2007

Michael Bee v. Anheuser Busch, Incorporated, a Missouri Corporation, and Prominence, Inc., a Nevada Corporation : Brief of Appellant

Utah Court of Appeals

Matthew H. Raty; Law Office of Matthew H. Raty; Cory B Mattson; Attorneys for Plaintiff.
Peter H. Christensen; Ryan P. Atkinson; Strong and Hanni; Attorneys for Defendant.

IN THE UTAH COURT OF APPEALS

MICHAEL BEE, Appellant and Plaintiff, v. ANHEUSER BUSCH, INCORPORATED, a Missouri Corporation, and PROMINENCE, INC., a Nevada Corporation. Appellees and Defendants.	**APPELLANT'S BRIEF** Appellate Case No. 20070804-CA

Appeal from the Judgment of the Honorable Robert P. Faust,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

Peter H. Christensen
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorney for defendant/appellee
Anheuser Busch

Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
Cory B Mattson (#9292)
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone: (801) 495-2252
Attorneys for Plaintiff/Appellant Michael Bee

Appellant requests oral argument and a published opinion.

IN THE UTAH COURT OF APPEALS

MICHAEL BEE, Appellant and Plaintiff, v. ANHEUSER BUSCH, INCORPORATED, a Missouri Corporation, and PROMINENCE, INC., a Nevada Corporation. Appellees and Defendants.	**APPELLANT'S BRIEF** Appellate Case No. 20070804-CA

Appeal from the Judgment of the Honorable Robert P. Faust,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

Peter H. Christensen
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorney for defendant/appellee
Anheuser Busch

Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
Cory B Mattson (#9292)
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone: (801) 495-2252
Attorneys for Plaintiff/Appellant Michael Bee

Appellant requests oral argument and a published opinion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

JURISDICTION OF THIS COURT

Plaintiff/Appellant Michael Bee filed his Notice of Appeal on September 27, 2007. The Utah Court of Appeals has jurisdiction over this appeal pursuant to § 78-2-2(3)(j) and 4, Utah Code.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court commit reversible error by rejecting plaintiff's requested voir dire and otherwise failing to question prospective jurors so as to elicit their exposure to negative reports about personal injury cases and their prejudice against such cases?

The issue was preserved for appeal at RR. 1740-1742; 2226, 1:6-3:1; 2223, 6:15-44:15.

2. Did the trial court commit reversible error by granting the two co-defendants six peremptory challenges, when there was no "substantial controversy" between them, even more-so because defendants had stipulated to dismiss a third-party action between them?

The issue was preserved for appeal at R. 2223, 115:13-116:16.

3. Did the trial court err by precluding as irrelevant, any and all evidence of Anheuser-Busch's irresponsible, reckless, and deceptive alcohol marketing and advertisements, the effectiveness of that marketing and advertisement, and the contribution of Anheuser Busch's conduct in this regard to plaintiff's injuries and damages.

The issue was preserved for appeal at RR.2223, 65:10-78:2, 81:12-82:4, 105:24-106:13, 107:13-108:8.

STANDARD OF REVIEW

1. Regarding Issue No. 1, the Utah Court of Appeals has stated,

> "We review challenges to the trial court's management of jury voir dire under an abuse of discretion standard. Generally, the trial court is afforded broad discretion in conducting voir dire, 'but that discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.'" *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993) (quoting *State v. Hall*, 797 P.2d 470, 472 (Utah Ct. App.), cert. denied, 804 P.2d 1232 (Utah 1990)) (other citations omitted).
>
> Due to the strong interest in enabling parties "to elicit necessary information for ferreting out bias," *State v. Saunders*, 1999 UT 59,¶34, 992 P.2d 951, a trial court's discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries. Id. at ¶43.

Depew v. Sullivan 2003 UT App. 152, 71 p. 3d 601, at ¶¶ 11, 12.

2. Regarding Issue No. 2, the trial court has very limited discretion on a Rule 47(e) decision to grant separate peremptory challenges to co-defendants. *Carrier v. Pro-Tech Restoration,* 944 P.2d 346, 353 (Utah 1997). The Utah Supreme Court stated:

> All of the *Pena* factors, to one degree or another, support close appellate review of trial court decisions under rule 47(c) [(predecessor to rule 47(e))] of the Utah Rules of Civil Procedure. We conclude, therefore, that the trial court should have limited discretion in its rule 47(c) decisions. On "the spectrum of discretion . . . , running from 'de novo' on the one hand to 'broad discretion' on the other," the appropriate discretion on this issue lies close to,

although probably not at, the "de novo" end. *See Pena*, 869 P.2d at 937. *Carrier*, at 353.

3. Regarding Issue No. 3, the trial court is given considerable discretion in deciding whether proffered evidence is relevant. *Bambrough v. Bethers*, 552 P.2d 1286 (Utah 1976).

