

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge


Case No. 2012-213247

Wal-Mart Store #2806Appellant,

v.

Prakash & Urmila SolankiRespondents.

REPLY BRIEF OF APPELLANT


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ARGUMENT IN REPLY TO BRIEF OF RESPONDENTS

I. **RESPONDENTS HAVE SET FORTH NO FACTS FROM WHICH A FINDING OF RECKLESS, WANTON OR WILLFUL CONDUCT MAY BE FOUND AND ACCORDINGLY, THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY.**

In their brief, Respondents argue that because the trial court determined that more than one inference can be drawn regarding Appellant's alleged reckless, wanton, or willful conduct, the trial court was required to submit the issue of punitive damages to the jury. (Respts.' Br. 6-7). As at trial, however, Respondents yet fail to point to any evidence that at the time Wal-Mart complied with the request for information from the police officers that it *consciously failed* to exercise due care as is required to support a finding of reckless, willful, or wanton conduct. See *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (holding evidence of written notice of the dangerous condition of a hole on the premises was sufficient evidence to submit the issue of punitive damages to the jury).

Respondents acknowledge that Wal-Mart must have been conscious or chargeable with consciousness of the existence of a dangerous condition before sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness. (Respts.' Br. 11).¹ However, Respondents erroneously assert that "the only issue properly before this Court with regard to the issue of the trial court's charging punitive damages is whether it is *possible* that an inference of recklessness, willfulness,

¹ Respondents also argue that Appellant erroneously relies on a "sufficiency of the evidence" argument. (Respts.' Br. 11-12). However, as set forth in beginning of the argument in its initial brief, Appellant has consistently argued that because "there was *no* evidence of any willful, wanton, or reckless act by Wal-Mart to sustain a punitive damages award, the trial court erred in submitting the issue to the jury and the punitive damages award should be reversed." (App.'s Br. 7 (emphasis supplied)). If, as is the case here, there is no evidence from which a jury could reasonably infer reckless, wanton, or willful conduct, it logically follows that the evidence is insufficient for the issue of punitive damages to be submitted to the jury.

or wantonness could reasonably have been drawn from the evidence....” (Respts.’ Br. 6 - 7). In fact, the applicable standard is that the plaintiff must prove by *clear and convincing* evidence that the defendant’s misconduct was willful, wanton, or reckless. *See Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366.² Here, because the facts asserted by Respondents and relied upon by the trial court do not give rise to consciousness of a dangerous condition that is chargeable to Wal-Mart, the trial court committed an error of law in submitting the issue to the jury and thus, the ruling of the trial court should be reversed.

A. Evidence that Wal-Mart Did Not Explain a Discrepancy in Receipts Provided to Law Enforcement in Response to Its Request for those Documents Does Not Support a Finding of a Conscious Failure by Wal-Mart and thus, the Trial Court Erred in Submitting the Issue of Punitive Damages to the Jury.

At trial, Respondents argued that Wal-Mart had a “heightened duty” to Respondents to explain discrepancies in receipts provided at the request of law enforcement. (Trial Tr. vol. 2, 19–20). Respondents now concede that their argument to the trial court regarding a heightened duty was erroneous. (Respts.’ Br. 14–15). Nonetheless, they argue that there was evidence of willful, wanton, or reckless conduct because “Wal-Mart made the Plaintiff appear to be an offender when he was not by creating and producing the evidence that was used to inculcate and arrest him.” (Respts.’ Br. 10-11). Specifically, Respondents claim that a Wal-Mart employee “entered the fraudulent transaction” and the receipts generated from the transaction had two different

² Respondents subsequently acknowledged the clear and convincing standard in their brief. (Respts.’ Br. 7).

credit card numbers.³ Respondents further assert that a Wal-Mart employee hand-keyed the transaction and that when the police requested documentation from Wal-Mart regarding the transaction, Wal-Mart provided the documentation but did not offer an explanation as to why the credit card numbers on the two receipts from the transaction were different. This alleged conduct, Respondents assert, rises to the level of willfulness “[b]y any standard.” (Respts.’ Br. 11). These allegations are the sum total of Respondents’ evidence of alleged willful, wanton, or reckless conduct by Wal-Mart.

