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Ray C. Johnson and Frances C. Johnson v. Donald Rogers and Newspaper Agency Corporation, a Utah corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RAY C. JOHNSON and FRANCES C. JOHNSON, Plaintiffs and Appellants, vs. DONALD ROGERS and NEWSPAPER AGENCY CORPORATION, a Utah corporation, Defendants and Respondents.	Case No. 20622

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APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE STANDARD FOR AVAILABILITY OF PUNITIVE DAMAGES IN UTAH IS, AND SHOULD BE, "RECKLESS INDIFFERENCE" TOWARDS THE RIGHTS OF OTHERS, AND THERE IS MORE THAN AMPLE EVIDENCE OF SUCH RECKLESS INDIFFERENCE BY EACH OF THE DEFENDANTS IN THIS CASE TO HAVE WITHSTOOD A MOTION FOR SUMMARY JUDGMENT ON THAT ISSUE.

The majority of the defendants' briefs on the issue of the standard under which punitive damages may be assessed against them involves the argument that the standard is malice which is implied from conduct. Evidencing the inherent problems with this approach is the complexity and the circuitousness of defendants' own argument. Precisely this kind of fictionalized standard was rejected by this Court, in a false imprisonment context, in McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (Utah 1984) ("McFarland"). Such a standard would be, quite simply, disingenuous. More significantly, however, defendants' argument ignores both the facts and the history of this case.

Judge Fishler ruled in this case that the standard for availability of punitive damages in Utah is "actual malice," which he defined as having an "intent to injure." Judge Fishler's ruling was based, in part, on his express finding that McFarland had impliedly overruled Behrens v. Raleigh Hills Hospital, Inc., 675 P.2d 1179 (Utah 1983) ("Behrens"), Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

("Leigh Furniture"), and Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982) ("Branch"). Judge Fishler then ruled that, as a matter of law, there was no such intent in this case. It is only the appropriateness of those rulings with which we are concerned on this appeal. Thus, implied malice is not at issue.

Defendants cite a number of Utah Supreme Court cases as support for their position that Utah has always required "malice, ill will or evil motive" as a prerequisite for punitive damages awards. These cases all pre-date the Behrens, Branch and Leigh Furniture cases, and the majority involved findings by the triers of fact that there was in fact malice by the defendants in those cases. Subsequently, this Court, along with the majority of other courts which have ever considered the issue, rejected the argument that malice in fact is required before a defendant may be held accountable in punitive damages. Even Judge Fishler recognized that the reckless indifference standard prevailed under Behrens, Branch and Leigh Furniture, but specifically found those cases to have been overruled by McFarland. Thus, the decision that there must be proof of intent to injure, which is directly contrary to the express holding in Behrens, was based entirely upon Judge Fishler's belief that such a result was mandated by McFarland.

Plaintiffs respectfully submit that Judge Fishler has incorrectly and overbroadly interpreted McFarland. The inequitable and illogical result of his decision is illustrated by the facts of the present case. Contrary to defendants' assertions, plaintiffs have offered more than sufficient evidence to create issues of fact with respect to each of the defendants' reckless indifference. Those facts were detailed in plaintiffs' prior brief, and will not be repeated here.

Furthermore, and notwithstanding defendant Rogers' argument to the contrary, the vast majority of states which have considered the issue of punitive damage recovery in the context of drunk driving have ruled that punitive damages are appropriate in such cases. See Plaintiffs' Appendix to Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment. The rationale for this position has been described as follows:

> Operation of a motor vehicle after voluntary intoxication presents a good example of the second general type of conduct by a defendant for which punitive damages will be sanctioned--conduct which the defendant knows, or should have reasoned to know, not only creates an unreasonable risk of harm but a strong probability that the harm will result, yet as to which the defendant proceeds in reckless or conscious disregard of the consequences. The majority of courts have held that driving a motor vehicle on a public road after voluntary intoxication, by itself, comports with their definitions of the type of conduct on the part of a defendant which must be found to

