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Wayne Pearce v. Martin J. Wistisen and Richard Oveson : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WAYNE PEARCE,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 18,376
MARTIN J. WISTISEN and RICHARD OVESON,	:	
Defendants-Respondents.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, HONORABLE ALLEN B. SORENSEN PRESIDING

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE COURT'S FAILURE TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 6 ON IMPUTED LIABILITY UNDER UTAH CODE ANNOTATED §73-18-18 WAS REVERSIBLE ERROR.

In State v. Ouzounian, 26 Utah 2d 442, 291 P.2d 1093, 1095 (1971), the Court states the general rule that:

> A refusal to give an instruction cannot be the basis for reversal, unless the jury was insufficiently advised of the issue they were to determine, or it appears that they were confused or misled to the prejudice of the person complaining.

491 P.2d at 1095. (Emphasis added).

Plaintiff agrees with the rule as stated, but as to the instant action, plaintiff asserts that the exceptions outlined in the rule and emphasized above are applicable and controlling in the instant case.

Plaintiff's Requested Instruction No. 6 was the only instruction which would have given the jury an understanding of the law on vicarious liability as set out in Utah Code Ann. §73-18-18. No

instruction given by the Court conveyed any notion whatsoever of the statutory vicarious liability of the defendants for the negligent acts of Kevin Wistisen.

In the absence of such an instruction it is clear that the jury was insufficiently advised as to the law on vicarous liability which was a key issue for the jury's determination. As a consequence, the verdict was the product of a confused and misled jury, which resulted in substantial prejudice to the plaintiff. Based on the authority of Ouzounian, the Court's failure to give Plaintiff's Requested Instruction No. 6 is a basis for reversal.

Defendants' assertion that the Court's Instruction No. 5 was an adequate substitution for Plaintiff's Requested Instruction No. 6 completely misses the central issue in dispute. The Court's Instruction No. 5 states:

> In this case the plaintiff has the burden of persuading you that the defendants Martin J. Wistisen and/or Richard Oveson and/or the boat operator Kevin Wistisen was negligent and that such negligence was a proximate cause of the death of Evan Pearce.

The above cited instruction informs the jury only that the plaintiff has the burden of proving that one or both of the defendants, or Kevin Wistisen was negligent and that such negligence was the proximate cause of the death of Evan Pearce. Nowhere in the instruction is found the least indication that the negligence of Kevin Wistisen was to be imputed by law to the defendants. Nowhere in the instruction is found any explanation concerning the relevance of the negligence of a non-party. The fact that the jury found the defendants to be negligent in no way demonstrates that the jury found said negligence by imputing the

negligence of Kevin Wistisen. There is no way in which the jury could have extracted the notion of vicarious liability from the instructions they received.

Absent an adequate instruction on imputed liability, the jury could easily have found, as they did, that the negligence of the named defendants was not the proximate cause of the death of Evan Pearce. It is obvious that the lack of instruction concerning the imputability and relevance of Kevin Wistisen's negligence created confusion in the jury and prduced error so substantial as to require reversal.

Defendants have suggested that it is the Court's failure to mention the term "vicarious liability" that is the chief concern of the plaintiff. Plaintiff is little concerned whether the words "vicarious liability" were used in the instruction, as long as the instruction conveyed the concept of the vicarious liability doctrine. Such was not the case. No substantive communication of the doctrine was ever made to the jury in the Court's instructions, not even implicitly. Defendants have repeatedly stated that since the Court's instruction concerned the negligence of both defendants and Kevin Wistisen, the plaintiff's request for a vicarious liability instruction was satisfied. Defendants apparently misunderstand the vicarious liability doctrine. The point is not that the negligence of Kevin Wistisen is involved, but that it be imputed to defendants. In light of the fact that not even the most vague notion of the vicarious liability doctrine was presented to the jury, plaintiff's request for reversal on this point is indeed one of "substance" rather than "one of form only" as asserted by defendants.

Defendants rely on the case of Watters v. Querry, 626 P.2d 455 (Utah 1981), and cite the following language therefrom:

> Nevertheless, the court cannot be said to have failed to properly instruct the jury when requested instructions are fully covered in other instructions given.

626 P.2d at 458-459. (Emphasis added). The language of Watters clearly indicates that when requested instructions are not fully covered in other instructions, the court has failed to properly instruct the jury. This is exactly what occurred in the instant case and, therefore, reversible error was committed by the trial court.