STATEMENT OF THE CASE

In this personal injury action, the trial court rejected plaintiff's requested voir dire designed to reveal prospective jurors' exposure to negative reports about personal injury cases and their prejudices against such cases. The trial court then granted co-defendants six peremptory challenges, compared to the three allowed plaintiff, although there was no "substantial controversy" between the defendants under Rule 47(e) Utah R. Civ. P. Also, during the trial, the court precluded highly relevant, critical evidence of Anheuser Busch's irresponsible, reckless, and deceptive alcohol marketing and advertisements, which was probative of all the liability issues in the case, including defendants' negligence, comparative fault, and recklessness justifying punitive damages. The jury returned a verdict, finding plaintiff primarily at fault for his injuries.

STATEMENT OF FACTS

1. Michael Bee fell and suffered brain, head, and neck injuries at the 2002 Bud World Party during the Salt Lake City Winter Olympics, when defendants served him alcohol to his intoxication, and then brought him onto an ice rink without a

helmet or other protective gear, to participate in a hockey-puck shooting contest. R. 2223, 1:6-3:3.

2. Mr. Bee sued defendant Anheuser Busch, seeking compensatory and punitive damages, and Anheuser Busch filed a third-party complaint against Prominence, the event manager it hired to help with the Bud World Party. RR. 1-5, 40-45.

3. Plaintiff then filed an Amended Complaint, asserting negligence against and demanding recovery from both defendants. RR. 99-103.

4. The morning of the first day of trial, the court heard argument on plaintiff's requested voir dire, and rejected plaintiff's requested Nos. 1 through 4, including their subparts. Addendum 1, RR. 1740-1742; R. 2226, 1:6-3:1; R. 2223, 6:15-44:15. These were designed to reveal prospective jurors' exposure to negative reports about personal injury cases and their prejudice against personal injury cases. *Id.*

5. During voir dire, the trial court asked no questions to prospective jurors' to elicit their exposure to negative reports about personal injury cases and prejudice against these cases. R. 2223, 6:15-44:15.

6. In the judge's chambers before the jury panel was brought to the courtroom for jury selection, defendants requested and the court granted, over objection, six peremptory challenges to the co-defendants, while allowing plaintiff only three. R. 2223, 115:13-116:16.

7. After the judge had taken the bench for jury selection, the defendants revealed to the court and plaintiff's counsel that they had settled all disputes between them. Plaintiff then, again, objected to additional peremptory challenges for defendants, but the court, again, overruled plaintiff's objection. R. 2223, 116:8-15; 45:22-48:14.

8. After the parties exercised their peremptories allocated by the court, the jury was empaneled and the case was tried between March 26-30, 2006. R. 2223, 48:12-14; RR. 2022-2028.

9. The trial court had originally instructed the jury panel, as follows:

> Mr. Bee asserts that his injury was caused by Anheuser and Prominence's negligence. Both Anheuser and Prominence deny Mr. Bee's claim and assert various defenses negating their liability, including Mr. Bee was negligent himself. Defendant and third party plaintiff, Anheuser Busch claims that defendant Prominence's negligence was the cause of Mr. Bee's injury, which Prominence denies. Further, Anheuser Busch claims that defendant, Prominence, was negligent when it caused the plaintiff's injury and that it breached its contract with Anheuser Busch which is also being denied by Prominence.

R. 2223, 20:17-21:3. However, after disclosing their settlement, defendants requested, and the court instructed the empaneled jury as follows:

> THE COURT: Mr. Bee asserts that his injury was caused by Anheuser Busch and Prominence's negligence. Both Anheuser Busch and Prominence deny Mr. Bee's claim, and they assert various defenses including claiming that Mr. Bee himself was negligent.
>
> Further, due to some other things that have occurred prior to the time of the trial, you need to be aware there are no issues or

> claims in this case from defendant Anheuser Busch against Prominence for negligence.

R. 2223, 64:7-18. *See also* R. 2223, 48:15-54:9.

10. Throughout the trial, plaintiff endeavored to introduce evidence of Anheuser-Busch's irresponsible, reckless, and deceptive alcohol marketing and advertisements, and that these were a substantial factor contributing to plaintiff's injuries. However, the court precluded any and all such evidence as irrelevant. R. 2223, 65:10-78:2, 81:4, 105:24, 106:13, 107:13-108:8.

11. The jury rendered a verdict on March 30, 2007, finding the defendants negligent and that their negligence caused injury and damages to plaintiff, but that plaintiff was 75% at fault for his injuries. RR. 2022-2028.

12. Originally, the jury apportioned 75% of the fault to Anheuser-Busch and just 10% of the fault to plaintiff, but apparently changed its view and switched the percentages of fault. *Id.* R. 2026 at ¶ 10.

13. After the trial, Anheuser-Busch submitted a proposed judgment to the court for signature. RR. 2079-2085.

14. Plaintiff objected, noting that he had been able to secure a copy of the jury verdict form after the time it was read in trial, which showed that the court had incorrectly read the verdict form. *Id.* RR. 2075-2078.

15. Contrary to Anheuser Busch's proposed judgment, the jury had not answered question 12(B), or, better said, the jury had originally answered 12(B) "No", but had then scribbled or scratched out its "No" answer to 12(B). R. 2028.

