IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

MAXINE L. WASSON, Executrix of the Estate of Roy E. Walters, Plaintiff	:	
v.	:	NO. 91-00,636
WILLIAM C. McCLINTOCK, et al., Defendant	:	

OPINION and ORDER

The unsuccessful plaintiff in this case, believing the court made numerous errors during trial, has asked this court to enter a judgment in her favor or grant her a new trial. Most of her allegations of error have little merit. However, on one issue this court is inclined to agree: the court improperly admitted evidence that the plaintiff's decedent drank alcohol on the evening he was struck and killed by an automobile. That unfortunate ruling was the unfortunate result of a sound interpretation of the law but an incorrect application of the law to the facts of this case. Because of that error, the plaintiff is entitled to a new trial.

Factual Background

Maxine Wasson brought this suit as executrix of the estate of Roy E. Walters, Jr., who was struck and killed by an automobile shortly after leaving the Loyalsock Hotel in the early morning hours of November 19, 1989. Mr. Walters had spent much of the evening in various drinking establishments, and was crossing Route 87 to reach the parking lot across from the Hotel when he was struck and killed by a vehicle operated by William McClintock. The total number of beers Mr. Walters consumed from about 5:00 p.m. until 2:00 a.m., depending upon which

witnesses were believed, ranged from six to ten and one-half.[1] But while several witnesses saw him drinking, no witness noticed any physical symptoms of intoxication.[2] A blood test taken after the accident established an extremely high blood alcohol level of .277.[3]

There were no witnesses to the accident other than defendant William McClintock, the driver who struck Mr. Walters and who, as fate would have it, owned Shore Acres, one of the taverns Mr. Walters frequented. Mr. McClintock testified that he never saw Mr. Walters–he merely heard the thump of his body hitting the car. Mr. McClintock admitted he was traveling 45 m.p.h. in a 35 m.p.h. zone, but claimed the accident was caused by an unidentified "phantom" vehicle that ran a stop sign and suddenly pulled out in front of him, diverting his attention and forcing him to swerve to avoid a collision. In the process he inadvertently hit Mr. Walters, who was apparently crossing the highway at that moment.

DISCUSSION

After a five-day trial the jury found that Mr. McClintock was negligent but

---

[1] Mr. Walters' son testified that Mr. Walters drank as many as two beers at the Loyalsock Hotel at about 5:00 p.m. or 6:00 p.m. Jean Sullivan testified that Mr. Walters drank as many as two beers at Shore Acres at 6:00 p.m. or 7:00 p.m. Jean Sullivan also testified that Mr. Walters returned to Shore Acres between 9:00 p.m. and 10:30 p.m. and drank as many as three beers. Kathy Stroble testified that Mr. Walters drank as many as two beers at Shore Acres between midnight and 1:00 a.m. Various witnesses testified that Mr. Walters drank as many as one and one-half beers at the Loyalsock Hotel before 2:00 a.m.

[2] Mr. Walters' son Scott, however, told investigating police investigating that his father may have been drunk, by which he meant Mr. Walters' blood alcohol content might have exceeded the legal limit.

[3] A plaintiff's expert effectively disputed the accuracy of the test.

that his negligence was not a substantial factor in Mr. Walter's death. The plaintiff's Motion for Post-Trial Relief requests the court to enter judgment for her or, in the alternative, grant a new trial. The errors alleged are: (1) inconsistent jury verdict, (2) incorrect "right of way" charge, (3) failure to give "last clear chance" charge, and (4) admission of blood alcohol test.

I. Issues Without Merit

The jury found that defendant McClintock was negligent, but that his negligence was not a substantial factor in bringing about the plaintiff's harm. The plaintiff contends this verdict proves the jury did not understand the concept of legal cause or substantial factor. The plaintiff argues that because the evidence clearly showed McClintock's car struck and killed Mr. Walters, it is logically inconsistent to find that Mr. McClintock was negligent but that his negligence was not a substantial factor. The court believes it is the plaintiff who is confused about legal cause. The mere fact that courts require a separate finding as to negligence and substantial factor shows that these are clearly two different things and it is entirely reasonable to find one and not the other. Factual cause in this case was clearly established; legal cause was another matter entirely. As counsel for Mr. McClintock suggests, the jury may well have found that Mr. McClintock was negligent because he was speeding, but because of the sudden entry of the phantom vehicle, he would have had insufficient time to avoid striking Mr. Walters even if he had been traveling at 35 m.p.h. In fact, that is precisely what Gregory Manning, expert witness for the defense, stated at trial, and the jury was entitled to believe that testimony.

