

2008

# John Boyle and Norrine Boyle v. Kerry Chirstensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN BOYLE and NORRINE BOYLE,

Plaintiffs / Appellants,

vs.

KERRY CHRISTENSEN,

Defendant / Appellee.

---

Case No. 20080582

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

---

**REPLY BRIEF OF APPELLANTS**

---

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## ARGUMENT

### **I. THE TRIAL COURT’S FAILURE TO ASK THE PLAINTIFF’S REQUESTED VOIR DIRE QUESTIONS ABOUT TORT REFORM WAS AN ABUSE OF DISCRETION.**

#### **A. Plaintiff was entitled to the requested voir dire.**

If there is one legal concept that is well settled in Utah, it is that a trial court must, upon request, question prospective jurors about their views on tort reform. *See Alcazar v. University of Utah Hospitals*, 2008 UT App 222, ¶¶ 5, 19, 188 P.3d 490 (characterizing the Court’s precedent on the subject as “rather direct” and “clear”). In *Bee v. Anheuser-Busch, Inc.*, 2009 UT App 35, --- P.3d ----, this Court recently reaffirmed that point, noting that its “prior precedent is clear on this issue.” *Id.*, ¶ 16 (holding that trial court abused its discretion in failing to ask plaintiff’s questions about tort reform).

The precedent is so clear, in fact, that this Court’s entire discussion of the issue in *Bee* consisted of a quotation from a 1993 opinion, *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993), which applied an earlier decision, *Evans v. Doty*, 824 P.2d 460 (Utah Ct. App. 1991). The language quoted in *Bee* concisely articulates why questioning prospective jurors about tort reform is necessary to a fair trial, and why it is inherently prejudicial not to do so:

The *Evans* court explained that the decision about whether such voir dire questions should be asked “requires a balancing of the relative interests of the parties in light of the facts and circumstances of the particular case.” Specifically, “in tort cases we cannot ignore the reality that potential jurors may have developed tort-reform biases as a result of an overall exposure to such propaganda.” “Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias within

certain prospective jurors.” This is precisely the type of bias that counsel must be allowed to uncover if an impartial jury is to be impaneled. Accordingly, even when specific examples of tort-reform propaganda are not presented to the court, a “plaintiff has a legitimate interest in discovering which jurors may have read or heard information generally on tort reform.”

\* \* \*

In this case, none of the questions asked by the trial court even remotely addressed whether the prospective jurors had heard or read anything relating to tort-reform issues. Nor did the trial court attempt to address in a more general fashion the issues of tort-reform propaganda in its voir dire questioning. The court asked only broad questions concerning the prospective jurors’ self-assessed ability to be fair and impartial. As a result of this limited line of questioning, appellant was unable 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 their ability to render a fair and impartial verdict. Thus, under *Evans*, the trial court’s line of questioning ignored appellant’s need to garner information necessary both to detect actual bias and to intelligently exercise his peremptory challenges.

Accordingly, we conclude that the trial court should have asked the prospective jurors appropriate preliminary questions – either those suggested by appellant or alternative questions more to its liking – designed to detect, initially, whether any of the prospective jurors had been exposed to tort reform propaganda. Had the trial court done so, and had any of the jurors responded positively to these initial questions, appellant would have been entitled to have more specific questions put to the jurors designed to probe those jurors’ attitudes regarding, and possible bias resulting from, the tort-reform information.

*Id.*, ¶ 16 (ellipses omitted; emphasis in original.)

In this case, even in the absence of objection by the defendant, the trial court rejected all of Mr. Boyle’s proposed questions regarding tort reform. As pointed out in Mr. Boyle’s opening brief, the trial court’s voir dire focused on information that might be useful in challenging jurors for cause, but this Court has repeatedly emphasized that a

party's right to a fair trial requires the ability to elicit information needed for the intelligent exercise of peremptory challenges as well. See *Alcazar, supra*.

Mr. Christensen incorrectly characterizes Mr. Boyle's argument on appeal as a complaint that his "exact questions" were not asked during voir dire. (Brief of Appellee, p. 2; see also *id.* (characterizing Mr. Boyle as seeking to have his jury questionnaire presented "in the exact depth and extent" as requested).) That is not Mr. Boyle's contention. Of course a party is not entitled to have his questions asked verbatim. *Davis v. Grand County Service Area*, 905 P.2d 888, 892 n.9 (Utah Ct. App. 1995). However, he is entitled to have the *substance* of his questions asked, when they are designed to ascertain jurors' views about tort reform and personal injury lawsuits. *Alcazar, supra*.

