

Judge denies Swain new trial

By Dotti Farrington

The evidence was substantial and the punitive damages awarded may have been too little, Superior Court Associate Justice Patricia A. Hurst said Thursday, March 23, as she denied a new trial for David Swain, 50, a former Jamestown Town Council member.

On Feb. 24, a jury found that Swain was responsible for the drowning death of his wife, educator Shelley Arden Tyre, 46, on March 12, 1999.

Swain asked for the new trial on nine claims, including that Hurst herself made errors, had blocked him from getting a lawyer, and had called the evidence speculative.

Six jurors from northern Rhode Island found that Swain "by a preponderance of evidence committed battery... (and) killed with malice aforethought" his wife while they were scuba diving in the British Virgin Islands.

The wrongful-death civil lawsuit was brought in 2002 by Richard and Lisa Tyre of Jamestown, semi-retired educators and the parents of Swain's late wife, Shelley Arden Tyre, 46, with J. Renn Olenn of Warwick as their attorney.

The jurors awarded the Tyres \$1.5 million in compensatory damages and \$2 million in punitive damages. The court applied interest of 12 percent on the compensatory award, from date of death to date of the verdict, adding more than \$1.2 million to the original sum, for a total award of \$4,815,085.

Jurisdiction

Swain said his role, if any, in his wife's death should have been based on criminal law in Tortola, the island off which Swain and his wife were diving, not on Rhode Island civil law. Hurst said her charge to the jury was based on Tortola criminal law and that Rhode Island had a very definite interest civilly in both Swain and his wife, as Rhode Island residents.

Swain was hesitant and stumbling in some of his presentation, but was very emphatic about the issues of jurisdiction. Hurst concluded, "You

and I differ but I understand your objection." The proceedings in Rhode Island were appropriate and proper, she ruled.

Swain still has an active appeal to the state Supreme Court on the verdict. He is also the principal in Jamestown Probate Court action on the disposal of his late wife's estate, and in federal Bankruptcy Court action in which he claimed he was virtually penniless and in substantial debt.

In what she said was an unusually long ruling, Hurst spent about an hour giving her analysis of the Swain case and verdict. She said she did not believe the charges against Swain when the case was first filed, and she continued to expect him to prevail until late in the case, when filings about the evidence mounted against him.

Hurst detailed how she extended full, if not extra, considerations to him when his lawyer first became ill more than two years ago, and even late in the proceedings, when Swain decided to represent himself. Swain said Hurst denied recognizing an attorney he would have substituted last October. Hurst said she denied a continuance in October, not recognition of his choice of attorney.

Swain argued that punitive damages were illegal. Hurst said punitive damages are legal under wrongful-death verdicts. She suggested that in her view the punitive award, intended to deter others from doing likewise, could have been more.

Swain contended that he was prevented from testifying. Hurst recalled his lack of attendance through much of the trial, his motion to quash a subpoena to testify, and case law that allowed his videotaped deposition in lieu of his direct appearance. She said Olenn withdrew the subpoena following Swain's quash motion.

Without jurors present, the judge said it was "wildly speculative" for Olenn to claim that no reasonable person could find Swain innocent. Olenn had asked Hurst to direct the jurors to give a verdict against Swain.

Swain was not present for most of the trial, although he was in the courthouse for several chamber proceedings recorded with the judge, without the jury or public present. Hurst said she outlined on a number of pre-trial occasions the possible consequences of his choice to not attend the trial or to be represented by a lawyer.

Last week, Swain spent nearly 30 minutes listing his complaints about the handling of his case and his reasons for requesting a new trial. Olenn said Swain's reasons for asking for a new trial represented questions of law that would be covered through an appeal.

Hurst said Swain's points seem to be his "contending the verdict is against the weight of the evidence. I will have to therefore give my analysis of the evidence." She assured Olenn she had read both his and Swain's memos on the points in contention.

Swain objected to the court's final judgment on the jury's verdict. That judgment identified him under the state "slayer statute" that prevents him from profiting through inheritance from his wife. A hold is on his wife's estate of up to \$1 million; Swain accessed more than half before the hold was applied.

Hurst said the jury's finding that Swain was responsible for the drowning death of his wife was "the only rea-

sonable conclusion a jury could draw." After eight days of testimony, the jury deliberated for not quite three hours before finding Swain liable for his wife's death.

