly the Supreme Court in *English* made no such distinction.

Lacking any authority in support of plaintiff's argument, we must conclude that § 343 of the Restatement and its near-twin Instruction No. 17 are correct statements of the law of premises liability and that issuance of Instruction No. 17 to the jury was proper.

B. IN CONJUNCTION WITH OTHER INSTRUCTIONS AND THE SPECIAL VERDICT FORM, JURY INSTRUCTION NO. 17 PROPERLY INSTRUCTS THE JURY ON THE LAW OF COMPARATIVE NEGLIGENCE.

Plaintiff's argument as to the appropriateness of Instruction No. 17 is somewhat disjointed and difficult to address in rebuttal. It is perhaps easier to review Utah law dealing with the issuance of jury instructions and draw conclusions from that.

In determining whether giving a jury instruction constitutes reversible error, the court must evaluate the instruction in the context of the entire set of jury instructions to decide "whether all the instructions read in harmony fairly presented to the jury in a clear and understandable way the issues of fact and applicable law." *Anderson v. Toone*, 671 P2d 170, 175 (Utah 1983). On appeal, the trial court's determination of which jury instructions to issue will be affirmed "when the jury instructions taken as a whole fairly instruct the jury on the law applicable to the case." *Ames v. Maas*, 846 P2d 468, 471 (Utah App 1993). If a jury instruction is erroneous, that error can be cured by use of a special verdict which contains an interrogatory based upon the correct law. *Anderson* at 175. For example, in *Eskelson v. Ballhaus*, 622 P2d 798 (Utah 1980) the Utah Supreme Court held that a jury instruction, which examined alone might be erroneous, was non-prejudicial in view of other instructions issued and a special verdict which directed the jury to allocate 100 percent negligence between plaintiff and defendant if the jury found both parties to be negligent.

It appears from plaintiff's argument that his main objection to Instruction No. 17 is his belief that it forces the jury to

find in favor of the defendant and improperly instructs the jury to apply the law of contributory negligence instead of the law of comparative negligence. The entirety of the instructions issued to the jury fails to support this argument.

Plaintiff also confuses the issues of contributory and comparative negligence and the effect which Instruction No. 17 has in context of determining defendant's liability for its own negligence. The proper application of the law of comparative negligence requires four steps. First, the finder of fact must determine whether, under the appropriate law, the defendant was negligent. If that conclusion is made in the affirmative, the finder of fact must then determine whether the plaintiff was negligent. If both parties are found to be negligent, then the finder of fact must allocate to each party his share of responsibility for negligence. Finally, that allocation of negligence is used to determine who should bear what amount of the damages.

The first step of this process requires that the jury be instructed on the law controlling the decision of whether the defendant was negligent. Only after the issue of defendant's negligence has been decided is it appropriate for the jury to look at the law of comparative negligence.

Defendant acknowledges that Utah's adoption of comparative negligence supplanted principles of contributory negligence. Defendant has never argued that plaintiff's actions should entirely preclude any recovery. It is clear from the record that

the trial court was aware of and applied comparative negligence in its instructions to the jury. The central question is whether, in the entirety, the jury instructions properly instructed the jury as to the law of premises liability and the law of comparative negligence. The record indicates that they did.

Along with Instruction No. 17, which provides the jury the appropriate law regarding defendant's duty, the trial court provided other instruction on the law of negligence, including Instruction No. 20, dealing with comparative negligence:

If you find that the defendant was negligent, you must decide if the plaintiff was also negligent. If the plaintiff was negligent and the plaintiff's negligence was a proximate cause of the plaintiff's own injuries, the plaintiff's negligence must be compared to the negligence of the defendant.

A plaintiff whose negligence is less than 50 percent of the total negligence causing the plaintiff's injuries may still recover compensation, but the amount will be reduced by the percentage of the plaintiff's negligence. If the plaintiff's negligence is equal to or greater than the negligence of the defendant, then the plaintiff may recover nothing. For example, if you find the plaintiff's negligence was 30 percent of all negligence causing the injuries, then the plaintiff's recovery will be reduced by 30 percent. On the other hand, if you find the plaintiff's negligence is 50 percent or greater, then the plaintiff will recover nothing.