> justify the imposition of punitive damages. For example, in Connecticut driving under the influence was found to fit the characterization of "wanton misconduct"; in New York it was found to equate with the needed "gross, willful and wanton negligence"; in Oregon the requisite "wanton and reckless" conduct was found; and, in Pennsylvania driving under the influence was found to meet the necessary "outrageous conduct done with reckless indifference to the interests of others" tests so as to justify a punitive award.
>
> The jurisdictions which view driving while intoxicated as itself sufficient to warrant the imposition of punitive damages place great emphasis on the fact that the defendant knew he was consuming a substance which would seriously effect [sic] his ability to drive safely and that this impaired ability posed a clear danger to others who the defendant would encounter on the highway. Thus, the conscious choice to drive after drinking to the point of intoxication is viewed as sufficient antisocial conduct to justify punitive damages. (Citations omitted; emphasis added.)

J. Ghiardi & J. Kircher, Punitive Damages Law and Practice § 5.03 (1985). The suggestion that Utah should ignore this precedent, and instead adopt a policy which is extremely favorable to the drunk driver, is not worthy of extensive discussion. This state, through both its courts and its legislature, has always maintained a hard line with respect to the social problems that are created by intoxicated operation of vehicles. The present case clearly does not warrant any change in that well established state policy.

In any event, however, the facts of this case are sufficient to withstand summary judgment on this issue even in those few jurisdictions which have held that "mere evidence of intoxication" is not alone sufficient to support a punitive damages award. In the present case, defendant Rogers, an habitual drinker and drug user, went to a private club with friends immediately before he was expected to report to work and drive a company vehicle to Park City. At that club, Rogers consumed enough drinks to cause the level of alcohol in his system to be more than two times the legal level of presumptive intoxication. In that state, he proceeded to operate both his personal vehicle and the vehicle of his employer on downtown Salt Lake City streets. In the course of his operation of these vehicles, Rogers' level of impairment was so great that he drove through an intersection, over a curb, onto a sidewalk and demolished a number of concrete pillars--thereby causing David Johnson's death. Rogers claims that he does not even recall these events. In addition, it is not clear, as defendant's counsel suggests, that Rogers did not also run a red light. Such conduct cannot, in good conscience, be referred to as a "momentary lapse," nor as something that could have happened to anyone regardless of their level of intoxication. Thus, plaintiffs have offered more than "mere evidence of intoxication" in this case.

With respect to defendant NAC, there is also sufficient evidence to have withstood a motion for summary judgment on the issue of its reckless indifference. The evidence suggests that NAC's hiring, operating and management procedures were such as to create a situation which was conducive to widespread drinking and drug usage by its nighttime employees. There were virtually no practices instituted by NAC which could have prevented such conduct. In fact, NAC's employees, including Rogers, had essentially unlimited discretion with respect to their operation of NAC's vehicles. In addition, there is evidence that NAC both knew of and condoned this behavior by its employees, thereby making it significantly more likely to occur. NAC's attempts, following summary judgment, to deny these facts and attack the credibility of the witnesses who described them are wholly inappropriate, as plaintiffs are entitled to the benefit of all reasonable factual inferences on this appeal. See, e.g., Cooke v. Mortensen, 624 P.2d 675 (Utah 1981) and Themy v. Seagull Enterprises, Inc., 595 P.2d 526 (Utah 1979).

Plaintiffs did admit in the trial court that they could not prove that either Rogers or NAC intended to injure David Johnson or his family. However, as the facts here have shown, adoption of such a standard would effectively bar recovery of punitive damages within the State of Utah. The end

result would be that the punishment and deterrent functions served by punitive damage awards would be eliminated. This result would appear to go far beyond the intent of this Court when it decided McFarland, yet this is the result which currently prevails in the Third District Court of this State.