Hurst, who presided over the trial and all pre-trial proceedings, cited both lay and professional witnesses who testified about circumstances of Shelley Tyre's death. She said most witnesses gave clear and convincing testimony, and that those whose testimony was not substantial did not negate the others. She cited points that were circumstantial or represented assumptions, and weighed them against testimony she called credible, consistent and substantial, "and sometimes even overwhelmingly" against Swain.

She listed major points by expert witnesses, including by Dr. Bruce A. Hyma, chief medical examiner for Miami Dade County. He had testified "some type of terminal violence (by a person) occurred that deprived her of her air supply," Hyma also said that Sheeley Tyre's death was "a homicidal drowning."

The judge said Swain had the "means, knowledge, and skill" to cause the drowning as calculated by the experts, and that the testimony ruled out all other possibilities, such as medical reasons or equipment failure.

She was influenced by Swain's apparent lack of interest in how his wife drowned, by his "flat" affect, and by his inability to recall details about the day of his wife's death. "These are

not the kind of events that people forget easily. How could a person not know, not want to understand?"

Hurst said she was not influenced by reference to Swain's mother having been murdered by his brother in 1976. "It was a family tragedy. It added nothing but maybe something about his impassive demeanor, his being emotionally detached. I rejected it" as evidence, Hurst said.

The judge also said she did not give any due to the description of Swain's decision not to prolong resuscitation efforts, and of his angry exchange with his in-laws days after the death. "It was part of the death process," she said.

The judge observed that Swain and Tyre had a rocky relationship and that he was accused of pursuing another woman. She said she believed Swain may have been more in love with scuba diving and his scuba diving business than any woman, and that he stood to lose the business if he and Tyre divorced.

"The only reasonable conclusion was that this was a homicide," Hurst said. "I'm satisfied I would have reached the same verdict as the jury. The quality of the evidence was strong," she noted.

No criminal charges were filed in Tortola and none can be filed here or anywhere else except in the British Virgin Islands, according to several authorities.

A story about the case was featured in People magazine on newsstands this week.



\$399⁹⁹ weber

Genesis Premium Silver A Series LP Gas Grill
26,000 BTUs, with 528-sq.-in. total cooking area. Enclosed cart with stainless steel flavorizer bars, cooking grates and burners. Multiple work surfaces. Lifetime limited warranty. S 534 844 1 Tank not included.
Free Assembly & Free Delivery

W WICKFORD LUMBER & HARDWARE CO.
True Value
Mon.- Fri. 7:00 AM - 7:00 PM • Sat. 7:30 AM - 5:00 PM
Sun. 9 AM - 1 PM • 434 Tower Hill Road, N Kingstown
295-8866 • 884-8700
www.wickfordlumber.com While supplies last.



KARN'S Law Group

LEGAL TIP

A fitness club that violated safety regulations could be sued by a member who slipped near the pool, despite a negligence waiver, the California Court of Appeal has ruled in reversing a trial court.

The plaintiff slipped and fell on the pool deck. The next day, he discovered an accumulation of algae around the drain in the area of the deck where he fell.

He sued the fitness club for negligence, alleging that it had violated the state's public swimming pool safety standards.

The club contended that the claim was barred by an injury waiver the plaintiff signed as part of his membership agreement.

The court disagreed, stating that the club had a duty to keep the pool safe and could not contract that duty away.


PERSONAL INJURY LAW

- Automobile Accidents
- Traumatic Brain Injuries
- Product Liabilities
- Slip and Fall Injuries
- Maritime Injuries

No Fee Unless Successful

The Supreme Court licenses all lawyers in the general practice of law. The court does not license any lawyer as an expert or specialist in any field of practice.

809 AQUIDNECK AVE • MIDDLETOWN, R.I. 02842
401-841-5300 FAX 401-846-5999
www.karnslaw.com



With These IRA & CD Rates You'll Smile Too!

5.000%
APY* 9 MONTH

For information call 845-2265, outside Newport County call 877-709-2265

BANK NEWPORT
An OceanPoint Financial Partner™
Focused on your success!
banknewport.com

PROUD PATRON OF THE 2006 U.S. WOMEN'S OPEN

* Annual percentage yield, (APY) shown is accurate as of 3/21/06 and is subject to change without notice. \$1,000 minimum balance to open Platinum CD, \$500 minimum balance to open IRA CD. To obtain 5.00% APY on term CDs, you must have a BankNewport Platinum or Platinum Partnership Account (not required for IRA Certificates). Ask us about other available certificate rates and maturity terms. A penalty may be imposed for early withdrawal. Personal accounts only.

Member FDIC