Haydamach v Town of Brookhaven
2007 NY Slip Op 30393(U)
March 26, 2007
Supreme Court, Suffolk County
Docket Number: 0012809
Judge: Gary J. Weber
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INDEX No. 04-12809

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE
Motion Seq. # Oral Trial Motion

HAYDAMACH, TINA V., as Administratrix of the Estate of JOSIAH DANIEL ERICSSON, Deceased, and as mother and legal guardian of JOSIAH WILLIAM HAYDAMACH, an infant.

Plaintiff(s)

-against-

BROOKHAVEN, TOWN OF, JOHN G. KIERAN, JR., AND JOANNE MCKENZIE, as Administratrix of the Estate of HAILE FUHS-BROWN, Deceased,

Defendant(s)

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Plaintiff, by his attorney, has made what counsel refers to as an ***in limine*** motion seeking to preclude the testimony of a representative of the Suffolk County Medical Examiner's Office concerning the presence of metabolites of tetrahydro cannabinol in the blood of one Haile Fuhs-Brown who was the driver of the vehicle in which the plaintiff's decedent was traveling when he sustained the injuries which eventually lead to his death at Stony Brook Hospital. Also, Plaintiff wishes to preclude such testimony concerning Plaintiff's decedent, Josiah Daniel Ericsson. In this application, Plaintiff is joined by counsel for the defendant; Administratrix of the Estate of Haile Fuhs-Brown.

The first issue is whether such evidence is relevant at all with respect to either or both Mr. Fuhs-Brown or Mr. Ericsson.

The second issue is, even if such evidence is relevant, what sorts of proof need to be submitted in order to lay a proper foundation for the admission of the evidence itself.

In an ideal world these issues would have been resolved by standard motion practice before a jury was picked and waiting. The Court is constrained to do as best can be done with the situation as it exists. The arguments of respective counsel in these regards appear on the record of the proceedings, but not in the form of motion papers.

Relevancy

The situation as regards the driver of the automobile, Mr. Fuhs-Brown, is fairly straight forward.

Vehicle and Traffic Law Section 1192-4 prohibits the operation of a motor vehicle while the operator is impaired by any controlled substance listed in Section 3306 of the Public Health Law. Marijuana is a controlled substance listed in Schedule I.

For this reason, evidence that Mr. Fuhs-Brown was operating a motor vehicle while his ability to do so was impaired by the ingestion of marijuana is relevant in that such evidence would support the proposition that Mr. Fuhs-Brown was operating his motor vehicle in violation of law at the time of the accident in question.

The situation is otherwise with respect to Mr. Josiah Daniel Ericsson, the deceased. Mr. Ericsson was only a passenger in the automobile being driven by Mr. Fuhs-Brown. Even if Mr. Ericsson's senses were, indeed, impaired by the ingestion of marijuana at the time of the accident, as to Ericsson, this was no crime, as he was not operating the automobile.

It may have been that at some other time previous to the accident Mr. Ericsson had been guilty of possession of marijuana but that case is not before us, nor is it relevant to business at hand.

This result would probably be otherwise if there were some other evidence in this case showing that Mr. Ericsson, for example, had been smoking marijuana in company with Mr. Fuhs-Brown at or just before the accident. Such evidence would tend to show that Mr. Ericsson assumed the risk when he chose to enter the Kuhs-Brown automobile that Mr Fuhs-Brown was driving.

Under those circumstances, proof that Mr. Ericsson's facilities were impaired by the use of marijuana would tend to corroborate other evidence - in the example, the smoking of marijuana in the company of Mr. Kuhs-Brown toward the end of proving that Mr. Ericsson had assumed the risk of driving with Mr. Fuhs-Brown.

On this record, there is no such evidence. In fact, all of the testimony has been to the contrary and to the effect that no marijuana was ever present throughout the course of this incident and neither any marijuana nor trace of the same was found in the Fuhs-Brown automobile after the accident.

Under these circumstances, to permit testimony to the effect that both the driver (Mr. Fuhs-Brown) and the passenger (Mr. Ericsson) had metabolites signifying the presence of marijuana in their respective blood samples would be to needlessly invite the jury to speculate that since both the driver and the passenger tested in this way that it necessarily follows that the passenger must have been aware of the driver's condition - based only on evidence that each tested positively for metabolites of the same controlled substance.

The admission of such evidence as to Plaintiff's intestate, Josiah Daniel Ericsson, can accomplish nothing but to create the possibility that the jury will make an impermissible inference based upon such findings - namely, that simply because the driver and passenger tested positive for metabolites of marijuana that the passenger necessarily knew of the driver's condition.

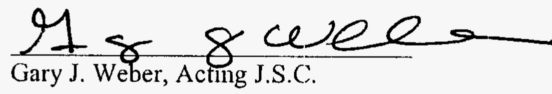
As to the issue of relevancy, therefore, the court will permit otherwise admissible testimony as the driver, Haile Fuhs-Brown, but not as to the passenger Josiah Daniel Ericsson.

<u>Admissibility</u>

As to the driver, Haile Fuhs-Brown, the Court will entertain an offer of proof and conduct a brief hearing outside the presence of the jury in order to ascertain whether the toxicologist will offer testimony which, if believed, would make it more likely that Haile Fuhs-Brown was operating his motor vehicle under the influence of marijuana. This does not mean such evidence must be conclusive, only probative, on this question in this civil case. The Court will not pass upon the credibility of this witness, and no issue has been presented to warrant a *Frye* hearing in this regard. ***See Nonnon v. City of New York, 32 AD3d 91 (2nd Dept. June 2006).***

Let this memorandum decision also serve as the order of the court.

Dated: March 26, 2007



Gary J. Weber, Acting J.S.C.

Non-Final Disposition
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