In this case, there was no ambiguity about Mr. Boyle's request. Of the 15 questions proposed by him, only four were other than general background inquiries, and those four all addressed the same issue: tort reform. See R. 599-600. This was not some arcane legal concept; this was an area in which the law has been "clear" for fifteen years. *Bee, supra*. Nonetheless, the trial court rejected all of the tort reform questions.

Rather than admit this obvious fact, Mr. Christensen euphemistically claims that the trial court elected to submit Mr. Boyle's questionnaire "in amended form." (Brief of Appellee, p. 2; see also *id.*, p. 13 (stating that the court "simplified" the questionnaires.)) But the trial court did not "amend" or "simplify" the wording of plaintiff's requested voir

dire – it omitted the entire line of questioning. Not one of the court’s questions asked anything about tort reform.

Mr. Christensen argues, however, that, “in their totality and in context,” these three questions were sufficient to “ferret out biases regarding tort reform”:

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?

(Brief of Appellee, p. 11, citing R. 536.)

It was this very type of generic questioning that the Court found insufficient in *Evans* and its progeny. See *Bee, supra*; *Alcazar, supra*; *Barrett, supra*. Such questions may filter out jurors who are sufficiently self-aware and honest to answer them “No,” but they do not elicit impressions or viewpoints as needed for meaningful peremptory challenges.

The trial court’s failure to touch on tort reform at all is a key distinction between this case and *Ostler v. Albina Transfer Co., Inc.*, 781 P.2d 445 (Utah Ct. App. 1989), cited by Mr. Christensen. In that case, the plaintiff appealed from a trial court’s decision with respect to voir dire. “[T]he gist of plaintiff’s questions went to the issue of potential

juror bias against large monetary awards.” *Id.* at 447. Unlike this case, the trial court in *Ostler* covered the subject requested by the plaintiff, just with differently worded questions. *Id.*

Mr. Christensen says that the trial court asked “extensive follow-up questions of the jury during oral voir dire in order to discover any potential bias or prejudice.” (Brief of Appellee, p. 11.) But these “follow-up questions” only followed up on the threshold questions that the court asked, none of which encompassed tort reform.

Finally, Mr. Christensen attempts to distinguish *Alcazar* by pointing out that that case was a medical malpractice case in which the plaintiff submitted voir dire that was specific to medical malpractice claims. “In this case,” Mr. Christensen says, “the underlying case deals with an auto/pedestrian accident, but the questions Plaintiff argues should have been asked deal with tort reform in general.” (Brief of Appellee, p. 12.) *Alcazar* was indeed a medical malpractice case. *Bee* was a slip and fall. In both cases, this Court said that tort reform should be addressed. As suggested by its name, in jurors’ minds, the “tort reform” movement extends to all “tort” cases.

B. Plaintiff’s request for voir dire was preserved.

Mr. Christensen does not contest the fact that Mr. Boyle timely submitted a written request that jurors be questioned about their views on tort reform. *See* R. 596-600 (plaintiff’s requested questionnaire and voir dire). Nor does he deny that the trial court did not announce its decision on that request before it conducted the voir dire.

Nonetheless, Mr. Christensen claims that Mr. Boyle was required to state his request again “after the trial court elected to submit a questionnaire in amended form” – in other words, after the trial court had already ruled on the requested voir dire. (Brief of Appellee, p. 2) (emphasis added). That is incorrect. With the exception of jury instructions, which are governed by a separate rule (U.R.Civ.P. 51), the Utah Rules of Civil Procedure provide that no exception need be taken of a ruling that has already occurred. U.R.Civ.P. 46 states:

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(Emphasis added.)

There is no dispute that, “at the time the ruling [was] sought,” Mr. Boyle “ma[de] known to the court the action which he desire[d] the court to take,” *i.e.*, to ask prospective jurors about their views on tort reform. Once a court has made a decision, an attorney has no obligation to – and may risk serious consequences if he does – repeat a request that has already been denied by the court. Rule 46 eliminates any such requirement. Compare with U.R.Civ.P. 51(f) (describing procedure for objecting to jury instructions).

Mr. Christensen cites no cases holding that a written request for voir dire is inadequate to preserve the issue. In fact, this Court’s recent decision in *Bee* appears to suggest otherwise. In that case, the plaintiff’s counsel submitted written voir dire

questions regarding tort reform before trial, but the court did not ask them. “Bee asserts that he again raised the issue of the tort reform questions during a sidebar held off the record at the close of voir dire but that the trial court rejected his request to question the potential jurors on the issue,” the Court noted. 2009 UT App. 35, ¶ 4.