16. Plaintiff requested that the judgment reflect the jury's actual findings on the verdict form. *Id.* RR. 2075-2078.

17. Plaintiffs submitted a proposed judgment to the court accurately setting forth the jury's verdict. R. 2086-2090. The trial court, however, overruled or disregarded Plaintiff's objections and entered Anheuser-Busch's proposed judgment. RR. 2091-2097.

SUMMARY OF ARGUMENTS

Utah appellate courts have long recognized the duty of trial courts to allow plaintiffs to discover the exposure of prospective jurors to negative reports about personal injury cases and the prejudice they hold against such cases. In the matter at bar, however, the trial court rejected all of plaintiff's requested voir dire designed to discover such exposure and prejudice. The court then failed to ask any of its own voir dire to elicit the information. This was prejudicial error since plaintiff's right to the informed exercise of his peremptory challenges was substantially impaired.

The court committed a second prejudicial error during jury selection when it granted six peremptory challenges to the co-defendants. The court accepted defendants' argument that a "substantial controversy" existed since Anheuser Busch had filed a third-party complaint against defendant Prominence, asserting Prominence's responsibility for

plaintiff's injuries and damages. That, however, does not qualify as a "substantial controversy" under Rule 47(e), Utah R. Civ. P., that would allow the trial court to allocate additional peremptory challenges. Furthermore, the defendants settled all claims between them and informed the court of this during the jury selection process. Thus, defendants lost even the one, albeit inapposite, ground they had asserted for separate sets of peremptory challenges. Yet, the trial court remained steadfast in its decision to allocate six peremptory challenges to the co-defendants.

The court committed a third prejudicial error by precluding plaintiff from showing Anheuser Busch's negligence and recklessness in its irresponsible and deceptive marketing and advertising practices. The court ruled that the evidence was irrelevant to the case. In actuality, the evidence was highly probative and critical to show Anheuser Busch's knowledge, foreseeability of injury, negligence and recklessness.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REJECTING ALL OF PLAINTIFF'S REQUESTED VOIR DIRE DESIGNED TO REVEAL PROSPECTIVE JURORS' EXPOSURE TO NEGATIVE REPORTS OF PERSONAL INJURY CASES AND PREJUDICE AGAINST SUCH CASES.

Plaintiff requested the following voir dire, (all of which was rejected by the trial court at defendants' urging), which was designed to elicit juror exposure to negative reports about personal injury cases and prejudice against these cases:

> Question No. 1. Do you believe a lawsuit is a proper method of resolving disputes concerning compensation for personal injuries? *Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989). Please explain [in chambers].
>
> Question No. 2. Have any of you watched, read, or heard anything that suggests a "lawsuit crisis" or the need for "tort reform"? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].
>
> a. Do you think the article, program, etc. made some good points?
>
> b. Did you agree with the points made? Please explain [in chambers].
>
> c. Would you be inclined to reduce the damage award, if any, in this case, because of what you have watched, read or heard? Please explain [in chambers].
>
> Question No. 3. Have any of you watched, read or heard anything which suggests that jury verdicts are too high or unreasonable? What have you seen, heard or read? (To be asked of jurors in chambers.)
>
> a. Do you personally believe that jury verdicts are unreasonable?

b. Do you believe that monetary limits should be placed upon the amounts which a jury can award to an individual who sues for personal injuries?

Question No. 4. Would you be hesitant to award compensation for any of the following elements of damages, provided you first find that the plaintiff sustained his burden of proof to be entitled to damages:

1. Past medical expenses?
2. Past lost wages?
3. Pain and suffering, including loss of enjoyment of life?
4. Punitive damages to punish a wrong-doer?

RR. 1740-1742.

As the court can see, plaintiff's requested voir dire included citations to Utah appellate precedent. These included citations to the *Ostler, Barrett,* and *Evans* cases. The court of appeals reminded trial courts in *Depew v. Sullivan*, 2003 UT App. 152, 71 P.3d 601, of the validity of the voir dire principles set forth in these prior holdings. They establish the right of plaintiffs to voir dire that allows discovery of biases or prejudice in prospective jurors and which allows plaintiffs the right to the informed exercise of their peremptory challenges. *Id.* at ¶¶ 10-11. The court also cited holdings of the supreme court articulating these same principles:

> The Utah Supreme Court has instructed "trial judges to take care to adequately and completely probe jurors on all possible issues of bias." *State v. James*, 819 P.2d 781, 798 (Utah 1991). The purpose for this probing is to facilitate "both the detection of actual bias and the collection of data to permit informed exercise of the peremptory challenge." *State v. Taylor*, 664 P.2d 439, 447 (Utah 1983) (citations omitted). "All that is necessary for a voir dire question to be appropriate is that it allow '[a party] to exercise his peremptory

> challenges more intelligently.'" *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (quoting *State v. Ball*, 685 P.2d 1055, 1060 (Utah 1984)). Accord *Saunders*, 1999 UT 59 at ¶34.

