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. 27615 (S.C. Filed Mar. 30, 2016)

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, Inc., and Derrick L. Jones,.....Respondents.

RESPONDENTS' PETITION FOR REHEARING

This Court published its recent 3-2 decision in *Roddey v. Wal-Mart Stores East, LP*, on March 30, 2016. See Op. No. 27615 (Shearouse Adv. Sh. No. 13, p. 22). Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Respondents, Wal-Mart Stores East, LP, U.S. Security Associates, Inc. ("USSA"), and Derrick L. Jones, petition this Court for rehearing of its majority decision. As set forth more fully below, the Respondents respectfully submit that the Court overlooked or misapprehended the following points in its decision:

1. The Court's majority opinion misapprehends or overlooks the fact that Jones' pursuit of Beckham and Hancock was not "set into motion" by any wrongful acts on the part of Wal-Mart, but began spontaneously when Beckham began to run from

Jones and he followed her, and that it would have continued regardless of any instruction by Wal-Mart. Jones claims that, before the pursuit began, he had been given no "distinctive instructions" when he asked Wal-Mart employees what, if anything, they wanted him to do. (App. p.219, lines 6-14). He was told nothing other than "try to kind of like delay – you know, try to delay her. Try to talk to her until we can get out there." (App. p.184, line 23-p.185, line 4). At that time, Beckham was still in the store and no one knew what she was going to do. Wal-Mart had given Jones no instructions to formally detain Beckham, a function reserved for Wal-Mart loss prevention personnel, nor had any Wal-Mart employee asked Jones to follow or obtain any information from or regarding Beckham. Petitioner's pursuit expert, Dr. Jeffrey Alpert, (App. p.267, lines 11-17), took no issue with Jones asking Beckham if he could speak with her as she walked past his security vehicle, (App. p.277, lines 12-21), nor did Petitioner's guard force management, parking lot security and loss prevention expert, Jeffrey Gross, criticize that act. (App. p.235, line 16-p.236, line 16).

After Beckham abandoned her bag of stolen merchandise at the interior doorway leading to the exit of the store, Wal-Mart considered the incident to be over, as Wal-Mart had not actually been deprived of the merchandise. (App. p.335, lines 17-19). Hence, no Wal-Mart employees followed Beckham outside or made any effort to stop her from leaving, and they were therefore not outside and in view of Jones and Beckham when they encountered each other. As soon as Jones spoke to Beckham as she walked by his security vehicle, Beckham began to run, prompting Jones to turn his vehicle around and follow. No employees of Wal-Mart saw any portion of those events until Jones had already followed Beckham to the middle of the parking lot, Beckham had already jumped

into the backseat of Hancock's vehicle, and Jones had effectively blocked Hancock's vehicle by turning his security truck into the same aisle of the parking lot.

Despite that the sequence of events unfolded as outlined above, some of the Court's reasoning appears to be predicated, in part, on the conclusion that Jones' pursuit was prompted at the very outset by instructions from Wal-Mart. For instance, in its majority opinion, the Court noted that Wal-Mart employees' instructions *led* Jones to drive through Wal-Mart's parking lot in pursuit of Beckham (p. 9) and that Jones' acts were set into motion by the original wrongful acts of Wal-Mart. However, as there is no evidence that any Wal-Mart employee instructed Jones to obtain the license tag number of Hancock's vehicle *before* Jones had already initiated the pursuit through the parking lot, no act by Wal-Mart can reasonably be said to have set into motion those events.

Just as Wal-Mart did not incite Jones to pursue Beckham by asking him to follow her and get her license tag number at any time *before* they were already engaged with each other in the middle of the parking lot, it is incorrect to say that Wal-Mart, at any point, instructed Jones to *actually* engage in a pursuit, as noted at a couple of points in the opinion.[1] A Wal-Mart employee (Cox) only asked Jones to get Hancock's license tag number at the moment when she saw Hancock had turned around and Jones was in a position to see it, which occurred in a matter of seconds after she walked outside and saw the vehicles. She also provided an explanation for yelling out to get the tag, to wit, that she meant for Jones to get the tag number *and stop*. (App. p.344, lines 9-16). Jones affirmed that he was asked to get the license tag number of the vehicle, and while he testified he was *not* told to follow anyone off of the property, Jones read into the request

[1] The Court noted, on page 8, that there was evidence that Wal-Mart employees violated Wal-Mart's policies by instructing Jones to engage in the pursuit. The Court also noted, on page 9, it was reasonably foreseeable that instructing a contracted security guard to engage in such pursuit would be dangerous.

to get the tag number much more than was actually said to him. In any event, it is obvious that any instruction to get the tag number in the midst of the ongoing pursuit was superfluous and could not have influenced Jones to have engaged in the pursuit, which he had already initiated on his own.