As Mr. Christensen points out, under *Lamb v. B & B Amusements Corp.*, 869 P.2d 926 (Utah 1993), an informal sidebar is insufficient to preserve an issue for appeal, because it is not on the record. Therefore, the only arguable preservation in *Bee* was the written request before trial, as was done in this case. The Court apparently found that to be sufficient, reversing the trial court.<sup>1</sup>

Mr. Christensen incorrectly implies that the trial court asked counsel if additional questions were desired, and that Mr. Boyle’s counsel could have reiterated his request for tort reform questions at that time. His brief states:

When the jury pool was brought back before the judge [after a recess], he asked many additional questions of juror number 8. (*Id.* at 93-97.) After his questioning, the court invited counsel for both parties up for a bench conference and specifically asked if they [had] any further questions, and both parties indicated that they had nothing further. (*Id.* at 97:10-18.)

(Brief of Appellee, p. 7 ¶ 16.)

The transcript reveals that the trial court’s inquiry was actually limited to any further questions of *Juror No. 8* (who happened to be former insurance defense lawyer

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<sup>1</sup> There was no Utah precedent that would have placed counsel on notice that complying with the trial court’s prescribed procedure for voir dire would be claimed to be inadequate under the circumstances of this case. If the Court deems it advisable to clarify the means of preserving voir dire requests in such cases, any such clarification should be prospective only.

Carmen Kipp's widow). After asking Mrs. Kipp about her husband's practice and her own experience as a legal secretary (R. 693, pp. 92-97), a bench conference was held in which the court asked only, "Did you have any other questions you want me to put to her?" (*Id.*, p. 97:15-16.))

It is obvious from that context that the trial court was asking whether counsel had more questions for "her," i.e., Mrs. Kipp, not inviting exceptions to his overall voir dire. In fact, unlike jury instructions, at no point during the voir dire process did the court ask, or provide an opportunity, for exceptions. Upon the conclusion of its questioning of the panel, the court proceeded immediately into the challenge phase of the selection. (R. 693, p. 90 (upon conclusion of panel questioning, court states, "[T]he record should reflect, again, this is case number 050912506. I have in chambers Mr. [Roger] Christensen [counsel for Boyle] and Ms. Van Orman [counsel for Christensen]. And we're at a point in the jury selection phase of the case where we have questioned 16 panel members. And I understand that Ms. Van Orman wishes to challenge for cause one of the first 16 panel members. Go ahead, Ms. Van Orman. . . ."))

Under U.R.Civ.P. 46, Mr. Boyle preserved his request for voir dire on the subject of tort reform. However, even if some ambiguity existed on the issue, the trial court's failure to conduct the requested voir dire would constitute plain error anyway. For plain error to exist, two elements must be met: The error must be "plain," and it must be prejudicial. *Davis*, 905 P.2d at 892. This Court has repeatedly stated that its precedent

on this issue is “clear,” and that the failure to so question is inherently prejudicial. *Bee, supra; Alcazar, supra; Barrett, supra; Evans, supra.*

## **II. DEFENSE COUNSEL’S REFERENCE TO THE MCDONALD’S COFFEE CASE IS GROUNDS FOR REVERSAL.**

Mr. Christensen does not deny that his counsel intentionally and expressly referred to the “McDonald’s coffee case” in her closing argument. Nor does he deny that *Liebeck v. McDonald’s* has become the poster child of tort reform in this country (a case of “national notoriety,” as Mr. Christensen concedes). Nor does he dispute that counsel incorrectly stated the nature of that case by telling the jury that the *Liebeck* verdict resulted from a per diem compensatory damages argument, when it was actually an award of punitive damages that had nothing to do with a per diem argument (and, in fact, was later remitted).

Mr. Christensen asks the Court to ignore such misconduct by claiming that it was merely a “harmless” and “innocuous” statement used “in an effort to cast light on Plaintiff counsel’s attempt to inflate the damages by presenting them as part of a per diem analysis.” (Brief of Appellee, p. 2; *also id.*, pp. 1, 14, 16.)<sup>2</sup>

Notably, Mr. Christensen does not claim that his counsel was responding to an improper argument, only a “prejudicial” one. (Brief of Appellee, pp. 14-17.) (By design,

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<sup>2</sup> Mr. Christensen does not identify the portion of counsel’s closing argument to which he is referring, but merely asks this Court to assume it was a per diem argument. Because it is immaterial to resolution of the issue, Mr. Boyle will not delve into what does or does not constitute a per diem argument.

of course, every statement made in a closing argument is supposed to be prejudicial. That is far different from improper.)