Depew, at ¶ 12.

Unfortunately, in the matter at bar, the trial court rejected all of plaintiff's requested voir dire designed to elicit prospective jurors' exposure to negative reports about personal injury cases, as well as the prejudice of prospective jurors against these cases. The trial court disregarded the case law and the argument of plaintiff's counsel, Mr. Raty, and instead was led astray by the arguments of counsel for the defendants, Mr. Dalton and Mr. Christensen:

> THE COURT: Okay. We'll go on the record with case number 020910483. We're no[w] discussing the potential voir dire questions and objections. And two, we're addressing the plaintiffs. All right. You've objected to the questions one through four, and the reasons were for the record, counsel?
>
> MR. DALTON: The reasons were that these type of questions generate - are just intended to generate inflammatory responses, Your Honor. I had this same experience just in my last trial where they used these same questions. All the jurors don't like lawsuits. They don't like high verdicts. When these questions were last - asked at the last trial that I got at, we spent an inordinate amount of time bringing people in that said, oh, the McDonald's case, or the BMW case. And I think a reasonable question is, do you have a problem with resolving disputes through lawsuits is okay. But when you start trying to bait people to get, you know, the conservatives who don't like big verdicts, then you're just going to get all kinds of responses, and it's intended to just - to try to inflame people.

MR. RATY: Your Honor, these are taken right out of the case law. Our appellate courts have recognized we live in a tort reform society. The plaintiffs have an absolute right to know the exposure of these potential jurors to the propaganda that's generated by these big companies and insurance companies on these issues. . . . [T]hey are right out of the case law, Your Honor, and they're very fair questions. [W]e have a need and a right to know if we've got tort reformers on this jury. We have the right to intelligently exercise our peremptory challenges, and we can't do that if we don't know what their opinions are. We don't know what they've been exposed to. These are all legitimate questions. I've always had these given in my past trials, and they're very appropriate.

THE COURT: I may reduce them down. I don't know as I'm going to go into the detail. I think more of a general flavor of some of these questions would be fine. Like - and like for example, question three. Do you personally believe that jury verdicts are unreasonable? Well, that's so broad, at least to me. Which jury verdict? How much - you know, I - you know. I think -

MR. CHRISTENSEN: The court can craft one question and -

THE COURT: Yeah.

R. 2226, 1:6-3:1. Unfortunately, the trial court did not even craft and give the one question it indicated it would, to address, in some token way, plaintiff's requested voir dire questions 1 through 4. RR. 2223, 6:15-44:15.

In *Barrett*, the Utah Court of Appeals was presented with a very similar situation to the case at bar. There, the trial court had rejected the plaintiff's requested voir dire designed to discover prospective jurors' exposure to negative reports of medical

negligence cases. *Barrett* at 96-97. The Utah Court of Appeals reversed the judgment of the trial court, stating,

> We hold only that in cases such as this one, the plaintiff is entitled during voir dire to elicit information from prospective jurors as to whether they have read or heard information generally on medical negligence or tort reform, and to follow up with appropriate questions if affirmative responses are received.
>
> The trial court's failure to ask prospective jurors threshold questions sufficient to elicit information on the jurors' possible exposure to tort-reform and medical negligence information prevented appellant from detecting possible bias and from intelligently exercising his peremptory challenges. The trial court's limitation of voir dire questioning substantially impaired appellant's right to the informed exercise of his peremptory challenges, and therefore constitutes reversible error. The judgment in favor of appellee is reversed, and the case is remanded for a new trial.

Barrett v. Peterson, 868 P.2d 96, 101 (Utah Ct. App. 1993). *See also*, *Evans v. Doty*, 824 P.2d 460, 467(Utah Ct. App. 1991).

Just as in *Barrett*, in the matter at bar, plaintiff had the right to know whether prospective jurors had read, heard, or seen negative reports about personal injury cases, and, if so, what the reports said and what the prospective jurors thought about them. This information, as acknowledged by *Barrett*, *Evans,* and *Depew* was critical to allow plaintiff to intelligently exercise his peremptory challenges and secure possible excuses for cause. *Barrett* at 102, *Evans* at 467. In *Evans*, the court explained,

> In tort cases, and more particularly in medical malpractice cases, we cannot ignore the reality that potential jurors may have developed tort-reform biases as a result of an overall exposure to such

> propaganda. Accordingly, in cases such as this one, the plaintiff has a legitimate interest in discovering which jurors may have read or heard information generally on medical negligence or tort reform. . .
>
> Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias within certain prospective jurors, and, had [plaintiff] been able to identify those jurors exposed to such propaganda, she could have more intelligently exercised her peremptory challenges.

Evans at 467. (Citations omitted). In *Barrett,* the court added,

> In light of the pervasive dissemination of tort-reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know which potential jurors, if any, have been so exposed. Plaintiff is entitled to such information absent any particular showing of specific campaigns, advertisements, or literature offered for the purpose of showing potential prejudice. Failure to ask such questions ignores the plaintiff's "need to gather information to assist in exercising . . . peremptory challenges."

