Ruling on Swain appeal expected this fall

By Dotti Farrington

David Swain's appeal of the Superior Court finding that he caused the drowning death of his wife Shelley Tyre in 1999 was assigned March 21 by the Rhode Island Supreme Court to the court's regular calendar for full briefing and conference. The process is expected to be completed for a decision in the fall.

The decision for the regular calendar came after court review of written pre-briefing arguments filed in November by Anthony R. Leone II of Cranston, Swain's new lawyer, and J. Renn Olenn of Warwick, attorney for Richard and Lisa Tyre of Jamestown, who brought the civil suit against their son-in-law. Shelley Tyre's parents initiated the wrongful death case after Swain refused to give them details of their daughter's fatal dive, and they had received reports from other divers about irregularities surrounding her death.

Swain is a Jamestown scuba dive shop operator and former Town Council vice president. He has denied that he caused his wife's death. He admitted during the Superior Court trial in February, 2006, that he did not follow required safety practices, but he suggested omission of such practices did not cause or contribute to his wife's death. He was sanctioned by the major industry association that suspended his certifications to teach diving. Swain reported he was maintaining his business via the certifications of his staff.

A six-member jury found him guilty of wrongful death in the civil trial and assessed compensatory and punitive damages totaling more than $4 million. The presiding judge Patricia Hurst, said the finding meant that Swain was a slayer under state law and the slayer finding means he is not entitled to any inheritance under his wife's will.

Court issues

The Supreme Court will rule on procedures, not on Swain's innocence or guilt. Swain wants a reversal of the judgment and a new trial. His presentation to the Supreme Court was that the Superior Court did not have jurisdiction in the matter. His wife drowned while they were scuba diving in Tortola, British Virgin Islands. Police there said the case remains open. British Virgin Island officials originally ruled the death accidental, "unless proven otherwise."

Swain's appeal claims that Hurst abused discretion by not allowing him more than the two years she gave him to find a backup lawyer after his main defense attorney Paul Anderson became ill. Leone also said Hurst knew Swain had no money to obtain new counsel.

Swain filed for bankruptcy in October, 2005, when Hurst denied him more time so that a potential new lawyer could prepare for a trial the following February. He subsequently filed reports that he spent at least half of the approximately $1 million in his wife's estate, before a lien was placed on it. The lien mainly affects the North Main Street dive shop that Swain has been operating. The bankruptcy, other than the court judgment, was granted in May, absolving Swain from paying hundreds of thousands of dollars in additional bills he created before a lien was placed against the estate. The bankruptcy decision, however, does not free him from damages due under the wrongful death judgment, if the judgment is upheld.

Leone also stated "there were constitutional issues such as the Fifth Amendment right against self incrimination" for which Swain needed a lawyer, "in a case tantamount to a murder trial."

Leone said it would be in the jurisdiction of the Probate Court, not Superior Court, to determine a slayer, and that "it should be more lenient to the pro se (self-defending) litigant" in a probate matter.

Olenn is seeking to have Swain's appeal dismissed and the jury judgment upheld.

The preliminary briefs were completed after the court granted Swain two delays so he could find an attorney. Olenn did not challenge the first delay, but objected to the second delay as, "examples of dilatory practice that Swain is engaged in . . . a self-inflicted wound."

"Swain used his failure to get a lawyer as a delaying tactic and ultimately as a strategy for trial. He cannot now complain on appeal that his strategy was unsuccessful," Olenn wrote in his brief.

The next stage of the appeal process calls for the lawyers to file additional briefs and then prepare for a session before a full five-judge panel that meets only in closed session. The lawyers will have 30 minutes each to present their arguments, with the option of reserving up to 10 minutes for rebuttal. After the presentations, the judges will meet again in closed session, decide the issues, and write their joint ruling.

Osprey

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year. This means that the transmitter could have malfunctioned, fallen off, or not received enough sun to recharge and transmit. There is also a chance that the bird has perished. Unfortunately, the mortality rate for fledgling ospreys is in the neighborhood of 80 percent, he added. "We're lucky to have done so well with Conanicus," Bierregaard said. "He's survived for two years and has a good chance of returning to the area."

When asked if Conanicus would mate, Bierregaard said that he wouldn't mate this year, but would scout the area to see what nesting facilities were available. He went on to say that raptors often pick a mate in their third year, but don't produce young until their fourth year. Then they'll produce an average of two fledglings per season until they get older and slow down. He mentioned that they live for about 14 or 15 years, and sometimes a few more.

"During their third year, if they pick a mate, they'll set up housekeeping and develop their instincts," Bierregaard said. "They kind of play house and learn how to live together and figure out how to mate," he added. "Generally, they take their time. I expect Conanicus to return to Cuba in the fall. When birds find a place they like, they traditionally migrate to the same spot for the rest of their lives. They're creatures of habit." He also said that Conanicus wouldn't find a mate until he returned to the area where he was hatched. "Raptors don't mate when they're away from home," he mentioned.

Comet in his nest last Fall Photo by Deb Seger-Pini

Betsy Gooding, who co-chairs CIRP with Powell, said that Conanicus' parents are a successful breeding pair, having produced Conanicus in 2005 and Comet in 2006 as well as other siblings. Conanicus and Comet were the only two selected to be fitted for transmitters, she said. Then she mentioned that the transmitters were made possible through a CIRP partnership with the Rhode Island Audubon Society. "They purchased the devices while CIRP paid for the download time," she said. She went on to say that CIRP is sponsored by the Jamestown Education Foundation. "Anyone wishing to donate to the project can earmark their donations to the JEF for the raptor project and the money will go directly to the CIRP," she said.

Powell is scheduled to give a talk on raptors and the CIRP on April 19 at the library. He said that he would include information on the history of birds and migrations, crediting the meticulous and comprehensive records kept by Mabel Davenport, known as the island bird lady when she was alive.

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