

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

JOYCE C. BEAN and ROBERT KAMPERT, CO-CONSERVATORS OF THE ESTATE OF SARA KAMPERT, a Minor, and JOYCE C. BEAN and ROBERT KAMPERT, CO-CONSERVATORS OF THE ESTATE OF LACIE MARIE KAMPERT, a Minor, and CHRISTOPHER NEWBURY, By and Through his Natural Mother and Next Friend, TAMARA NEWBURY, and ROBERT KAMPERT and BARBARA KAMPERT,

Respondents,

v.

SUPERIOR BOWEN ASPHALT COMPANY, LLC,

Appellant.

DOCKET NUMBER WD71638

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: April 12, 2011

APPEAL FROM

The Circuit Court of Platte County, Missouri
The Honorable Abe Shafer, Judge

JUDGES

Division Two: Mitchell, P.J., and Ellis and Howard, JJ.

CONCURRING.

ATTORNEYS

Phillip S. Smith, Kansas City, MO
James Montee, St. Joseph, MO

Attorneys for Respondents,

Paul D. Cowing, Lee's Summit, MO

Attorney for Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

JOYCE C. BEAN and ROBERT KAMPERT,)
CO-CONSERVATORS OF THE ESTATE OF)
SARA KAMPERT, a Minor, and JOYCE C.)
BEAN and ROBERT KAMPERT,)
CO-CONSERVATORS OF THE ESTATE OF)
LACIE MARIE KAMPERT, a Minor, and)
CHRISTOPHER NEWBURY, By and Through)
his Natural Mother and Next Friend, TAMARA)
NEWBURY, and ROBERT KAMPERT and)
BARBARA KAMPERT,)

OPINION FILED:
April 12, 2011

Respondents,)

v.)

SUPERIOR BOWEN ASPHALT COMPANY,)
LLC,)

Appellant.)

WD71638

Platte County

Before Division Two Judges:

Karen King Mitchell, Presiding Judge, and
Joseph M. Ellis and Victor C. Howard, Judges

Superior Bowen Asphalt Company (“Superior”) appeals the Circuit Court of Platte County’s (“trial court”) amended judgment granting a new trial to the Estate of Sara Kampert, the Estate of Lacie Marie Kampert, Robert Kampert, Barbara Kampert and Christopher Newbury (collectively, “the Kamperts”) in their wrongful death action against Superior for the death of James Kampert. The trial court granted the Kamperts’ motion for a new trial based upon jury confusion caused when two instructions (one submitted by the Kamperts and one submitted by Superior) were read together. On appeal, Superior claims that the trial court erred in granting the Kamperts’ motion for new trial because they invited the error by submitting an optional version of their verdict directing instruction that contained inconsistent language with the mandatory defendant’s verdict directing instruction set forth in the Missouri Approved Instructions.

AFFIRMED.

DIVISION TWO HOLDS:

To establish that the trial court abused its broad discretion in sustaining the Kamperts' motion for a new trial based on plain error in the jury instructions, Superior would have to have shown either that there was no error in the instructions or that there was no potential for prejudice from the erroneous instruction. In this case, we agree that it was error for verdict directing instructions containing inconsistent language to have been submitted to the jury. There was also clearly prejudice, as the jury stated to the trial court that it was confused by the inconsistent language and asked for clarification, which the court could not give at that time.

The crux of Superior's appeal is that the Kamperts invited the error by submitting an optional version of their own verdict directing instruction (based upon MAI 19.01 and 20.01) that contained language that conflicted with the language set forth in the mandatory version of the corresponding defense instruction (based on MAI 32.01(3)). Because we find nothing in the text of MAI 19.01 or the accompanying notes on use which leads us to conclude that the optional modification found in MAI 19.01 is mandatory in cases alleging comparative fault, we conclude that the Kamperts are not barred from asserting plain error in the combination of the instructions. The trial court, therefore, did not abuse its discretion in granting the Kamperts' motion for new trial.

OPINION BY: Karen King Mitchell, Presiding Judge

April 12, 2011

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