THE STATE OF SOUTH CAROLINA
In The 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.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Did the trial court err when it granted Wal-Mart a directed verdict and held that there was no evidence that Wal-Mart was negligent even though there *was* evidence that Wal-Mart employees violated the company's policies?

II. Did the trial court err when it granted Wal-Mart a directed verdict and found that it was not foreseeable for a violation of Wal-Mart's company policies to result in a serious injury?

III. Does the trial court's error in granting Wal-Mart a directed verdict require a new trial against *all* defendants because there is no way to be sure how the wrongful dismissal of a co-defendant affected the comparative negligence verdict against the remaining defendants?

STATEMENT OF THE CASE

Alice Hancock died in a car crash as she drove her sister away from a Wal-Mart store in Lancaster. This was after Ms. Hancock's sister attempted to shoplift from the store.

Ms. Hancock's sister said that at the time of the crash, the women were being chased by a security guard who was assigned to patrol Wal-Mart's parking lot. Although the evidence is contested, there is some evidence that Wal-Mart employees instructed the security guard to pursue the women. This violated several of Wal-Mart's company policies.

The parties tried the case to a jury and at the close of the plaintiff's case, the trial court granted Wal-Mart a directed verdict by reasoning that there was no evidence of Wal-Mart's negligence and that even if Wal-Mart *had* been negligent, there was no proximate cause between Wal-Mart's negligence and Ms. Hancock's death. The trial continued against the security guard and his employer.

This appeal revolves around whether the decision to grant Wal-Mart a directed verdict was correct.

This incident occurred one evening in June of 2006 after Ms. Hancock drove to Wal-Mart with her sister. The women entered the Wal-Mart together, but Ms. Hancock left the store before her sister and returned to her vehicle in the parking lot. While Ms. Hancock was in the car, her sister attempted to shoplift some blue jeans and a denim skirt.

Wal-Mart employees watched Ms. Hancock's sister and followed her through the store as she attempted this. When a Wal-Mart employee stationed at the store's exit asked Ms. Hancock's sister for a receipt, Ms. Hancock's sister claimed that the receipt was in the car. After that, she placed the bags of merchandise on the floor of the store and left. See (App.p.289, line 1 - p.290, line 4) (from the sister's testimony); (App.p.333, line 16 - p.334, line 20) (testimony of Shaun Cox, a Wal-Mart employee).

Although this conduct meets the definition of shoplifting under South Carolina law, Ms. Hancock's sister was not a shoplifter under Wal-Mart's company policy. A person commits the crime of shoplifting by taking possession of a merchant's property with the intention of not paying for that property. See S.C. Code Ann. § 16-13-110(A)(1) (2003). Wal-Mart's policy is different. Wal-Mart says that an "unlawful taking" does not occur until a person passes the last point of sale and exits the facility. See (App.pp.372-73) (under "Four Elements" and "Unlawful Taking").

Wal-Mart's policy for dealing with shoplifters is detailed and lengthy. It is in the Appendix from page 374 to page 378. Only certain employees are allowed to investigate suspected shoplifters, and even then, the policy provides both specific and general directions to guide those interactions. The policy says to "put people first," to "use caution," and to prioritize everyone's safety over the recovery of merchandise.

Once she was in the parking lot, Ms. Hancock's sister encountered Derrick Jones, a parking lot security guard employed by U.S. Security Associates.

The two people had a short verbal exchange. Ms. Hancock's sister said that Jones "screamed" at her. (App.p.290, line 3 - p.291, line 12). Jones said that he politely asked to speak with Ms. Hancock's sister and she declined. (App.p.185, lines 5-20).

Ms. Hancock's sister then moved quickly towards her car while Jones maneuvered his truck in an attempt to block the women. (App.p.185, lines 17-20) (Jones's story); (App.p.246, line 19 - p.249, line 22) (an expert witness's description). This left Jones's vehicle and Ms. Hancock's car facing one another. (App.p.249, lines 12-18).

