THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5028 (S.C. Ct. App. filed Aug. 29, 2012)

Travis A. Roddey, as the Personal
Representative of the Estate of
Alice Monique Beckham Hancock, ... Petitioner,

v.

Wal-Mart Stores East, LP,
U.S. Security Associates, and
Derrick L. Jones, ... Respondents.

REPLY BRIEF

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ARGUMENT

A. There *is* evidence that Wal-Mart directed Derrick Jones to violate Wal-Mart's rules. This suggests that when Wal-Mart was instructing Jones, Wal-Mart was behaving negligently.

It is difficult to understand the respondents' argument that there is no evidence of Wal-Mart's negligence. They say Wal-Mart did nothing more than ask Derrick Jones to talk to someone and to record a license plate number, but that narrative is not faithful to the evidence in the record.

Derrick Jones said he told Wal-Mart employees that the car he was pursuing was leaving the store's parking lot. (App.p.224, lines 15-22). He said the reply he received was an instruction to get the vehicle's tag number. *Id.* Jones said this was not an isolated instruction—he was having a dialogue with Wal-Mart over the radio. (App.p.225, lines 1-10). Jones claimed he was talking with more than one person from the store. (App.pp.186-87). He said he was told to get the vehicle's tag number "numerous times." (App.p.136).

The respondents say they are viewing the facts in Mr. Roddey's favor, but they are not. Jones has admitted that Wal-Mart did not *specifically* order him to leave the parking lot, but the claim is that Wal-Mart knew he was leaving and kept prodding him on.

One of Mr. Roddey's experts explained why Wal-Mart's conduct was problematic. He said that while Derrick Jones was the person who "physically" violated Wal-Mart's rules, those violations seem to have been done with Wal-Mart's tacit approval. (App.p.244-45). This expert found fault with Wal-Mart engaging Jones without giving him specific directions. *Id.* Wal-Mart explicitly forbade its own people from participating in this sort of conduct, but Wal-Mart nevertheless instructed Jones to take action. (App.p.252).

This is why the law recognizes the claim of negligent hiring, training, or supervision. This is not master-servant liability—everyone agrees Jones was not a Wal-Mart employee. Wal-Mart is a sophisticated entity who understands that this sort of situation is inherently dangerous. A consistent theme of Wal-Mart's loss-prevention policy is that actions which may look innocuous can quickly become hazardous and that the key to protecting everyone's safety is to follow company protocol. Wal-Mart has assumed a duty of care, and if a breach of that duty causes injury, Wal-Mart should be liable. Wal-Mart has derivative liability for the acts of its employees. Negligent supervision ensures that Wal-Mart will remain liable if it coaxes a third party to break the rules.

B. It is hard to understand the argument on "but-for" causation when the evidence tends to show that the reason Derrick Jones got involved in this situation was because Wal-Mart employees asked him to.

Wal-Mart says that its actions are not a "but for" cause of Ms. Hancock's death. This means Wal-Mart is arguing that as a matter of law, the evidence suggests Derrick Jones would have inserted himself in this situation *regardless* of whether Wal-Mart ever asked him to get involved.

It is hard to see the reasoning behind the argument that Wal-Mart's direction of Jones had nothing to do with Jones's participation. Derrick Jones said that he got involved because a Wal-Mart employee asked him to. (App.p.184, line 20 - p.185, line 4).

The Court will also recall the evidence that Wal-Mart's directions were the directions that caused Derrick Jones to take actions he knew he was not supposed to take. Wal-Mart does not like this evidence and is entitled to dispute it, but the evidence *does* exist.

C. Mr. Roddey does not follow the respondents' arguments on foreseeability and "intervening cause." It wasn't unforeseeable for Derrick Jones to follow the women. Jones said that Wal-Mart instructed and encouraged him to do it.

The respondents continue to view the facts in their own favor. For example, the respondents repeatedly say that Wal-Mart's employees had only a few seconds to act and that Derrick Jones's actions were unforeseeable. They say nobody from Wal-Mart knew what was happening in the parking lot, that Wal-Mart employees were shocked by what they saw, and that *if* these employees had told Derrick Jones to stop, Jones might not have heard them.

This is the same theme the respondents pushed at trial, but when they questioned one of Mr. Roddey's experts about it, this expert pushed back. This encounter did not happen in an instant. Wal-Mart employees followed Ms. Hancock while she was inside the store, they arranged an encounter at the store's exit, and they watched Ms. Hancock as she placed her bags on the floor and walked out. When Wal-Mart's lawyer emphasized one employee's testimony about being shocked at the circumstances, Mr. Roddey's expert replied that Wal-Mart employees had watched everything unfold. (App.p.261, lines 14-17). There was a video that showed Wal-Mart's people standing in the foyer and watching the parking lot. *Id.* Wal-Mart was quoting a different employee who arrived late to the scene. *Id.*

The respondents' theory is a perfectly sensible theory to present to the jury, but this case was resolved on a motion for a directed verdict, and as the Court is aware, the standard for a directed verdict requires the trial court to view the evidence and all of the reasonable inferences from the evidence in Mr. Roddey's favor. *Fairchild v. South Carolina Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012). A jury might believe Wal-Mart's

argument, but it might also believe the same thing Mr. Roddey's expert believed, which is that Wal-Mart had ample time to tell Derrick Jones to stop. (App.p.262, lines 13-18).