R. 523, Appendix 6. This is a correct statement of the law of comparative negligence; plaintiff has not argued otherwise. In addition, the jury completed a Special Verdict Form which contained interrogatories Nos. 3, 4, 5, and 6 providing for

findings of negligence on the part of plaintiff and allocating damages according to the comparative negligence of the parties.

R. 502-503

Under the law of comparative negligence, the finder of fact must first determine whether, according to applicable law, the defendant was negligent. That is the purpose of Instruction No. 17, to state the applicable premises liability law for determination of defendant's negligence. If the jury finds, under the appropriate law, that defendant was not negligent, any negligence of plaintiff becomes moot and need not be addressed. If, on the other hand, the jury finds defendant to be negligent, then the inquiry turns to whether plaintiff was also negligent and to what extent. Only then can the jury allocate damages.

Even if Instruction No. 17 were an erroneous statement of the law, that error is cured by the instruction to the jury permitting them to allocate negligence to the parties. All of the jury instructions, read together and in context, along with the options provided in the Special Verdict Form, properly instructed the jury as to the law of premises liability and the law as to comparative negligence, those two areas of law which the jury was charged to measure against the facts.

C. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE ISSUANCE OF JURY INSTRUCTION NO. 17 WAS PREJUDICIAL TO HIS CASE.

Even if this Court were to determine that Instruction No. 17 was erroneous, it must receive evidence of prejudice which would justify reversal.

[N]ot every error in instructing a jury will result in reversal. 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."

Ames at 471, citations omitted. This requires evidence that, in absence of the alleged error, "a more favorable result would have been obtained by the complaining party." *Shurtleff* at 1174, citing *Rowley v. Graven Brothers & Co., Inc.* 26 Utah 2d 448, 491 P2d 1209 (1971). Whether an erroneous jury instruction results in prejudice is determined "in light of all the instructions and circumstances of the case." *Ames* at 474.

Plaintiff spends substantial time in a circular discussion of the correctness of Instruction No. 17 and the propriety of issuing the instruction to the jury. However, no persuasive evidence is presented that, if the instruction was erroneous, any prejudice resulted to plaintiff. As discussed above, it is insufficient to rely on the jury's decision against plaintiff as evidence of prejudice. Plaintiff must present persuasive evidence leading the conclusion that "a more favorable result would have been obtained by the complaining party." *Shurtleff* at 1174. No such evidence has been presented by plaintiff.

Even if Instruction No. 17 were erroneous in context of all the instructions given, there is no prejudice resulting from the alleged error. The error is therefore harmless and does not require reversal.

CONCLUSION

The trial court's exclusion of plaintiff's expert testimony due to noncompliance with the scheduling order is supported by case law and is not an abuse of discretion. Nor did the trial court err in issuing Instruction No. 17 in the context of other jury instructions and the special verdict form. Even if this court were to find error in the witness exclusion or issuance of the instruction, such an error does not justify reversal because plaintiff has failed to demonstrate prejudice with the required sufficiency.

The judgment of the trial court should, therefore, be affirmed.

Respectfully submitted this ____ day of September, 1994.

WILLIAMS & HUNT

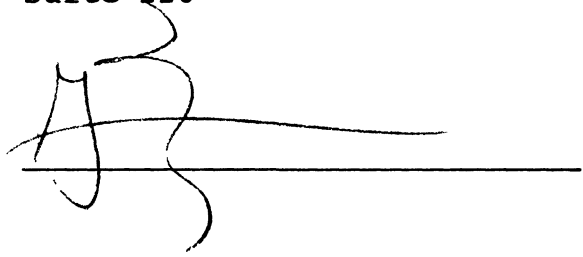
A handwritten signature in black ink, appearing to read 'G. B. Ferguson', is written over a horizontal line.