The plaintiff also claims the court improperly refused to charge the jury that a driver must yield the right-of-way to a pedestrian at an intersection when there are no traffic signals in operation, and that a driver must drive at a safe speed when approaching and crossing an intersection. The court refused these charges for the simple reason that the accident did not occur at an intersection. See 75 Pa.C.S.A. §3542 for the definition of an intersection. Troopers Dugan and Kirkendall both testified that the accident occurred 44 feet south of the intersection. The plaintiff's argument that this spot should be considered an intersection simply because the Loyalsock Hotel sits on the southeast corner of the intersection of Route 87 and State Route 2030 is without merit. Moreover, even if the court was wrong in this ruling such error would be harmless because the jury found that Mr. McClintock was indeed negligent.

The plaintiff next contends that the court erred in refusing to charge on the "last clear chance" doctrine. The last clear chance doctrine permits a factfinder to consider the plaintiff's conduct in light of an unforeseen emergency not of his own making. Plaintiff's theory of the case was that Mr. Walters started across the road in time to make it to the other side without being hit by Mr. McClintock, but while in the highway was startled and stunned when the phantom vehicle ran a stop sign and turned onto Route 87. That accounted for his failure to reach the other side of the road before Mr. McClintock's vehicle arrived. The court refused to give this charge as related to Mr. Walters because there was no factual basis to support it. No witness saw Mr. Walters cross the street. There was no evidence he was stunned or

confused by the phantom.[4] Moreover, since the jury found Mr. McClintock negligent and never reached the issue of plaintiff's comparative negligence, any error on this point was harmless.

II Evidence of Alcohol Consumption

Prior to trial Mr. Walters filed a motion in limine asking the court to exclude the blood test results and any reference to Mr. Walters' drinking. Pennsylvania has long followed the general rule that no evidence of a pedestrian's alcohol consumption may be introduced unless the evidence establishes a degree of intoxication that proves the pedestrian was unfit to cross the street. The theory behind this policy is that evidence of drinking is so prejudicial it will improperly lead a jury to find against the imbiber for that reason alone.

This is a classic case of our legal system's schizophrenic approach toward fact-finding, especially where juries are concerned. On the one hand we trust jurors to make important and difficult factual decisions while on the other hand we hide many relevant facts from them. We thus expect them to put together a puzzle without all the pieces. We do this in the name of protecting litigants against the "prejudicial effects" of certain evidence because we are afraid that the jury will be so biased by such evidence it will reach a decision for the wrong reason. Thus even highly relevant evidence must be excluded by the trial court if the court believes its probative value is outweighed by its potential prejudicial effect.

This policy is strongly imbedded in Pennsylvania's approach to evidence of

---

[4] The court did, however, permit counsel for the plaintiff to harp on that theory during closing argument to his heart's content.

pedestrian consumption of alcohol. Our appellate courts, however, have failed to provide a clear rule of law for us to follow. Unfortunately, the relevant cases are somewhat confusing and contradictory. This court has struggled through that morass and arrives at the following interpretation of the law.

A. Admissibility of Blood Alcohol Test

The first question confronting the court in ruling on the plaintiff's motion in limine was the admissibility of the blood alcohol test results obtained after the accident. After reviewing the muddled case law we concluded that blood test results are not admissible without independent evidence of intoxication, which does not include expert testimony about the test. Expert testimony, in other words, only comes in if the blood tests are admissible, and blood tests are admissible only if there is independent evidence the pedestrian was unfit to cross the street.

In Ackerman v. Delmonico, 336 Pa. Super. 569, 486 A.2d 410, 414 (1984), the court stated, "[B]lood alcohol level alone may not be admitted for the purpose of proving intoxication. There must be other evidence showing the actor's conduct which suggests intoxication. Only then, and if other safeguards are present, may a blood alcohol level be admitted." In Ackerman the test results were properly admitted because there was testimony the pedestrian drank heavily in the late afternoon and evening before the accident, that he had a strong odor of alcohol on his breath, and that he slurred his speech. In Clinton v. Giles, 719 A.2d 314 (Pa. Super. 1990), by contrast, neither the blood test nor the testimony of the expert interpreting the test was admissible since there was no evidence whatsoever of the pedestrian's conduct or fitness to cross the street. The court explicitly agreed with

the trial court's summary of the law: "[E]ven when there's expert testimony . . . there must be corroboration by other evidence, before a pedestrian's use of alcohol could come in . . . ." Id. at 319 note 7.

We acknowledge, however, that in Whyte v. Robinson, 421 Pa. Super. 33, 617 A.2d 380 (1992) the court seemed to insinuate it was improper for opposing counsel to ask the plaintiff if he was aware of his blood test results merely because there was no expert testimony to interpret the results or relate them back to the time of the accident.

