STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS C.A. NO.: 07-CP-29-0593
Travis A. Roddey, Individually and as the Personal Representative of the Estate of Alice Monique Beckham Hancock, deceased, Plaintiff, v. Wal-Mart Stores East, LP, U.S. Security Associates, Inc., and Derrick L. Jones, Defendants.	)	**ORDER BARRING EVIDENCE OF PLAINTIFF'S NEGLIGENT HIRING CAUSE OF ACTION ON GROUNDS OF OF RES JUDICATA**

THIS MATTER CAME BEFORE THE COURT on Defendants' motion *in limine* to bar evidence pertaining to Plaintiff's cause of action for negligent hiring, training, supervision and/or entrustment (collectively referred to as the "negligent hiring" cause of action) on the grounds it is res judicata. Appearing at the hearing were S. Randall Hood and Whitney B. Harrison on behalf of the Plaintiff, and W. Howard Boyd, Jr. and Stephanie G. Flynn on behalf of the Defendants. For the reasons set forth below, Defendants' motion to bar evidence of Plaintiff's negligent hiring cause of action is GRANTED.

PROCEDURAL HISTORY

Plaintiff, Travis L. Roddey, as Personal Representative of the Estate of Alice Monique Beckham Hancock ("Hancock" or "Decedent"), initiated this wrongful death and survival action against Defendants arising out of a single-car accident that occurred on June 20, 2006, in Lancaster County, South Carolina. The accident occurred after Decedent's sister, Donna Beckham, shoplifted items in the Lancaster Wal-Mart store and the women fled from the store in

Hancock's vehicle. Approximately two miles from the store, Hancock lost control of her vehicle, left the roadway, and collided into a tree, resulting in her death.

Defendant Derrick Jones, a security officer employed by U.S. Security Associates ("USSA"), followed the women for some distance off of the Wal-Mart property in his USSA truck. Plaintiff has admitted Jones was not an employee of Wal-Mart. USSA officers were independent contractors, and Wal-Mart had no role in the hiring, training, and supervision of Jones, nor ownership interest in the USSA truck. USSA security officers were tasked only with serving as a source of information to Wal-Mart regarding activity in the parking lot, recording useful information, and assisting if requested by Wal-Mart.

The trial of this case commenced in the Lancaster County Court of Common Pleas on April 6, 2010, before the Honorable Brooks P. Goldsmith. At the conclusion of Plaintiff's case, Wal-Mart moved for a directed verdict on the grounds that (1) there was no negligence on the part of Wal-Mart, (2) no evidence that any negligent acts or omissions on the part of Wal-Mart were a proximate cause of the accident, and (3) even if any negligence on the part of Wal-Mart was a proximate cause of the accident, the only reasonable inference to be drawn from the evidence was that Hancock's own negligence and recklessness was a greater than 50% cause of the accident. The only acts of alleged negligence on the part of Wal-Mart addressed at the directed verdict stage were those of Wal-Mart's employees in requesting Jones's assistance (by allegedly asking Jones to delay and/or speak to Beckham as she left the store and obtain Hancock's license tag number) and failing to tell Jones to stop pursuing Hancock when they saw what was occurring. Plaintiff made no claim Wal-Mart had liability for negligent hiring, training, supervision and/or entrustment, did not contest that Jones was not an employee of Wal-Mart, and set forth no other grounds in opposition to Wal-Mart's dismissal from the case. The trial court

granted Wal-Mart's motion for directed verdict, holding (1) there was no evidence of negligence on the part of Wal-Mart and (2) alternatively, even if Wal-Mart was negligent, there was no evidence such negligence was a proximate cause of the accident. Oral requests and a written motion for reconsideration were restricted to evidence establishing the elements of breach of duty and proximate causation against Wal-Mart and no elements of Plaintiff's other cause of action for negligent hiring, supervision, training and/or entrustment. The only other motion presented at the directed verdict stage was USSA's motion for a directed verdict on the negligent hiring cause of action, which was denied. The trial continued against USSA and Jones.

At the conclusion of trial on April 13, 2010, the case was submitted to the jury. On Plaintiff's negligence claim, the jury found Hancock was 65% negligent and Jones/USSA were 35% negligent in causing the accident. On Plaintiff's negligent hiring cause of action against USSA, the jury found USSA was negligent in hiring Jones, but such negligence was not a proximate cause of the accident.