Mr. Christensen says that *Olsen v. Preferred Risk Mutual Insurance Co.*, 11 Utah 2d 23, 354 P.2d 575 (1960) is “particularly on-point,” because the attorney in that case made a per diem argument, and the Supreme Court said that such arguments are “prejudicial.” That is correct. The court also said that such arguments are permissible. Presumably, that is why Mr. Christensen never objected to counsel’s argument.

At best, then, Mr. Christensen’s argument is that he was entitled to make an *improper* argument in order to counter a *proper* argument. Not surprisingly, he cites no authority for such a proposition.<sup>3</sup>

Mr. Christensen also argues that the statement was mere “lawyer talk,” and that it did not prejudice Mr. Boyle. (Brief of Appellee, p. 15.) But the entire purpose of mentioning the *Liebeck* case is to appeal to a jury’s prejudices. The sole issue to be decided in this case was the amount of damages to which Mr. Boyle was entitled, and the defendant’s strategy was to depict Mr. Boyle as overreaching. It is not coincidental that

<sup>3</sup> Courts have held that an improper argument is not appropriate even in response to an *improper* argument. “[A] court of law is no place to resort to the argument of ‘he said it first’ or ‘he did it too.’ Opposing counsel’s violations of professional standards should never be the basis for engaging in professional misconduct. Merely because another lawyer allegedly disregards the ethical rules does not give the opposing lawyer the right to also disregard the rules. Further, asserting that engaging in misconduct because another lawyer is also engaging in misconduct is in and of itself misconduct.” *Lioce v. Cohen*, 174 P.3d 970, 986 (Nev. 2008).

counsel picked the one case that uninformed jurors would most equate with that sin. That is the very reason why defense lawyers cite it.<sup>4</sup>

Mr. Christensen says that “[c]ounsel obviously did not mean to offer the case as evidence or a substitute therefore, but simply as a statement offered to appeal to the jury’s common sense. . . . [C]ounsel was simply stating that Plaintiff’s prejudicial analysis results in excessive verdicts.” (Brief of Appellee, p. 16.) Unfortunately, counsel did not simply ask jurors to apply their common sense. She did not simply tell jurors that arguments like that of plaintiff’s counsel result in excessive verdicts. Instead, she drew a direct comparison between plaintiff’s argument and another specific case, stating, “That’s how we get verdicts like the McDonald’s case with a cup of coffee.” Counsel essentially told jurors that if they agreed with plaintiff’s damages argument, they would be doing the same thing the jury did in the infamous McDonald’s case.

Moreover, even under Mr. Christensen’s post hoc rationalization, Liebeck would have no legitimate application to this case. As noted above, counsel’s statement about the Liebeck verdict was materially incorrect. That verdict was for punitive, not compensatory, damages, and did not result from a per diem argument, as counsel (mis)represented. *See* Brief of Appellant, p. 8. There was no justification, factually or legally, for counsel’s assertion.

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<sup>4</sup> At the undersigned’s law firm alone, the McDonald’s coffee case has been mentioned by defense counsel in at least three trials.

In arguing that a citation to the single most notorious damages verdict in the nation should not be considered prejudicial, Mr. Christensen cites *Hales v. Peterson*, 11 Utah 2d 411, 360 P.2d 822 (1961). In that case, the Utah Supreme Court determined that a particular statement by defense counsel in closing argument regarding a traffic citation was not sufficiently prejudicial to warrant a new trial. However, the trial court in that case had *sustained* the plaintiff's objection to the comment, *id.* at 824, thus conveying to the jury the impropriety of the remark. In this case, the trial court overruled the objection, suggesting to the jury that counsel's comparison to the McDonald's case was a legitimate consideration.

Moreover, the prejudice in this case resulting from the *Liebeck* reference is necessarily enhanced by the (lack of) voir dire on the very issue symbolized by that case. Mr. Boyle was unable to ascertain, let alone challenge, persons whose preconceived notions on tort reform made them especially susceptible to the "coffee case" argument.

### **III. THE TRIAL COURT ERRONEOUSLY DISMISSED NORRINE BOYLE'S CLAIM FOR LOSS OF CONSORTIUM.**

The final issue on appeal, the dismissal of Norrine Boyle's claim for loss of consortium, is reviewed de novo. Accordingly, both parties have cited to the record that was before the trial court when the ruling was made. Mr. Christensen, however, has failed to afford Mrs. Boyle the inferences to which she is entitled as a party opposing a motion for summary judgment.