Plaintiffs also admit that punitive damage recovery is not appropriate in every automobile accident case. However, this is not, as defendants would have this Court believe, an ordinary automobile accident case involving ordinary negligence by the defendants. Plaintiffs fully support the defendants' suggestion that this Court should actually read the record that has been compiled in this case. Even a cursory review of the depositions of some of NAC's employees and former employees will show that there are triable issues with respect to the defendants' reckless indifference which should have been allowed to go to a jury.

II. THERE WERE MATERIAL ISSUES OF FACT WHICH SHOULD HAVE PRECLUDED SUMMARY JUDGMENT AS TO DEFENDANT NAC'S VICARIOUS LIABILITY FOR PUNITIVE DAMAGES.

Plaintiffs will not reiterate their argument with respect to NAC's vicarious liability for punitive damages here. However, the gist of that argument is that there is a triable issue of fact with respect to NAC's liability for punitive damages under any one of the three recognized vicarious liability standards, notwithstanding NAC's argument

that the evidence is insufficient to support an award under the most restrictive approach. Moreover, NAC has again ignored the judgment from which plaintiffs have appealed. In fact, Judge Fishler ruled that there simply can be no vicarious liability for punitive damages in Utah, and that the only way to recover punitive damages from a corporation such as NAC is to prove that its managerial employees were guilty of conduct which resulted in injury and which evidences "actual malice." Thus, Judge Fishler rejected every one of the recognized standards of vicarious liability, including the most restrictive Restatement rule, and defendants' argument with respect to the sufficiency of the evidence under that standard is therefore inappropriate.

Plaintiffs do take issue with defendants' somewhat misleading statement that the pure vicarious liability rule is "clearly the minority point of view." In fact, this standard is still the rule in a substantial minority of jurisdictions, and was, until very recently, the majority rule. See, J. Ghiardi & J. Kircher, Punitive Damages Law and Practice §§ 5.05 and 5.06 (1985), and supplement thereto. Moreover, defendants' suggestion that, as "a singular expression of its reasoning," the "some fault" standard should be seen as somehow less valid than the New Mexico standard, which also appears to be a singular expression of its reasoning, is somewhat disingenuous.

Finally, some of defendants' arguments essentially amount to admissions that issues of fact exist with respect to whether or not NAC should be held accountable under any of the three standards of vicarious liability. For example, NAC argues that it was not reckless in employing or retaining Rogers as a driver, since Terry Northrup, Rogers' supervisor, stated that he did not know that Rogers had been previously convicted of drunk driving in Oregon. Plaintiffs cite the Court to the facts that were recited in their opening brief which surely create a triable issue with respect to whether or not NAC in fact did know of Rogers' difficulties, or at the very least, simply avoided obtaining that knowledge.

The point is that Judge Fishler did not rule that plaintiffs' evidence was insufficient, as a matter of law, to satisfy the Restatement, or any other, standard of vicarious liability for punitive damages. On the contrary, Judge Fishler simply rejected the concept of vicarious liability for punitive damages in its entirety. Plaintiffs submit that this was an unrealistic ruling which is not in furtherance of the punishment and deterrent policies which this Court has sought to further with punitive damage awards generally. Thus, vicarious liability for punitive damages will be appropriate under certain circumstances, especially where, as here, "compensatory damages may be simply absorbed [by NAC] as a cost of doing

business." Behrens, 675 P.2d at 1186. Plaintiffs urge this Court to adopt the some fault standard, as the standard which is most likely to further the purposes for imposition of punitive damages generally, but in any event, to reverse the ruling by Judge Fishler that vicarious liability for punitive damages simply does not exist in Utah.

III. PLAINTIFF RAY JOHNSON IS ENTITLED TO MAINTAIN AN ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, SINCE HE WAS BOTH INJURED AND WITHIN THE ZONE OF DANGER CREATED BY THE ACCIDENT.

