

2009

Ken Claypoole v. Neil G. Skougard, Boyd Ross, Winward Electric Service and Michael Wood : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEN CLAYPOOLE,

Appellant and Plaintiff,

vs.

NEIL G, SKOUGARD and BOYD ROSS
and WINWARD ELECTRIC SERVICE,
INC., and MICHAEL WOOD,

Appellees and Defendants.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20090390 CA

Appeal from the Judgment of the Honorable Rodney S. Page, Judge of the Second
Judicial District Court, Davis County, State of Utah

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FILED

Appellant request oral argument and a published opinion.

UTAH APPELLATE COURTS

NOV 09 2009

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STATEMENT OF FACTS

Plaintiff/Appellant generally agrees with Defendants/Appellees' Statement of Facts.

However, the following needs to be set forth as additional facts:

1. Mr. Claypoole testified at trial that, although he believed the first impact was harder, he was braced and was ready for the first accident, he was real tight for the first accident, but, for the second one, he just didn't see it coming and wasn't ready for it. R. 1623, p. 357, 358).

2. Dr. Nelson testified at trial that Mr. Claypoole's symptoms of his low back condition were aggravated by the February 7, 2001 accident. (R. 1621, p. 159, 160).

ARGUMENT

POINT I

MR. CLAYPOOLE DID NOT WAIVE HIS OBJECTIONS TO VOIR DIRE

Defendant would have the Court believe that plaintiff in the case at bar did not do enough to preserve his objections to the manner in which the jury was examined for voir dire. However, the opposite is true. The trial court made it abundantly clear that he was not going to submit a jury voir dire questionnaire to the jury, and was only going to allow follow up questions by counsel, notwithstanding the pronouncements of this court in the progeny of cases suggesting the use of extensive voir dire and suggestion on the use of Jury Voir Dire Questionnaires, *State v. Mead*, 2001 UT 58 (UT, 2001, ¶31) [While it may be advisable for a trial court to use a jury questionnaire in certain situations, the trial court has "considerable latitude as to the manner and form of conducting the voir dire examination." case cited omitted], *Evans v. Doty*, 824 P.2d 460 (Utah Ct.App.1991) [a trial judge should liberally allow questions designed to discover attitudes and biases, both conscious and subconscious, even though such questions go beyond that needed for challenges for cause, *Evans*, 824 P.2d at 462, *Barrett v. Peterson*, 868 P.2d 96, 104 (Utah Ct. App. 1993) [Inadequate voir dire substantially impairs a plaintiff's right to the informed exercise of peremptory challenges], *Alcazar v. U. of Utah Hospitals & Clinics*, 188 P.3d 490 (Utah App. 2008) [A trial judge should liberally allow questions designed to discover attitudes and biases, both conscious and subconscious, even though such questions go beyond that needed for challenges for cause.

Alcazar, 188 P.3d 490 ¶ 10], [a trial court could elect to use a questionnaire to efficiently pose such questions to the jury panel, and judicial involvement would only be needed for any suggested follow-up questions. This form of questioning may help eliminate the potential for lengthy voir dire, *Alcazar*, 188 P.3d 490, note 1].

Here the court was asked on at least three occasions to allow a Jury Voir Dire Questionnaire to be submitted to the jury. On September 16, 2008 at the time of pre-trial, Plaintiff advised the court that he intended to submit a jury questionnaire:

MR. HAVAS: One other matter I want to raise to the Court. I'm going to submit to the Court a proposed jury questionnaire. R. Partial Transcript of Pretrial Conference September 16, 2008, 3:10.

Plaintiff continued to advise the court of the jury questionnaire:

MR. HAVAS: And on the jury questionnaire when we agree on one, I'll submit that substantially before the jury instructions, etcetera.

THE COURT: I am not going to submit a jury questionnaire to the jury, I'll tell you right now, but I'll look at your voir dire, okay? R. Partial Transcript of Pretrial Conference September 16, 2008, 4:3.

The court was adamant that he was not going to submit a questionnaire to the jury:

THE COURT: I'm not going to submit a questionnaire to the jury.

MR. MINNOCK: Okay, well, we'll just do it as voir dire.

THE COURT: But your welcome to do one if you want to preserve that on the record, but I'm not going to submit a questionnaire to the jury, so keep that in mind. R. Partial Transcript of Pretrial Conference September 16, 2008, 4:6-18.

Notwithstanding the court's pronouncement on not being willing to submit a jury questionnaire, Plaintiff submitted a Motion for Jury Questionnaire along with a supporting Memorandum citing the cases in support of a jury questionnaire and the need for extensive

jury voir dire. R. 1308-1314. Attached to the Memorandum was a proposed 28 question juror questionnaire. The short questionnaire was converted to Plaintiff's Requested Jury Voir Dire R. 1383, which was designed to ask open ended questions so that plaintiff could garner as much information about the potential jurors as possible. After the court's unequivocal pronouncements, it would have been futile to ask the court again to submit a questionnaire to the jury or to allow attorney conducted voir dire.