Defendants' brief further argues that since the jury found both defendants and Kevin Wistisen negligent that "appellant received the finding of negligence which he sought." Defendants have misunderstood plaintiff's case. Plaintiff's purpose in requesting their proposed Instruction No. 6 was not to show that Kevin Wistisen and the two named defendants were independently negligent, but rather to show that Kevin Wistisen's negligence was imputable by law to the named defendants. In view of the fact that Kevin Wistisen is not a defendant to this action, a finding of negligence on his part is absolutely useless to plaintiff's case unless the jury were to understand that Kevin Wistisen's negligence was to be imputed to the two named defendants. Since not one scintilla of imputed or vicarious liability doctrine was present in any of the Court's instructions, the jury could not have found the named defendants liable for the negligence of Kevin Wistisen. Absent an adequate instruction by the Court on vicarious liability the plaintiff did not and could not have received the finding of negligence which he sought.

Based on the authority and analysis above, plaintiff's case was substantially prejudiced by the Court's failure to give his Requested Instruction No. 6 and said refusal by the Court requires reversal of the trial court's verdict.

POINT II

THE PLAINTIFF WAS SUBSTANTIALLY PREJUDICED BY THE ERRONEOUS ADMISSION OF EVIDENCE CONCERNING ALCOHOL CONSUMPTION BY THE DECEASED, EVAN PEARCE.

Plaintiff has asserted, ever since he learned of defendants' intentions to introduce evidence at trial concerning the illegal purchase and consumption of alcohol by Evan Pearce, that such evidence would be prejudicial and inflammatory. Although defendants conceded to the trial court that they could not prove how much alcohol the deceased, Evan Pearce, had consumed, or that he was ever intoxicated, defendants were intent on introducing such evidence to inflame the jury and prejudice them against the young man.

Defendants assert that they were entitled to introduce the evidence as rebuttal, stating that plaintiff brought up the matter first. (Brief of Respondents at 18-19). This assertion is grossly false. Defendants presented both the purchase and consumption of the alcohol to the jury in their opening statement to the jury. (R. at 285.) This was clearly not by way of rebuttal, but rather, was the primary and principal means by which the jury was exposed to this prejudicial and inflammatory evidence.

The defendants discussion of Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) fails to recognize the import of Bach. While it is true that Bach states the general

rule that evidence of drinking before a fatal accident is generally relevant to the jury's consideration of contributory negligence, the holding in Bach carves out a major exception to that general rule which is directly applicable in the instant case. The court in Bach held, with respect to the introduction of evidence that alcohol consumed prior to a fatal accident:

> [T]he relevance of such evidence disappears if the drinking occurred so long before the accident that the alcohol could no longer have any effect on the decedent's conduct. The probative value of such evidence must be closely scrutinized to avoid the possibility of prejudice to the party charged with negligence . . . This evidence was much too remote and uncertain to be of effective probative value on this issue of contributory negligence.

502 F.2d at 1121 (emphasis added).

In the instant case the court failed to closely scrutinize the probative value of the evidence of prior consumption of alcohol by Evan Pearce. The court failed to consider that any consumption of alcohol did not contribute to the creation of the predicament in which Evan Pearce was placed. The court failed to consider that there was no expert testimony of any kind which would have tended to show that Evan Pearce was being affected by alcohol in his system or by the after effects of alcohol which had been in his system. The court failed to consider that the testimony of Rod Hunt could not quantify the alcohol consumed by Evan Pearce in any way save to say that he was "involved" (R. at 295) in the activity of drinking while at the party. The court failed to consider that the illegal purchase of the alcohol by Evan Pearce was completely irrelevant to his condition at the time of the incident in question.

The argument forwarded by the defendants with respect to the Bach case is that the drinking in the Bach case may have been more remote in time than the drinking in the present case. In that regard, defendants cite the Record at page 548 (Brief of Respondent at 2-3) to the effect that Evan Pearce's drinking continued until 9:00 a.m. of the morning of June 1, 1979. Evan's drowning occurred sometime between 7:00 p.m. June 1, 1979 and June 2, 1979. The Record at page 548 does not support that conclusion, but only supports the conclusion that Evan Pearce may have been drinking until 6:00 a.m. or 6:30 a.m. of June 1, 1979, some 12 1/2 to 13 hours prior to the earliest possible time of drowning. That evidence is remote and not related by other testimony to the time of Evan's death. Comparisons of varying degrees of remoteness does not invalidate the clear and logical import of the Bach case which emphasizes that evidence of the consumption of alcohol has such a propensity to prejudice that the court must make a special examination of such evidence and must require appropriate foundational testimony to establish the probative value thereof.