For example, Mr. Christensen asks the Court to assume that this was a “very low speed” accident. (Brief of Appellee, p. 3 ¶ 1.) Although Mr. Christensen testified that he struck Mr. Boyle at about ten miles per hour, (R. 354, p. 17), in a Truck v. Pedestrian collision, that is not a “very low speed.”

Mr. Christensen also implies that Mr. Boyle did not have symptoms on the day of the accident. (See Brief of Appellee, p. 3 ¶ 2.) However, the evidence was that, when Mr. Christensen’s vehicle struck Mr. Boyle, the tire of the defendant’s truck pinned Mr. Boyle’s foot to the ground as Boyle rode up on the hood. All of the experts, including those hired by Mr. Christensen, agreed that the impact was sufficient to cause a ruptured disc. Initially, Mr. Boyle was relieved that the accident had not been more severe and that he was able to walk away from it. He went back to his employment, but within a short time the pain became so severe that he had to excuse himself and leave. The pains in his back became severe on the date of the accident. (R. 328.)

A paragraph-by-paragraph response to Mr. Christensen’s fact statement need not be delineated, however, to demonstrate a genuine issue of material fact with respect to Norrine Boyle’s claim. Mr. Christensen does not contest that the evidence was sufficient for a jury to find a “dispute as to the causation and extent of Mr. Boyle’s back injury,” or that, from plaintiff’s evidence, the evidence might seem “severe.” (Brief of Appellee, pp. 17, 19.) It was also largely uncontested that the injury is permanent and life-altering. (E.g., R. 334, 342-345 (citing to testimony of plaintiff’s expert Dr. Lyle Mason).)

The existence of a fact issue on the first requirement of a loss of consortium claim (a significant permanent injury) was thus essentially uncontested. Mr. Christensen's principal argument is on the second requirement, "incapability of the person of performing the types of jobs the person performed before the injury[.]" Utah Code Ann. § 30-2-11.

As Mr. Christensen notes, there is no Utah case law interpreting this language. Mr. Christensen argues that it must be interpreted to mean "completely" incapable. (Brief of Appellee, p. 18.) Mr. Boyle believes that it means "materially" incapable, *i.e.*, that a material difference in the injured party's ability to perform the types of jobs he performed before would satisfy the statute. That would include an inability to work full-time any more, and/or an ability to work only through significant pain, both of which were supported by evidence in the record. *See, e.g.*, R. 261-261 (Mr. Boyle was no longer able to work 40 hours per week; at times is unable to work even 30 hours; also describing continuous pain).

Under Mr. Christensen's interpretation of the statute, an injury could relegate an individual to permanent part-time employment with the accompanying ramifications (loss of benefits, impaired promotional opportunities, etc.), yet technically he would not be "completely" incapable of performing the work, and therefore no loss of consortium claim could obtain. That is not a reasonable interpretation. *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) ("It is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.")

Moreover, an issue of fact existed as to whether the employment that Mr. Boyle was able to get after the accident was substantially similar to the type of job he was previously able to work. Although Mr. Christensen argued that Mr. Boyle's prior and current employment were basically the same, there was testimony from which a jury could have found otherwise. *See, e.g.*, R. 331-332 (former job included training functions, extensive driving to private residences for sales presentations, and very high income potential; present job is sedentary work at a call center). This was an issue of fact that should have been submitted to the jury.


### **CONCLUSION**

The trial court erred in declining to question jurors about their views on tort reform, and in permitting the defendant's counsel to draw a parallel between this case and the "McDonald's coffee case." Individually and in combination, those errors prejudiced John Boyle and deprived him of a fair trial.

The trial court further erred in finding that no genuine issue of material fact existed with respect to Norrine Boyle's claim for loss of consortium. For the reasons set forth above and in the Boyles' opening brief, appellants respectfully request the Court to reverse the judgment and remand the case for a new trial.

DATED this 13<sup>th</sup> day of March, 2009.

CHRISTENSEN & JENSEN, P.C.

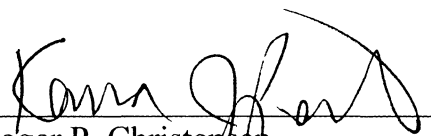
  
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CERTIFICATE OF SERVICE

This is to certify that on the 13<sup>th</sup> day of March 2009, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS were mailed, first-class postage prepaid, to:

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