Unfortunately, our Superior Court further muddied the waters in Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998). In that thin opinion the court upheld the admission of blood tests because evidence of intoxication included: (1) the smell of alcohol on the pedestrian's breath, (2) the blood test results [!], and (3) expert testimony on the blood test results. However, Judge Beck's concurring opinion pointed out there was testimony regarding the pedestrian's conduct in darting out in front of oncoming traffic against a traffic signal, although the majority did not mention that evidence. Moreover, in a footnote the majority opinion stated, "Appellant's blood alcohol level would have been inadmissible absent the additional corroborating evidence." Id. at 1146, note 2. We therefore conclude that Kraus did not change the law on this issue and we stand by our decision that blood tests are only admissible when there is independent corroborating evidence of unfitness to cross the street.

B. Independent Evidence of Unfitness

A second and related question presented by this case is what sort of evidence

establishes unfitness to cross the street. Appellate courts have been less than precise in articulating a standard. The primary ambiguity, in our view, is whether physical evidence of the pedestrian's behavior is required, or whether it is sufficient to present evidence that he or she drank excessively prior to the accident. The decision in this case turns on the answer to that question, for while there was testimony that Mr. Walters drank between six and ten and one-half beers during the nine hours prior to the accident, there was no evidence he exhibited any physical symptoms of intoxication.

After studying the relevant case law, this court determined that physical evidence of the pedestrian's conduct is not always necessary. A proponent may also establish unfitness to cross the street by introducing evidence on the *amount of alcohol consumed*, if the amount is sufficiently excessive. We based this decision on the articulation of the law that first appeared in Cook v. Phila. Trans. Co., 199 A.2d 446, 414 Pa. 154 (1964), where the always-colorful Justice Musmano explained that alcohol-related evidence was inadmissible in that case because there was no evidence of "intoxication or copious drinking on the part of Mrs. Cook, or that she had staggered or that there was liquor on her breath."

In Kriner v. McDonald, 223 Pa. Super. 531, 533, 302 A.2d 392 (1973), the Superior Court zeroed in on that language and summarized the law in a passage that has gained acceptance as the definitive standard on this issue and has been cited in virtually every appellate case addressing the issue since Kriner:

> [E]vidence tending to establish intoxication on the part of a pedestrian is inadmissible unless such evidence proves unfitness to be crossing the street. Pennsylvania courts have gone to great lengths to enforce this rule. Consequently, no reference should be made to a pedestrian's use of alcohol unless there is evidence of *intoxication or*

> *copious drinking* on the part of the pedestrian; for example, evidence that the injured party was staggering or had liquor on his breath gives support to such an inference.

(Emphasis added.)

In this court's opinion, the operative phrase is "intoxication or copious drinking." Since we expect the appellate courts to have a firm grasp of the rules of English grammar, we must assume evidence of intoxication and evidence of copious drinking are two distinct types of evidence. If the courts were simply being redundant, they would not have separated the two words by "or."

Evidence establishing *intoxication*, as stated in Clinton, supra, at 319 and Whyte, supra, at 384, includes staggering, stumbling, aimless wandering, or incoherent mumbling. In other words, physical evidence of the pedestrian's conduct. What then constitutes evidence of *copious drinking?* This court reasoned that phrase refers to evidence showing the amount of alcohol consumed. Therefore, we concluded that physical evidence of the pedestrian's conduct is not always necessary to establish unfitness to cross the street.

The appellate courts have wisely emphasized the importance of physical symptoms of excessive alcohol consumption.[5] This is generally a good policy

---

[5] In Whyte, supra at 384, the court noted that none of the witnesses observed the pedestrian prior to the accident, and the record was devoid of "any evidence such as staggering, stumbling, aimless wandering, glassy eyes or incoherent mumbling." In Ackerman, supra, the court noted that the pedestrian's speech was slurred. In Clinton, supra, at 319, the court stressed that there was an "absence of any evidence related to the appellee's conduct or fitness to cross the street." While it is true that in Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998) the opinion mentioned only that the pedestrian's breath smelled of alcohol, Judge Beck's concurring opinion pointed out that there was testimony regarding the pedestrian's behavior crossing the street which apparently suggested that he was physically impaired. And finally, in the recent case of Chicchi v. Southeastern Pa. Transp. Auth., 727 A.2d 604 (Pa. Cmwlth. 1999), the pedestrian's behavior suggested he was high on cocaine when

because the purpose of the alcohol admission rule is to ensure that potentially prejudicial evidence of alcohol consumption is introduced only when there is sufficient evidence to show a person was physically impaired by the alcohol. The amount of alcohol a person consumes is not usually a sufficient indication of whether the individual was intoxicated because many other factors enter into play such as the person's weight and alcohol tolerance, the amount of food a person consumed, the speed at which a person metabolizes the alcohol, and the amount of time over which the alcohol was consumed. By insisting that the pedestrian must have exhibited physical signs of intoxication before admitting other evidence of alcohol consumption, courts ensure there is a solid basis upon which to conclude the pedestrian was unfit to cross the street.