Barrett at 101. (Citations omitted).

Based on the holdings of Utah appellate courts, the trial court clearly erred in rejecting plaintiff's requested voir dire and in failing to ask any other questions to elicit prospective juror exposure to negative reports of personal injury cases and prejudice against these cases.

Rejecting the standard requirement that plaintiff show that an absence of error would have resulted in a different outcome, *Barrett* held that in the context of voir

dire questioning, prejudicial error is shown if the plaintiff's right to the informed exercise of peremptory challenges has been substantially impaired:

> An appellant claiming that the trial court's unreasonable limitation of voir dire substantially impaired his ability to exercise peremptory challenges simply cannot prove, in the traditional way, that prejudice resulted from the error. Appellant cannot show with any certainty that had certain questions been asked, particular responses would have been received; that certain jurors would then have been challenged for cause or peremptorily; and that particular, more favorably predisposed jurors would have been seated instead, who would have deliberated to a different result. Accordingly, in this context, we apply the test enunciated in *Hornsby*: Prejudicial error is shown if the appellant's right to the informed exercise of peremptory challenges has been "substantially impaired." 758 P.2d at 933.

Barrett at 103. Similarly, in *Depew*, the court determined the failure to ask questions to elicit biases of prospective jurors was, of itself, prejudicial, and that no showing of "actual prejudice" was required since there was no way for the plaintiff to show any particular juror as biased or prejudiced. *Depew,* at ¶¶28-34.

As in *Barrett*, in the case at bar, the trial court rejected all of plaintiff's requested voir dire to discover prospective juror exposure and biases. The trial court asked no meaningful question that would elicit disclosure by prospective jurors of exposure to negative reports on negligence cases and their effect. Thus, an entire jury was allowed to sit in judgment of a personal injury case without plaintiffs having any knowledge of the jurors' exposure to negative reports of and prejudice against personal injury cases. The trial court's conduct was prejudicial since it substantially impaired the

plaintiff's right to meaningful voir dire and to the informed exercise of their peremptory challenges. The court should, therefore, reverse the judgment of the trial court and remand the case for a new trial.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING THE CO-DEFENDANTS TWICE THE NUMBER OF PEREMPTORY CHALLENGES ALLOWED TO PLAINTIFF.

While in the judge's chambers on the morning of the first day of trial, co-defendants requested and the court granted co-defendants six peremptory challenges (three for each), in comparison to just three for plaintiff. Defendants argued, and the court accepted the argument that the third-party complaint filed by Anheuser-Busch against Prominence meant that a "substantial controversy" existed between them under Rule 47, Utah R. Civ. P. The court thus believed it had discretion to award the co-defendants additional peremptory challenges. However, Utah appellate case law makes abundantly clear that such a third-party complaint does not constitute a "substantial controversy" for purposes of Rule 47(e). *See* discussion below. Furthermore, after the court granted the additional peremptory challenges, co-defendants informed the court that they had reached a settlement of all claims between them. Nonetheless, over plaintiff's renewed objection, the court still granted six peremptory excuses to the co-defendants.

Rule 47(e), Utah R. Civ. P. provides in pertinent part,

> Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just.

Utah appellate courts have defined what constitutes a "substantial controversy" for purposes of Rule 47(e), and explained the very limited discretion of the trial court in deciding when to grant additional peremptory challenges. *See, e.g., Carrier v. Pro-Tech Restoration,* 944 P.2d 346 (Utah 1997). The courts' holdings make clear that the co-defendants in the matter at bar had no "substantial controversy" between them, and that the trial court committed prejudicial error by awarding defendants six peremptory challenges.

In *Carrier*, the Utah Supreme Court upheld the Utah Court of Appeals' ruling that the trial court had erred in granting six peremptory challenges to co-defendants. *Id.*, at 349, 357 and *Carrier v. Pro-Tech Restoration*, 909 P.2d 271 (Ct. App. 1995), cert. granted, 920 P.2d 1194 (Utah 1996). Plaintiff Carrier was involved in a car accident with defendant Smith who, at the time, was working for defendant Pro-Tech Restoration. Both defendants answered Carrier's complaint by asserting Carrier was more at fault than they. *Carrier*, 944 P.2d at 349. Initially, Smith and Pro-Tech were represented by the same attorney, but early on in the litigation, Smith left Pro-Tech's employ and testified at deposition that Pro-Tech instructed him to lie so as to place more

blame for the accident on plaintiff Carrier. *Id.* This lead to Smith hiring separate counsel. *Id.*

At trial, the court granted each co-defendant three peremptory challenges, stating only "[T]hey are disparate enough just by the nature of the case to permit [allocating separate sets of peremptory challenges]." *Id.* at 350. At the end of trial, the jury returned a verdict finding plaintiff Carrier 60% at fault. *Id.* Carrier appealed. *Id.*