The trial court has ruled in this case that plaintiff Ray Johnson is entitled to maintain a cause of action against defendants for negligent infliction of emotional distress arising out of this accident, expressly on the basis that Mr. Johnson was within the "zone of danger" created by Rogers' negligent operation of NAC's vehicle. Plaintiffs do not contest the ruling that Mrs. Johnson may not recover on her claim for negligent infliction of emotional distress, as she was admittedly outside of the zone of danger. However, defendants have appealed Judge Fishler's ruling with respect to Mr. Johnson's claim, arguing essentially that this Court has ruled clearly that no cause of action for emotional distress may be maintained on the basis of negligence in Utah. As support for their argument, defendants cite Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961) and Covert v. Kennecott Copper

Corp., 23 Utah 2d 252, 461 P.2d 466 (1969), neither one of which may properly be construed in that fashion.

The Samms case involved a claim for emotional distress damages arising out of the defendant's continued sexual advances to the plaintiff. This Court simply held that recovery of emotional distress damages in such a case would only be allowed where the defendant committed an intentional wrong. The Court did not consider what criteria would apply to recovery for emotional distress by bystanders at an accident, but dealt only with the criteria for recovery by a plaintiff for the direct insult of unwanted sexual advances. Moreover, the Samms court specifically limited its holding to situations that do not involve physical injury. In fact, the court expressed a very progressive attitude with respect to tort damage recovery generally, rejecting the theory that a possibility of spurious claims should prevent recovery, stating:

> That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false.

358 P.2d at 347.

Similarly, the Covert case does not support the proposition for which it has been cited, as it did not involve a finding that no cause of action exists for negligent infliction of emotional distress. Rather, in Covert, the court

simply found no evidence of negligence which would have been sufficient to support such a claim. The implication is that such a claim could exist under appropriate facts, since the court found that the defendant's conduct in that case amounted to no more than "a mistake in judgment in circumstances of emergency." 461 P.2d at 469.

Finally, in a holding which could not be reconciled with defendant's position, this Court has allowed recovery of emotional distress damages under the theory of strict liability for nuisance, even where the defendant's conduct was specifically found to be insufficient to support a cause of action in negligence. Branch v. Western Petroleum, Inc., supra.

Thus, although this Court has never been presented with the issue of bystander recovery of emotional distress damages, it does not appear, as defendants suggest, that there simply can be no recovery of such damages on the basis of negligence. It should be noted that the vast majority of other jurisdictions that have considered this issue have allowed emotional distress damages to bystanders under certain circumstances. The most conservative of those jurisdictions would allow recovery where the defendant's conduct also resulted in impact on the person that claims emotional distress. See, e.g., Ellington v. United States, 404 F.Supp. 1165 (M.D.Fla. 1975). The Samms case provides support for at least this type

of recovery, in that its holding was limited to cases that do not involve physical injury. As such, plaintiff Ray Johnson's emotional distress should be compensable under both this bystander recovery approach, and as a part of his recovery for his physical injuries.

However, Judge Fishler did not so limit his ruling. In fact, Judge Fishler adopted the standard which has been widely recognized in other jurisdictions, and under which recovery is allowed to a bystander where, although there was no impact, the plaintiff was within the "zone of danger" created by the defendant's conduct and was closely related to the injured party. See, e.g., Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972).

Judge Fishler's adoption of the zone of danger standard is supported by substantial precedent from other jurisdictions. See, Annot., 29 A.L.R.3d 1337 (1970; Supp. 1985), and cases cited therein. However, the issue of bystander recovery for emotional distress has never been considered by this Court. The cases which have denied recovery of emotional distress damages where the plaintiff's claim was based upon negligence have ordinarily done so on the theory that the potential for spurious claims in such cases is simply too great. The Samms case, involving emotional distress caused by unwanted sexual advances, provides a good example of such a

claim. However, the zone of danger standard of emotional distress recovery has been developed with the intent of preventing just such spurious claims. Thus, in order for a bystander to recover for emotional distress in a zone of danger jurisdiction, he must have been so close to the accident as to presumably have had legitimate fear for his own personal safety, and in most jurisdictions, must have had a close relationship to an injured party as well.