Ms. Hancock's sister climbed into the back seat of her car, and Ms. Hancock backed her car up—away from Jones—and drove rapidly out of the parking lot. (App.p.188, lines 5-25); (App.p.291, line 20 - p.292, line 12). Jones followed behind.

Jones explained his conduct by describing that Wal-Mart employees had asked him to delay the women and then to get their license tag number. (App.p.184, line 20 - p.185, line 4). He also said that Wal-Mart employees repeated the instruction about getting the license tag as the women were driving off the premises. (App.p.222, line 12 - p.225, line 8).

Wal-Mart denied asking Jones to delay the women. (App.p.321). The relevant employee also said she only made one request for the vehicle's tag number. (App.p.337).

The witnesses offered very different versions of what happened next.

According to Ms. Hancock's sister, Jones followed the women out of the parking lot, driving close to their bumper and flashing his high beams. (App.p.293, lines 8-25). Ms. Hancock's sister said that this continued for about two miles and that after she heard Ms.

Hancock exclaim that Jones was still right behind them, she heard and felt a bump before the vehicle shot off the road and crashed. (App.p.294, line1 - p.295, line 16).

Jones's version was that he followed the women out of the Wal-Mart parking lot but lost them shortly thereafter. He claimed that he discovered the wreck only after he gave up his search and turned his truck around to drive back to the store. (App.p.188, line 5 - p.194, line 12) (Jones's deposition testimony); see also (App.pp.406-410) (Jones's written statements).

The parties stipulated at trial that Ms. Hancock was driving the speed limit at the time of the accident. See (App.p.306, lines 8-9; p.307, lines 3-16).

Ms. Hancock's personal representative filed this lawsuit on May 9, 2007, bringing claims for simple negligence as well as negligent hiring, training, and supervision. The complaint alleged that Wal-Mart and U.S. Security were vicariously liable for Jones's actions. The complaint also alleged direct liability against Wal-Mart for improperly instructing Jones to follow Ms. Hancock's vehicle and to obtain her license tag number.

The negligent hiring claim was based on the fact that Jones's criminal background (a drug conviction) should have disqualified him from being employed as a security guard. See (App.p.237, lines 7 - p.239, line 6).

All of the defendants answered and alleged, among other things, that Ms. Hancock's negligence exceeded any negligence of their own.

The parties tried the case to a jury for six days in April of 2010. Jones did not attend.

On the fourth day of trial, after the plaintiff rested his case, the trial judge granted Wal-Mart's motion for a directed verdict. The court ruled that there was "insufficient

evidence that Wal-Mart was negligent, or even if they were there is a lack of proximate cause that the events were not foreseeable." (App.p.365, lines 15-22).

The case proceeded against both U.S. Security and Jones, and at the end of the case, the jury returned a verdict that apportioned 65% of the fault for the accident to Ms. Hancock and 35% to the remaining defendants. See (App.pp.124-26) (the verdict form). The jury found that U.S. Security negligently hired Jones, but the jury also found that this negligence did not proximately cause Ms. Hancock's death. *Id.*

Mr. Roddey made a timely post-trial motion, see (App.p.150), which the court denied on June 4, 2012. See (App.p.127). Seven days later, Mr. Roddey initiated his appeal.

The Court of Appeals affirmed in a 1-1-1 decision. See 400 S.C. 59, 732 S.E.2d 635 (Ct. App. 2012); also at (App.pp.1-27). Each judge applied different reasoning for his vote.

Chief Judge Few voted to affirm because although he found that there *was* evidence of Wal-Mart's negligence, he believed that Wal-Mart's conduct could not have reduced any of Ms. Hancock's comparative fault. (App.pp.4-8). He also opined that no jury could have concluded that Ms. Hancock was less than 50% at fault for the crash. (App.p.8).

Judge Short voted to affirm because he believed that Derrick Jones's actions in following the women were unforeseeable and an "intervening" cause. (App.pp.9-10).