GARY B. FERGUSON
Attorney for Defendant

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY THAT a true and correct copy of the foregoing instrument was mailed first-class, postage prepaid this 13th day of September, 1994 to the following:

Darwin C. Fisher, Esq.
FISHER, SCRIBNER, MOODY & STIRLAND
2696 N. University Ave., Suite 220
Provo, UT 84606
Attorneys for Appellant

A handwritten signature in dark ink, appearing to be 'DF', is written over a horizontal line.

29486

Tab 1

GARY B. FERGUSON [A1062]
WILLIAMS & HUNT
Attorneys for Defendant Blanding City
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678
Telephone: (801) 521-5678

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
SAN JUAN COUNTY, STATE OF UTAH

MELVIN LAWS,	:	
	:	DEFENDANTS FIRST SET OF
Plaintiff,	:	INTERROGATORIES TO
vs.	:	PLAINTIFF
	:	
BLANDING CITY,	:	
	:	Civil No. 5396
Defendants.	:	

Pursuant to Rule 33 of the Utah Rules of Civil Procedure, defendant, by and through his counsel of record, Gary B. Ferguson, submits the following Interrogatories to plaintiff to be answered upon oath and in writing within thirty (30) days of service hereof. These Interrogatories are intended to be continuing so as to require supplemental responses to the full extent specified in Rule 26 of the Utah Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1: List all your addresses where you have lived for the ten years prior to the April 28, 1990 accident, including the dates you moved into and out of each residence, and the reason(s) for moving.

INTERROGATORY NO. 2: List all addresses where you have resided since the April 28, 1990 accident, including the dates you moved into and out of each residence, and the reason(s) for moving.

INTERROGATORY NO. 3: State the names and present addresses of all persons who lived in the same residence with you for the ten years preceding the April 28, 1990 accident.

INTERROGATORY NO. 4: State the names and present addresses of all persons who have lived in the same residence with you from the time of the April 28, 1990 accident to the present, and state the dates during which such persons lived with you and the purposes of such residence.

INTERROGATORY NO. 5: If you have served in the military, state the date and place of discharge and type of discharge which you received.

INTERROGATORY NO. 6: If you received a medical disability from the military, or were not allowed to serve in the military for medical reasons, describe the details of the physical or mental deficiency which was the basis for this medical disability and the amount of disability assigned to you.

INTERROGATORY NO. 7: With respect to each health care provider who has treated or examined you since April 28, 1990, state:

- a. Name;
- b. Address;
- c. Profession;

- d. Date(s) of treatment or examination;
- e. Reasons for treatment or examination;
- f. Treatment or examination received.

INTERROGATORY NO. 8: With respect to each hospital or clinic or institution in which you have been treated or examined since April 28, 1990, state:

- a. Name;
- b. Address;
- c. Date(s) of treatment or examination;
- d. Reason for treatment or examination;
- e. Treatment or examination received.

INTERROGATORY NO. 9: State the places and dates and the names and addresses of all persons and/or institutions who rendered assistance in your personal care, your household work, your occupation or education because of injuries you received on April 28, 1990.

INTERROGATORY NO. 10: If you have recovered from any of the injuries received in the April 28, 1990 accident, describe the injury, state approximately where and by whom you were last examined or given medical treatment with respect to the injuries you received and from which you have recovered.

INTERROGATORY NO. 11: Were you disabled as a result of the accident?

INTERROGATORY NO. 12: If so, state:

- a. A description of the disability;

b. The percentage of disability, if you received such a rating;

c. If such rating was made, the name and address of the person making the rating;

d. Whether the disability is temporary or permanent; and if temporary, when it is expected to terminate.

INTERROGATORY NO. 13: List all your past employers for the ten years preceding the April 28, 1990 accident.

INTERROGATORY NO. 14: List all your employers since the April 28, 1990 accident, and give a job description for each employer.

