

2008

John Boyle and Norrine Boyle v. Kerry Chirstensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN BOYLE and NORRINE BOYLE,

Plaintiffs / Appellants,

vs.

KERRY CHRISTENSEN,

Defendant / Appellee.

Appellate Case No. 20080582

Third District Court Civil No. 050912506

HON. TYRONE E. MEDLEY
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS

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**FILED
UTAH APPELLATE COURTS**

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the court below are identified in the caption on appeal.

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JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78A-4-103(j).

ISSUES PRESENTED FOR REVIEW

The following issues are presented to this Court for review:

ISSUE NO. 1: Whether the trial court committed reversible error in refusing Plaintiff's request to have prospective jurors complete a brief written Jury Questionnaire that was designed, in part, to ferret out potential biases regarding tort reform, or to ask such questions orally in voir dire.

Standard of review: A trial court's management of jury voir dire is reviewed for abuse of discretion. *Alcazar v. University of Utah Hospitals, et al.*, 2008 UT App 222 ¶9, 188 P.3d 490, 493; *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993).

Preservation: This issue was preserved in plaintiffs' proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow Up Voir Dire. (R. 596-600; Exhibit 2.)¹

ISSUE NO. 2: Whether the trial court committed reversible error by allowing defense counsel to refer in closing argument to an unrelated lawsuit of national notoriety

¹ Plaintiff's Proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow up Voir Dire are attached hereto as Addendum Exhibit 2. Perhaps because it was submitted as an attachment to correspondence, the document was not docketed at the time of its initial filing. However, defendant acknowledged receiving it (R. 436), and it was incorporated in part by the trial court (R. 536 # 1, 2, 9, 11, 14 and R. 599-600, # 5-9). To clear up the record, plaintiff subsequently resubmitted another copy of the document without objection. (R. 599-600)

that was not in evidence and that was intended to appeal to the prejudice of the jury by stating, “That’s how we get verdicts like the McDonald’s case with a cup of coffee.”

Standard of review: The trial court’s decision to allow defense counsel to refer to the McDonald’s coffee case in closing argument is reviewed for abuse of discretion. *State v. Alonzo*, 932 P.2d 606 (Utah App. 1997), and *State v. Alonzo*, 973 P.2d 975 (Utah 1998).

Preservation: Plaintiff objected on the record at the time of the prejudicial statement. (R. 695, p. 48:17-23)

ISSUE NO. 3: Whether the trial court committed reversible error by granting Defendant’s pre-trial Motion in Limine to Dismiss Norrine Boyle’s loss of consortium claims under Utah Code Ann. § 30-2-11.

Standard of review: The trial court’s order is reviewed for correctness, with no deference given to the trial court. *Rinderknecht v. Luck*, 965 P.2d 564 (Utah App. 1998).

Preservation: These issues were raised in Plaintiffs’ Memorandum in Opposition to Defendant’s Motion in Limine to Dismiss Plaintiff Norrine Boyle. (R. 326-355)

DETERMINATIVE STATUTES AND RULES

UCA §30-2-11: Action for consortium due to personal injury.

- (1) For purposes of this section:
 - (a) “injury” or injured” means a significant permanent injury to a person that substantially changes that person’s lifestyle and includes the following:
 - (i) a partial or complete paralysis of one or more of the extremities;
 - (ii) significant disfigurement; or
 - (iii) incapability of the person of performing the types of jobs the person performed before the injury; and
 - (b) “spouse” means the legal relationship:
 - (i) established between a man and a woman as recognized by the laws of this state; and
 - (ii) existing at the time of the person’s injury.
- (2) The spouse of a person injured by a third party on or after May 4, 1997, may maintain an action against the third party to recover for loss of consortium.
- (3) A claim for loss of consortium begins on the date of injury to the spouse. The statute of limitations applicable to the injured person shall also apply to the spouse's claim of loss of consortium.
- (4) A claim for the spouse's loss of consortium shall be:
 - (a) made at the time the claim of the injured person is made and joinder of actions shall be compulsory; and
 - (b) subject to the same defenses, limitations, immunities, and provisions applicable to the claims of the injured person.
- (5) The spouse's action for loss of consortium:
 - (a) shall be derivative from the cause of action existing in behalf of the injured person; and
 - (b) may not exist in cases where the injured person would not have a cause of action.
- (6) Fault of the spouse of the injured person, as well as fault of the injured person, shall be compared with the fault of all other parties, pursuant to Sections 78B-5-817 through 78B-5-823, for purposes of reducing or barring any recovery by the spouse for loss of consortium.
- (7) Damages awarded for loss of consortium, when combined with any award to the injured person for general damages, may not

exceed any applicable statutory limit on noneconomic damages, including Section 78B-3-410.

- (8) Damages awarded for loss of consortium which a governmental entity is required to pay, when combined with any award to the injured person which a governmental entity is required to pay, may not exceed the liability limit for one person in any one occurrence under Title 63G, Chapter 7, Governmental Immunity Act of Utah.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition below

Plaintiff John Boyle filed a Complaint on or about July 14, 2005, alleging that defendant was responsible for an automobile / pedestrian accident on July 22, 2004 in which Mr. Boyle was injured. (R. 1-5) Mr. Boyle's spouse, Norrine Boyle, was subsequently allowed to intervene as a plaintiff, alleging loss of consortium.² (R. 105-05)

On January 8, 2008, Defendant filed a Motion in Limine requesting dismissal of Norrine Boyle's Loss of Consortium claim, arguing that Mrs. Boyle's claim lacked the necessary evidentiary support to meet the statutory requirements of Utah Code Ann. § 30-2-11. (R. 240-316) In opposing the motion, Mrs. Boyle argued that Mr. Boyle's testimony was sufficient to establish both significant disfigurement and partial incapacity, either of which would meet the statutory threshold for loss of consortium. (R. 326-55) After oral argument, the trial court granted Defendant's Motion in Limine to dismiss Plaintiff Norrine Boyle's Loss of Consortium Claim (R. 528), entering an order to that effect on May 28, 2008. (R. 532-534) (attached hereto as Addendum Exhibit 1).)