Following the verdict, Plaintiff filed a Motion to Alter or Amend the Judgment and for a New Trial based, in part, on the trial court's alleged error in directing a verdict in favor of Wal-Mart. Plaintiff alleged no error with regard to the jury's verdict in favor of USSA on negligent hiring. As to Wal-Mart, Plaintiff's argument was restricted to breach of duty and proximate causation, elements establishing negligence. Plaintiff contended the error required a new trial "as to all of the defendants" because "[a] comparative negligence charge asks the jury to compare the negligence of the plaintiff against the negligence of all of the parties on the other side of the lawsuit." Comparative fault, however, is only an issue with respect to the negligence action since there was no apportionment of fault on the negligent hiring claim.

Plaintiff's post-trial motions were denied, and Plaintiff subsequently filed a Notice of Appeal. In Appellant's Initial Brief to the South Carolina Court of Appeals, Appellant framed the only issue on appeal as "[w]hether the trial court erred when it granted a directed verdict in this negligence action in favor of Wal-Mart." Plaintiff did not appeal the jury's verdict in favor of USSA on the negligent/supervision hiring claim. Plaintiff's arguments were limited to Wal-Mart's alleged acts establishing the elements of his negligence cause of action—breach of duty and proximate causation. Plaintiff reasoned a new trial was required as to "all Defendants" because the law of comparative negligence, a defense raised to Plaintiff's negligence cause of action, requires the jury to compare the negligence of Plaintiff against the combined negligence of all Defendants.

The Court of Appeals affirmed the directed verdict for Wal-Mart in a split decision (1-1-1). The Court, in three separate opinions, only addressed evidence of Wal-Mart's negligence, foreseeability and Hancock's comparative negligence. Justice Few found there was evidence of negligence and the events were foreseeable to Wal-Mart, but voted to affirm because he believed Hancock was more than 50% at fault. Justice Short voted to affirm because he believed there was a lack of proximate causation. Justice Huff dissented and would have reversed the directed verdict in favor of Wal-Mart and remanded for a new trial against Wal-Mart alone. While Justice Huff acknowledged Plaintiff requested a new trial as to all Defendants, he found Plaintiff waived that argument by not including it in the statement of issues on appeal, stating that "[t]hough [Plaintiff] cites law concerning the effect of a jury finding of comparative negligence on a plaintiff's ultimate ability to collect damages, he provides no supporting authority for his assertion that a court may require a new trial against defendants against whom a verdict has

already been found and who are not then held responsible for damages based upon the jury's finding as to the relative percentages of negligence assigned to the various parties."

Plaintiff's Petition for Rehearing was denied, and Plaintiff filed a Petition for a Writ of Certiorari to the Supreme Court. In the opinion issued by the Supreme Court, Acting Justice Toal stated at the outset, "[Plaintiff] appeals the court of appeals' decision affirming the trial court's grant of Wal-Mart's motion for a directed verdict on [Plaintiff's] negligence claim." The Supreme Court analyzed Wal-Mart's breach of its duty of care, proximate cause, and apportionment of fault under the comparative negligence framework. The Court ultimately ruled the trial court should have submitted to the jury the issues of Wal-Mart's negligence and proximate cause, and remanded the negligence cause of action for a new trial as to all defendants. The Court rationalized that the jury could find the collective fault of the defendants was over fifty percent and that Hancock was less than fifty percent. The Supreme Court did not order that the retrial revived any cause of action not before it on appeal and did not address or mention the negligent hiring action.

This matter is now before this Court for a retrial of the case. In connection with the retrial, Plaintiff has notified Defendants of his intent to seek the introduction of evidence supporting Plaintiff's former cause of action for negligent hiring, training, supervision and entrustment against USSA. Defendants oppose the admission of any evidence regarding Plaintiff's former negligent hiring cause of action on the grounds that the cause of action was previously determined by a jury, was not appealed and is barred by operation of law under principles of res judicata. This Court makes the following findings and conclusions.

FINDINGS AND CONCLUSIONS

Causes of action for negligence and for "negligent hiring, training and supervision" are "separate and distinct requiring different kinds and quantities of proof." See Longshore v. Saber Sec. Servs., 365 S.C. 554, 563 (Ct. App. 2005) (emphasis added). Negligence cases turn on proof of duty, breach, causation and damages, while negligent hiring cases turn on knowledge of the employer and foreseeability of harm to third parties, which is analyzed by examination of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused. See Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005). Negligent supervision cases impose a duty on an employer, under certain circumstances, to exercise reasonable care to control an employee acting outside the scope of his employment and likewise require knowledge of the employer and foreseeability of harm to third parties in establishing the employer knows or should know of the necessity and opportunity for exercising control. See Lemon v. Sheriff of Sumter County, F.Supp.2d, 2012 U.S. Dist. LEXIS 22196 (D.S.C. Feb. 22, 2012); see also Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) (an employer may be liable for negligent supervision if the employee intentionally harms another when: (1) the employee is present on the premises of the employer or is using a chattel of the employer and (2) the employer knows or has reason to know he has the ability to control his employee and knows or should know of the necessity and opportunity for exercising control). Accordingly, in the Longshore case, it was error for the trial court to have applied a jury's apportionment of fault in the negligence action to an award of actual damages in the negligent hiring, training and supervision action. See Longshore, 365 S.C. at 562-63.