INTERROGATORY NO. 15: Do you claim your future earning capacity has been impaired?

INTERROGATORY NO. 16: If so, state:

a. The amount claimed for such future loss;

b. The basis upon which such computation is made.

INTERROGATORY NO. 17: Have you been hospitalized during your lifetime as a result of any injury or illness, other than that described in your Answer to Interrogatory No. 8?

INTERROGATORY NO. 18: If so, in each instance,

state:

- a. The name and address of the hospital;
- b. The name and address of the doctor who treated you;
- c. If a traumatic injury, describe how it was caused;
- d. The nature and extent of the injury or illness;
- e. Describe any disability you sustained as a result of the injury or illness;
- f. Whether a claim or a lawsuit was filed as a result thereof;
- g. If a claim was filed, the person or firm against whom the claim was made;
- h. If a lawsuit was filed, where the lawsuit was filed, the name and caption of the lawsuit, and the court in which it was filed.

INTERROGATORY NO. 19: Have you ever filed a claim for medical expenses or compensation as a result of any industrial injury?

INTERROGATORY NO. 20: If so, for each instance,

state:

- a. The name and address of the employer;
- b. When said injuries were incurred;

c. The names and addresses of the doctors who treated you;

d. The nature and extent of the injuries, including any disability rating given; and

e. The name of the entity providing benefits.

INTERROGATORY NO. 21: Were you suffering from any illness or physical disability immediately prior to the accident described in the Complaint?

INTERROGATORY NO. 22: If so, state the nature and type of each illness or disability.

INTERROGATORY NO. 23: Have you suffered any injuries or incurred any illness after the accident referred to in the Complaint?

INTERROGATORY NO. 24: If so, for each such illness or injury, state:

a. The date it occurred;

b. Where and how it occurred;

c. The nature and extent of the injury or illness;

d. The name and address of the doctors and physicians who treated you;

e. Whether any lawsuit was brought against any person by reason of the illness or injury, and if so, the name of the court wherein the lawsuit was brought, the name of the parties, and the name of the case, and whether said lawsuit was tried or settled.

INTERROGATORY NO. 25: Identify each person who you expect of call as an expert witness at trial.

INTERROGATORY NO. 26: State the subject matter on which each said expert is expected to testify, state the substance of the facts and opinions to which said expert is expected to testify, and state a summary of grounds for each opinion.

INTERROGATORY NO. 27: Identify each expert who has been retained or specially employed in anticipation or litigation or preparation for trial but who is not expected to be called as a witness at trial.


INTERROGATORY NO. 28: Please list the name, address, and telephone number of every fact witness known to you or your counsel who has personal information concerning the accident.

INTERROGATORY NO. 29: Have you or anyone on your behalf obtained a statement for any witnesses listed in Interrogatory No. 28? If so, state:

- a. The date the statement was obtained;
- b. The name and address of the person obtaining the statement;
- c. Whether the statement was oral or written;
- d. The subject matter of the statement;
- e. The name and address of the person currently having custody of such statement.

DATED this 19~~th~~ day of December, 1991.

WILLIAMS & HUNT

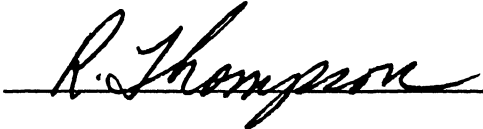


GARY B. FERGUSON
Attorney for Defendant
Blanding City

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed by first-class mail, postage prepaid on this 19 day of December, 1991 to the following:

Michael A. Harrison, Esq.
FRANDSEN, KELLER & JENSEN
90 W. 100 N.
Price, UT 84501
Attorneys for Plaintiff



8121

Tab 2

LAW OFFICES OF
WILLIAMS & HUNT
A PROFESSIONAL CORPORATION

257 EAST 200 SOUTH , SUITE 500
P.O. BOX 45678
SALT LAKE CITY, UTAH 84145-5678

ARY B. FERGUSON

November 24, 1993

TELEPHONE (801) 521-5678
FAX (801) 364-4500

VIA FACSIMILE

Darwin Fisher, Esq.
2696 N. University Avenue
Suite 220
Provo, UT 84604

Re: *Laws v. Blanding City*
Our File No. 5ULGT-3007

Dear Darwin:

I have reviewed your letter of November 23, 1993 regarding the proposed depositions in Blanding on Wednesday and Thursday, December 8 and 9, 1993.