In addition to the above, the majority opinion misapprehends or overlooks the fact that there is no evidence in the record establishing that Jones would have discontinued his pursuit at any point after it began. Jones had begun the pursuit without any purpose or end goal. There is no evidence he needed a reason to keep going. Jones should have been able to see Hancock's license tag when he was directly behind her vehicle in the parking lot, which was why Cox yelled out into the walkie-talkie to get the tag. As explained by Wal-Mart's General Manager, Chris Tipton, asking Jones to obtain Hancock's license tag number while in the parking lot was not a violation of Wal-Mart policy. (App. p.351, lines 3-17). Even Plaintiff's pursuit and loss prevention experts agreed that recording the license tag number in the parking lot was reasonable and explainable. (App. p. 260, lines 14-23; p. 277, lines 8-21). Yet, Jones continued in his pursuit.

According to Beckham's testimony, Jones then remained in close range of Hancock's vehicle for the next two miles away from the property while flashing his lights[2], which, if true, and without guessing what Jones' motivations might have been, would seem inconsistent with an effort to just obtain Hancock's license tag number. It is obvious he must have been motivated by something else given the method in which Beckham claims he was pursing Hancock (and assuming Beckham's testimony to be true). The totality of the circumstances establishes that the only reasonable inference to

[2] No one other than Beckham has offered testimony regarding these acts, none of which were witnessed by Wal-Mart.

be drawn from the evidence is that Jones independently initiated *and* decided to continue a pursuit for more than two miles and that Wal-Mart's attempt to have Jones get the license tag number in the midst of the ongoing pursuit, while Jones and Hancock were still in the parking lot, had no bearing on either the initiation of the chase by Jones or on his actions (*i.e.*, tailgating and flashing his lights) once the vehicles were away from the property and no longer in view.

In view of the above, Wal-Mart's acts could not have served as either a but-for or legal cause of the accident.

2. The Court's majority opinion misapprehends or overlooks the fact that it should disregard Jones' testimony that he was somehow having an ongoing conversation over a walkie-talkie while in the midst of pursuing Hancock and Beckham at a high rate of speed in the parking lot. As set forth by the majority opinion, Jones testified that both Rollings and Cox repeatedly instructed him to get the license plate number, that he was telling them he could not see it, and that he told them Hancock was about the leave the parking lot. All the while, Jones contended both of the Wal-Mart employees continued to instruct him to obtain the license tag number. Testimony may be properly disregarded as inherently incredible where it is refuted by facts which are of common knowledge. See Still v. Hampton & Branchville R.R., 258 S.C. 416, 425 (1972). Here, communications between Jones and Wal-Mart were only possible and being made over walkie-talkies, the basic function of which is incontrovertible and of which this Court may take judicial notice. See id. Walkie-talkies do not operate like telephones, but are hand-held, two-way radio transceivers and, although any number of persons can listen at one time, only one radio on the channel can transmit at a time. Pushing the "push-to-talk" button turns off

the receiver and turns on the transmitter. If more than one person attempts to talk simultaneously, the channel is jammed and no one can listen.

Despite the limitations of a walkie-talkie system, and without even considering the limited range that they had even within the Wal-Mart store, it is incredible to believe that Jones could have had the ability to be hotly pursuing Hancock and Beckham, maneuvering his security truck around the islands that defined the aisles and exit of the parking lot, and maneuvering through a stop sign and stop light, past other vehicles in the intersection at a high rate of speed, all while having a back and forth conversation with more than one person. South Carolina law recognizes, and common sense dictates that self-serving statements are inherently less reliable than self-inculpatory statements. See Jones v. Catoe, 345 S.C. 389, 402, 548 S.E.2d 587, 594 (2001). See also Rule 804(b)(3), SCRE (providing exception to rule against hearsay where the statement, at the time of its making is against declarant's pecuniary or proprietary interest, the rationale being the assumption that persons do not make statements which are damaging to themselves unless satisfied that the statements are true). It is not at all unlikely Jones' testimony was motivated by trying to find some explanation for continuing a pursuit, which he initiated entirely on his own accord, well beyond his limited "jurisdiction" (*i.e.*, the Wal-Mart parking lot), despite knowing that he was not allowed to leave and never should have left the parking lot. Jones' testimony in regard to these alleged communications, which serves as support in the majority opinion for the finding that there is some evidence of Wal-Mart's negligence, is inherently incredible and should be discounted.

