SUPREME COURT OF FLORIDA

WAL-MART STORES, INC.,
a foreign corporation,

Petitioner,

vs.

SANDRA COKER, as personal representative of THE ESTATE OF BILLY WAYNE COKER,

Respondent.

CASE NO. 90,916

DISTRICT COURT OF APPEAL
FIRST DISTRICT,
NO. 96-02416

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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SUPPLEMENTAL ARGUMENT

I. MERRILL CROSSINGS

A.

In Merrill Crossinas Associates v. McDonald, 22 Fla. L. Weekly S739 (Fla. December 4, 1997), defendants negligently failed to furnish adequate parking lot security, resulting in a foreseeable criminal attack upon a Wal-Mart customer in its parking lot, In the case at bar, Wal-Mart negligently sold pistol ammunition to underage customers in violation of federal law, resulting in the foreseeable commission of an armed robbery of an auto-parts store and shooting of the store clerk. In comparing these factual settings, Wal-Mart's supplemental argument attempts to distinguish the present case from Merrill Crossinas by focusing on the conduct of the negligent party defendants. Wal-Mart's argument in this respect, however, is flawed fundamentally because, as the following discussion will demonstrate, the correct analysis in determining under Merrill Crossings whether the comparative fault statute applies to intentional tort cases requires examination of the conduct of the intentional tortfeasors who caused the injury or death, not the conduct of the negligent party defendants.

Section 768.81(4)(b), Florida Statutes, excludes "any action based upon intentional tort" from the comparative fault scheme detailed by section 768.81, Florida Statutes. To interpret the phrase "any action based upon intentional tort," this court in

Merrill crossings looked to section 768.81(4)(a), Florida Statutes, which states in pertinent part: 'In determining whether a case falls within the term 'negligence cases,' [such that comparative fault would be required] the court shall look to the substance of the action and not the conclusory terms used by the parties." Merrill Crossincrs, 22 Fla. L. Weekly at S740 (emphasis supplied). To ascertain the meaning of the phrase "substance of the action," the court adopted the following analysis from Slawson v. Fast Food Entersrises, 671 So. 2d 255 (Fla. 4th DCA), rev. dismissed, 679 So. 2d 773 (Fla. 1996):

> 'Hence, looking 'to the substance of the action and not the conclusory terms used by the parties,' we conclude that the substance of this action was an intentional tort, not merely negligence. In limiting apportionment to negligence cases, the legislature expressly excluded actions 'based upon an intentional tort.' [e.s.] The drafters did not say ***including*** an intentional tort; or ***alleging*** an intentional tort; or ***against parties charged with*** an intentional tort. The words chosen, 'based upon an intentional tort,' imply to us the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort. In other words, the issue is whether an action comprehending ***one*** or more negligent torts actually has as its core an intentional tort by someone."

Merrill Crossings, 22 Fla. L. Weekly S741 (quoting Slawson, 671 So. 2d at 258) (italics the court's; underlining supplied). Following the above-quoted analysis, this court in Merrill Crossinas concluded

> The substance of the action here is that McDonald was the victim of an intentional tort; we are not faced with the kind of true negligence action we examined in Fabre.

Merrill Crossincts, 22 Fla. L. Weekly at S741.

The foregoing discussion clearly indicates that the conduct which caused the plaintiff's injury or death, rather than the conduct alleged against the party defendant, controls the question whether the "substance of the action" presents a "negligence case" covered by the comparative fault statute or an "intentional tort" governed by joint and several liability. In this respect, the instant case is indistinguishable from Merrill Crossings and Stellas v. Alamo Rent-A-Car, Inc., 702 So. 2d 232 (Fla. 1997). In Merrill Crossings, an unknown intentional tortfeasor shot and injured plaintiff in Wal-Mart's parking lot. In Stellas, plaintiff was injured when a man smashed the passenger window of her rental car and took her purse. In the instant case, the non-party intentional tortfeasors shot and killed plaintiff's decedent at an auto-parts store after unlawfully purchasing pistol ammunition from Wal-Mart. Although the allegations of negligence made against the party defendants in these cases vary with the particular facts, the injuries or deaths all occurred by commission of intentional torts by non-party wrongdoers whose actions were reasonably foreseeable to the party defendants, Thus, all three causes of action were 'founded or constructed on an intentional tort." Slawson, 671 So. 2d at 258. In other words, using the Slawson terminology, all three

causes of action had as their "core" intentional torts committed by someone.

