

IN THE SUPREME COURT OF THE STATE OF NEVADA^[BM1]

TREASURE ISLAND CORP., D/B/A
TREASURE ISLAND AT THE MIRAGE
BAY RESORT AND CASINO,
Appellant,
vs.
KELLI DUHON, AN INDIVIDUAL,
Respondent.

No. 51023

FILED

NOV 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

In this case, respondent Kelli Duhon slipped and fell on a large puddle of oil in a crosswalk extending over Buccaneer Bay Boulevard, appellant Treasure Island's (TI) private roadway. Duhon sued for damages, claiming that TI owned the crosswalk in question or, alternatively, that TI had a duty to maintain the crosswalk since TI put the crosswalk to "special use" as a result of its customer and employee traffic. The jury returned a general verdict finding TI liable but did not reveal the theory upon which its decision was based.

On appeal, TI alleges, among other things, that the jury was not properly instructed on the "special use" theory of liability, which imposes a duty upon private property owners who put a public walkway to a "special use." We agree that the jury was given an incomplete and inaccurate instruction with regard to the "special use" theory. Furthermore, because the jury returned a general verdict and it is impossible to discern under which theory of liability it found TI liable, we

must reverse the district court's judgment and remand for a new trial.¹ The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

"Special use" jury instruction

TI argues that the district court erred by rejecting its proffered instruction regarding what constitutes a "special use." As a result, TI contends that the jury was provided with an incomplete instruction on the "special use" theory of liability. We agree.²

We review a district court's decision to give or refuse a jury instruction for an abuse of discretion. See Allstate Insurance Co. v. Miller, 125 Nev. ___, ___, 212 P.3d 318, 331 (2009). However, we review de novo whether the jury was provided with a complete and correct statement of the law. See id.

Under the "special use" doctrine, an abutting landowner is "under a duty to maintain that portion of a public [walkway] put to his special use in a reasonably safe condition for pedestrians if that special use by the defendants or its customers creates the hazard." Herndon v. Arco Petroleum Co., 91 Nev. 404, 406, 536 P.2d 1023, 1025 (1975). The term "special use" has been defined as some type of use that is

¹TI also contends that the district court erred by (1) denying its motion for a directed verdict, (2) denying it an opportunity to recall a key witness in the case, and (3) rejecting its jury instructions regarding Clark County's definition of "public sidewalk" and "crosswalk." Having reviewed these contentions, we conclude that none have merit.

²As a related matter, TI asserts that the "special use" doctrine does not apply to crosswalks and, therefore, is inapplicable in this case as a matter of law. We conclude that TI's view of the "special use" doctrine is exceedingly narrow and reject this argument.

“independent of and apart from the ordinary and accustomed use for which [walkways] are designated.” Wiseman v. Hallahan, 113 Nev. 1266, 1268, 945 P.2d 945, 946 (citing Major v. Frasier, 78 Nev. 14, 18, 368 P.2d 369, 371 (1962)).

At the close of evidence, the district court instructed the jury that it could find TI liable for Duhon’s injuries if it found that TI put the crosswalk to its “special use,” and that the “special use or that of [its] customers create[d] the hazard.”³ However, the district court rejected TI’s complementary “special use” instruction, which stated that, “[l]iability will not lie unless the abutting property owner created the defect in a manner independent of and apart from the ordinary and accustomed use for which [walkways] are designated.”

Here, TI’s proposed instruction properly defined the term “special use.” See Wiseman, 113 Nev. at 1268, 945 P.2d at 946. By instructing the jury on “special use” liability, but failing to provide a definition as to what constitutes a “special use,” we conclude that the district court did not completely and accurately instruct the jury.

³The district court’s “special use” instruction provided:

Ordinarily the owner or occupant of property adjacent to a public walkway is under no duty to keep the public walkway in a reasonably safe condition.

However, the owner or occupant of property adjacent to a public walkway is under a duty to keep that portion of a public walkway put to his special use in a reasonably safe condition if his special use or that of his customers creates the hazard.

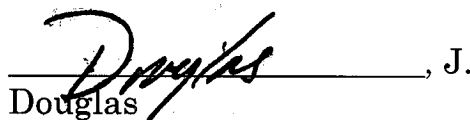
The incomplete and inaccurate “special use’ instruction was prejudicial

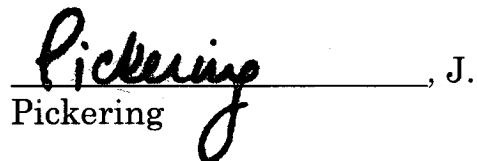
Even if the district court provided an incomplete or inaccurate instruction to the jury, reversal is only warranted if the error was prejudicial. See Allstate, 125 Nev. at ___, 212 P.3d at 331. Such prejudice exists when the jury may have reached a different verdict absent the error. See id.

Because the jury was not provided with a special verdict form, it is impossible to determine whether the error contributed to the jury’s verdict in this case. See Allstate, 125 Nev. at ___, 212 P.3d at 333 (stating that when this court is unable to determine the theory of liability that the jury relied upon, reversal and remand may be appropriate). While the jury could have determined that TI owned the crosswalk in question and was thus liable for Duhon’s injuries under that theory, it could have alternatively found TI liable under the “special use” theory of liability. Since the jury was not completely and accurately instructed on the “special use” theory of liability, we are unable to definitively say that the error did not have an impact on the jury’s verdict. See Allstate, 125 Nev. ___, 212 P.3d at 331. As a result, we conclude that the incomplete and inaccurate instruction on “special use” was prejudicial. Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.

 , J.
Parraguirre

 , J.
Douglas

 , J.
Pickering

cc: Hon. Michael Villani, District Judge
Howard Roitman, Settlement Judge
Hall Jaffe & Clayton, LLP
Kaempfer Crowell Renshaw Gronauer & Fiorentino/Reno
Law Offices of Michael A. Koning
Eighth District Court Clerk