Plaintiff John Boyle's claims for damages (defendant stipulated to liability) were tried to a jury from June 3-6, 2008. Prior to trial, both parties provided proposed Jury Questionnaires to the trial court. (R. 436-40; 596-600.) The court took these two sets of instructions, to which neither party objected, and culled and then combined them into one

² For convenience, and because Norrine Boyle's claim was dismissed prior to trial, plaintiffs are referred to collectively as "Plaintiff" herein, except where otherwise stated.

document. During jury selection on June 3, 2008, the court conducted oral voir dire using the document it had created. The court declined to ask any of the Plaintiff's questions designed to reveal possible juror biases regarding tort reform, nor was Plaintiff afforded an opportunity to question the jurors on the tort reform issues. (R. 693, pp. 25-98)

Later, during closing argument, Defendant's counsel, arguing that Mr. Boyle's compensatory damage analysis would result in an excessive verdict, exclaimed, "That's how we get verdicts like in the McDonald's case with a cup of coffee." (R. 695, p. 48:17-22) The trial court overruled Plaintiff's objection that the comment was not supported by the evidence and was prejudicial. (R. 695, pp. 48:23-49:5)

Despite significant injuries, including a back surgery, the jury returned a verdict of only \$62,500, including medical expenses, which included only \$27,800 in non-economic damages. The trial court entered the Final Verdict on the Judgment June 20, 2008. (R. 669-673) Plaintiffs timely appealed. (R.674-75)

Facts

On July 22, 2004, Plaintiff John Boyle was struck by a pick-up truck while he was in a crosswalk in front of a Smith's grocery store. (R. 241) Prior to trial, Defendant admitted liability for the accident. (R. 241)

Mr. Boyle was originally treated by a chiropractor, but once an MRI revealed a ruptured disc at the L4-5 level in his lower back, he was referred to an orthopedic

surgeon, Junius J. Clawson. When non-surgical treatments failed, Dr. Clawson (assisted by Dr. Reed Fogg) performed back surgery on Mr. Boyle at Cottonwood Hospital on November 5, 2004. (R. 339-40)

Dr. Clawson found, in performing the surgery, that Mr. Boyle's L5 nerve root was severely compressed by the herniation of the disc. It was Dr. Clawson's opinion that the disc herniation was caused by the July 22, 2004 auto-pedestrian accident. (R. 339-40)

Although the surgery provided some relief, it proved to be largely unsuccessful. As a result, Mr. Boyle has been left with permanent chronic pain. Since the accident, Mr. Boyle has not been able to sleep in a bed and is only able to get limited sleep in a recliner. His lack of sleep causes problems with everything that he does. It has not precluded him from working at a sedentary job, but even at that kind of work, it has interfered with his productiveness and precluded him from working full eight hour days. He is not able to perform employment with any significant physical demands and can no longer even carry small baskets of golf balls. Prior to the accident, Mr. Boyle was an accomplished golfer, and, at one point in his adult life, worked as the golf pro at a golf course. Now, according to Mr. Boyle, his chronic pain and lack of sleep "permeates everything that I do." (R. 261-62)

Based upon the foregoing, Mr. Boyle's wife of many years, Norrine, asserted a claim for loss of consortium. Prior to trial, Defendant filed a Motion in Limine to dismiss Norrine Boyle's claim. The Defendant admitted that Mr. Boyle had alleged a significant

permanent injury, and that whether it substantially changed his lifestyle was a disputed fact. (R. 363) However, Defendant argued that, as a matter of law, Plaintiff was not incapable of performing the “same types of jobs that he performed before the injury,” and therefore no claim for loss of consortium could be made. (R. 363) The trial court dismissed Mrs. Boyle’s claims as a matter of law. (R. 532-34)

Subsequently, Mr. Boyle’s claims proceeded to trial. Consistent with the court’s Case Management Order, Plaintiff submitted a written request for examination of potential jurors. (R. 596-600) Because a substantial part of John Boyle’s claims were for general damages for chronic pain, Plaintiff sought insight into the jurors’ attitudes and potential biases regarding general damages and awards for pain and suffering. Plaintiff’s proposed two-page questionnaire sought to explore, among other things, the jurors’ attitudes concerning people who bring personal injury lawsuits (Section 4 and 5)³; their attitudes concerning money damages for pain and suffering (Section 6)⁴; and their attitudes concerning statutory limits on pain and suffering awards (Section 7)⁵. (R. 599)

³ 4: What are your feelings or opinions about people who bring personal injury lawsuits?

5: If you were seriously hurt or injured by the negligence of another, would you sue? Please explain your answer: (R. 599)

⁴ 6: If supported by the evidence, could you award money damages for

a. Future physical pain ☐ yes ☐ no

b. Mental anguish ☐ yes ☐ no

c. The impact on a wife of partially disabling injuries to her husband?

d. Future medical bills ☐ yes ☐ no

If you answered NO to any of the above, please explain: (R. 599)

⁵ 7. Do you believe the law should impose limits on money that can be awarded for pain and suffering: ☐ yes ☐ no If YES, what do you believe these limitations should be? (R. 599)

The trial court declined to use the questionnaire, or to ask Plaintiff's questions set forth in Sections 4, 5, 6 and 7. (R. 536)

At trial, although the defendant admitted liability for causing the accident (R. 693, p. 6:20-21), the defense strategy centered on casting Mr. Boyle in a negative light for requesting a substantial amount of money for his injuries. This theme was carried too far in closing arguments where defense counsel (over objection) compared Mr. Boyle's claimed damages to those made in an unrelated 1994 case often referred to as the "McDonald's coffee case":

Ms. Van Orman: It's a per diem analysis. How many days has it been since the accident? How many days for the rest of his life? And how much per day is that worth? That's what been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

(R. 695, p. 48:17-22)

Plaintiff's counsel objected on the grounds that the statement addressed a matter not in evidence and was prejudicial, but the objection was overruled. (R. 695, pp. 48:17-49:5) The jury returned a very low verdict of only \$62,500, of which only \$27,800 was awarded for general damages.