Affirming the court of appeals reversal and remand for a new trial, the supreme court stated that the "facts fall far short of supporting a finding that a 'substantial controversy' existed between the defendants." *Id.* at 353. The court made clear that issues of apportionment of fault between defendants do not constitute a "substantial controversy" for purposes of Rule 47(e), that a "substantial controversy" typically involves a cross-claim not derivative of plaintiff's claim against the defendants. *Id.* at 351-52. The court said,

> [W]e stated in *Sutton* that in "cases where defendants are joined, in which one seeks to blame the other for the wrong or injury of which the plaintiff complains[,] . . . there is no substantial reason why the defendants, for purposes of a peremptory challenge, should not be considered as being on the same side." 249 P. at 458. Additionally, we listed several scenarios in *Randle* that will not meet the "substantial controversy" standard. This list, which incorporated the principles announced in *Sutton*, includes separate answers, separate counsel, uncooperativeness, liability shifting, different defenses or claims resting on different facts or legal theories, and derivative cross-claims. 862 P.2d at 1332-33. This list leaves only a few scenarios that can constitute a "substantial controversy." Moreover, the possible scenarios that might meet the "substantial controversy"

> standard are not particularly complicated. For example, a co-party either has or has not filed a nonderivative cross-claim. *See id.* at 1333.

Id. at 351-52. Citing *Randle v. Allen*, 862 P.2d 1329 (Utah 1993) (emphasis added). The court explained what was at stake in granting additional peremptory challenges to one side:

> Peremptory challenges are a powerful tool for shaping the jury that hears the case and ultimately determines which side prevails. Therefore, the trial court should avoid lightly giving one side additional challenges. As we noted in *Randle*, "[G]ranting co-parties on one side of a lawsuit additional challenges places the opposing side at a disadvantage." *Id.* at 1333. Consequently, we advised trial judges to "carefully appraise the degree of adverseness among co-parties and determine whether that adverseness truly warrants giving that side more challenges than the other." *Id.*

Id. at 352.

In the matter at bar, there was no "substantial controversy" as that term has been defined by Utah appellate courts. The trial court had no basis to grant separate peremptory challenges just because Anheuser Busch had filed a third party suit asserting that Prominence was responsible for plaintiff Michael Bee's injuries and damages. This was derivative of Mr. Bee's complaint against Anheuser Busch, not a claim independent of plaintiff's complaint. Furthermore, the co-defendants had settled their claims and informed the court and plaintiff of that before any prospective juror had been dismissed. The court could and should have corrected the number of peremptory challenges allotted.

In *Carrier*, the supreme court also upheld the court of appeal's conclusion that the trial court's error was prejudicial and warranted a new trial. Explaining, the court quoted from *Randle*, as follows:

> A side that has additional peremptory challenges has the opportunity to shape the jury to its advantage. Although that self-evident statement does not itself show prejudice, the size of the disparity in the peremptory challenges allowed in this case was significant[, twelve for the defendants and four for the plaintiff]. Requiring a party to show prejudice in such circumstances is to require the impossible. " 'To show actual prejudice, the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge[s] performed in accordance with the prescribed rule of the game.' " *Blades v. DaFoe*, 704 P.2d 317, 322 (Colo. 1985) (quoting *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky. 1979)). Accordingly, we hold that it was prejudicial error for the trial court to grant [the defendants] six peremptory challenges. 862 P.2d at 1334 . . . .

Id. at 353.

Just as in *Carrier* and *Randle*, in the matter at bar, the trial court's error in granting additional peremptory challenges to co-defendants was prejudicial. As in those cases, the court should reverse the judgment of the trial court and remand the case for a new trial. *Id.*, at 349, 357 and *Carrier v. Pro-Tech Restoration*, 909 P.2d 271 (Ct. App. 1995), cert. granted, 920 P.2d 1194 (Utah 1996).

POINT III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PRECLUDING ANY AND ALL EVIDENCE OF ANHEUSER BUSCH'S IRRESPONSIBLE, RECKLESS, AND DECEPTIVE ALCOHOL MARKETING AND ADVERTISEMENTS.

In addition to the proof of defendants' negligence in serving plaintiff alcohol to his intoxication and bringing him onto the ice to compete without any protective gear, at trial, plaintiff attempted to demonstrate Anheuser Busch's negligence and recklessness through evidence of its marketing and advertising practices which contributed to plaintiff's alcohol consumption, intoxication, and ill-advised participation in Anheuser Busch's contest. A large part of plaintiff's proof in the case consisted of such evidence. *See* R. 2223, 65:10-75:2, 81:12-82:4, 105:24-106:13, 107:13-108:8. However, the court precluded any and all such evidence as irrelevant. *Id.*

The excluded evidence was relevant because, under Rule 401, Utah Rules of Evidence, it tended to make defendants' negligence and recklessness more probable. As set forth in plaintiff's proffers, Anheuser Busch had long been involved in the business of brewing and selling alcoholic beverages and knew of the great danger of alcohol-related injuries. However, Anheuser Busch did not warn the public, and instead portrayed the effects of alcohol consumption in a false light, as simply pleasurable and totally safe. The precluded evidence would have added substantially to the proof of Anheuser Busch's negligence and recklessness. The excluded evidence was critical,

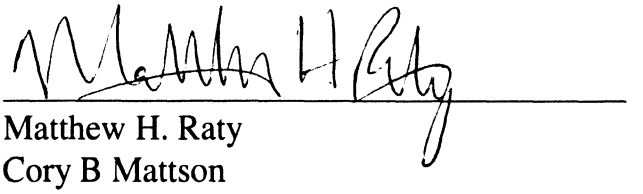
because, as the court can see, comparative fault and punitive damages were issues over which the jury apparently greatly vacillated.