Judge Huff voted to reverse. He wrote that comparative negligence and foreseeability were issues for the jury, but he would have ordered a new trial only against Wal-Mart. (App.pp.21-27). Judge Huff rejected Mr. Roddey's argument that the doctrine of comparative negligence required a new trial as to all of the defendants. He reasoned that Mr. Roddey had abandoned this issue during briefing. (App.p.27 n.10).

ARGUMENT

This should not be a difficult case. Although the evidence is contested, it ought to be apparent that there is at least *some* evidence of Wal-Mart's negligence. The law seems to plainly establish that a defendant's violation of its own policies will tend to show a breach of the standard of care, and although Wal-Mart may feel that its employees did not violate the company's policies, a reasonable jury could disagree. The trial court said that there was "no" evidence that Wal-Mart was negligent. Respectfully, this reasoning was wrong.

It ought to be equally obvious that the trial court's reasoning on proximate cause was incorrect. A serious injury is more than just a foreseeable consequence of violating Wal-Mart's policy. Avoiding injuries is a main reason why the policy exists. The policy says so.

This error requires a new trial as to all of the defendants. Ms. Hancock might have 65% of the fault compared only to Derrick Jones, but that fraction says nothing about how her liability compares to Wal-Mart's liability or how Wal-Mart's liability and Jones's liability relate to one another. Comparative fault requires the jury to weigh the plaintiff's conduct against the combined negligence of *all* of the defendants. No equation can tell us how much liability the jury would have assigned to the empty chair at the defendants' table. When multiple defendants could be liable on the same claim, there has to be a retrial.

I. The trial court erred when it held that there was no evidence of Wal-Mart's negligence. Evidence that Wal-Mart workers violated Wal-Mart's policies is evidence of Wal-Mart's negligence.

If a defendant violates its own policies, that violation constitutes evidence of negligence. This Court's decisions explain the justification for the rule. A successful negligence claim requires the defendant to have breached the standard of care, and the

standard of care in a given case can be established by the common law, by statutes, by industry standards, or by a defendant's own policies and guidelines. *Madison ex rel. Bryant v. Babcock Ctr.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (citing *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005)).

Here, Wal-Mart has adopted a detailed policy that prioritizes personal safety over recovering inventory and prosecuting shoplifters. If Wal-Mart violated that policy, any such violation is evidence that Wal-Mart breached the standard of care it voluntarily assumed.

The record contains ample evidence that Wal-Mart breached its policies.

The policy instructs that only certain employees called "Authorized Associates" are allowed to investigate or detain a suspected shoplifter. (App.p.374). Wal-Mart has specified the procedure for approaching a suspect, see (App.p.390), and it has identified factors that suggest the potential for a hostile confrontation. See (App.p.388). The policy cautions employees to never pursue a suspect who is in a moving vehicle, to never pursue a suspect off of Wal-Mart's property, to never *use* a vehicle to pursue a suspect, and to terminate the pursuit if the suspect begins to enter a vehicle. (App.p.375).

Derrick Jones said that Wal-Mart did not follow these rules. He said that a Wal-Mart employee contacted him over his walkie-talkie, told him that there was a shoplifter exiting the store, and asked him to "kind of like delay" the suspect until the Wal-Mart employees could get out there. (App.pp.184-85). Jones further testified that Wal-Mart employees instructed him to get the tag number of Ms. Hancock's vehicle. (App.pp.185-86). Jones said that Wal-Mart repeated the instruction to get the tag number, even when it was obvious that doing this would require a vehicular pursuit on a public street. (App.pp.191, 219, 223-24).

Wal-Mart disputes this version of events and that is Wal-Mart's prerogative, but at the directed verdict stage, the court does not weigh testimony, decide issues about credibility, or resolve conflicts in evidence. *Fairchild v. South Carolina Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012); *Erickson v. Jones Street Publishers*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). Those questions belong to the jury.

There *is* evidence of Wal-Mart's negligence. This Court should reverse the trial court's ruling to the contrary.