Respondents’ claim is patently flawed because there simply is no evidence that Wal-Mart knew of a discrepancy between the receipts when it provided the documents to law enforcement and there is no evidence that Wal-Mart *consciously* failed to exercise due care as is required to sustain a claim of punitive damages. Moreover, even if Wal-Mart had informed the police that the credit card numbers on the receipts did not match, there is no evidence that the course of the criminal investigation would have been any different. In fact, the investigating officer knew of the discrepancy upon her review of the documents. (Trial Tr. vol. 1, 303-07). Respondents have yet to set forth any evidence in the record to show that Wal-Mart had knowledge of information that would have exonerated Respondent had it been provided or explained to the police. Even assuming Wal-Mart knew of a discrepancy, which is not supported by the record, there is no evidence that Wal-Mart could have offered a meaningful explanation for the discrepancy in the receipts. Similarly, the allegation that Wal-Mart knew the transaction was hand-keyed does nothing to further Respondents’ claim for punitive damages. In short, there is no clear and convincing evidence of a conscious failure by Wal-Mart that

³ Respondents’ characterization of the transaction as fraudulent is without support. Respondents cite nothing in the record to support the suggestion that the cashier or any other Wal-Mart employee committed fraud with regard to the transaction.

would give rise to a finding of willful, wanton, or reckless conduct; thus, the award of punitive damages should be reversed.⁴

B. The Trial Court's Analysis of the Facts Supports the Conclusion that there was No Clear and Convincing Evidence of Willful, Wanton, or Reckless Conduct, and the Trial Court Erred in Submitting the Issue of Punitive Damages to the Jury.

Respondents argue that the trial judge did not acknowledge that the conduct of Wal-Mart, if believed by the jury, amounted to simple negligence but merely made an “offhand remark” that he viewed the evidence as simple negligence. (Respts.’ Br. 7). In fact, the trial court’s recitation was far more than an offhand remark. The trial court went into detail in several instances and suggested that the conduct at issue did not rise to the level of gross negligence, but only simple negligence. (Trial Tr. vol. 1, 423; vol. 2, 15; vol. 2, 18-19; vol. 2, 41). In citing the trial court’s analysis at length, Wal-Mart does not suggest that the trial court is compelled to rule in the manner in which it initially analyzes an issue on the record. Rather, the references to the trial court’s analysis illustrate the detail with which the trial court questioned counsel for Respondents about the lack of evidence to support a finding of gross negligence with regard to both the keying of the transaction and Wal-Mart’s response to the inquiry by the police. (App.’s Br. 11–15). By contrast, in concluding that the issue of gross negligence would be submitted to the jury, the trial court offered no facts to support the ruling and summarily concluded that the jury could reasonably find gross negligence based on the “weirdness of this transaction.” (Trial Tr. vol. 2, 66). In the absence of clear and convincing evidence of

⁴ Notably, the trial court did not conclude that the alleged reckless conduct occurred when Wal-Mart provided documents in response to the request from law enforcement. Rather, the trial court summarily concluded that “based upon the weirdness of the transaction” there was sufficient evidence of gross negligence and that he would charge gross negligence and punitive damages. (Trial Tr. vol. 2, 66).

willful, wanton, or reckless conduct by Wal-Mart, the trial court's ruling in this regard was erroneous and the award of punitive damages should be reversed.

II. IT IS WITHIN THE PROVINCE OF THIS COURT TO REVIEW THE EVIDENCE TO DETERMINE WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY.

Respondents next argue that the trial court has considerable discretion regarding the amount of damages and that this Court's review is limited to correction of errors of law. (Respts.' Br. 11-12 (citing *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004)). Respondents suggest that a reversal of the trial court's erroneous decision to submit punitive damages to the jury would constitute improper weighing of the evidence by this Court. In fact, where, as here, the trial court committed an error of law in submitting the issue of punitive damages to the jury, it is squarely within the province of this Court to determine whether clear and convincing evidence to support a punitive damages award existed and to reverse the trial court's decision where warranted.

This Court has recognized that "[a]lthough appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (citing *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004)); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 311, 529 S.E.2d 45, 59 (Ct. App. 2000).

This Court's decision in *Longshore* is instructive and confirms that it is within the province of the appellate court to determine whether clear and convincing evidence

existed to support the award of punitive damages. 365 S.C. at 564-565, 619 S.E.2d at 11. In *Longshore*, the plaintiff was a victim of a shooting by a security officer and filed actions against the security company and the officer for negligent use of deadly force, negligent hiring, training and supervision, and assault and battery. *Id.* at 557, 619 S.E.2d at 7. The trial court submitted the issue of punitive damages to the jury and the jury returned a verdict in favor of the plaintiff for both actual and punitive damages. *Id.* at 559, 619 S.E.2d at 8. The defendant appealed and argued *inter alia* that the trial court erred in submitting the issue of punitive damages to the jury. *Id.* at 564, 619 S.E.2d at 11. The trial court agreed and reversed the award of punitive damages, concluding, “[u]pon review, we find no clear and convincing evidence that [Employer’s] conduct in negligently hiring, training, or supervising [Employee] was willful, wanton, or in reckless disregard of the rights of others.” *Id.* Accordingly, this Court reversed the award of punitive damages. *Id.* at 565, 619 S.E.2d at 11.