I will not be able to attend depositions on those days. However, Kurt Frankenburg who took the deposition of Dr. Edgerton will be able to cover depositions in Blanding on those days. I have spoken with Norm Johnson, the city manager for Blanding City. He will contact each one of the witnesses on your list who are either city employees or city office holders to determine whether or not they can appear for depositions on the days that have been selected. As soon as he gets back to me, I will forward that information to you. I know, at least for now, that Norm Johnson will be there for his deposition on December 8. For your information, the city employees are Norm Johnson, Jeff Black and Mark Shumway. The city office holders or elected officials are Steve Palmer, Jim Slavens and Jim Shumway. None of the other individuals listed in your letter are employees or representatives of my client. Therefore, I have no control over whether or not they will appear at the for a deposition.

You have listed Stan Perkins as a witness to be deposed. Mr. Perkins' deposition was taken earlier in this case on September 22, 1992. If you do not have a copy of that deposition, I will be happy to forward it to you. I will object to him being redeposed unless you can show me that there is good cause for doing that.

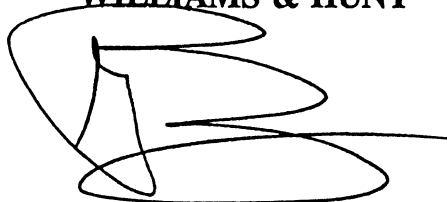
With reference to Dr. Burton, I have designated him as an expert witness to be used, potentially, in rebuttal to Dr. Edgerton. At this time, so long as Dr. Edgerton's testimony does not change, I do not foresee using Dr. Burton as an expert witness. If, however, Dr. Edgerton's testimony changes to something not known to me, I may then be forced to call Dr. Burton as a true rebuttal witnesses.

In the last several weeks, you told me that you would inform me of who would actually be your expert witness on liability. I still do not have that information. Since I do not have the information I cannot notice up that expert witness. This presents a problem for me given the December 10, 1993 discovery cutoff. Please advise me as soon as you can of the name of the liability expert witness who you intend to use so that we can make arrangements to have that witness's deposition taken on or before December 10, 1993 it at all possible.

I feel that you have allotted too much time for many of these depositions. Therefore, I would like to start them earlier or end them earlier. Please let me know.

Very truly yours,

WILLIAMS & HUNT

A handwritten signature in black ink, appearing to be "Gary B. Ferguson", written over the firm name.

Gary B. Ferguson

GBF/rt

Enc.

24975

Tab 3

FISHER, SCRIBNER, MOODY & STIRLAND

A Professional Corporation
Attorneys and Counselors at Law
2696 N. University Ave., Suite 220
Provo, Utah 84604

THOMAS J. SCRIBNER
DARWIN C. FISHER*
J. GRANT MOODY†
T. MCKAY STIRLAND‡

Telephone: (801) 375-5600
Facsimile: (801) 375-5607
Also-admitted in Washington,*
Oregon,† and Arizona‡

December 6, 1993

Gary B. Ferguson, Esq.
257 East 200 South, Suite 500
Salt Lake City, UT 84145

Re: Laws v. Blanding City

Dear Gary,

This is to inform you that Greg Thorpe of ECKHOFF, WATSON & PREATOR Engineering will be the expert witness we will use at trial.

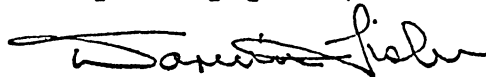
I am in the process of sending information to Mr. Thorpe for his evaluation and therefore he obviously has not had an opportunity to review the information and form an opinion.