3. The Court's majority opinion misapprehends or overlooks the fact that, while evidence of a company's deviation from its own internal policies is relevant to

show the company deviated from the standard of care, Wal-Mart did not employ and had no authority over Jones. Wal-Mart further had no duty or responsibility to supervise him. Jones was to act independently and in accordance with USSA's guidelines. Accordingly, while Jones' violation of those rules that were applicable to him could constitute evidence of *his* negligence, Jones was not subject to Wal-Mart's policies and was not supposed to engage in any loss prevention activities. His violation of Wal-Mart's internal policies cannot therefore be probative of Wal-Mart's negligence. Wal-Mart's liability has to rise and fall on the acts of its own employees in following Wal-Mart's policies and procedures.

In examining the actions taken by Wal-Mart employees, there is no evidence any Wal-Mart employee acted inappropriately in any interaction with Hancock or Beckham, nor did any Wal-Mart employee try to circumvent their rules by procuring Jones to do something they could not. While Beckham was still in the store and it was unclear what she was going to do, Jones claims that he was only told to speak with Beckham for a moment to perhaps delay her. No one asked Jones to physically detain Beckham or to follow her as she left the Wal-Mart store. Yet, after Beckham dropped her stolen merchandise inside and left the store, and before anyone at Wal-Mart was outside or had any idea what was occurring, Jones independently began pursuing Beckham the second she ran, with no instruction or prodding. Wal-Mart had no knowledge of the chase until Hancock, Beckham and Jones were fully engaged with each other in the middle of the parking lot. Hence, Wal-Mart cannot be said to have procured Jones to pursue Beckham and Hancock in violation of Wal-Mart policy.

There is also no prohibition in Wal-Mart's policies in asking that Jones get the license tag number at the moment when Jones was positioned directly behind Hancock and could have done just that. Even Petitioner's experts conceded there was no harm in getting Hancock's license tag number in the parking lot. Gross agreed that recording a license tag number would be explainable and reasonable, (App. p.260, lines 14-23), while Alpert likewise did not take issue with Cox requesting Jones get the tag number. (App. p.277, lines 8-11). It was Jones's actions and methods that Petitioner's experts criticized.

That Wal-Mart acquiesced in Jones leaving the parking lot and proceeding with the pursuit of Beckham and Hancock away from the property is based entirely on Jones' own subjective interpretation of what someone *meant* for him to do when they yelled out to get the tag. The testimony by Wal-Mart employees regarding the intent of that request, however, was clear. They meant for him to get the tag and stop. There was no direction ever given to leave the property or to continue to pursue, nor did they expect Jones would do so given USSA's guidelines which make clear that Jones is to remain on the property. (App. p.324, lines 8-10; p.325, lines 2-9; p.338, lines 4-7; p.342, lines 7-12). Jones likewise admitted he knew he was not supposed to leave the parking lot. Accordingly, there was no evidence of violation by Wal-Mart employees of their policies and procedures.

4. The Court's majority opinion misapprehends or overlooks the fact that, even considering Petitioner's claims that there are grounds to find Wal-Mart independently liable (and not just vicariously liable through Jones), Wal-Mart's conduct could not have had any bearing on Hancock's proportion of fault. The reaction and resulting acts of both Beckham and Hancock were solely, and at all times, responsive to

Jones' acts. They had no interaction with any Wal-Mart employee that spurred them to flee. Before the chase began, Hancock was already waiting in her vehicle, and Beckham had responded to the inquiry by the Wal-Mart door greeter for a receipt by placing the bag of stolen merchandise onto the floor and walking outside, with no one following her. At that point, neither Beckham nor Hancock had any further contact with any Wal-Mart employee.

The examination then must turn to the actions taken by the two participants in the vehicular pursuit—Hancock and Jones. There is no evidence Hancock had any knowledge that Wal-Mart told Jones anything. Wal-Mart also had no interactions with Hancock that prompted her to react in the manner than she did. Hancock responded initially to her sister when she saw Beckham running toward her in the parking lot. She drove toward her sister and then reacted to Jones when she saw that his security truck was in front of her by backing up at a high rate of speed before hitting a concrete median and turning around, all of which occurred before any Wal-Mart employee yelled to Jones to get the tag. After speeding toward the exit and running through a stop sign and red light to get out of the Wal-Mart parking lot, Hancock continued to flee at a high rate of speed for over two miles, narrowly avoiding other collisions until she lost control of her vehicle and failed to negotiate a curve, driving straight off of the roadway, across a yard, and into some trees. Because Wal-Mart's conduct does nothing to explain Hancock's response, it cannot have had any effect on the jury's apportionment of fault to her. The jury considered all of Hancock's actions, as well as the testimony of Jones and all of the involved Wal-Mart employees who testified at trial, before finding that Hancock was 65% at fault in causing the accident. Petitioner should be bound by that determination.