SUMMARY OF ARGUMENT

This court has consistently held that plaintiffs are entitled during jury *voir dire* to information regarding potential jurors attitudes gleaned from a jury questionnaire or other means to detect tort reform biases and to exercise peremptory challenges intelligently. Here, the trial court allowed injury-specific questions that aided the Defendant in the

exercise of his peremptory challenges, but did not allow any questions designed to ferret out jurors' potential biases regarding tort reform and personal injury lawsuits, prejudicing plaintiff.

The plaintiff was further prejudiced in closing arguments when defendant referenced an unrelated, nationally notorious tort reform case, the "McDonald's coffee case." Defendant's mention of this case was intended to inflame the juror's prejudices regarding excessive damages being awarded, which was highly prejudicial to the plaintiff in this "damages only" lawsuit.

Finally, the trial court erred in dismissing plaintiff Norrine Boyle's consortium claim prior to trial. As the facts and reasonable inferences drawn therefrom show that Mr. Boyle was incapable of performing his two jobs in the same manner or to the same extent he was prior to the accident, which is sufficient to meet the statutory threshold for loss of consortium.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO ASK PLAINTIFF'S REQUESTED VOIR DIRE QUESTIONS CONCERNING PROSPECTIVE JURORS' POTENTIAL BIASES REGARDING TORT REFORM.

Pursuant to the Scheduling Order in place, Plaintiff provided the court with a proposed Request for Submission of a Jury Questionnaire and for Reasonable Follow Up Voir Dire which included his short, two-page, questionnaire. (R. 599-600) Shortly thereafter, the Defendant also submitted a Proposed Voir Dire. In that document, Defendant specifically did not “object to the questionnaire submitted by plaintiffs...” (R. 436). The trial court, off the record, made the determination that it would create jury questions that it would then use to personally voir dire the jury. The court omitted Plaintiff's questions intended to elicit jurors' views regarding general damages and tort reform in general:

4: What are your feelings or opinions about people who bring personal injury lawsuits? If supported by the evidence, could you award a large amount of money to the plaintiff in this case?

5: If you were seriously hurt or injured by the negligence of another, would you sue? Please explain your answer:

6: If supported by the evidence, could you award money damages for

a. Future physical pain ☐ yes ☐ no

b. Mental anguish ☐ yes ☐ no

c. The impact on a wife of partially disabling injuries to her husband?

d. Future medical bills ☐ yes ☐ no

If you answered NO to any of the above, please explain:

7. Do you believe the law should impose limits on money that can be awarded for pain and suffering: ☐ yes ☐ no If YES, what do you believe these limitations should be?

(R. 599)

Instead, the court asked the jury only the 15 questions that it had fashioned, none of which addressed tort reform. (*See Addendum Exh. 3.*) From the tenor and language of the questions asked, it appears that the trial court might have been attempting to identify jurors who might be subject to *for cause* challenges, but it wholly disregarded the Plaintiff's need to gather information to assist in exercising *peremptory* challenges.

The only questions that were arguably designed to elicit responses regarding biases were the trial court's questions 13, 14 and 15:

13. Do you have any feelings or beliefs that would prevent you from being fair and impartial regarding persons who have personal injury disputes and who choose to resolve those disputes by going to court?
14. Do you have any personal religious or other beliefs that would prevent you from awarding damages in a large amount, small amount, or zero amount, if warranted and justified by the evidence and the law given you by the Court?
15. Given all considerations and everything you know about this case so far, can you be fair, impartial, neutral, judge of the facts and follow the law as given to you by the Court?

(R. 536)

Not surprisingly, prospective jurors who were asked these general questions answered "No, No, and Yes," without elaboration. (R. 693, pgs. 33, 39, 41, 47, 51, 55-

56, 61, 62, 64, 65, 70, 73, 79, 82, 84, and 89). The questions were neither designed to, nor did they, elicit any information about the individuals' views regarding personal injury lawsuits or tort reform.

This Court has repeatedly reminded trial courts that parties are entitled to seek information from prospective jurors regarding their views on these issues. *See Alcazar v. U of U Hospitals*, 2008 UT App 222, ¶¶ 5, 19, 188 P.3d 490 (noting “rather direct authority” and “prior, clear precedents” establishing plaintiffs’ entitlement to *voir dire* questions regarding tort reform), citing *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991) and *Barrett v. Peterson*, 868 P.2d 96 (Utah App. 1993).

In *Alcazar*, the trial court reviewed the plaintiffs’ requested *voir dire* but declined to ask the questions the plaintiffs wanted in order to elicit jurors’ potential biases regarding medical malpractice claims and tort reform. Instead, as in this case, the court decided to ask more general questions. *Id.*, ¶¶ 5-7. The jury returned a verdict finding the defendant not negligent.