II. The trial court erred when it held that there was a lack of proximate causation. Avoiding a serious injury is one of the main reasons why Wal-Mart's policy exists.

The term "proximate cause" describes two concepts. "Cause in fact" which is also known as "but-for" causation, and "legal causation" which hinges on foreseeability. *Oliver v. South Carolina Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). The trial court's analysis focused on the "foreseeability" component. It summarily held that "the events were not foreseeable." (App.p.365).

There are two reasons why this reasoning is incorrect.

First, the trial court's holding is flawed factually. The court seems to have been saying that it was unforeseeable for Jones to follow the women in his vehicle, but that view overlooks Jones's testimony. Jones has said that Wal-Mart employees told him to get the car's tag number and that Wal-Mart repeated this instruction when it was obvious that the task required a vehicular pursuit on a public street. (App.pp.191, 219, 223-24). It wasn't unforeseeable for Jones to follow the women. He said that Wal-Mart employees instructed and encouraged him to do it.

Second, the trial court's decision wrongly implies that legal causation hinges on the foreseeability of someone's conduct as opposed to the foreseeability of the plaintiff's injury. The law does not tie liability to whether Wal-Mart could anticipate Jones's actions or whether Wal-Mart might have predicted that Ms. Hancock would crash her car a couple of miles away from the store. Instead, it generally is enough that the plaintiff's injury be of the type that would naturally flow from the defendant's negligence. *Young v. Tide Craft*, 270 S.C. 453, 463, 242 S.E.2d 671, 675-76 (1978). Jones's actions are not the test. Wal-Mart is liable as long as a reasonable person could foresee that this sort of violation of Wal-Mart's policies might result in serious injury or death.

That test is satisfied here. Wal-Mart's materials repeatedly stress that its policy has been designed to protect the well-being of employees, customers, and shoplifting suspects. (App.pp.375, 377, 389). Wal-Mart cautions employees that the way to stay in control of the situation is to follow the policy, (App.p.377), and Wal-Mart further warns that "[i]n most cases, proper techniques will reduce the possibility of confrontations leading to injuries." (App.p.379). The policy recognizes that if a suspect enters a vehicle, that conduct might indicate a potentially violent situation. (App.p.388). Wal-Mart also advises employees to let the suspect go rather than engage in a pursuit "that is likely to injure or cause harm to someone." (App.p.376). A serious injury is more than just a foreseeable consequence of violating Wal-Mart's policy. Avoiding a serious injury is one of the main reasons why Wal-Mart's policy exists.

One of Wal-Mart's trial strategies was to ignore Jones's testimony about how this situation unfolded and to paint its employees' conduct in an innocuous light. Wal-Mart

would say that there is nothing risky about shadowing Ms. Hancock's sister inside the store, asking to see her receipt, and asking Derrick Jones to try and take a vehicle's tag number.

There are two problems with this line of argument.

First, it ignores Derrick Jones's testimony, and at the directed verdict stage, the only version of events that counts is the version that is most favorable to the plaintiff.

Second, Wal-Mart's policy seems to specifically contemplate that any interaction with a shoplifter is risky and that what appears harmless might actually be a critical mis-step from a risk-management perspective. Derrick Jones was not trained to acquire the tag number of a moving vehicle, and he certainly was not trained in how to accomplish this task while at the same time safely operating his vehicle in the Wal-Mark parking lot. At trial, Ms. Hancock presented the testimony of a witness who was qualified as an expert in parking lot security, guard force management, and loss prevention. (App.p.325-36) (qualification). This person opined that the reason Wal-Mart has its policy is because "pursuits are dangerous." (App.p.245). He also said that the "headwaters of this problem" was Wal-Mart's asking Jones to take actions which Wal-Mart's policy specifically forbids. (App.p.250).

A reasonable jury could find that a serious injury is a foreseeable result of violating Wal-Mart's policy. The Court should reverse the ruling below, which holds the opposite.