CONCLUSION

The court should reverse the judgment of the trial court and remand the case for a new trial, since the trial court committed prejudicial errors in rejecting plaintiff's requested voir dire, to discover prospective juror exposure to negative reports of personal injury cases and prejudice against such cases. The trial court also committed prejudicial error in granting co-defendants six peremptory challenges, although there was no "substantial controversy" that would allow the trial court to allocate additional challenges. Finally, the court committed also committed prejudicial error in precluding plaintiff from adducing evidence of irresponsible, reckless, and deceptive marketing and advertising, which contributed to the cause of plaintiff's injuries and damages.

WHEREFORE, plaintiff Michael Bee respectfully requests that the Utah Court of Appeals reverse the judgment of the trial court and remand the case for a new trial.

DATED AND SUBMITTED this 5th day of May, 2008.

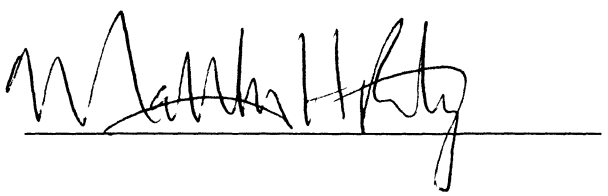


Matthew H. Raty
Cory B Mattson
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANT'S BRIEF** was served upon appellee's counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 5th day of May, 2008.

Attorney for Anheuser Busch Co.
Peter H. Christensen
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180



Q \Bee\P\Appeal\Appellant\Brief wpd

ADDENDUM

Addendum 1: RR. 1740-1744, Plaintiff's Requested Voir Dire.

Addendum 2: R. 2226, 1:6-3:1, Trial Court's oral ruling on Plaintiff's Requested Voir Dire.

Tab 1

Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
New England Professional Plaza
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone: (801) 495-2252
Fax: (801) 495-2262
Attorney for Plaintiff

THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MICHAEL BEE, Plaintiff, v. ANHEUSER BUSCH, INCORPORATED, a Missouri Corporation, and PROMINENCE, INC., a Nevada Corporation. Defendants.	**PLAINTIFF'S REQUESTED VOIR DIRE**
ANHEUSER BUSCH, INCORPORATED, a Missouri Corporation. Third-Party Plaintiff, v. PROMINENCE, INC., a Nevada Corporation, Third- Party Defendant.	Civil No. 020910483 Judge Robert P. Faust

Plaintiff proposes the following *Voir Dire* questions:

Question No. 1. Do you believe a lawsuit is a proper method of resolving disputes concerning compensation for personal injuries? *Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989). Please explain [in chambers].

Question No. 2. Have any of you watched, read, or heard anything that suggests a "lawsuit crisis" or the need for "tort reform"? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty,* 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].

a. Do you think the article, program, etc. made some good points?

b. Did you agree with the points made? Please explain [in chambers].

c. Would you be inclined to reduce the damage award, if any, in this case, because of what you have watched, read or heard? Please explain [in chambers].

Question No. 3. Have any of you watched, read or heard anything which suggests that jury verdicts are too high or unreasonable? What have you seen, heard or read? (To be asked of jurors in chambers.)

a. Do you personally believe that jury verdicts are unreasonable?

b. Do you believe that monetary limits should be placed upon the amounts which a jury can award to an individual who sues for personal injuries?

Question No. 4. Would you be hesitant to award compensation for any of the following elements of damages, provided you first find that the plaintiff sustained his burden of proof to be entitled to damages:

1. Past medical expenses?

2. Past lost wages?

3. Pain and suffering, including loss of enjoyment of life?

4. Punitive damages to punish a wrong-doer?

Question No. 5. Do you drink alcohol, and, if so, how much?

Question No. 6. Does anyone close to you drink alcohol, and, if so, how much?

Question No. 7. Do you purchase Anheuser-Busch products, such as Budweiser Beer, Bud Light, or any of the beers manufactured by Anheuser-Busch?

Question No. 8. Would any of you have difficulty awarding damages against the Defendant Anheuser-Busch because of a like you have for or connection you feel to Anheuser-Busch or its products?

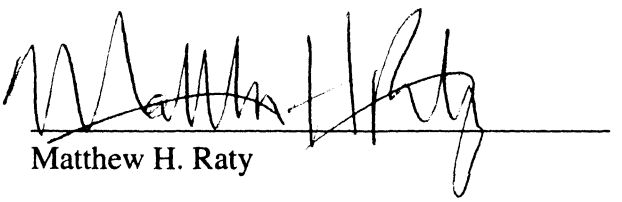
Question No. 9. Do you, or does anyone close to you, work for the alcohol industry or have stock, other ownership, or financial interest in Anheuser-Busch or another alcohol manufacturer?