The *Alcazar* court was very clear as to why the trial court’s *voir dire* procedure was both erroneous and prejudicial. First, the court discussed its holding in *Evans*, in which the trial court had asked a line of general questions regarding fairness and impartiality that “was only effective in identifying proper for-cause challenges.” Such narrow questioning was insufficient, this Court held:

The trial court’s questions did not allow the plaintiff an opportunity to know which of the prospective jurors had been exposed to tort reform

propaganda, totally aside from whether the prospective jurors would themselves admit such exposure had changed their attitudes or biased them. Essentially, we concluded that the trial judge's line of questions ignored the plaintiff's need to gather information to assist in exercising her peremptory challenges.

Alcazar, 2008 UT App 222, ¶12 (emphasis in original; citations omitted).

In *Barrett*, this Court again reversed a trial court's refusal to ask about exposure to tort reform information, depriving the plaintiff of "information necessary both to detect actual bias and to intelligently exercise his peremptory challenges." *Id.*, ¶ 13, quoting *Barrett*, 868 P.2d at 102 n.7. In both *Evans* and *Barrett*, the *Alcazar* court noted, the plaintiffs had not been given an opportunity to "determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting the jurors' ability to render a fair and impartial verdict." *Id.* at ¶14.

Alcazar then observed that, under *Evans* and *Barrett*, "our inquiry does not end once we have established that the trial court abused its discretion in failing to ask any meaningful tort reform . . . questions during voir dire." *Id.* at ¶15. Once the determination has been made that a party was substantially impaired in its right to exercise peremptory challenges, "[w]e will reverse if, considering the totality of the questioning, counsel was not afforded an adequate opportunity to gain the information necessary to evaluate the jurors. *Id.* at ¶15 (internal citations to quotes omitted).

In *Alcazar*, the only question the trial court asked specifically regarding tort reform was: “Has any of you or a close friend or relative personally formed an opinion either in favor or opposed to tort reform or been a member of any organization that has?” *Id.* at ¶18. As in this case, most of the other questions were designed to uncover general biases and prejudice. However, the trial court “allowed the potential jurors to be questioned as to both their experience with doctors and hospitals and any negative aspects of this experience.” *Id.* Based on these facts, the *Alcazar* court concluded that the “trial court simply left Plaintiffs’ counsel without the necessary information needed to ferret out a potential juror’s actual bias or to intelligently exercise peremptory challenges, thus prejudicing Plaintiffs.” *Id.* The Court reversed and remanded for a new trial due to the restrictive *voir dire*. *Id.* at ¶¶ 18-19.

Just as in *Alcazar*, the trial court in this case rejected Plaintiff’s specific tort-reform questions, and instead asked a few generic “yes/no” questions which did nothing more than elicit obvious answers. After declining to elicit information as to jurors’ prejudices regarding lawsuits and tort reform, the court then allowed defense counsel to appeal to those very prejudices by specifically referring to an unrelated lawsuit that is the “poster child” of tort reform propaganda (*see infra*).

Compounding the prejudice, the trial court allowed *voir dire* questions that were beneficial to the Defendant in exercising its peremptory strikes. At trial, the only issue was the amount of damages to be awarded from an automobile / pedestrian accident in

which back injuries were alleged. The trial court asked specific questions regarding both automobile /pedestrian accidents⁶ and back injuries.⁷ For those who answered these two questions in the affirmative, the trial court followed up with “who,” “what,” “where,” “when,” and “how” inquiries. (R. 693 at pp 30-33; 45-47) Not surprisingly, Defendant used two of his three peremptory strikes on a juror who had a close friend who was involved in an auto accident who suffered back and neck injuries (R. 693 at 30, 31), and another juror who suffers from neck and back injuries from an automobile accident (R. 693 at 45, 46). (The Jury List including the peremptory information is at R. 537).

Under this court’s “prior, clear precedents,” the trial court erred in declining to question prospective jurors about tort reform. This error was severely prejudicial, particularly under the circumstances of this case, and the judgment should be reversed.

II. THE TRIAL COURT’S RULING ALLOWING DEFENDANT TO REFER TO THE “MCDONALD’S CASE” IN CLOSING ARGUMENT WAS REVERSIBLE ERROR.

At trial, having admitted liability for causing the accident, the defendant focused on casting Mr. Boyle in a negative light for requesting a substantial amount of money for his injuries. To emphasize the point, in closing argument defense counsel compared Mr. Boyle’s claim to the damages awarded by the jury in the McDonald’s coffee case:

Ms. Van Orman: It’s a per diem analysis. How many days has it been since the accident? How many days for the rest of his life? And how much

⁶ 11. Have you, any close family member or close friend ever been involved in an automobile /pedestrian accident? (R. 536)

⁷ 12. Have you, any close family member or close friend ever sustained back injuries? (R. 536)

per day is that worth? That's what been done here. That's how we get verdicts like in the McDonald's case with a cup of coffee.

R. 695: p. 48:17-22)

Plaintiff's counsel objected that the McDonald's case was not in evidence and the reference was prejudicial, but the objection was overruled. (R. 695: pp. 48:23–49:5). The jury returned a very low verdict of only \$62,500, which included medical expenses and only \$27,800 for general damages.

No evidence was presented in this case (nor would it have been proper) regarding *Liebeck v. McDonald's, et al.*, D-202-CV-9302419 (N.M. – Albuquerque District 1994), also known as the “McDonald's coffee case.” In the fourteen years since the (in)famous punitive damages verdict was rendered in *Liebeck*, it has become a “powerful cultural icon” and acquired “great symbolic significance” in the tort reform debate, “Java Jive: Genealogy of a Juridical Icon,” 56 *U. Miami L. Rev.* 113, 114 (2001), largely through misreporting and misstatements of the actual facts of the case. *Id.*, pp. 118-162.⁸

Utah law is quite clear regarding the use of unrelated commentary in closing argument that is not supported by the evidence. In *State of Utah v. Alonzo, supra*, two defendants were accused, and later found guilty, of assaulting a police officer and one of interfering with an arrest. In his closing argument, their counsel attempted to draw parallels between their case and the controversial Rodney King case in Los Angeles. 973

⁸ Defendant's closing argument in this case perpetuated this trend, suggesting to the jury that the (pre-remittitur) *punitive damage* award that caused such consternation in *Liebeck* somehow resulted from a *per diem compensatory damage* argument.