III(a). This error requires a new trial against all defendants because there is no way to know how much fault the jury would have assigned to the empty chair.

South Carolina's form of comparative negligence requires the jury to weigh any of the plaintiff's contributory negligence against the combined negligence of all of the defendants. This has been the law since the Court adopted modified comparative negligence

in *Nelson v. Concrete Supply Co.* See 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). The plaintiff's recovery will be reduced in proportion to his or her own negligence, but as long as the defendants' combined negligence exceeds the plaintiff's share of the fault, the plaintiff can recover. See *Creech v. South Carolina Wildlife & Marine Res. Dep't*, 328 S.C. 24, 33 n.1, 491 S.E.2d 571, 575 n.1 (1997) (citing *Nelson*); see also S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2014) (the Uniform Contribution Among Tortfeasors Act).

A straightforward application of this rule leads to the conclusion that if two defendants have potential liability on the same claim, the wrongful dismissal of one defendant will require a new trial as to all defendants. There is no formula that will tell us the share of liability that the jury would have allocated to Wal-Mart if Wal-Mart had been in its rightful place at the defendants' table. That determination is for the jury.

Cases from other jurisdictions recognize this principle. Some of them describe the situation as a dismissal of one defendant that nevertheless "infected" the verdict against the others. *Buffett v. Vargas*, 914 P.2d 1004, 1011 (N.M. 1996); *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970). New York seems to prefer to say that "the interests of justice" require the wrongful dismissal of one defendant to demand a retrial as to all defendants with potential liability. *Gadani v. Dormitory Auth.*, 856 N.Y.S.2d 268, 270 (N.Y. App. Div. 2008) (listing several cases with this language). The underlying rationale of these decisions appears to be the same. When a defendant is erroneously excluded from trial, there is no way to be sure how that exclusion impacted the jury's determination of the remaining defendant's negligence. The wrongful exclusion left the jury with an "all or nothing" choice. *Williams*, 431 F.3d at 609. Limiting the retrial to one defendant makes the same error. *Id.*

Judge Huff believed that Mr. Roddey's failure to include the previous paragraph in his brief constituted abandonment of this argument. (App.p.27 n.10)..

Mr. Roddey's principal brief to the Court of Appeals gave this argument its own heading and cited two South Carolina cases—*Nelson* and *Creech*—that explained the law of comparative negligence. (App.pp.60-61). Neither U.S. Security nor Jones opposed this argument. The respondents never argued that the court should *not* order a new trial as to them. See (App.pp.63-98) (the respondents' brief).

This Court's "abandonment" jurisprudence speaks of short, conclusory statements that are presented without any supporting authority. E.g., *State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001). That is not what happened here. Mr. Roddey's argument was (hopefully) lucid, grounded in the definition of comparative negligence, and it was not opposed by the respondents. Had the respondents contested the point, Mr. Roddey would have cited the foreign authorities which seem to demonstrate that his argument is correct.

III(b). Alice Hancock is not automatically due the majority of fault for her death. A reasonable jury could find Wal-Mart to be more negligent than Ms. Hancock or Derrick Jones and at worst, this is a case where all parties are guilty of significant negligence.

Chief Judge Few voted to affirm even though he believed the trial court was wrong about there being no evidence of negligence and about there being no legal causation between Wal-Mart's alleged conduct and Ms. Hancock's death. He gave two reasons for this vote. First, he believed that Wal-Mart's conduct could not have reduced any of Ms. Hancock's comparative fault. (App.pp.4-8). Second, he opined that no jury could have concluded that Ms. Hancock was less than 50% at fault for the crash. (App.p.8).

i. Wal-Mart would necessarily be able to reduce Ms. Hancock's percentage of fault because Wal-Mart could be *more* culpable than Derrick Jones.

The proper analysis on this point is related to the same reasoning why the wrongful exclusion of Wal-Mart requires a new trial as to all of the defendants. When a defendant is wrongfully excluded from trial, there is simply no way to know how that exclusion impacted the jury's view of everyone else's liability. *Williams*, 431 F.3d at 609.