Once he has formed an opinion, I will inform you and at that point you can decide whether or not you wish to take his deposition.

If you have any questions, please contact me.

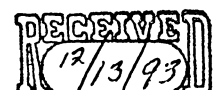
Thank you.

Very truly yours,



Darwin C. Fisher
Attorney at Law
FISHER, SCRIBNER, MOODY & STIRLAND, P.C.

DCF:cf



Tab 4

DARWIN C. FISHER, 1080
THOMAS J. SCRIBNER, P.C., 4910
FISHER, SCRIBNER, MOODY & STIRLAND
Attorneys for Plaintiff
2696 N. University Ave., Suite 220
Provo, UT 84604
Telephone: (801) 375-5600

SEVENTH JUDICIAL DISTRICT COURT
San Juan County

FILED DEC 14 1993

CLERK OF THE COURT
BY _____
Eggen

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SAN JUAN COUNTY, STATE OF UTAH

MELVIN LAWS,	:	SUPPLEMENTAL ANSWERS TO
	:	PLAINTIFF'S ANSWERS TO
Plaintiff,	:	DEFENDANT'S INTERROGATORIES
	:	AND RESPONSES TO REQUEST
vs.	:	FOR PRODUCTION OF DOCUMENTS
	:	
BLANDING CITY,	:	Civil No.5396
	:	(Judge Lyle R. Anderson)
	:	
Defendant.	:	

COMES now Plaintiff, Melvin Laws, by and through his attorney Darwin C. Fisher and answers Defendant's Request to Supplement Answers to Interrogatories and Responses to Request for Production of Documents.

INTERROGATORY NO. 25: Identify each person who you expect of (sic) call as an expert witness at trial.

ANSWER: Greg Thorpe, Eckhoff, Watson & Preator Engineering, 1121 E. 3900 South, Building C, Suite 100, Salt Lake City, UT 84124.

INTERROGATORY NO. 26: State the subject matter on which

each said expert is expected to testify; the substance of the facts and opinions to which said expert is expected to testify, and provide a summary of the grounds for each opinion.

ANSWER: Mr. Thorpe is expected to testify concerning the design, construction, maintenance, and safety, etc. of Blanding City landfill. We have not received the opinion of Mr. Thorpe. As soon as we receive his opinion, we will provide the information required by Interrogatory No. 26.

INTERROGATORY NO. 27: Identify each expert who has been retained or specially employed in anticipation or (sic) litigation or preparation for trial but who is not expected to be called as a witness at trial.

ANSWER: Please see answer to Interrogatory No. 25 and previous answers to Interrogatory No. 27.

INTERROGATORY NO. 28: Please list the name, address, and telephone number of every fact witness known to you or your counsel who has personal information concerning the accident or the injuries you sustained in the accident.

ANSWER: Please see previous answers to Interrogatory No. 28 and Plaintiff's witness list which has been provided to Defendant.

REQUEST NO. 1: Produce all documents relied upon in answering the accompanying Interrogatories.

ANSWER: Plaintiff did not rely upon any documents in

answering the Request to Supplement Answers to Interrogatories and Responses to Request for Production of Documents except those specifically referred to and which are in the possession of Defendant.

REQUEST NO. 4: Produce a copy of all reports received from all expert witnesses retained by plaintiff's counsel in this action, which expert witnesses are expected to testify on behalf of the plaintiff.

ANSWER: Plaintiff has not received any reports from expert witnesses. When such reports are received, Plaintiff will make available to Defendants the information required by Rule 26 of the Utah Rules of Civil Procedure.

Dated this 13th day of December, 1993.