The court conducted its voir dire in open court, with all members of the venire present. By the time that the court finished with his questioning of the venire, plaintiff was unable to get the members of the panel to open up and respond to his questions. Had the court asked his questions in such a fashion that members of the jury venire would have to answer by giving more than affirmative or negative answers, plaintiff may have been able to have the jury open up and plaintiff could have obtained information which would have helped him in exercising his peremptory challenges. As was observed in the Nevada case of *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (Nev. 1988):

...Moreover, while we do not doubt the ability of trial judges to conduct voir dire, there is concern that on occasion jurors may be less candid when responding with personal disclosures to a presiding judicial officer. 6

6 For example, one study suggests that the judge's presence evokes considerable pressure among jurors toward conforming to a set of perceived judicial standards and that this is minimized when an attorney conducts voir dire. Jones, *Judge--Versus Attorney-Conducted Voir Dire; an Empirical Investigation of Juror Candor*, 11 Law and Human Behavior 131, 143-44 (1987).

Whitlock, 752 P.2d at 212.

The Nevada court's pronouncement on the importance of an impartial jury is equally true in Utah.

The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country. *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir.1974). The voir dire process is designed to ensure--to the fullest extent possible--that an intelligent, alert and impartial jury which will perform the important duty assigned to it by our judicial system is obtained. *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex.Crim.App.1967). The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given. See *Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969). We are convinced that prohibiting attorney-conducted voir dire altogether may seriously impede that objective.

Id.

The manner in which the jury was questioned as to underlying biases or prejudices substantially impaired Plaintiff's ability to challenge jurors for cause or to exercise his peremptory challenges and prejudiced plaintiff in his ability to select a truly impartial jury.

Defendants/Appellees rely on the recent case of *Boyle v. Christensen*, __ P.3d __, 2009 UT App241 (September 3, 2009) as being dispositive of the issue of preservation of the issue for appeal. However, a close reading of *Boyle* would show that in *Boyle* plaintiff failed to submit briefing on the issues.

¶12 Mr. Boyle argues on appeal that his mere submission of specific jury questions relating to damages and tort reform

preserves for appeal his claim that the voir dire questions the district court actually posed were inadequate.

The Court of Appeals differentiated *Boyle* with *Alcazar v. University of Utah Hosps.*

& *Clinics*, 2008 UT App 222, 188 P.3d 490 (Utah App 2008) and indicated:

compare *Doe v. Hafen*, 772 P.2d 456, 458 (Utah Ct. App. 1989) (finding no preservation where a party failed to "call the judge's attention to [a] specific question" in a set of voir dire questions that had been rejected by the trial court), with *Alcazar v. University of Utah Hosps. & Clinics*, 2008 UT App 222, ¶ 5, 188 P.3d 490 (addressing substantive issue where appellant had "repeatedly attempted to persuade the trial court to give the requested voir dire questions, including briefing the rather direct authority from this court on the issue, [but] the court declined and offered its own unique philosophical approach to voir dire in medical malpractice cases").

Boyle, supra 2009 UT App 241, ¶ 12.

Here, as in *Alcazar*, plaintiff attempted to warn the court of the error contemplated and submitted a detailed memorandum of the direct authority from the Utah Court of Appeals on the issue. The trial court's judgment should be reversed and this case should be remanded for a new trial.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PLAINTIFF'S SETTLEMENT DEMAND LETTER FROM A PREVIOUS CIVIL CASE INTO EVIDENCE, WHICH THE DEFENDANT THEN USED FOR IMPEACHMENT PURPOSES.

Other than pointing out to the court that the settlement demand letter in the other case, prepared by Appellant's attorney, contained puffing in order to effectuate a settlement in the

other case. Allowing that kind of evidence in a separate case, is unfair and should not have been allowed. Other than this additional statement, Appellant relies on his arguments contained in his opening brief.

POINT III

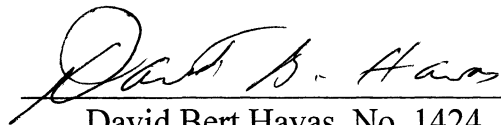
THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUBMITTING A CONFUSING SPECIAL JURY VERDICT FORM TO THE JURY.

Appellant pointed out to the trial court that the intent of the Utah Supreme Court is to use plain English in jury instructions. The phrasing of the instructions in this case were confusing and whether counsel used these confusing phrases during trial or not, does not justify using them in jury instructions and thus make them unintelligible. The trial court should have instructed the jury in everyday English, not legalese. Other than this clarification, Appellant relies on his arguments contained in his opening brief.

CONCLUSION

WHEREFORE, plaintiff/appellant Ken Claypoole, respectfully requests the Utah Court of Appeals to reverse the judgment of the trial court and remand the case for a new trial.

DATED AND SUBMITTED this ^H9 day of November, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2009, a copy of the foregoing Appellant's Reply Brief was served in the manner indicated below upon the following:

Joseph E. Minnock	<input checked="" type="checkbox"/> US. Mail
Morgan, Minnock, Rice & James, L. C.	<input type="checkbox"/> Hand Delivered
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