2002

Sandra Miskin v. Marianne Carter : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

SANDRA MISKIN, Plaintiff-Appellant, vs. MARIANNE CARTER, Defendant-Respondent.	Case No. 20587

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable James S. Sawaya

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POINT ONE

THE RECORD CLEARLY SHOWS THAT CARTER WAS DRUNK.

Carter's Brief argues that Carter was not drunk. (See Brief of Respondent at Point One.) However, that argument is clearly "tongue in cheek." Carter concedes that her blood alcohol level was .08% however long after the accident she was tested. (Brief of Respondent, at p. 3.) By Statute, a person with a .08% blood alcohol is considered to be drunk. See §41-6-44(1), Utah Code Ann. Indeed, Carter was convicted of drunk driving. (R. 413 and Carter Deposition, pp. 18-20.) In short, there is no good faith dispute on this issue. This is a drunk driving case.

POINT TWO

PUNITIVE DAMAGES SHOULD BE ALLOWED WHETHER CARTER WAS SLIGHTLY DRUNK OR DEAD DRUNK.

Carter concedes that punitive damages can be awarded against an intoxicated driver. (Brief of Respondent at p. 12.) However, Carter argues that punitive damages should not be allowed where a driver is only "slightly" drunk. (Brief of Respondent at pp. 12-18.)

Carter does not define the concept of being "slightly" drunk. Certainly, there was no expert testimony to explain the concept of being "slightly" drunk.

Where courts have bothered to determine some minimum threshold, most have determined that drunk driving, in and of itself, is enough to get to the jury on punitive damages. Anderson v. Amundson, 354 N.W. 895 (Minn. App. 1984); Campbell v. Van Roekel, 347 N.W.2d 406 (Io. 1974); Ingram v. Pettit, 340 So.2d 922 (Fla. 1976); Colligan v. Fera, 349 N.Y.S.2d 306 (1973); Svejcara v. Whitman, 487 P.2d 167 (N. Mex. App. 1971).

Additionally, punitive damages have been awarded where drunk driving causes ordinary type accidents to occur. Alcohol can cause a driver to rear end a car as easily as it can cause driving on the wrong side of the road. Thus, punitive damages were awarded in rear-end collisions in Homes v. Hollingsworth, 352 S.W.2d 96 (Ark. 1961), Higginbotham v. O'Keefe, 340 S.W.2d 350 (Tex. Co. App. 1960); and Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). They have been awarded in ordinary intersection accidents. Svejara v. Whitman, 487 P.2d 167 (N.M. App. 1971) and where there was a failure to yield the right-of-way. Adams v. Hunter, 343 F.Supp. 1284 (D. So. Car. 1972). Because alcohol causes accidents to happen in every way imaginable, there is no sense requiring that an alcohol related accident occur in some particularly negligent manner before punitive damages can be awarded.

Punitive damages have also been awarded where the degree of intoxication was unknown; not considered important enough to be specified in the opinion; or where the issue of intoxication was contested. Campbell v. Van Roekel, 347

N.W.2d 406 (Io. 1984); Svejcara v. Whitman, 487 P.2d 167 (N.M. 1970; Colligan v Fera, 349 N.Y.S.2d 306 (1973).

The legislature has set a blood alcohol level which creates a crime.[1] That legislation represents what public policy requires. Any level which the courts might set above that would be at odds with the public policy of this State.[2] Any requirement that an alcohol related accident occur in a particularly negligent manner would also be at odds with the legislature's policy and the reality that alcohol can cause common accidents to occur as well as more spectacular kinds of accidents.

1/ Section 41-6-44(1), Utah Code Ann.:

> It is unlawful and punishable as provided in this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of a vehicle within this state.

2/ The issue of whether the punitive damages standard is satisfied is a jury question. Elkington v. Foust, 618 P.2d 37 (Utah, 1980); Restatement (Second) Torts, §908, Comment d. If it is true that Carter was only "slightly" drunk, that can be fairly argued to the jury. The jury will possibly award modest punitive damages if a driver is "slightly" drunk. On the other hand, a jury might award substantial punitive damages if a driver is dead drunk. In addition, it is for the jury to consider whether there are sufficient mitigating factors present to award no punitive damages. Thus, the defense of being "slightly" drunk can best be reserved to a jury. To hold as a matter of law that drunk driving alone is not enough to get to the jury would fly in the face of the expressed public policy of this state and would involve the court in endless, arbitrary line drawing.

POINT THREE

PUNITIVE DAMAGES SHOULD BE AWARDED IN ADDITION TO ANY CRIMINAL PENALTIES

Carter argues that punitive damages are not necessary because drunk drivers are subject to criminal penalties. (See Brief of Respondent at pp. 17 and 18.)

It should be sufficient to note that criminal penalties have not stopped the carnage!

Those courts which have considered the argument that punitive damages should not be awarded in drunk driving cases because criminal penalties exist have consistently rejected the argument. Harrell v. Ames, 508 P.2d 211 (Or. 1973); Colligan v. Fera, 349 N.Y,S,2d 306(1973); Svejcara v. Whitman, 487 P.2d 167 (New Mex. App. 1971); Miller v. Blanton, 210 S.W.2d 293 (Ark. 1948); Pratt v. Duck, 191 S.W.2d 562 (Tenn. App. 1945).

This court has on numerous occasions rules in favor of punitive damages even though criminal penalties were in existence, e.g. Holdaway v. Hall, 505 P.2d 295 (Utah 1973), Assault; Elkington v. Foust, 618 P.2d 37 (Utah 1980), Sexual Assault; Evans v. Gaisford, 247 P.2d 431 (Utah 1952), Assault. Indeed, many other kinds of intentional wrongdoing which would support punitive damages would also be crimes.

POINT FOUR

THE McFARLAND RULE ON PUNITIVE DAMAGES IS LIMITED TO FALSE IMPRISONMENT CASES.

A series of recent Utah cases have permitted punitive damages for reckless conduct. This is also referred to as implied malice or malice in law. See e.g., Behrens v. Raleigh Hills Hospital, 675 P.2d 1179 (Utah 1979).

Carter claims that Behrens and cases adopting the Behrens standard have all been overruled, sub silento by McFarland v. Skaggs Companies, Inc., 678 P.2d 1179 (Ut. 1983). Specifically, Carter claims that the standard for punitive damages is actual malice. (As opposed to implied malice or malice in law.)

However, McFarland's rationale was clearly limited to the peculiar questions faced in the shoplifting-false imprisonment situation. After an analysis of false imprisonment law,[3] the McFarland court overruled the earlier false imprisonment case of Terry v. Zion's Cooperative Mercantile Institution, 605 P.2d 314 (Ut. 1979). The

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[3] The statement made in defendant's brief that the majority rule is that punitive damages are awarded only for actual malice is correct only if it is limited to false imprisonment cases. The cases in MacFarland cited for what other courts do in similar situations were all false imprisonment cases. Three of the four out-of-state cases cited in McFarland come from jurisdictions which allow punitive damages in drunk driving situations. The majority rule outside the false imprisonment context is set forth in Restatement (Second) Torts §908 and allows punitive damages when there is either actual or legal malice. Pre-Terry Utah Supreme Court dicta also supports the award of punitive damages where either actual or legal malice is present. Wilson v. Oldroyd, 267 P.2d 759, 765 (Utah 1954); Ruga v. Tolman, 117 P. 54, 57 (Utah 1911); see also Powers v. Taylor, 379 P.2d 380 (Utah 1963).

McFarland holding was expressly limited to false imprisonment cases and was expressed in these words:

> . . . Accordingly, we adopt as the appropriate standard for determining the availability of a punitive damages award in an action for false imprisonment that of 'malice in fact' or 'actual malice.' 678 P.2d at 304.
> [Emphasis added].

Two recent decisions of this Court, decided after McFarland, reaffirm that punitive damages should be allowed for a "reckless indifference towards. . .the rights of others." Synergetics v. Marathon Ranching Co., Ltd., 12 Utah Adv. Rptr 15, 19 (Utah 1985); and Aiken, Wright & Miles v. Mountain States Telephone Co., 20 Utah Adv.Rptr. 20, 24 (Utah 1985).

The McFarland case is clearly limited to its own facts of false arrest.

POINT FIVE

MOST JURISDICTIONS HOLD THAT DRUNK DRIVING IS THE TYPE OF OUTRAGE WHICH SHOULD SUPPORT PUNITIVE DAMAGES

Miskin's Opening Brief cites cases from 16 jurisdictions which have permitted punitive damages in the drunk driving context. Since then, plaintiff has uncovered five more. Butters v. Mince, 616 P.2d 127 (Colo. 1980); Calloway v. Rossman, 257 S.E.2d 913 (Ga. App. 1977); Moore v. Bothe, 479 S.W.2d 634 (Ky. 1972); Allers v. Willis, 643 P.2d 592 (Mont. 1982), and Pratt v. Duck, 191 S.W.2d 562 (Tenn. App.

1945). These cases overwhelmingly demonstrate that drunk driving satisfies the classical criteria for allowing punitive damages.

In addition to this overwhelming case law, the public policies behind the punitive damages standards require the availability of punitive damages in drunk driving cases. Ultimately, words such as actual malice, implied malice, reckless indifference, malice in law, are simply labels used for the convenience of lawyers and judges. The important issue behind the labels is the public policy of deterring outrageous conduct. The important issue in this case is to help stop the slaughter caused by drunk drivers. In Ingram v. Pettit, 340 So.2d 922 (Fla. 1976), the Florida Supreme Court stated that:

> The distinctions articulated in labeling particular conduct as "simple negligence", and "willful and wanton misconduct" are best viewed as statements of public policy. . .We would deceive ourselves, however, if we viewed these distinctions as finite legal categories and permitted the characterization alone to cloud the policies they were created to foster. Our guide is not to be found in the grammar, but rather in the policy of the state in regard to highway accidents. From that perspective, we see that the courts and the legislature have evolved the notion that drunk drivers menace the public safety and are to be discouraged by punishment.
> (340 So.2d at 924.)

Thus, we urge the Court to focus as much on the substance of the tragedy as on the legal labels.

CONCLUSION

Drunk driving is a national tragedy. The slaughter on highways has reached epidemic proportions. Traditional solutions are not enough. As a matter of public policy, this Court should use punitive damages as one additional tool to combat this evil.

DATED this 21 day of Nov, 1985.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant, (Re: Carter vs. Miskin, No.20587), was mailed this 21 day of Nov, 1985, to the following:

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