P.2d at 981. The trial court precluded references to the King case, and both this Court and the Utah Supreme court upheld that ruling. “We have held in the past that attorneys have broad latitude in presenting closing arguments,” the Supreme Court wrote, “but that such latitude does not extend to counsel calling the jury’s attention to material that the jury would not be justified in considering in its verdict.” *Id.* (emphasis added).

The error was especially prejudicial in this case. Because the defendant admitted liability, the trial was entirely focused on the damages to be awarded. The “McDonald’s coffee case” comment was not directed to a peripheral issue at trial, it was directed to the main and only issue being decided, the proper amount of damages to award to a plaintiff who needed back surgery after being struck by a vehicle. Counsel’s comment was the exclamation point to the defense theory that the Plaintiff’s damages claims were excessive, with the defense comparing Mr. Boyle’s damages calculation directly to a case widely perceived by the lay public as a lawsuit in which excessive damages were awarded. (See, e.g., the *Liebeck v. McDonald’s Restaurants* Wikipedia entry⁹ (noting characterization of *Liebeck* case as “the poster child of excessive lawsuits”).)¹⁰

As noted *supra*, Plaintiff had not been afforded an opportunity to explore jurors’ views on tort reform and possible biases derived therefrom. Defendant’s reference to

⁹ http://en.wikipedia.org/wiki/Liebeck_v._McDonald's_Restaurants (last accessed November 23, 2008).

¹⁰ Even if the trial court had ruled correctly that the improper comment should have been stricken, the damage was done and the point was made. By intentionally choosing the most notorious tort reform case, the defendant made his point, but also led the trial court into inherently prejudicial error.

Liebeck was unabashedly intended to inflame jurors' pre-existing prejudices regarding allegedly frivolous lawsuits, after Plaintiff had been precluded from exploring the extent of those prejudices. Either in conjunction with Argument I or standing on its own, defense counsel's express invocation of the McDonald's coffee case in closing argument was irreparably prejudicial in this context, and a new trial is warranted.

**III. THERE WAS SUFFICIENT EVIDENTIARY SUPPORT TO
ALLOW NORRINE BOYLE'S LOSS OF CONSORTIUM
CLAIMS TO REACH THE JURY.**

After Mr. Boyle filed his initial complaint alleging that defendant was responsible for the accident in which he was injured, his spouse, Norrine Boyle, was added as a plaintiff to assert a claim for loss of consortium pursuant to Utah Code Ann. §30-2-11. Prior to trial, the trial court granted the defense's Motion in Limine to Dismiss Norrine Boyle's claim, ruling as a matter of law that the plaintiffs' evidence did not meet the statutory threshold for bringing a consortium claim in Utah. (R.532-34)

The statute at issue states, in part:

30-2-11. Action for consortium due to personal injury.

(1) For purposes of this section:

(a) "injury" or "injured" means a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:

(i) a partial or complete paralysis of one or more of the extremities;

(ii) significant disfigurement; or

(iii) incapability of the person of performing the types of jobs the person performed before the injury; and

(b) "spouse" means the legal relationship:

- (i) established between a man and a woman as recognized by the laws of this state; and
- (ii) existing at the time of the person's injury.

The defense did not argue that Norrine Boyle was not John Boyle's "spouse," nor claim that Mr. Boyle's herniated disk which necessitated back surgery and still causes him ongoing pain was not a "significant permanent injury" that "changes that person's lifestyle". Rather, the defendant focused primarily on §30-2-11 (a)(iii), regarding whether Mr. Boyle is capable of "performing the types of jobs the person performed before the injury".

As the defense's "motion in limine" was, in actuality, a motion for summary judgment on Mrs. Boyle's claims, the trial court could grant the motion only if there was "no genuine issue as to any material fact and . . . the moving party [was] entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). When reviewing a grant of summary judgment, the facts and reasonable inferences must be drawn in the light most favorable to the nonmoving party. Conclusions of law are reviewed for correctness. *Gary Porter Construction v. Fox Construction*, 101 P.3d 371, 374; 2004 UT App 354 ¶ 10.

Mrs. Boyle was not deposed; therefore the factual basis regarding the consortium claim was found in John Boyle's deposition testimony. Specifically regarding whether he is capable of performing jobs he could perform before the automobile/pedestrian accident, Mr. Boyle testified:

Q. Okay. Is your work restricted currently? Are you able to do your job without any problems?

- A. My lack of sleep causes problems in everything I do. I get frustrated much more quickly, I don't have endurance, I don't work eight hours a day because six is about all I can handle and some days I can't handle that. I wake up tired every day. Very often I try to go back to bed – not to bed, to the recliner for ten or 15 minutes just so that I can function.

So that permeates everything I do and in lots of different ways.

(R. 261: 12-21)

- Q. Okay. What about your back, does your back prevent you from doing anything at work?

- A. Not at that work. I do work at the golf course on Saturday mornings from a half hour before daylight until 10:00 o'clock.

- Q. What do you do there?

- A. I bring out the carts, the golf carts, and tend the shop, the pro shop. And I find that I can't lift two buckets of balls. They might be eight pounds each. I can't lift two of them at once. By the end of the shift my back really hurts and I go home and get in the recliner for a couple of hours just so that it won't hurt so much.

(R. 262: 10-22).