Based on the foregoing analysis, the present case is controlled by Merrill Crossings and Stellas.

B.

Without offering any factual, legal or policy justification, Wal-Mart contends that Merrill Crossincrs represents "a single exception" to Fabre[1] limited to "negligent security" cases. Supplemental Brief of Petitioner on the Merits at 7. Wal-Mart's contention in this regard is unquestionably refuted by this court's decision in Stellas. In that case, the Stellas family rented a car from Alamo Rent-A-Car in Orlando to be returned in Miami. On the way to Miami, the Stellases' daughter took a wrong turn off the expressway into a high crime neighborhood where she was assaulted while her car was stopped. The Stellases sued Alamo based on negligent failure to warn, claiming that Alamo should have known of the dangers of driving into certain areas of Miami with a bumper sticker identifying the car as a rental and should have warned the Stellas family accordingly. At trial, the intentional tortfeasor's name was placed on the verdict form over plaintiffs' objection. The third district affirmed. This court, following Merrill Crossinas and Slawson, quashed the district court decision and held it was error to permit the name of the intentional tortfeasor to be placed on the verdict form.

[1] Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

Stellas clearly is not a so-called "negligent security" case. Therefore, Wal-Mart's contention that Merrill Crossinss represents a limited exception to Fabre reserved exclusively for negligent security cases lacks merit.

C.

Wal-Mart also suggests in its supplemental brief that Merrill Crossings is distinguishable on the basis that the shooting in Merrill Crossinas occurred on Wal-Mart's premises, while, in the instant case, the shooting took place away from Wal-Mart's premises. Supplemental Brief of Petitioner on the Merits at 7. In response, the district court in the first appeal of this case held that Wal-Mart owed a duty of care to Coker's decedent, even though the shooting took place away from Wal-Mart's premises, and whether the shooting was a foreseeable consequence of Wal-Mart's negligent sale of ammunition was a question of fact for the jury. See Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774 (Fla. 1st DCA 1994) (Coker I), rev. denied, 651 So. 2d 1197 (Fla. 1995). This holding is entirely consistent with the principle that, although a party generally is not responsible for injuries which occur away from its premises, liability can be imposed for off-premises injuries when such injuries are foreseeable. See Holiday Inns, Inc. v. Shelburne, 576 So. 2d 322 (Fla. 4th DCA), dismissed, 589 So. 2d 291 (Fla. 1991). Indeed, in Stellas, the intentional tort which caused injury to plaintiff occurred away from the defendant's rental car

establishment as the car was rented in Orlando and the assault occurred on a public highway in Miami. Therefore, the situs of the injury, whether on or off defendant's premises, is not a factor in determining whether the comparative fault statute applies.

The fact that Coker's decedent was not a Wal-Mart customer also is not a basis for distinguishing the present case from Merrill Crossinas. The Coker I court held that the federal statute violated by Wal-Mart created a legal duty on Wal-Mart's part to Coker's decedent even though Coker's decedent was not a Wal-Mart customer. Coker, 642 So. 2d at 642. That ruling is the law of this case which Wal-Mart acknowledged in its principal brief. Brief of Petitioner on the Merits at 42.

D.

Wal-Mart offers no realistic public policy justification for excluding the present fact situation from the Merrill Crossinss holding. To the contrary, the decision of the district court below holding that the intentional tortfeasors should not have been placed on the verdict form rests on a sound foundation of public policy which strongly supports imposition of liability against Wal-Mart for the full amount of the damages awarded.