It would be difficult to imagine a more legitimate claim of emotional injury than that which has been made in the present case. As he stood on a Salt Lake City street corner waiting for a change of light, Ray Johnson's life was abruptly and unexpectedly shattered, as his only child was violently struck by a truck that was driven by an intoxicated defendant Rogers. Shortly thereafter, David Johnson died in his father's arms. The unimaginable harm that has been suffered by Ray Johnson as a result of these events is directly attributable to the defendants' conduct. A clearer case could probably not be made for the adoption of the zone of danger standard in this jurisdiction, and Judge Fishler's ruling in that regard should be affirmed.

IV. THE § 31-41-9 THRESHOLD REQUIREMENT FOR PERSONAL INJURY LAWSUITS HAS BEEN SATISFIED IN THIS ACTION.

Utah Code Ann. § 31-41-9(1) provides the following limitation on personal injury actions arising out of automobile accidents:

> No person for whom direct benefit coverage is provided for in this Act shall be allowed to maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident except where there has been caused by this accident any one or more of the following:
>
> (a) Death;
>
> (b) Dismemberment or fracture;
>
> (c) Permanent disability;
>
> (d) Permanent disfigurement; or
>
> (e) Medical expenses to a person in excess of $500.00. (Emphasis added).

NAC has argued that, with respect to plaintiff Ray Johnson's general damages claim, this threshold requirement has not been met, claiming that Ray Johnson's medical expenses do not exceed $500.00. In fact, however, while the expenses that were incurred by Ray Johnson in connection with the treatment of his foot that was injured in the accident are less than $500.00, the total "medical expenses" that were personally incurred by Ray Johnson as a direct result of the accident are well in excess of $1,000.00.

As a direct and proximate result of the accident, Ray Johnson received psychiatric medical treatment from a licensed medical doctor, Dr. Susan Mirow. That fact is not disputed by the defendants. Those medical services cost Ray Johnson approximately $1,200.00. See Exhibit A to Deposition of Dr. Mirow. Nonetheless, NAC argues that consideration of psychiatric medical expenses in establishing the § 31-41-9 threshold would be "bootstrapping" past that threshold by inclusion of general damages for emotional distress within the term "medical expenses." However, any expenses for Ray Johnson's treatment that were actually and necessarily incurred by him as a direct and proximate result of the accident are not "general damages," but are in fact medical expenses within their ordinary meaning and within the meaning of § 31-41-9. Moreover, if there is a question as to whether or not these expenses were legitimately caused by the accident, it is a question of fact which should not have been resolved on a motion for summary judgment. In fact, Judge Fishler so ruled when he denied defendants' motion on this issue.

In addition, defendants' argument on this issue depends entirely for its validity upon a misinterpretation of § 31-41-9. That statute does not provide, as NAC has alleged, that in order for an injured person to maintain a cause of action for general damages, that person must personally have

suffered medical expenses in excess of $500.00. On the contrary, the statute specifically provides that an action for general damages can only be maintained if "there has been caused by this accident," any one of a number of criteria, including death or medical expenses to "a person" in excess of $500.00. Assuming, arguendo, that Ray Johnson's psychiatric expenses are not medical expenses for the purposes of this statute, there still can be no question but that there was caused by the accident which is the subject of Ray Johnson's claim, both a death and medical expenses to a person in excess of $500.00. Nothing in the statute provides that each and every plaintiff must themselves meet the threshold criteria, as NAC suggests. On the contrary, the threshold requirement is expressly directed at the severity of the "accident," rather than at the severity of the injuries that were received by each particular plaintiff. Therefore, the threshold requirement of § 31-41-9 has been fully satisfied, and Judge Fishler's ruling on that issue must be affirmed.

V. DEFENDANT ROGERS' PRIOR CRIMINAL CONVICTION DOES NOT PRECLUDE PLAINTIFFS FROM RECOVERY OF PUNITIVE DAMAGES AGAINST HIM.