Plaintiff's two causes of action in this case were not only subject to separate proofs, but were also treated separately on the verdict form submitted to the jury at trial. On appeal,

however, Plaintiff only challenged the directed verdict in favor of Wal-Mart, which was limited to issues of Wal-Mart's breach of duty and proximate causation, elements establishing negligence. While Plaintiff contended a reversal of the directed verdict would require a new trial as to all defendants so that the jury had the opportunity to apportion fault between Plaintiff and all Defendants in the negligence action, Plaintiff did not appeal the jury's verdict rendered separately on Plaintiff's negligent hiring, training, supervision and entrustment cause of action against USSA. Nor does the rationale offered for remand of the negligence action as to all Defendants—so that the jury could apportion fault under the comparative negligence framework as between Plaintiff and all Defendants—apply to the cause of action for negligent hiring/supervision, where the jury was not asked to apportion fault between the Plaintiff and any party as to that cause of action.

An appellate court can only speak to the issue(s) before it on appeal. See Austin v. Specialty Transp. Servs., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004) (a portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case); State v. Bray, 342 S.C.23, 535 S.E.2d 636 (2000) (it is error for an appellate court to consider issues not raised to it); Hendrix v Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (an issue not preserved for review should not be addressed by an appellate court). Accordingly, if Plaintiff believed the directed verdict in favor of Wal-Mart on Plaintiff's negligence cause of action infected the entire jury's verdict not only on Plaintiff's negligence cause of action, but also on the separately plead negligent hiring/supervision cause of action, Plaintiff should have appealed the jury's verdict rendered on the negligent hiring/supervision claim in addition to Wal-Mart's directed verdict for negligence. However, because Plaintiff did not appeal the jury verdict on Plaintiff's cause of action for

negligent hiring, training, supervision and/or entrustment, it was never before the appellate courts and is res judicata. Holding otherwise would require this Court to unduly conflate the two separate causes of action in order to revive the negligent hiring/supervision cause of action.

"Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." James F. Flanagan, South Carolina Civil Procedure 642 (2d ed. 1996). The doctrine of res judicata "had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated. See Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). There is no question but that the elements of res judicata have been met. Plaintiff's separate cause of action for negligent hiring, training, supervision and/or entrustment as to USSA was already tried to a jury verdict in this case.

For the foregoing reasons, the Court hereby grants Defendants Motion *in limine* to bar evidence pertaining to Plaintiff's cause of action for negligent hiring, training, supervision and/or entrustment on grounds of res judicata, and Orders that the trial of this case will proceed against all Defendants on Plaintiff's cause of action for negligence.

AND IT IS SO ORDERED.

November 2, 2016

G. Thomas Cooper, Jr.
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LANCASTER	)	C.A. NO.: 07-CP-29-0593
Travis A. Roddey, Individually and as the Personal Representative of the Estate of Alice Monique Beckham Hancock, deceased,	)	
Plaintiff,	)	**ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER**
v.	)	
Wal-Mart Stores East, LP, U.S. Security Associates, Inc., and Derrick L. Jones,	)	
Defendants.	)	

This matter comes before the Court by way of Plaintiffs' Motion to Alter and/or Amend the Judgment pursuant to Rule 59(e), SCRCP dated November 5, 2016. Specifically, Plaintiffs ask this Court to reconsider its Order Barring Evidence of Plaintiff's Negligent Hiring Cause of Action on Grounds of Res Judicata that was dated November 2, 2016, and filed November 4, 2016.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. This reconsideration applies not only to Plaintiff's Negligent Hiring, Training, Supervision and/or Entrustment cause of action, but also to any evidence offered to support that cause of action as set forth in this Court's Order dated November 2, 2016.

Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRCP, to reconsider this Court's November 2, 2016, Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Camden, South Carolina
November 7, 2016

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

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	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	C.A. NO.: 07-CP-29-0593
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IT IS SO ORDERED.

Camden, South Carolina
November 7, 2016

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit