

1989

Hale v. Boyne USA : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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NATHAN D. HALE, :
Plaintiff/Appellant, : Civil No. 890717-CA
vs. :
BOYNE USA, INC., dba : ARGUMENT CLASSIFICATION
BRIGHTON SKI RESORT, : PRIORITY SIXTEEN
Defendant/Respondent.
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APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA
PRESIDING

APPELLANT'S REPLY BRIEF

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 890717-CA

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Mary T. Noonan
Clerk of the Court
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The lift is specifically designed to roll up or slide up one who enters at the line prematurely. There is tremendous flexibility in the chair and how it swings back until it would slide completely over the top of the boys, where the operator could grab and stabilize the same even without stopping the lift, yelling and distracting Mr. Hale, and especially without permanently injuring Mr. Hale.

In addition, there is no emergency in reference to the young boys, as the chair would come in contact with them at or about the knee level, but it would roll back, and back, and back as far as needed, as the cable proceeds forward, until the chair goes right over the top of the boys.

If the chair/lift were designed any other way, then there would be negligent design.

In this case, it is clear, just as Judge Sawaya pointed out, as shown in the Appellant's Brief, the operator grabbed the chair and held on to it, without ever having pushed the button, and then let it slam into Nathan Hale.

Appellant submits that this clearly breaches the national standard, and the lower Court should be reversed, with instructions to enter judgment for the Appellant.

ARGUMENT TWO

HALE'S CLAIMS DO NOT ARISE OUT OF AN INHERENT RISK OF SKIING,
AND ARE NOT BARRED UNDER UTAH CODE ANNOTATED 78-27-53.

As set out in the Appellant's brief, an inherent risk of skiing involves the activities of the skier coming down the mountain. The Legislature was very clear on this point.

Appellee argues in its brief that this incident was solely caused by other skiers and therefore, an inherent risk of skiing.

Appellant submits that such a conclusion is absurd.

For one to assume the risks of skiing, he must of necessity be skiing. Mr. Hale was not skiing, unless one concludes that after he was struck by the chair he "skied", ie: smashed into the steel pole.

It is not the activities of others that determines if one is skiing. No matter who ever else may be involved, does not make Mr. Hale skiing at the time of the incident.

Had Mr. Hale been walking between the club house and his car, when struck by a skier, the same would not make Mr. Hale skiing.

Surely one can use the lift for many other reasons than for skiing, as there is a tremendous industry in the summer

time for tours, religious ceremonies, etc., that involve the use of the lift, but have nothing to do with skiing.

In addition, one can be skiing and have nothing to do with using the lift, as this Court is well aware of all of the cross country skiing, helicopter skiing, snow boarding, etc., that occurs perhaps as much as down hill skiing.

Lastly, there is nothing inherent as far as risks in riding a ski lift. Appellee goes to great lengths to find some basis for the Court's ruling in the tramway provisions of the Code.

Appellant submits that this all goes to the issue that there is nothing inherent as far as risks in riding a lift is concerned. The operation and maintenance of tramways and lifts is heavily regulated and supervised, and this is all done to diminish any "inherent" risks as far as the mechanical system is concerned.

In conclusion, Appellant submits that there is no application of the doctrine of "inherent risks of skiing" when boarding or riding a lift, and the fact that other skiers may also be involved does not make it any more or "less skiing" than it is without the other skier's involvement.

Otherwise a resort could argue that traffic accidents in the parking lots, slips and falls down the stairs in the lodge, or even getting food poisoning at the cafeteria, are

all inherent risks of skiing, merely because other skiers may be involved.

Appellant respectfully submits that there is no question that the lower court erred in this regard and so this Court should reverse and remand.

ARGUMENT THREE

PLAINTIFF FILED A TIMELY OBJECTION TO MEMORANDUM OF COSTS.

In this case, Defendant's counsel apparently delivered to the Court the proposed Findings of Fact, Conclusions of Law, and Judgment, along with the purported Memorandum of Costs, on June 1, 1989, as the same were signed and entered the following day; yet mailed the same to Counsel for the Appellant, on June 1, 1989.

From the record it appears that the Memorandum of Costs was personally delivered to Judge Sawaya on Thursday, June 1, 1989, as they were signed and entered by Judge Sawaya on Friday, June 2, 1989.

However, the documents were mailed to Counsel for the Plaintiff, apparently on Thursday, June 1, 1989, and not received until Monday, June 5, 1989.

As a result, Counsel for the Defendant in absolute violation of Rule 4-504 (2) of the Code of Judicial Administration, got Judge Sawaya to sign the Findings, Conclusions, and Judgment, calling for the payment of inappropriate costs, before Counsel for the Plaintiff could properly object and have the matter considered by the Court.

Rule 4-504 WRITTEN ORDERS, JUDGMENTS, AND DECREES, provides in subpart (2)

Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the Court for signature unless the court otherwise orders. Notice of objections shall be submitted to the Court and counsel within five days after service.

As a result, Counsel for the Defendant should have submitted the documents to Counsel for the Plaintiff, before ever submitting them to Judge Sawaya. This allowed the Defendant to have the same reduced to judgment well before the "five days after service" to review and properly object to the same.

Now, after sneaking this matter before Judge Sawaya, Appellee argues that Appellant has waived his right to object to the Memorandum of Costs, submitted by Appellee.