Defendant Rogers has raised, apparently for the first time on this appeal, the issue of whether his criminal punishment should bar plaintiffs' recovery of punitive damages against him. The majority of cases in which this issue has

been discussed have held that criminal punishment of a defendant for the same conduct which gave rise to the civil suit will not bar punitive damage recovery by the civil plaintiff. See, J. Ghiardi and J. Kircher, Punitive Damages: Law and Practice, § 5.33 (1985), and cases cited therein.

Recently, some states, such as Arizona and Indiana, have provided by statute that criminal sanctions do not affect civil plaintiffs' recovery of punitive damages. See, Puz v. McDonald, 140 Ariz. 77, 680 P.2d 213 (Ct.App. 1984); Gomez v. Adams, 462 N.E.2d 212 (Ind.App. 1984). In addition, the Supreme Court of Oregon has considered and rejected the argument now advanced by defendant Rogers in a thoughtful and extensive discussion on the issue:

> It is urged upon us that the purpose of punitive damages is identical to that of [the criminal code] and that it is unreasonable to permit punishment for the same act in two successive court proceedings where, in each instance, the purpose of the punishment is determent of defendant and others from like action.
>
> There is no doubt that in the vast majority of jurisdictions in the United States the rule is that an action for punitive damages is not affected by previous criminal sanctions. In a few states, punitive damages are never allowed, so the question does not arise. Of the states that do authorize the recovery of punitive damages, only a small minority, including Indiana and Nebraska, prohibit punitive damages where a tort is also a crime.
>
> * * *

We are told that it is "unreasonable" to allow double punishment for an act which would subject a defendant to both criminal and civil sanctions. We see nothing unreasonable about it. While there may be some judicial antagonism toward the proliferation of requests for punitive damages in certain civil cases, we do not think it reasonable to eliminate punitive damages merely because of a prior criminal conviction.

We are unable to understand why the additional determent of punitive damages is considered unreasonable. Not only the criminal justice system but every law abiding citizen is concerned with the increasing crime rate. If we are concerned with the types of acts which may subject a defendant to a criminal charge and civil liability such as violent crimes against the person, as in this case, we see nothing wrong with the additional determent of the allowance of punitive damages.

* * *

We believe there is merit to plaintiff's argument that it is in the cases of more aggravated wrongful conduct that criminal prosecution is apt to occur and to adopt the change which defendants urge will tend to shield those malefactors to a greater extent than those who may have to respond in punitive damages because their conduct was not so blatantly wrongful as to invite the attention of the criminal justice system.

We do not believe the change [in the law] for which defendants ask to be either just or reasonable. We believe that such a change would eliminate a factor which gives some aid in the determent of anti-social conduct. (Emphasis added; citations omitted.)

Roshak v. Leathers, 277 Or. 207, 560 P.2d 275, 277-79 (1977). As such, the Oregon court refused to change the rule in that jurisdiction that criminal punishment does not affect the availability of punitive damages in civil cases.

The same rationale is applicable to this case, and the same rule should be adopted by this Court, since defendant Rogers has similarly failed to offer any reasonable explanation why his criminal conviction should relieve him of liability to the plaintiffs in this action. In fact, there is evidence in this case that, despite the punishment that was meted out by the criminal justice system in this case, defendant Rogers has not, as he claims, ceased his consumption of alcohol since the accident occurred. See Deposition of Richard A. Christensen, pp.14-16.

CONCLUSION

For the reasons set forth in this and Appellants' Opening Brief, the Order of the trial court granting partial summary judgment to defendants on the issue of punitive damages should be reversed, and the Order with respect to plaintiff Ray Johnson's claim for negligent infliction of emotional distress should be affirmed.

DATED this 29th day of January, 1986.

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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, 4 true and correct copies of the foregoing APPELLANTS' REPLY BRIEF to the following on this 29th day of January, 1986:

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