At trial the defendants did not show or even suggest that the deceased, Evan Pearce, was under the influence of alcohol at the time of the accident. Defendants frankly admitted that they could not prove any adverse effects on Evan Pearce by any alleged alcohol consumption. In spite of this, and in spite of the fact that any consumption would have occurred substantially before the accident, thereby making it remote in time, defendants were intent on presenting to the jury evidence which could only prejudice the plaintiff and which was without any probative value.

Because the evidence was perceived as so damning, it was the first evidence presented by defendants in their case in chief.

Defendants attempt to sidestep the prejudice issue by asserting that since plaintiff did not accept a continuance to depose defendants' witness who was to introduce the prejudicial evidence, plaintiff has waived his right to argue the prejudice of the evidence. No amount of preparation or foresight could overcome the damaging effects of the evidence which was introduced concerning Evan Pearce's illegal purchase and consumption of alcohol. In view of the predominant community attitudes and biases against drinking in the community from which the jury was drawn, and the moral stigma associated with it, the prejudicial effect of the evidence in question is obvious.

Concededly, the determination as to undue prejudice is one to be made by the trial court in its sound discretion. The facts of the present case show that the trial court clearly abused its discretion in allowing the admission of the evidence in question.

The admission of the evidence in question, which plaintiff asserts had a disastrously prejudicial and inflammatory effect upon the decision of the jury, was reversible error.

POINT III

THE FAILURE OF THE COURT TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 13 REGARDING THE PRESUMPTION THAT EVAN PEARCE WAS EXERCISING DUE CARE FOR HIS OWN SAFETY WAS REVERSIBLE ERROR.

Defendants' argument against plaintiff's contention that the court's failure to give Plaintiff's Requested Instruction No. 13 was reversible error consists of an enumeration of several alleged acts of negligence by the deceased, Evan Pearce. (Brief of

Respondents at 11.)

The defendants list seven items of the deceased Evan Pearce's alleged negligence. (Brief of Respondents at 11-12). The first four items defendants list were acts or circumstances which occurred prior to the time of the actual emergency, that is, prior to the time Kevin Wistisen ran over the ski rope and abandoned the boat in the wind without electrical power and without anchor. Therefore, it is impossible to say that, with respect to the emergency, these acts constituted a failure by Evan Pearce to exercise due care for his own safety. In other words, had Kevin Wistisen not created the emergency in question these prior acts by Evan Pearce would be completely irrelevant with respect to any notion that he was not exercising due care for his own safety.

Defendants' claim that these first four enumerated acts show that Evan Pearce was not exercising due care for his own safety suggests a striking analogy to the "thin skull" doctrine. The core of the doctrine, as set out in 57 Am.Jur 2d, Negligence § 160, P. 522, is as follows:

> [T]he established rule is that where the result of an accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the negligence which caused the accident is the proximate cause of the disability, and if a latent condition itself does not cause pain and suffering, but that condition plus an injury causes such pain and suffering, the injury, and not the latent condition, is the proximate cause thereof. Where such a pre-existing condition is shown, the rule is that the negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct. Under this

> rule, which has sometimes been referred to as the "thin skull" doctrine, the tortfeasor takes his victim as he finds him.

In applying this rule by analogy, it is clear that defendants cannot assert as negligence any acts by Evan Pearce or conditions from which he suffered, which occurred or existed before Kevin Wistisen created the emergency by running over the rope and abandoning the boat. In essence, it is irrelevant whether Evan Pearce was tired or in some other condition prior to the time when Kevin Wistisen created the emergency, because at the time of the emergency defendants must "take their victim as they find him." The only acts by Evan Pearce which defendants may cite as contributory negligence, and use to oppose the presumption that Evan Pearce used due care for his own safety, would be acts which occurred after Kevin Wistisen created the emergency.

The last three enumerated acts by Evan Pearce occurred after Kevin Wistisen created the emergency, but are clearly not acts which a reasonable mind could construe as constituting a failure to exercise due care for one's own safety.