4. The Court's majority opinion misapprehends or overlooks the fact that Petitioner failed to preserve for appellate review the argument that the Court could procedurally grant a new trial as against defendants who received a non-erroneous verdict, favorable to them, which was not otherwise challenged in any respect. While Petitioner has maintained that his arguments fairly encompassed his position that a new trial as to Plaintiff's negligence cause of action should be granted as to all defendants, the majority opinion did not consider that Petitioner failed to set forth that point in crafting the issue on appeal. Having failed to do so, Petitioner's position should not have been considered. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). See also Allen v. Pinnacle Healthcare Systems, LLC, 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2001) (assertions regarding errors in awarding damages and attorney's fees to plaintiff were not included in the sole statement of the issue on appeal and were therefore not preserved for review).

Even if Petitioner had fashioned the issue on appeal so as to clearly assert his request for remand as to all defendants, the Court did not consider Petitioner's failure to set forth case law analyzing the propriety of a retrial for all defendants when some have received a favorable jury verdict that was not found to be in error. Rather, Petitioner only made the conclusory argument that the comparative negligence framework would so require. The cases cited did not, however, address or analyze issues of remand in cases involving multiple defendants who received differing outcomes through the trial process.

As an initial matter, the fact that South Carolina has adopted a comparative negligence model is no guarantee to any litigant that a jury will have the opportunity to

assess liability on the part of every single, potentially culpable defendant, for reasons both within and beyond that litigant's control. Secondly, there are no South Carolina cases that extrapolate from the comparative negligence framework the result that has been mandated here. There is, however, case law in many other jurisdictions addressing precisely this issue in a direct way and holding that the general rule is that the granting of a new trial as to one defendant does not require the plaintiff be granted a new trial with regard to another. See Jack v. Booth, 858 N.W.2d 711 (Iowa 2015) (citing 58 Am. Jur. 2d New Trial § 29, at 102 (2012)). Ultimately, only one such case was cited by Petitioner in his Reply Brief in support of Petitioner's position, after Respondents pointed out Petitioner's failure to have directly addressed the issue. See Williams v. Slade, 431 F.2d 605 (5th Cir. 1970).

In Williams, involving an automobile accident in which an innocent passenger sued both the driver of the vehicle in which she was a passenger and the driver of the other involved vehicle, the trial judge directed a verdict in favor of one driver, while the jury, left with an all or nothing decision, returned a verdict in favor of the other driver. The Fifth Circuit reversed and ordered a new trial as to both defendants because the court reasoned that *someone* had to be liable to the innocent plaintiff passenger. There was no evidence suggesting an unavoidable accident. Accordingly, a proper trial could only be held where the jury had the choice of holding liable one or the other of the drivers, or both.

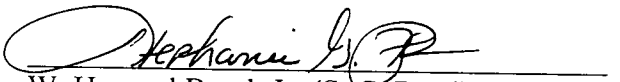
Here, there is no basis for saying that one or all of the defendants *must* inevitably be liable to Plaintiff. Rather, this case involved significant issues as to comparative fault on the part of Hancock in acting as the get-away driver, driving recklessly, and losing

control of her vehicle, resulting in her single-vehicle accident and death. If Jones is found not to be at fault in causing the accident, which occurred over two miles away from the Wal-Mart property, and with no involvement by any Wal-Mart employee, how is there any conceivable way that Wal-Mart could be liable for the same accident? In this case, following a six-day trial in which the jury had the benefit of Jones' testimony, as well as that of all involved Wal-Mart employees,[3] the jury determined Hancock was most at fault in the accident in which Jones and Hancock were the direct participants. That verdict should stand.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request this Court grant this Petition, permit rehearing, withdraw its prior decision, and enter a new opinion upholding and affirming the decisions rendered by the trial court, as affirmed by the Court of Appeals.

Respectfully submitted,



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[3] Wal-Mart was only absent from one day of trial before the jury rendered its verdict.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 13th day of April, 2016, a copy of Respondents' Petition for Rehearing was served by placing a copy of the Petition in an envelope with sufficient postage prepaid, and mailing it to counsel for Petitioner as follows:

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