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


DARWIN C. FISHER
Attorney for Plaintiff
Mel Laws

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid , this 13th day of December, 1993:

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



SECRETARY

Tab 5

SEVENTH DISTRICT COURT
San Juan County

FILED FEB - 2 1994

CLERK OF THE COURT
BY _____
Deputy

In The Seventh Judicial District Court Of San Juan County
State of Utah

MELVIN LAWS,	Plaintiff,
vs.	
BLANDING CITY,	Defendant,

**RULING ON MOTION
TO STRIKE DESIGNATION
OF EXPERT WITNESS**

Case No. 9107-5396

The original scheduling order entered in this matter required both parties to designate expert witnesses by August 15, 1993. Thereafter, the Court entered an Amended Scheduling Order, with the agreement of the parties, requiring designation of all witnesses by September 30, 1993. Discovery cutoff was set for December 10, 1993.

On September 30, 1993, plaintiff designated the engineering firm of Eckhoff, Watson & Preator as its expert witness, but did not provide the name of the individual in that firm who would testify. On November 24, 1993, and following intervening discussions on the subject, defendant's counsel wrote to plaintiff's counsel and asked him to provide the name of the witness as soon as possible so that the deposition could be taken before December 10, 1993. On December 6, 1993, counsel for plaintiff responded

and named Gary Thorpe as the expert witness, at the same time stating that Mr. Thorpe would not have formed an opinion until after he had reviewed information that was still "in the process" of being sent to him. This letter was received by defendant's counsel on December 13, 1993.

Defendant has moved to strike the designation of Gary Thorpe as an expert witness pursuant to Rule 16(d), U.R.C.P., which authorizes such relief for failure to comply with a scheduling order. Plaintiff maintains that he technically complied with the order and that there is no prejudice from the failure to comply with the spirit of the order. Plaintiff claims that his case will be severely prejudiced if he is unable to produce expert testimony on whether the Blanding City dump was safe in its design, construction, maintenance and operation. Plaintiff has offered no explanation for failing to have an individual expert ready with an opinion before the discovery cutoff.

In Arnold v. Curtis, 846 P.2d 1307 (Utah 1993), the Utah Supreme Court upheld striking the testimony of a medical expert in a medical malpractice case. The effect was summary judgment for the defendant. The expert in question was named three months after the designation deadline and five weeks before trial and was the second expert designated by the plaintiff. The opinion of the first expert was insufficient to withstand summary judgment.

Plaintiff did not properly designate his expert witness until he provided the name of an individual. It is unreasonable

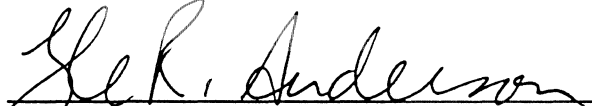
to expect a party to examine every member of a firm in order to make sure that the eventual witness has been deposed. Furthermore, though it may be technically sufficient to designate an expert who has not yet formed an opinion, the expert must, at the very least, be prepared with an opinion within a reasonable time before discovery ends.

It is not essential to plaintiff's case that he have an expert on the design, construction, maintenance and operation of dumps. Dumps are something within the ken of ordinary citizens. Though expert testimony may be helpful, the Court expects that members of the jury will be able to determine whether defendant negligently operated the dump without the assistance of an expert.

The motion to strike is granted. The Court takes this action reluctantly because it ordinarily prefers not to limit the parties in presentation of their cases, as long as the evidence is relevant. However, defendant has a right to adequate notice of expert testimony. In addition, it is important to emphasize the importance of scheduling orders in efficient trial management.

This matter is scheduled for trial beginning at 9:30 A.M. on February 22, 1994. Four days are allocated for the trial.

DATED this 2nd day of February, 1994.