It is apparent from the language of the statute that the legislature was only interested in allowing a consortium claim where serious, ongoing injuries were involved in order to avoid soft, frivolous claims. Viewed in the light most favorable to Mrs. Boyle, the evidence adduced in opposition to defendant's motion in limine reflected that Mr. Boyle, after his back surgery, is suffering from ongoing pain issues that are extensive enough that he is incapable of sleeping anywhere other than in a recliner, is suffering

from recurring sleep deprivation causing an inability to work full-time at a sedentary job, and is unable to even lift a small amount of weight at his slightly less than sedentary job at the golf course. Even with very little physical exertion delivering golf carts and staffing a golf shop, he is still in enough pain after just a few hours that he has to go home and rest for a couple of hours to alleviate the pain.

An automobile/pedestrian accident that caused a herniated disk, necessitated back surgery, and still causes ongoing pain is unquestionably a “significant permanent injury” that “changes that person’s lifestyle”. It is not a reasonable interpretation of the statute that Mr. Boyle must be incapable of “performing the types of jobs the person performed before the injury” at all. Rather, it meets the language and intent of the legislation if he is impaired in his ability to perform the job to the same degree and extent that he could prior to the incident.

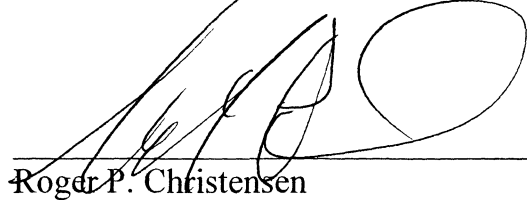
Nothing in the statute requires that an individual must be bedridden before his spouse may maintain a claim for loss of consortium. Rather, the language supports the argument that Mr. Boyle’s ability to perform his job or jobs must be materially affected by his injury. The facts adduced on that issue were sufficient to meet the statutory threshold, and to allow the jury to determine how and whether to award damages to Mrs. Boyle under these circumstances. The dismissal of her claims prior to trial was error, and the case should be remanded for trial.

CONCLUSION

For the reasons set forth above, appellants respectfully request the Court to reverse the judgment and remand the case for a new trial on the claims of John Boyle and Norrine Boyle.

DATED this 24th day of November, 2008.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read 'Roger P. Christensen', is written over a horizontal line.

Roger P. Christensen

Scot A. Boyd

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of November, 2008, two true and correct copies of the foregoing BRIEF OF APPELLANTS was mailed, first-class postage prepaid, to:

Kristin A. VanOrman, 7333
Jeremy G. Knight, 10722
STRONG & HANNI
Attorneys for Defendant/Appellee
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read 'R. Christensen', is written over a horizontal line.

Roger P. Christensen
Scot A. Boyd
Attorneys for Plaintiffs/Appellants

ADDENDUM

Exhibit 1 – Minutes 5/19/08 and Order Dismissing Norrine Boyle's Claim .

Exhibit 2 – Plaintiff's Proposed Jury Questionnaire

Exhibit 3 – Judge's Voir Dire Questions

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

JOHN BOYLE,	:	MINUTES
Plaintiff,	:	RULING FROM 5/19/08
	:	
	:	
vs.	:	Case No: 050912506 PI
	:	
KERRY CHRISTENSEN,	:	Judge: TYRONE E. MEDLEY
Defendant.	:	Date: May 21, 2008

Clerk: tinaa
TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): ROGER P CHRISTENSEN
Defendant's Attorney(s): KRISTIN A VAN ORMAN
Video
Tape Number: 8.16-8.30

HEARING

This matter is before the Court for a Ruling from the Oral Argument heard on 5/19/08. Appearances as stated above.

1. Defendants Motion in Limine to Dismiss Plaintiff Norrine Boyle's Loss of Consortium Claim is Granted.

2. Defendant's Motion to Strike Lyle B Mason's Expert Testimony is Denied.

3. Defendant's Motion to Strike Helen Woodward as an Expert Witness is granted.

Kristin Van Orman is to prepare an Order with in 1 week. The Court would like this Order to be approved as to form.

05/19/08

sg

Kristin A. VanOrman (#7333)
Jeremy G. Knight (#10722)
STRONG AND HANNI
Attorneys for Defendant
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

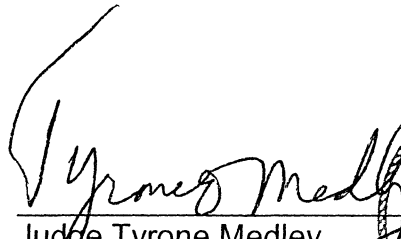
<p>JOHN BOYLE,</p> <p>Plaintiff,</p> <p>vs.</p> <p>KERRY CHRISTENSEN,</p> <p>Defendant.</p>	<p>ORDER</p> <p>Civil No.050912506</p> <p>Judge Tyrone E. Medley</p>
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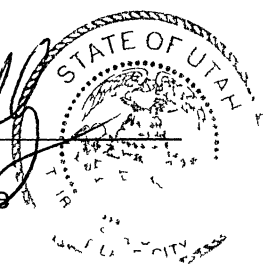
This matter came before the Court on May 19, 2008 for Defendant's motions in limine seeking to exclude Helen Woodard and Dr. Lyle Mason as expert witnesses as well as Defendant's motion to dismiss plaintiff Norrine Boyle's claims for loss of consortium. Oral argument was held with Roger Christensen in attendance for the plaintiffs and Kristin VanOrman representing the defendant.