Question No. 10. Do you believe that as a juror you should be able to disregard the judge's instructions and decide a case based on your own beliefs? Please explain.

Question No. 11. Have you or any of your close relatives or friends worked or do you or they now work in any aspect of the insurance industry (insurance salesman, employee of an insurance company, adjuster, underwriter, or anything similar)? Please explain. *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991).

Question No. 12. Has any juror here been a party to a civil lawsuit? As a result of that experience do you believe that you would be more sympathetic to one party or the other?

DATED this 21st day of March, 2007.



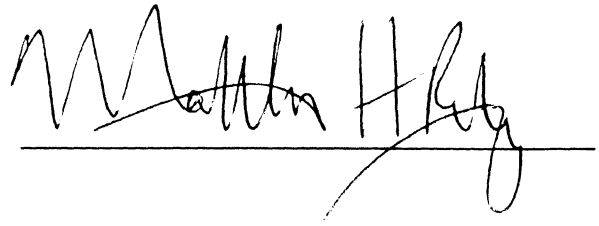
Matthew H. Raty

CERTIFICATE OF SERVICE

I hereby certify that **PLAINTIFF'S REQUESTED VOIR DIRE** were served upon the defendants at the addresses listed below, via fax and first class U.S. Mail, on this 21st day of March, 2007.

Attorney for Anheuser Busch Co.
Peter Christensen
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Fax: 596-1508

Attorney for Prominence, Inc.
Donald Dalton
P.O. Box 58084
Salt Lake City, Utah 84158
Fax: 583-2519



Q:\Bee\P\VoirDire

Tab 2

SALT LAKE CITY, UTAH - MARCH 26, 2007 AM

HONORABLE ROBERT FAUST, JUDGE PRESIDING

(Transcriber's note: Speaker identification was difficult due to positions and camera angle)

P R O C E E D I N G S

9:09:44 THE COURT: Okay. We'll go on the record with case number 020910483. We're not discussing the potential voir dire questions and objections. And two, we're addressing the plaintiffs. All right. You've objected to the questions one through four, and the reasons were for the record, counsel?

MR. DALTON: The reasons were that these types of questions generate - are just intended to generate inflammatory responses, Your Honor. I had this same experience just in my last trial where they used these same questions. All the jurors don't like lawsuits. They don't like high verdicts. When these questions were last - asked at the last trial that I got at, we spent an inordinate amount of time bringing people in that said, oh, the McDonald's case, or the BMW case. And I think a reasonable question is, do you have a problem with resolving disputes through lawsuits is okay. But when you start trying to bait people to get, you know, the conservatives who don't like big verdicts, then you're just going to get all kinds of responses, and it's intended to just - to try to inflame people.

MR. RATY: Your Honor, these are taken right out of the case law. Our appellate courts have recognized we live in a tort reform society. The plaintiffs have an absolute right to know the exposure of these potential jurors to the propaganda that's generated by these big companies and insurance companies on these issues. And, you know, I don't really want to threaten you and say, you know, that would be prejudicial error and not to give these. But they are right out of the case law, Your Honor, and they're very fair questions. When we have a need and a right to know if we've got tort reformers on this jury. We have the right to intelligently exercise our preemptory challenges, and we can't do that if we don't know what their opinions are. We don't know what they've been exposed to. These are all legitimate questions. I've always had these given in my past trials, and they're very appropriate.

THE COURT: I may reduce them down. I don't know as I'm going to go into the detail. I think more of a general flavor of some of these questions would be fine. Like - and like for example, question three. Do you personally believe that jury verdicts are unreasonable? Well, that's so broad, at least to me. Which jury verdict? How much - you know, I - you know. I think -

MR. CHRISTENSEN: The Court can craft one question and -

THE COURT: Yeah.

MR. CHRISTENSEN: - that -

MR. RATY: To disclose of that?

MR. CHRISTENSEN: Figures that out.

THE COURT: What about the alcohol issues, five through -

MR. CHRISTENSEN: Well, I think, again, there the Court can reduce it maybe to one. We have a couple questions in our - if you have a problem with the beer company, and I think the Court can probably reduce it to a question that this case may have some, you know, evidence regarding the consumption of alcohol, you know, is that going to cause a problem for you? Again there, Your Honor, I think you're going to get all - you're taking a risk of having a tremendous amount of responses, but I do understand why counsel has to ask it.

MR. RATY: Oh, yeah. We've got to ask it.

THE COURT: Uh-huh (affirmative).

MR. CHRISTENSEN: And so I just don't think it needs to be asked repetitively.

MR. RATY: There's nothing repetitive about five through -

THE COURT: I don't know if I want to ask them if they personally drink alcohol or not. I think we could certainly say, this issue involves - the case involves