In Merrill Crossings, this court articulated the public policy considerations which apply to apportionment of fault when a party's negligence results in foreseeable criminal conduct:

> We also agree with the district court that the language [contained in section 768.81

> (4)(b)] excluding actions "based on an intentional tort" from the statute gives effect to a public nolicv that negligent tortfeasors such as in the instant case should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence.

Merrill Crossings, 22 Fla. L. Weekly at S740 (emphasis supplied). As the following discussion will demonstrate, the public policy considerations underlying the present case are even more compelling.

Wal-Mart sold ammunition to the intentional tortfeasors in this case in direct violation of a federal criminal statute, 18 U.S.C. § 922(b)(1), a provision of the Gun Control Act which prohibits the sale of pistol ammunition to persons under the age of twenty-one. As noted by the district court on the first appeal, § 922(b)(1) was enacted 'to prevent those deemed too dangerous or irresponsible due to age, criminal background, or incompetency from obtaining firearms and ammunition." Coker, 642 So. 2d at 777. As the court explained, "[t]o accomplish that purpose, Congress chose to control the initial dissemination of firearms and ammunition, and not simply to prohibit the subsequent possession of them." Id.

The Coker I district court analysis is consistent with the strong public policy considerations supporting the federal Gun Control Act as explained by the United States Supreme Court in Huddleston v. United States, 415 U.S. 814 (1974):

> Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

Id. at 824 (citations omitted). To underscore the point, the Huddleston court cited testimony from James V. Bennett, then Director of the Federal Bureau of Prisons, during the Senate hearings on the Gun Control Act. Bennett offered the following illustrative case study which is not unlike the unfortunate facts of the present case:

> 'On September 26, 1958, a 20-year-old youth shot and seriously wounded a teller during the course of a bank robbery in St. Paul; only a week previously he had bought the revolver, a .357 Smith & Wesson, in a Minneapolis sporting goods store, pawned it the same day, and on the day of the robbery redeemed it with money obtained from a check forgeries."

Id. at 826 n.7. Bennett concluded his testimony with the following observation: "'No responsible and thoughtful citizen can, in my opinion, seriously object to measures which would discourage youngsters, the mentally ill, and criminals from coming into possession of handguns.'" Id.

The strong public policy concerns supporting federal gun control legislation also were addressed by the third district in K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 487 (Fla. 1984),

where the retailer sold a rifle to a drug user charged under a felony information in violation of the Gun Control Act, resulting in the subsequent shooting of a police officer. Echoing the sentiment expressed by the United States Supreme Court in Huddleston, the third district concluded:

> From these statements of legislative intent, it seems clear that the 'risk of harm" Congress meant to prevent was just the 'type" of conduct which occurred in this case. The injury took place as a direct result of K-Mart's selling a 'lethal weapon" to one whom Congress has determined to be incompetent to buy it just because of the dangers to "us all," including William Keller, by the likelihood of its being misused,
>
> Since the irresponsibility and unpredictability of the recipient was the very reason that Congress forbade such transfer of the firearm, it can make no difference that the danger was actually realized, as it almost invariably must be, in what would in other contexts be deemed an unanticipatable manner.

Keller, 439 So. 2d at 286-87.

Consistent with the Keller rationale, this court in Merrill Crossings stated "it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against." Merrill Crossings, 22 Fla. L. Weekly at S740. In this case, under facts more egregious than those in Merrill Crossings, Wal-Mart violated a federal criminal statute which was enacted for the express

purpose of preventing the very harm which tragically occurred when it sold pistol ammunition to two minors near closing time on a Saturday night. Paraphrasing the statement from Merrill Crossings quoted immediately above, it would be irrational in this case to allow Wal-Mart, who negligently sold pistol ammunition to underage customers in violation of federal law, to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the federal statute was supposed to protect against.

II. NEW TRIAL ON DAMAGES

Alternatively, Wal-Mart argues that in the event the district court's decision is approved based on Merrill Crossings, it should receive, nonetheless, a new trial on damages because the jury, according to Wal-Mart's argument, understood from instructions given by the trial court and argument delivered by Coker's counsel that Wal-Mart would be required to pay only its proportionate share of the damage award and returned its verdict accordingly. Not surprisingly, Wal-Mart does not cite any authority for this contention.

