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John Boyle and Norrine Boyle v. Kerry Christensen : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JOHN BOYLE and NORRINE BOYLE,

Plaintiffs / Appellants,

vs.

KERRY CHRISTENSEN,

Defendant / Appellee.

Case No. 20090822

Court of Appeals Case No. 20080582

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

REPLY BRIEF OF APPELLANTS ON *CERTIORARI*

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ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT AS TO THE VOIR DIRE QUESTIONS SUBMITTED TO THE JURY.

A. Plaintiff was entitled to the requested voir dire.

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 v. University of Utah Hospitals, et al.*, 2008 UT App 222, 188 P.3d 490.

Mr. Christensen argues on appeal that the Court of Appeals correctly determined that the trial court's purportedly "related questions" were sufficient to shed light on the jurors' potential biases. (Brief of Appellee, p. 17.) The problem with this argument is that the trial court's questions were not at all related in *substance* to Mr. Boyle's proposed voir dire questions. Rather than asking "related" questions, or modifying or simplifying the wording of plaintiff's requested voir dire, the trial court omitted the entire line of questioning proposed by Mr. Boyle. Not one of the trial court's questions asked anything about tort reform. As a result, the trial court's questions were not designed to ascertain jurors' views about tort reform and personal injury lawsuits. *Alcazar, supra*.

There was no ambiguity about Mr. Boyle's request in his proposed questions. Of the 15 questions proposed by him, the only four that did *not* relate to general background

inquiries 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 v. Anheuser-Busch, Inc.*, 2009 UT App 35, 204 P.3d 204. Nonetheless, the trial court rejected all of the tort reform questions.

Mr. Christensen argues, however, that, “in their totality and in context,” these two questions were sufficient to “elicit substantially equivalent information” as the information sought in Mr. Boyle’s questions:

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?

(Brief of Appellee, p. 18, citing R. 536.)

It was this very type of generic questioning that the Court found insufficient in *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991), and its progeny. *See Bee, supra; Alcazar, supra; Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993). 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 questions of the jury during oral voir dire in order to discover any potential bias or prejudice.” (Brief of Appellee, p. 19.) But these “follow-up questions” only followed up on the threshold questions that the court asked, none of which encompassed tort reform.

Mr. Christensen also 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. “Here,” Mr. Christensen says, “the underlying case deals with an auto/pedestrian accident, but the questions Plaintiff argues should have been asked dealt with tort reform in general.” (Brief of Appellee, p. 16.) *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. As such, the Court of Appeals’ affirmance of the trial court’s failure to inquire regarding tort reform during voir dire should be reversed.

B. The Court of Appeals incorrectly found that Mr. Boyle failed to preserve his request for tort reform voir dire.

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 receiving the court's written questions" – in other words, after the trial court had already ruled on the requested voir dire. (Brief of Appellee, p. 9) (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. Rule 46 eliminates any requirement that an attorney repeat a request that has already been denied by the court.

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. 10.)

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 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, because the error was “plain,” and it was prejudicial. *Davis v. Grand County*, 905 P.2d 888, 892 (Utah Ct. App. 1995). The Court of Appeals has repeatedly stated that its precedent on this issue is “clear,” and that the failure to ask tort reform questions is inherently prejudicial. *Bee, supra*; *Alcazar, supra*; *Barrett, supra*; *Evans, supra*.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT DEFENSE COUNSEL’S REFERENCE TO THE MCDONALD’S COFFEE CASE WAS NOT 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). *See* M. McCann, et al., “Java Jive: Genealogy of a Juridical Icon,” 56 U. Miami L. Rev. 113, 127-130 (2001).

Mr. Christensen asks the Court to ignore such misconduct by claiming that it was merely “non-prejudicial,” “harmless” and “innocuous” “lawyer talk” used “to expose Plaintiff’s prejudicial per diem damages calculations.” (Brief of Appellee, p. 19, 21,

22:.)¹ Notably, Mr. Christensen does not claim that his counsel was responding to an improper argument, only a “prejudicial” one. (Brief of Appellee, pp. 21-22.) (By design, 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 Mr. Boyle’s counsel’s closing 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.²

In arguing that the statement was mere “lawyer talk,” Mr. Christensen contends that the statement did not prejudice Mr. Boyle. (Brief of Appellee, p. 19-20.) But the

¹ 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.

² 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).

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

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." (Brief of Appellee, p. 22.) 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. 22. There was no justification, factually or legally, for counsel's assertion.

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. The Court of Appeals determination that the trial court acted appropriately in refusing tort reform voir dire and in overruling Mr. Boyle's objection to Mr. Christensen's counsel's reference to the *Liebeck* case should be reversed.

III. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF 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. 7.) 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. 7.) 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 fact-by-fact 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.” (Brief of Appellee, p. 23.) It was also largely uncontested by Mr. Christensen that Mr. Boyle’s 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 that changes a person’s lifestyle) 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.

In a departure from his position before the Court of Appeals, where he argued that this language must be interpreted to mean "completely" incapable, Mr. Christensen now contends that incapability means Mr. Boyle "must be clearly unable to complete the essential parts of his job after the injury." (*Contrast* Brief of Appellee, p. 25, with Brief of Appellee at the Court of Appeals, p. 18.) Apparently, Mr. Christensen agrees with the District of Utah's interpretation that the statute actually does not impose a literal requirement of incapability.

Under Mr. Christensen's new interpretation of the statute, however, 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 incapable of performing the essential parts of his job after the injury, 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.")

Contrary to Mr. Christensen's interpretation, Mr. Boyle believes that the statute requires that an injury render a person "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. 261-262 (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).

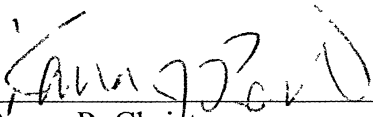
Moreover, an issue of fact existed as to whether the employment that Mr. Boyle was able to get after the accident was substantially similar to the type of job he was previously able to work. Although Mr. Christensen argues that Mr. Boyle's prior and current employment were basically the same, there was 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

For the reasons set forth above, Appellants / Plaintiffs respectfully request the Court reverse the Court of Appeals, and remand to the trial court for a new trial on the claims of John and Norrine Boyle.

DATED this 12th day of April, 2010.

CHRISTENSEN & JENSEN, P.C.



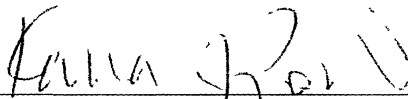
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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of April, 2010, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS ON *CERTIORARI*** were mailed, first-class postage prepaid, to:

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