Wal-Mart is unique among the parties. Wal-Mart is the only party that has adopted detailed and specific guidelines for dealing with suspected shoplifters. This policy was presumably the result of careful research and thoughtful risk-management decisions. The significance of this point is that the law typically assigns greater culpability to a party who knows the risks and engages in risky conduct anyway. It would not be out of bounds for the jury to see Wal-Mart as more culpable than Jones. Wal-Mart recognized that these situations are dangerous but engaged an un-trained person like Jones and gave him no directions.

Chief Judge Few's analysis also overlooks the distinction between derivative liability and direct liability. Negligent entrustment is a claim of independent liability against Wal-Mart. This Court's decision in *James v. Kelly Trucking Co.* recognizes this principle. A defendant can be liable in tort if the defendant hires someone, fails to train someone, or fails to supervise someone in a way that creates an unreasonable risk of harm to the public. See 377 S.C. 628, 631, 661 S.E.2d 329, 330-31 (2008). A jury could find Wal-Mart to be more negligent than Jones because Wal-Mart was the supervisor who knew better. By saying that a jury could *not* do this, Chief Judge Few's decision limits the difference between derivative and direct liability to a label that carries no practical effect.

ii. At worst, this is a case where all parties are guilty of significant negligence. At best, Ms. Hancock was simply driving away from someone who had no right to detain her.

This Court has instructed that if the facts show both parties guilty of negligence or willfulness, questions of negligence, proximate cause, and contributory negligence should be submitted to the jury. *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 175, 246 S.E.2d 176, 178 (1978) (quoting *Wilson v. Marshall*, 260 S.C. 271, 274, 195 S.E.2d 610, 611 (1973)). The Court has followed this principle on several occasions when defendants sought to avoid trial on the grounds that the plaintiff's own conduct appeared to be the obvious cause of the plaintiff's injury. See *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 86, 508 S.E.2d 565, 573 (1998) (plaintiff who fell down dimly lit stairwell); *Creech*, 328 S.C. at 24, 491 S.E.2d at 571 (plaintiff who fell off a boat dock); and *Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985) (plaintiff who voluntarily participated in an organization's hazing activities).

Chief Judge Few cited one case—*Bloom v. Ravoira*—in support of his decision that Ms. Hancock was more at fault as a matter of law, but as the Court's decision in *Bloom* describes, that case involved circumstances where the evidence of the plaintiff's "*greater* negligence" is overwhelming and the defendant's negligence was only "slight." See 339 S.C. 417, 424, 529 S.E.2d 710, 714 (2000) (emphasis in original). The plaintiff in *Bloom* was struck by a car when he darted out from between two parked cars and into a dark and rainy street in Charleston. The Court's decision recites that the defendant who struck Mr. Bloom had been driving the speed limit and was not driving recklessly.

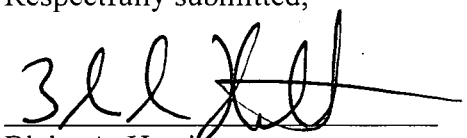
Those circumstances are meaningfully different than Wal-Mart directing an untrained security guard to engage in a vehicular pursuit. It does not matter if the pursuit was supposed to be temporary and was designed to gather information like a vehicle's tag number. Either way, Wal-Mart's policy recognizes that this activity was highly dangerous and improper.

Derrick Jones had no right to detain Ms. Hancock, and it is important to recall the stipulation that Ms. Hancock was driving the speed limit at the time of the crash. Ms. Hancock is not automatically more at fault for her death. This is an evaluation for the jury.

CONCLUSION

This should not be a difficult case. The evidence is contested, but it ought to be apparent that there *is* evidence of Wal-Mart's negligence, and it ought to be equally apparent that 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, and it should remand this matter for a new trial against all defendants.

Respectfully submitted,



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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 *Brief of Petitioner* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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