As important as physical symptoms are, however, that is not the *only* way to gain admissibility of alcohol consumption and blood tests. We believe that Justice Musmano, as well as his less eloquent successors, understood that in some cases one can conclude–by the sheer amount of alcohol consumed–that a person was physically affected. In allowing the proponent to show evidence of "copious drinking" the courts left that option open, to cover cases where the proponent can prove an excessive amount of drinking but has no witnesses to the pedestrian's behavior. It will also cover cases where the pedestrian was able to suppress physical symptoms, although he or she was actually intoxicated.

The question then confronting the court was *how much* drinking constitutes copious drinking, and that is where we went astray. We now realize the standard of

---

hit by the train. His failure to respond to the loud shrieking whistle of the approaching train was explained by the cocaine paraphernalia found at the scene.

copious drinking will be met only on the rarest occasions–instances when the pedestrian drank so much alcohol in such a short period of time that one can reasonably conclude he or she was physically affected and unfit to cross the street. After all, the word "copious" does not mean several, or even many. It was hand-picked by that master of words, Justice Musmano, to conjure up images of extreme abundance and excessiveness–a very large quantity. In short, we believe that although physical symptoms of intoxication are normally required to establish unfitness, in those rare instances where the pedestrian truly drank copiously a court may admit such evidence.

This is not one of those rare instances. From the testimony presented, the jury could not have found that Mr. Walters drank more than ten and one-half beers between the hours of 5:00 p.m. and 2:00 a.m. Certainly there are many individuals who could drink that amount of alcohol in nine hours and show no effects, given the rate at which the human body metabolizes alcohol. In short, ten and one-half beers over nine hours is not sufficient to establish copious drinking and we know not what Puritanic demon possessed us to find that it was.[6] Had Mr. Walters sipped stronger spirits, belted down brew by the caseload, or guzzled grog in his final hours, we might have been justified in our ruling. As it is, however, the next Lycoming County jury to hear this tale will never know of the few brews Mr. Walters nursed as he savored the final drops of his life.

Conclusion

Since there was no evidence that Mr. Walters exhibited physical symptoms

[6] Perhaps this was due to the court's lifelong affiliation with the United Methodist Church.

of intoxication and since there was insufficient evidence of copious drinking, neither the testimony regarding the number of drinks consumed by Mr. Walters, nor the results of his blood test, nor the expert testimony interpreting the blood tests should have been admitted. Because the extremely high blood test level was obviously prejudicial and because erroneous admission of harmful or prejudicial evidence constitutes reversible error, we must grant the plaintiff a new trial. See White, supra, at 383.[7]

O R D E R

AND NOW, this _____ day of August, 1999, the Motion for Post-Trial Relief filed by the plaintiff on 1 July 1999 is disposed of as follows: the Motion for JNOV is denied, and the Motion for a New Trial is granted.

BY THE COURT,

Clinton W. Smith, P.J.

[7] We cannot resist the temptation to express our own personal opinion on the case for although the trial was legally flawed, we are convinced it was in fact very fair. Although we believe our interpretation of the case law set forth in this opinion is sound, we also feel Pennsylvania courts are paternalistic and overly protective in this area, as with many other evidentiary issues. We fail to understand the fear that jurors will be inflamed or improperly swayed by evidence of alcohol consumption. Why not permit jurors to hear evidence of the pedestrian's drinking, conduct, and blood test results, as well as any relevant expert testimony, and then allow the jurors to decide whether the pedestrian was affected by the alcohol? That is precisely what happened at this trial. The jurors heard testimony that Mr. Walters drank six to ten and one-half beers, along with testimony that he showed no physical signs of intoxication. The jurors learned about the blood test results, but they also heard the plaintiff's convincing expert testimony that the results were inaccurate. In short, each party was given a full opportunity to present all the relevant favorable evidence it could gather, and the jurors were trusted to sort it all out. As an observer of the entire process, this court believes the plaintiff received a fair trial in fact, although not in law.

cc: Dana Stuchell Jacques, Esq.
Hon. Clinton W. Smith
Gary Harris, Esq.
Richard Gray, Esq.
Franklin Noll, III, Esq.
401 Penn Street, Suite 100
Reading, PA 19601
Jay Stark, Esq.
Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Gary Weber, Esq., Lycoming Reporter