District Court Judge

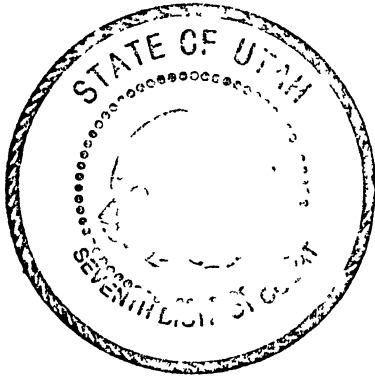
CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the forgoing RULING ON MOTION TO STRIKE DESIGNATION OF EXPERT WITNESS, postage prepaid, to the following:

Darwin C. Fisher
Thomas J. Scribner
FISHER, SCRIBNER, MOODY & STIRLAND, PC
Attorneys for Plaintiff
2696 N. University Avenue. Suite 220
Provo, UT 84604

Gary B. Ferguson
WILLIAMS & HUNT
Attorneys for Defendant
PO Box 45678
Salt Lake City, UT 84145-5678

DATED this 2nd day of February, 1993.



Ber McEugall
Deputy Court Clerk

Tab 6

INSTRUCTION NO. 17

Blanding City is subject to liability for physical harm caused to Melvin Laws by a dangerous condition at the Blanding City dump, 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 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.

INSTRUCTION NO. 18

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

ml

INSTRUCTION NO. 19

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

INSTRUCTION NO. 20

If you find that the defendant was negligent, you must decide if the plaintiff was also negligent. If the plaintiff was negligent and the plaintiff's negligence was a proximate cause of the plaintiff's own injuries, the plaintiff's negligence must be compared to the negligence of the defendant.

A plaintiff whose negligence is less than 50 percent of the total negligence causing the plaintiff's injuries may still recover compensation, but the amount will be reduced by the percentage of the plaintiff's negligence. If the plaintiff's negligence is equal to or greater than ~~the negligence of the defendant~~, ~~the total negligence of all defendants~~, then the plaintiff may recover nothing. For example, if you find the plaintiff's negligence was 30 percent of all negligence causing the injuries, then the plaintiff's recovery will be reduced by 30 percent. On the other hand, if you find the plaintiff's negligence is 50 percent or greater, then the plaintiff will recover nothing.

INSTRUCTION NO. 28

It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact, you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true, and that fact must be proved by a preponderance of the evidence.

This is a civil action and six members of the jury may find and return a verdict. At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and then return it to this room.

Tab 7

SEVENTH DISTRICT COURT
San Juan County

FILED FEB 24 1994

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SAN JUAN COUNTY, STATE OF UTAH

CLERK OF THE COURT
Deputy

MELVIN LAWS,	:	
Plaintiff,	:	SPECIAL VERDICT FORM
vs.	:	
BLANDING CITY,	:	Civil No.5396
Defendant.	:	(Judge Lyle R. Anderson)

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "YES". If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "NO". Also, any damages assessed must be proven by a preponderance of the evidence.

1. Was the defendant, Blanding City, negligent as alleged by Plaintiff?

ANSWER: Yes _____ No X

2. Was defendant Blanding City's negligence a proximate cause of the injuries sustained by the plaintiff?

ANSWER: Yes _____ No X

If you answered "NO" to either questions 1 or 2, then stop here and have the foreman sign the special verdict.

3. Was the plaintiff negligent, as alleged by the defendant?

ANSWER: Yes _____ No _____

4. Was the plaintiff's negligence a proximate cause of plaintiff's injuries?

ANSWER: Yes _____ No _____

5. If you answered questions 1 and 2 "Yes", then, and only then, answer the following question: Assuming all the negligence that proximately caused the plaintiff's injuries to total 100%, what percentage of that negligence is attributable to:

A. Plaintiff Melvin Laws _____%

B. Defendant Blanding City _____%

TOTAL 100 %

6. If you have answered Questions 1 and 2 "Yes", state the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the injuries.

Special Damages

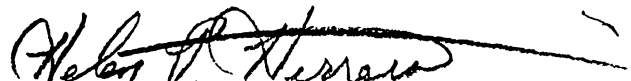
A. Past Special Damages \$ _____

B. Future Special Damages \$ _____

General Damages \$ _____

TOTAL \$ _____

DATED this 23rd day of February, 1994.


Foreman