Here, the record also lacks the requisite clear and convincing evidence to support the award of punitive damages. As discussed, the trial court merely concluded that there was evidence of gross negligence based upon the “weirdness” of the transaction and concluded that punitive damages would be submitted to the jury. (Trial Tr. vol. 2, 66). In so doing the court applied the gross negligence standard, which is determined by a preponderance of the evidence, rather than the clear and convincing standard applicable to the determination of whether the issue of punitive damages should be submitted to the jury.

Respondents argue that Appellant has not explained how the court’s application of the wrong standard could invalidate the jury’s award of punitive damages and that

Appellant did not challenge the court's instruction to the jury on punitive damages. Respondents are correct that Appellant does not challenge the instruction on punitive damages—the basis for Respondents' appeal is that the trial court did not make a finding that there was clear and convincing evidence to support a punitive damages award and even if it did, such a finding was not supported by the evidence and thus constitutes a reversible error of law. Simply put, there was no evidence of actual knowledge of any information that Wal-Mart consciously failed to provide to law enforcement or that would have changed the outcome of the criminal investigation or that would have precluded Respondents' arrest, nor was there evidence of any other conduct by Wal-Mart that rose to the level of willful, wanton, or reckless. At best, the evidence supported a finding of simple negligence. Accordingly, the trial court erred and the award of punitive damages must be reversed.

III. THE TRIAL COURT ERRED IN DENYING WAL-MART'S POST-TRIAL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR REVERSAL OR REDUCTION OF PUNITIVE DAMAGES.

Finally, Respondents argue that the trial court properly denied Wal-Mart's post-trial motions for judgment notwithstanding the verdict and for reversal or reduction of the punitive damages award. In support of their argument, Respondents assert that the jury was presented with video of the transaction and that the jury's entry of a defense verdict against the law enforcement agency indicates that it allocated blame for Respondent's arrest to Wal-Mart. (Respts.' Br. 17). While the jury may well have allocated blame to Wal-Mart, the issue of liability for simple negligence is not before this Court. Rather, the issue presented in this appeal is whether there existed clear and convincing evidence to

support an award of punitive damages. Because there was no such evidence, the trial court should not have submitted the issue to the jury.

In denying Wal-Mart's motions for judgment notwithstanding the verdict and to reverse or reduce punitive damages, the trial court reasoned that a reasonable jury could infer that Wal-Mart created or was aware of a dangerous condition because its employee hand-keyed Respondent's transaction. The trial court further reasoned that the jury viewed a video of the transaction and that Respondent testified that he did not fraudulently use a credit card and about his arrest and incarceration. (Order Den. Wal-Mart's Post-Trial Mots. 2-3). The trial court further opined for the first time that Wal-Mart created and disseminated the evidence used in the criminal proceedings without offering "an explanation as to the peculiar nature of this transaction or the clear discrepancies between the credit cards numbers [sic]. Had Wal-Mart acted sooner or at least noticed the discrepancies, Plaintiff may have been cleared of the criminal allegations sooner." (Order Den. Wal-Mart's Post-Trial Mots. 16). The trial court's speculation in this regard and its rationale for submitting punitive damages to the jury simply does not rise to the level of clear and convincing evidence of willful, wanton, or reckless conduct by Wal-Mart. As such, the issue of punitive damages should not have been submitted to the jury and further, once the award was made, the trial court erred in denying Wal-Mart's post-trial motions.

CONCLUSION

For the reasons set forth herein Appellant Wal-Mart Stores East L.P. respectfully requests that this Court find that the trial court erred in submitting the issue of punitive damages to the jury and reverse the award of punitive damages.

Respectfully submitted,



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PROOF OF SERVICE

I do hereby certify, on this 17th day of June, 2013, that a copy of the foregoing Reply Brief of Appellant and Proof of Service were served via electronic mail and by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: John D. Hawkins, Esquire (john@jdhawkinspa.com) and Charles Logan Rollins, II, Esquire (logan@jdhawkinspa.com), The Hawkins Law Firm, P.O. Box 5048, Spartanburg, South Carolina 29304.



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