This is why the respondents' reliance on *Shepard v. South Carolina Department of Corrections* is so odd. *Shepard* was an appeal after a bench trial; not a jury trial. See 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989). Because *Shepard* was a bench trial, the trial judge was allowed to make a factual decision about how it viewed the issue of foreseeability. The absence of a jury also meant that the Court of Appeals was bound to affirm the trial judge's decision as long as there was *some* evidence that would allow a fact-finder to conclude that proximate cause was lacking. See *Id.* at 372, 385 S.E.2d at 36 (the standard of review) and *id.* at 376-77, 385 S.E.2d at 38 (applying the standard to the record).

Mr. Roddey's case is a jury trial, not a bench trial. The trial judge was not permitted to pick between competing theories of foreseeability. Unless it was impossible for reasonable minds to reach different conclusions, proximate cause was for the jury.

The respondents' claim of "intervening cause" is equally strange. The law of intervening causes typically involves a third party tortfeasor—someone *other than* the plaintiff and the defendant—who steps in and causes the plaintiff's injury. In *Mellen v. Lane*, the alleged intervening actor was someone who threw a bottle during a bar fight. This did not qualify as an intervening cause because the defendant was a voluntary participant in the fight and because most people would expect a bar fight to cause significant injury to someone. See 377 S.C. 261, 286, 659 S.E.2d 236, 249 (Ct. App. 2008).

Other cases that involve an intervening cause argument operate under the same controlling principles. In *Newton v. South Carolina Public Railways Commission* there was

no connection between the at-fault driver and the defendant railway commission. See 319 S.C. 430, 462 S.E.2d 266 (1995). In *Young v. Tide Craft* the intervening actor was a boat repair shop with no connection to the boat's manufacturer. See 270 S.C. 453, 242 S.E.2d 671 (1978).

But Derrick Jones is not an intervening actor. Wal-Mart is the party that got Derrick Jones involved. The respondents analogize Wal-Mart's request that Jones chase these women to a Texas case where a wife told her husband that she heard a noise at the door and the husband responding by grabbing his shotgun, walking outside, and shooting a passing car. *Traweek v. Larkin*, 708 S.W.2d 942 (Tex. Ct. App. 1986). The Court can judge for itself, but that circumstance is not fairly comparable to the circumstances here. Here, there *is* evidence that Wal-Mart encouraged Derrick Jones to engage in activity that Wal-Mart knew was dangerous. Wal-Mart *invited* Jones's actions. Jones did not *intervene*.

D. Mr. Roddey has repeatedly advocated—at every stage of this litigation—that reversal would require a new trial as to all of the respondents. The respondents never opposed this, and Mr. Roddey's argument happens to be right.

Mr. Roddey filed a post-trial motion with the trial court. The motion argued that the trial court's error in granting a directed verdict would require a new trial as to all of the defendants. See (App.p.155).

Nobody disagreed with this argument. The respondents filed a joint memorandum in opposition to Mr. Roddey's motion, but this filing did not even acknowledge the contention that reversing the directed verdict would require a new trial against everyone. See (App.p.164-69). Instead, the respondents argued that the trial court's decision was

completely correct. They made the same claims that they are making here—that there was no evidence of Wal-Mart's negligence, that there is no "but for" causation, and that Derrick Jones's actions and Ms. Hancock's death were completely unforeseeable.

The same thing happened at the Court of Appeals. Mr. Roddey's notice of appeal named *everyone* as a respondent, and the fourth argument subheading reads :

> This Error Requires a New Trial to as to All the Respondents Because Comparative Negligence Requires That a Plaintiff's Negligence Be Compared to the Negligence of All Defendants.

(App.p.40). Again, the respondents did not oppose the argument. See (App.pp.63-98).

The respondents say that Mr. Roddey's brief only pointed to errors involving Wal-Mart. That is true, but it misses the point. Yes, the trial court's error involved Wal-Mart, but it affected the other defendants too. We cannot have the jury split fault between two camps and assume that adding a third bloc would not have mattered. That is just guessing.

And the reality is that Mr. Roddey's argument happens to be right. The consensus seems to be that when multiple defendants have potential liability on the same claim, the wrongful dismissal of one defendant will require a new trial as to all defendants.

Some courts have held that this rule does not apply to a defendant who was acquitted by the jury. Compare *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970) (ordering a new trial against an exonerated defendant) with *Buffett v. Vargas*, 914 P.2d 1004, 1009-10 (N.M. 1996) (when the jury has said a party was not negligent, that party should not automatically be subject to retrial with respect to apportioning fault). Even if South Carolina followed that approach, the rule would not apply to these circumstances. None of the respondents were absolved. We can only speculate at the impact caused by Wal-Mart's wrongful exclusion.

CONCLUSION

There *is* evidence of Wal-Mart's negligence. The trial court erred in concluding otherwise.

The trial court also erred in its analysis on foreseeability. A serious injury is more than just a foreseeable consequence of violating Wal-Mart's policy. Avoiding injury is a main reason the policy exists.

This Court should reverse the trial court and the Court of Appeals. It should remand this matter for a new trial against all of the defendants.

Respectfully submitted,

April 27, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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