Appellee suggests to this Court that Appellant, for some reason has not filed appropriate objections to the proposed Findings, Conclusions, and Judgment.

Appellant submits that this argument is wholly without merit, as Rule 4-504 of the Code of Judicial Administration, merely requires that "Notice of objections shall be submitted to the court and counsel within five days after service."

There is no question that Appellant filed within five days after service, his objections to the Proposed Judgment calling for the payment of inappropriate costs.

The rule merely provides that a notice be filed, that an objection is registered, and nothing more or less is required.

Appellee takes cases, regarding a wholly unrelated matter, ie: objections to the admissability of certain evidence, and suggests that the same rules apply to Memorandum of Costs.

Appellant submits that they are totally different, in that an objection to a cost, goes only to one consideration, and that is: Is it a taxable cost or not. Whereas, objections to certain evidence could be for any unnumbered reasons, ie: relevancy, hearsay, incompetent witness, etc.

Appellant submits that there is no merit to suggest that any thing more need be stated in an objection to Costs, both because its obvious that it could only be for one basis, and secondly, the rule expressly states that only "notice" of the same be filed.

Counsel incorporates the arguments made in the Appellant's Brief, as if more fully set forth herein.

In conclusion, Appellant submits that costs are only taxable pursuant to statute and not at common law. Frampton v. Wilson, 605 P.2d 771, (Utah, 1980). Appellee concedes that they inappropriately got Judge Sawaya to award costs for their expert witness, which were a substantial amount of their costs, ie: \$1,356.25 of \$2,122.70.

As noted above, Appellee clearly violated the rules regarding submitting the matter to the Court, and now wants

this Court to reward them for their wrongdoing.

The Utah Rules of Civil Procedure, Rule 54, states that the Memorandum of Costs must be "duly verified", which it was not, and never has been, and therefore this Court should reverse the judgment in reference to the award for costs, and deny the same all together, as Appellee has never submitted the same pursuant to the Rule, which requires that it must be done within five (5) days on entry of the judgment, and it has been well over a year.

There is no question that the Appellee got Judge Sawaya to sign off on the judgment, calling for the inappropriate award of costs, before the documents were ever even seen by the Appellant, let alone time in which to review and object before the Court.

There is no question that the costs, as awarded were inappropriate. Appellee concedes that most of the costs were inappropriate, ie: Newell Knight.

Counsel for the Appellant, therefore respectfully requests that the Court reverse the award of costs, all together and remand the matter to the District Court, with instructions to enter judgment for the Appellant.

CONCLUSION

Appellant submits that there is a hard and fast rule, and intended to be a fast rule, ie: hit the button before attempting anything else, and hit it every time.

There is no basis for not hitting the button in this case, as doing the same improves every other condition and circumstance involved.

It is undisputed that hitting the button first, would have mitigated any injury to the young boys, mitigated any injury to the operator, and would have mitigated the injury and permanent impairment of Mr. Hale.

It is undisputed that had the button been pushed, Mr. Hale would never have struck the steel post.

In addition, pushing the button, and/or pushing off the button on the stationary position, would assist the acceleration of the operator, should he be inclined to leave his post and run after the chair.


Appellant respectfully submits that there clearly was a breach of the standard (national) standard of care.

Appellant was not coming down the hill. He was not skiing, and therefore could not possibly have assumed the "inherent risks of skiing".

Appellee is not entitled to any costs, and especially should not be rewarded for their violation of the rules, and the same should therefore be reversed.

Appellant respectfully submits that the case be reversed and remanded to the lower Court with instructions to enter judgment for the Plaintiff for his permanent injuries.

Respectfully submitted this 12th day of September, 1990.

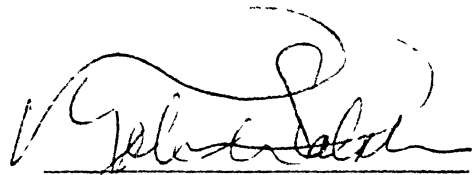
A handwritten signature in cursive script, appearing to read 'John Walsh', written over a horizontal line.

JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing APPELLANT'S REPLY BRIEF, to the Defendant, by mailing the same postage prepaid, addressed to: TODD S. WINEGAR, CHRISTENSEN, JENSEN, & POWELL, ATTORNEYS AT LAW, 510 CLARK LEAMING BUILDING, 175 SOUTH WEST TEMPLE, SALT LAKE CITY, UTAH, 84101.

Dated this 12th day of September, 1990.

A handwritten signature in dark ink, appearing to read 'John Walsh', is written over a horizontal line.

JOHN WALSH
ATTORNEY AT LAW

to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. ____"

The number of the request shall be written in lead pencil.

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies.

(Amended effective January 15, 1990.)

Amendment Notes. — The 1989 amendment added Justice Courts to the scope of applicability of this rule and substituted "five" for "10" in the first sentence and added the second sentence in Subdivision (1).

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court.

Applicability:

This rule shall apply to all civil proceedings in courts of record and not of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

demanding such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

Amendment Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R. App. P.

Compiler's Notes. — This rule is similar to Rule 54, F.R.C.P.

Cross-References. — Continuances, discretion to require payment of costs, Rule 40(b). Judges' retirement fee, taxing as costs, § 49-6-301.

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, Rule 62(h).

Witness fees, taxing as costs, § 21-5-8.