After review of the submitted briefs as well as considering oral argument, this Court hereby ORDERS, ADJUDGES AND DECREES as follows:

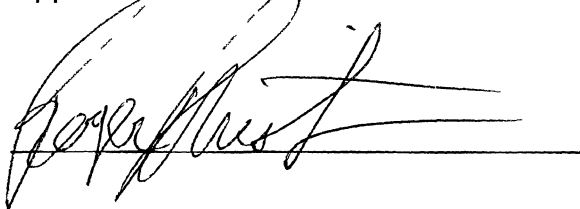
1. Defendant's motion to exclude Helen Woodard is **granted**. Ms. Woodard's report was produced late in the proceedings in violation of this Court's case management order.
2. Defendant's motion to exclude Dr. Lyle Mason is **denied**. Defense counsel is to be given the opportunity to depose Dr. Mason prior to the trial of this matter.
3. Defendant's motion to dismiss plaintiff Norrine Boyle's claim for loss of consortium is **granted**. It is the Court's ruling that the plaintiffs do not meet the statutory requirements for bringing a claim for loss of consortium and therefore such a claim is hereby dismissed.

DATED this 28 day of May, 2008.


Judge Tyrone Medley
Third District Court Judge



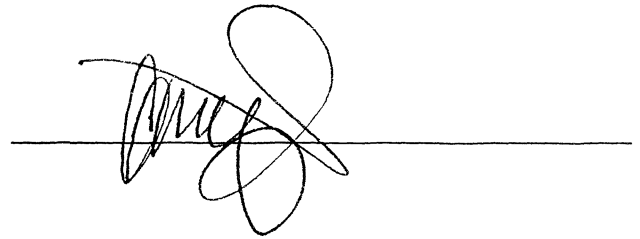
Approved as to form:



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of May, 2008, a true and correct copy of the foregoing ORDER was served by mail, postage fully prepaid, upon the following:

Roger P. Christensen
CHRISTENSEN & JENSEN
15 West South Temple, Suite 800
Salt Lake City, Utah 84101



FILED DISTRICT COURT
Third Judicial District

JUN - 9 2008

SALT LAKE COUNTY

By  Deputy Clerk

Roger P. Christensen, #0648
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144
Telephone: (801) 323-5000
Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

JOHN BOYLE and NORRINE BOYLE,

Plaintiffs,

vs.

KERRY CHRISTENSEN,

Defendant.

**PLAINTIFF'S REQUEST FOR THE
SUBMISSION OF A JURY
QUESTIONNAIRE AND FOR
REASONABLE FOLLOW UP VOIR DIRE**

Case No: 050912506

Judge: Tyrone E. Medley

Plaintiff hereby requests the Court to have the attached questionnaire completed by the potential jurors in this case, with copies provided to the Court and counsel, prior to the jury selection process.

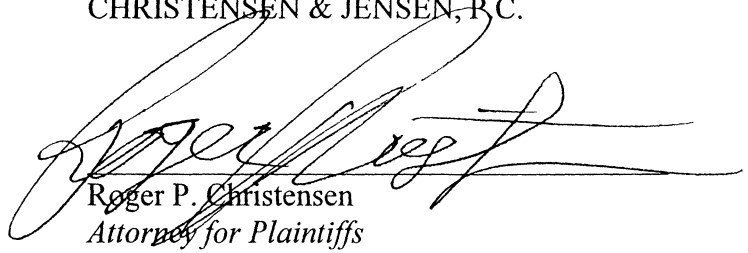
Plaintiff also requests the Court to allow plaintiffs' counsel the opportunity to ask reasonable jury voir dire questions following up on the individual jurors answers to the questionnaire. Plaintiff also requests the Court to allow plaintiffs' counsel to address the following additional areas with individual jurors in jury voir dire:

1. The juror's willingness and/or reluctance to follow the law, as instructed by the Court, in spite of personal disagreement with it.

2. Experience, training, knowledge and insights regarding people who have sustained some level of back injury and/or chronic pain.

DATED this 18th day of April, 2008.

CHRISTENSEN & JENSEN, P.C.

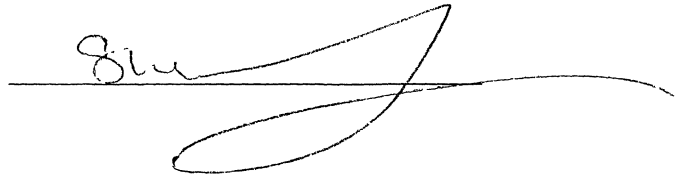


Roger P. Christensen
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2008 a copy of the foregoing PLAINTIFFS' REQUEST FOR THE SUBMISSION OF A JURY QUESTIONNAIRE AND FOR REASONABLE FOLLOW UP VOIR DIRE was mailed, first class mail, postage prepaid, to the following:

Kristin A. Van Orman
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

A handwritten signature in cursive script, appearing to read "K. Van Orman", is written over a horizontal line.

The information given in this questionnaire is confidential and will be used only to assist with jury selection in this case.

JUROR NAME: _____ AGE: _____ JUROR #: _____

<p>1. What is the highest grade that you completed in school?</p> <p>If college, please list any degrees received:</p>	<p>2. Where do you work and what is your job title?</p> <p>What jobs have you held in the past?</p> <p>What jobs has your spouse or significant other held in the past?</p>	<p>3. Circle any of the following in which you have received training or education:</p> <table> <tr> <td>Business</td> <td>Law</td> </tr> <tr> <td>Engineering</td> <td>Psychology</td> </tr> <tr> <td>Health/Medicine</td> <td>Statistics</td> </tr> <tr> <td>Insurance</td> <td>Teaching</td> </tr> <tr> <td colspan="2">Accident Investigation</td> </tr> </table>	Business	Law	Engineering	Psychology	Health/Medicine	Statistics	Insurance	Teaching	Accident Investigation	
Business	Law											
Engineering	Psychology											
Health/Medicine	Statistics											
Insurance	Teaching											
Accident Investigation												
<p>4. What are your feelings or opinions about people who bring personal injury lawsuits?</p> <p>If supported by the evidence, could you award a large amount of money to the plaintiff in this case?</p>	<p>5. If you were seriously hurt or injured by the negligence of another, would you sue?</p> <p>Please explain your answer:</p>	<p>6. If supported by the evidence, could you award money damages for</p> <p>a. Future physical pain <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>b. Mental anguish <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>c. The impact on a wife of partially disabling injuries to her husband?</p> <p>d. Future medical bills <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If you answered NO to any of the above, please explain:</p>										
<p>7. Do you believe the law should impose limits on money that can be awarded for pain and suffering: <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, what do you believe these limitations should be?</p>	<p>8. Have you ever been the plaintiff (the party suing) or a defendant (the party being sued) in a lawsuit? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain:</p>	<p>9. Have you ever served as a juror in a civil case? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, what type of civil case was it?</p> <p>What was the verdict in that case?</p> <p>Were you the foreperson? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Do you have any negative feelings as a result of your experience as a juror? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain:</p>										