In accordance with Florida Standard Jury Instructions 6.1(c), the jury was instructed to determine "the total amount of damages sustained" by Coker's survivors and was cautioned not to reduce the total damage award on account of any fault attributable to the non-party tortfeasors. (T-V 704). The jury also was informed by the trial court's instructions that upon

entry of judgment the court would reduce the total damages by the percentage of fault attributable to defendant and the non-party tortfeasors. Id.

Based on these instructions and counsel's argument to the jury, Wal-Mart reasons that "[t]he jury in the present case determined that Wal-Mart should only be liable for approximately $760,000 in damages." Supplemental Brief of Petitioner on the Merits at 11. Wal-Mart argues further that a new trial is required to enable the jury "to assess the real damages caused by Wal-Mart alone." Id.

Wal-Mart's argument is completely unfounded. First, Wal-Mart's arithmetic is incorrect. The jury determined that Wal-Mart was 35% at fault and awarded damages totaling $2.17 million divided among decedent's widow and two surviving children. (R-VI 843-47). Although 35% of $2.17 million is approximately $760,000, Wal-Mart overlooks the fact that only non-economic damages are reduced by the percentage of fault attributable to others as to any party whose fault equals or exceeds that of the claimant. See § 768.81(3), Fla. Stat. (1991). Thus, Wal-Mart was responsible for 100% of Coker's economic damages based on the doctrine of joint and several liability. Id. For that reason, the trial court entered judgment against Wal-Mart for $996,275, not $760,000. (R-VIII 1120).

Second, Wal-Mart's argument assumes that the same jury which determined that "total damages" were $2.17 million with Wal-Mart

35% at fault would have determined, based on the same evidence, that 'total damages" were only $760,000 if Wal-Mart was determined to be 100% at fault. Wal-Mart's argument in this respect is simply illogical and incorrectly presumes that the jury would have ignored the trial court's instructions to award 'total damages" without reducing its award because of the responsibility attributable to others. This is a presumption that cannot be made. See Nordin v. Gregory, 566 So. 2d 60, 61 (Fla. 5th DCA 1990)("Absent clear evidence to the contrary, it must be presumed that the jury correctly followed the court's instructions, applied the law and considered all the elements of damage.") .

This issue is controlled by Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996). In that case, this court held that upon reversal and remand for a new trial incorporating a verdict form listing a non-party tortfeasor who had been erroneously excluded under Fabre, the new trial should not be extended to the issue of damages. Nash, 678 So. 2d at 1263-64. By analogy, reversal in this case, because non-party tortfeasors were erroneously included on the verdict form, likewise does not require a retrial on the issue of damages. See Gonzalez v. Veloso, 702 So. 2d 1366, 1366 (Fla. 3d DCA 1997) (where non-party was erroneously included on the verdict form, court reversed judgment apportioning non-party's negligence with directions to enter judgment for plaintiff and against

defendant 'in the aggregate full amount" on the authority of Nash). See also Martinello v. B & P USA, Inc., 566 So. 2d 761, 764 (Fla. 1990)(in holding that plaintiff was entitled to a new trial under the theory of attractive nuisance rather than general negligence, the court determined that the new trial should be limited to the issue of liability, observing that the theory of negligence upon which the case is tried 'does not change the amount of damages awarded for the same injury").

CONCLUSION

Based on the foregoing, the district court's decision below reversing the judgment and remanding the case to the trial court to enter judgment against Wal-Mart for the full amount of the damages assessed by the jury should be approved.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jeffrey P. Gill, Esquire, Bridgers & Gill, 121 South Palafox Street, Suite A, Pensacola, Florida 32501, attorney for petitioner, and to Richard A. Sherman, Esquire, Law Offices of Richard A. Sherman, P.A., Suite 302, 1777 South Andrews Avenue, Fort Lauderdale, Florida 33316, attorney for petitioner, by mail this 19th day of March, 1998.

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