First, defendants cite the removal of the life jacket by Evan Pearce in an attempt to reach the boat as a failure to exercise due care for his own safety. On the contrary, this act constituted a valiant last-ditch effort by one who was intensly interested in securing his own safety. Evan Pearce had made several attempts to swim to the boat with the life jacket on. The wind was blowing the boat away from him faster than he could swim with the jacket on. He therefore made one last calculated effort to reach the boat without the hindering and obstructing effect of the jacket. He swam to the boat without the jacket but

even the removal of the jacket did not sufficiently aid him and he was unable to reach the boat.

Second, defendants cite Evan Pearce's failure to adjust the life jacket which was thrown out to him as a failure to exercise due care for his own safety. Evan Pearce did put the jacket on, but it was improperly undersized. (R. at 517). Even if it were to be assumed that the jacket could have been adjusted, it obviously was not adjustable while the wearer was wearing the jacket. To take the jacket off for adjustment would have only created a potential additional hazard to Evan Pearce's life.

Third, defendants credit the separation of Evan Pearce and Kevin Wistisen as being the sole result of action by Evan Pearce. Again it must be remembered that these boys were faced with a dire emergency. The water in which they were stranded was very cold and it was getting dark very rapidly. Evan Pearce's efforts to reach shore as quickly as possible can only be construed as an effort to secure his own safety.

Referring again to Haman v. Prudential Insurance Company of America, 415 P.2d 305, 311 (Idaho 1966); which was cited in detail in appellant's brief, the court held:

> [I]f reasonable minds might differ as to the conclusions to be drawn from the evidence opposing the presumption, the matter should be submitted to the jury and the jury informed as to the presumption . . .

(Emphasis added.)

Concededly, whether a prima facia case opposing the presumption has been made is a question for the Court. Based on the facts of the instant case, the extreme emergency faced by Evan Pearce and the efforts Evan Pearce made to secure his own safety,

the plaintiff asserts that the Court abused its discretion in ruling that sufficient evidence had been adduced by defendants to constitute a prima facia case. Plaintiff's assertion rests on the ease with which reasonable minds could readily have drawn conclusions with respect to the actions by Evan Pearce finding that he was indeed exercising due care for his own safety.

It is abundantly clear from the above analysis that reasonable minds could have drawn different conclusions from the evidence defendants adduced at trial in opposition to the presumption. It is indeed likely that reasonable minds might conclude that all actions by Evan Pearce were highly motivated by a desire to secure and exercise due care for his own safety. Sufficient evidence to make a prima facia case in opposition to the presumption was not adduced by defendants. The presumption should, therefore, have been submitted to the jury and the Court's failure to do so in this action constitutes reversible error.

POINT IV

THE FAILURE OF THE COURT TO INSTRUCT THE JURY AS TO THE STATUTORY REQUIREMENT OF AN ANCHOR ABOARD THE BOAT IN ISSUE WAS REVERSIBLE ERROR.

Plaintiff presented two theories to the trial court which he asserts required the trial court to give an instruction concerning the requirement of an anchor aboard the boat in question.

Plaintiff's first theory is based upon Utah Code Ann. § 73-18-8 (1980) and 4 Utah Admin. R. § A60-01-3(3)(b)(12)(1975), which state that the boat in question should have been equipped with "an anchor and line of sufficient weight and length to securely anchor such vessel." It was disputed whether the beachability of the boat, under the circumstances present on Utah Lake

at the time of the accident, would subject the boat to compliance with this requirement. Plaintiff asserts that defendants' evidence was not sufficient to exempt it from the operation of the statute and the administrative regulation and, therefore, the lack of an anchor was negligence.

Plaintiff's second theory is based upon rules and regulations promulgated by the state of Utah, through its Division of Parks and Recreation. Plaintiff contends that the rules and regulations made it "essential" that an anchor be on board the boat in question and that pursuant to these rules and regulations the lack of an anchor is evidence of negligence by the defendants. In otherwords, the requirement of an anchor on board the boat was a "safety standard," the deviation from which constitutes negligence.

Plaintiff relied on the authority in Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985 (1967), in which the plaintiff sued for injuries which he had received as a result of colliding with a glass door owned and maintained by defendants. Plaintiffs were allowed to enter into evidence FHA regulations on the necessity of having either safety glass or a horizontal metal bar in the door. The Utah Supreme Court allowed the evidence, holding that it was "one of the standards of the community in determining whether or not the defendants were negligent." (Emphasis added). The court in Wheeler continued by stating:

> While it is true that the weight of authority is against allowing regulations such as those of FHA to be given in evidence, yet there is a respectable authority permitting such evidence to be received.

431 P.2d at 987.

A trend exists in the law which allows codes or standards of safety issued or sponsered by governmental bodies to be admitted into evidence on the issue of negligence. As evidenced by the decision in Wheeler, Utah is among the minority that allows such codes and safety standards to be introduced into evidence.

In the instant case, plaintiff established by introduction of Exhibit 7, that safety regulations exist in the state of Utah which would make an anchor an essential piece of equipment on board the boat in question. Based on the authority in Wheeler and the safety standards promulgated by the Utah Division of Parks and Recreation, the lack of an anchor on board the boat in question was evidence of negligence on the part of the defendants.

Plaintiff's Requested Instruction No. 8 concerned the specific safety regulations promulgated by the Utah Division of Parks and Recreation. Since the safety equipment list was introduced into evidence without objection, it was error for the court not to give Plaintiff's Requested Instruction No. 8 in order to allow the jury to properly evaluate the evidence.

The court's failure to give an appropriate instruction on plaintiff's theory that an anchor was required aboard the boat constitutes prejudicial error.

CONCLUSION

Plaintiff's Requested Instruction No. 6 on the vicarious liability of the named defendants for the negligence of Kevin Wistisen as a minor operator of the boat was not given by the trial court. The plaintiff has demonstrated conclusively that no instruction given by the court, viewed in any light, communicated the doctrine of imputed liability so that the jury could have

found defendants liable for the negligence of Kevin Wistisen. The fact that the jury found negligence on the part of defendants, absent Plaintiff's Instruction No. 6, does not demonstrate that the jury imputed the negligence of Kevin Wistisen to them. Under the law, U.C.A. 73-18-8, the plaintiff was entitled to this instruction.

The plaintiff was substantially prejudiced by the erroneous admission of evidence concerning consumption of alcohol by the deceased, Evan Pearce. Defendants introduced evidence at trial that Evan Pearce illegally purchased and consumed alcohol sometime prior to the accident in issue. Defendants introduced such testimony in spite of the fact that they did not, and frankly admitted that they could not, show that Evan Pearce was intoxicated or in any way affected by consumption of alcohol at the time of the accident. Defendants introduced this evidence through the first witness for the defense for the purpose of adducing evidence which would prejudice and inflame the jury against Evan Pearce. The instant case clearly falls within rule stated in Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974), that consumption of alcohol which is remote in time is irrelevant and that such evidence should be closely scrutinized to avoid prejudice. The trial court clearly abused its discretion in allowing the admission of such evidence. The admission of such evidence was, therefore, reversible error.

The majority of the alleged acts of negligence by Evan Pearce occurred prior to the emergency created by the negligence of Kevin Wistisen and cannot be cited as comparative negligence on the part of Evan Pearce. The acts of Evan Pearce which

occurred after Kevin Wistisen created the emergency clearly show efforts of Evan Pearce which were highly motivated by a desire to secure his own safety. The presumption of due care for one's safety should have been presented to the jury. The failure of the trial court to present the presumption was reversible error.

The requested jury instruction concerning the requirement of an anchor was based upon the statutory requirement of Utah Code Ann. § 73-18-8 (1980) and 4 Utah Admin. R. § A60-01-3(3)(b)(12) (1975), and the rules and regulations promulgated by the Utah Division of Parks and Recreation. The Utah Supreme Court has held that rules and regulations of this nature are "one of the standards of the community in determining whether or not the defendants were negligent." Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985 (1967). Although the plaintiff requested such an instruction, no instruction given by the court touched on this requirement that an anchor be on board the boat or that a lack of an anchor would constitute negligence by the defendants. The court's failure to give an appropriate instruction on plaintiff's theory that an anchor was required aboard the boat constitutes prejudicial error.

Respectfully submitted this 29th day of September, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed 2 copies of the foregoing to Mr. Darwin C. Hansen, HANSEN, CRIST & SPRATLEY, Attorneys for Defendants-Respondents, 110 West Center Street, P.O. Box 489, Bountiful, Utah 84010, this 29th day of September, 1982.

Michelle M. Farmer
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