<p>10. What are your 3 favorite TV shows?</p> <p>1. 2. 3.</p> <p>What newspapers, magazines, or journals do you read regularly?</p>	<p>11. What groups or organizations do you/loved ones/family members belong to?</p>	<p>12. List 3 people you admire the most:</p> <p>1. 2. 3.</p> <p>List 3 people you admire the least:</p> <p>1. 2. 3.</p>																		
<p>13. Which of the following words would you use to describe yourself? Please check all that apply:</p> <table border="0"> <tr> <td><input type="checkbox"/> Analytical</td> <td><input type="checkbox"/> Old-fashioned</td> </tr> <tr> <td><input type="checkbox"/> Careful</td> <td><input type="checkbox"/> Open-minded</td> </tr> <tr> <td><input type="checkbox"/> Compassionate</td> <td><input type="checkbox"/> Pro-business</td> </tr> <tr> <td><input type="checkbox"/> Detail-oriented</td> <td><input type="checkbox"/> Pro-consumer</td> </tr> <tr> <td><input type="checkbox"/> Emotional</td> <td><input type="checkbox"/> Sensitive</td> </tr> <tr> <td><input type="checkbox"/> Frugal</td> <td><input type="checkbox"/> Skeptical</td> </tr> <tr> <td><input type="checkbox"/> Generous</td> <td><input type="checkbox"/> Suspicious</td> </tr> <tr> <td><input type="checkbox"/> Impulsive</td> <td><input type="checkbox"/> Visual</td> </tr> <tr> <td><input type="checkbox"/> Judgmental</td> <td><input type="checkbox"/> Worrier</td> </tr> </table>	<input type="checkbox"/> Analytical	<input type="checkbox"/> Old-fashioned	<input type="checkbox"/> Careful	<input type="checkbox"/> Open-minded	<input type="checkbox"/> Compassionate	<input type="checkbox"/> Pro-business	<input type="checkbox"/> Detail-oriented	<input type="checkbox"/> Pro-consumer	<input type="checkbox"/> Emotional	<input type="checkbox"/> Sensitive	<input type="checkbox"/> Frugal	<input type="checkbox"/> Skeptical	<input type="checkbox"/> Generous	<input type="checkbox"/> Suspicious	<input type="checkbox"/> Impulsive	<input type="checkbox"/> Visual	<input type="checkbox"/> Judgmental	<input type="checkbox"/> Worrier	<p>14. What do you enjoy doing in your spare time?</p> <p>Do you consider yourself to be: <input type="checkbox"/> Conservative <input type="checkbox"/> Moderate <input type="checkbox"/> Liberal</p> <p>Who makes the financial decisions in your home?</p> <p>Who writes the checks or pays the bills in your home?</p>	<p>15. Is there any reason you could not serve as a juror in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, please explain:</p> <p>Add any comments you wish to make:</p>
<input type="checkbox"/> Analytical	<input type="checkbox"/> Old-fashioned																			
<input type="checkbox"/> Careful	<input type="checkbox"/> Open-minded																			
<input type="checkbox"/> Compassionate	<input type="checkbox"/> Pro-business																			
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<input type="checkbox"/> Generous	<input type="checkbox"/> Suspicious																			
<input type="checkbox"/> Impulsive	<input type="checkbox"/> Visual																			
<input type="checkbox"/> Judgmental	<input type="checkbox"/> Worrier																			

I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct.

Juror's Signature

Date

LeC

J U R Y

FILED DISTRICT COURT
Third Judicial District

JUN - 3 2008

By

SALT LAKE COUNTY

Deputy Clerk

1. State your name and your spouse's name.
2. How are you employed? How is your spouse employed?
3. What is the highest grade that you completed in school?
4. How do you spend your leisure time? Do you have any hobbies?
5. Are you a member of any clubs or organizations? Any leadership positions?
6. Have you ever worked in or received training in the health care profession, legal profession, or any profession that handles medical and injury claims?
7. Have you ever served on a jury?
8. Have you, any close family member or close friend ever been a plaintiff, defendant or a witness in any lawsuit?
9. Have you, any close family member or close friend ever made a claim for personal injuries against someone whether or not such claim resulted in a lawsuit?
10. Have you, any close family member or close friend ever had a claim for personal injuries made against you or them?
11. Have you, any close family member or close friend ever been involved in an automobile/pedestrian accident?
12. Have you, any close family members or friends ever sustained back injuries?
13. Do you have any feelings or beliefs that would prevent you from being fair and impartial regarding persons who have personal injury disputes and who choose to resolve those disputes by going to court?
14. Do you have any personal, religious or other beliefs that would prevent you from awarding damages in a large amount, small amount, or zero amount, if warranted and justified by the evidence and the law given you by the Court?
15. Given all considerations and everything you know about this case so far, can you be a fair, impartial, neutral, judge of the facts and follow the law as given to you by the Court?