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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2016-002248

Travis Roddey, individually and as the Personal Representative of the Estate of Alice Monique Beckham Hancock Deceased .....Appellant,

v.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in ruling *in limine* to exclude evidence to be offered by Appellant for purposes of establishing an independent cause of action for negligent hiring, training, supervision and entrustment, where such cause of action was previously adjudicated, not appealed, and therefore not before the trial court on retrial of the case?

STATEMENT OF THE CASE

This appeal is being taken from an Order issued by the trial court on November 2, 2016, following a pretrial hearing, barring *in limine* certain evidence Appellant seeks to offer during the second trial of this case to establish a cause of action that was previously adjudicated in full during the first trial and never appealed. The first trial of this case, held April 6-13, 2010, encompassed two distinct causes of action for which Appellant sought recovery: (1) negligence and (2) negligent hiring, training, supervision and entrustment. At the conclusion of Appellant's case-in-chief on April 9, 2010, Wal-Mart moved for and was granted a directed verdict on the negligence action on the grounds that there was no breach of duty or proximate causation. Appellant filed a Notice of Motion and Memorandum in Support of Motion to Reconsider, Alter, and Amend Order Granting Directed Verdict to Wal-Mart pursuant to Rule 59(e), which the trial court denied on April 12, 2010. The trial continued to a verdict favorable to the remaining defendants, USSA and Jones, on both causes of action.

In Appellant's April 23, 2010, post-trial Motion to Alter or Amend the Judgment and for a New Trial, Appellant challenged the directed verdict in favor of Wal-Mart on the negligence action, and asserted a new trial needed to include USSA and Jones so that a jury could apportion comparative fault between Decedent and the defendants collectively. The trial court denied Appellant's motion by Order dated June 4, 2010. In a split decision, the Court of Appeals affirmed. This Court then reviewed the Court of Appeal's affirmance of "the trial court's grant of Wal-Mart's motion for a directed verdict on [Appellant's] negligence claim," held the trial court

should have submitted to the jury the issues of "Wal-Mart's negligence and proximate cause," Roddey v. Wal-Mart Stores East, LP, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016), and remanded for a new trial as to all defendants. Respondents filed a Petition for Rehearing on April 13, 2016, which was denied, and the case was remitted to the lower court.

The new trial was scheduled to begin on November 14, 2016. In pretrial meetings, the parties disagreed on the scope of the retrial, specifically whether it was limited to Appellant's negligence cause of action, or also included the cause of action for negligent hiring, training, supervision and entrustment. On grounds that Appellant's latter cause of action was previously adjudicated in full and not appealed with the negligence action, Respondents filed a motion to limit the evidence to be offered during retrial to Appellant's cause of action for negligence, which Appellant opposed. In an Order issued November 2, 2016, the trial court agreed with Respondents' position that the unappealed, prior adjudication of the negligent hiring action was now the law of the case and *res judicata* between the parties; therefore, evidence to be offered to establish a cause of action for negligent hiring, training, supervision and entrustment should be excluded *in limine*, and the trial was ordered to proceed against all defendants on Appellant's negligence cause of action. Appellant filed a Motion to Alter or Amend and for Reconsideration on November 5, 2016, which was denied by Order of November 7, 2016. Appellant also filed a Motion to Stay the trial of the case pending an appeal of the trial court's ruling, which was also denied by Order of November 7, 2016. Appellant immediately filed a Notice of Appeal and Petition for a Writ of Supersedeas to stay the trial scheduled to start the following week. Respondents filed a Response to Appellant's Petition for Writ of Supersedeas, together with a

Motion to Dismiss the Appeal.[1] The Court of Appeals granted Appellant's Petition for a Writ of Supersedeas to stay further proceedings in the trial court. Appellant then filed a Motion for Certification of the appeal for review by the Supreme Court, which was granted.

STATEMENT OF FACTS

The Appellant, Travis L. Roddey, Individually and as Personal Representative of the Estate of Alice Monique Beckham Hancock (sometimes referred to hereinafter as "Hancock" or "Decedent"), initiated this wrongful death and survival action against the defendants after a single-car accident that occurred on June 20, 2006, in Lancaster County, South Carolina. The accident occurred after the Decedent's sister, Donna Beckham, shoplifted items in the Lancaster Wal-Mart store, and the women fled in Hancock's vehicle. Approximately two miles from the store, Hancock lost control of her vehicle, leaving the roadway to her left, driving through a grassy area and colliding head-on into a tree.

On the evening of the incident, defendant Derrick Jones was working for USSA as a security guard, having only been hired by USSA[2] approximately 30 days earlier and assigned by USSA to work at the Lancaster Wal-Mart. Wal-Mart handled all of its own loss prevention activities, but contracted with USSA, a private security contractor, to provide a uniformed security guard and USSA truck to patrol the Wal-Mart parking lot strictly as a deterrent to unlawful activity. (See Security Services Master Agreement, R. pp. 148-163, and Guidelines for Private Security Contractors, R. pp. 165-167). USSA Security guards were not agents or employees of Wal-Mart, and Wal-Mart had no role in hiring, training and supervising Jones, nor

[1] While Respondents opposed Appellant's Petition for a Writ of Supersedeas and moved to dismiss this appeal on grounds that the trial court's ruling is plainly interlocutory and not immediately appealable, Respondents do not oppose appellate disposition of this issue for purposes of judicial economy and to potentially avoid a future appeal.

[2] At trial, USSA admitted negligence in the hiring of Jones based on many factors, including the failure to have discovered that Jones had pending criminal charges at the time of his application (all of which were later dismissed with the exception of simple possession of marijuana); multiple violations on his driver's license; and a positive drug screen for THC that was erroneously interpreted to be negative. (R. p. 580, lines 10-18; R. p. 583, lines 9-11; R. p. 584, line 2 - p. 585, line 19; R. p. 586, lines 16-21; R. p. 587, lines 16-19).

any ownership interest in the USSA security truck. (See id.; see also Br. of Appellant to the Ct. of Appeals, R. p. 301 ("Jones was not a Wal-Mart employee....")). Wal-Mart had no contact with Jones until he showed up to begin his first shift as a USSA security guard to patrol the Wal-Mart parking lot. In that role, USSA security guards were quite limited in their duties, tasked only with serving as a source of information to Wal-Mart regarding activity in the parking lot, recording useful information, and assisting upon request. (Br. of Appellant to the Ct. of Appeals, R. p. 300).

After Hope Rollings, a Wal-Mart customer service manager, witnessed Beckham concealing merchandise in Wal-Mart bags at an unmanned register, she alerted other employees, both by walkie-talkie and in person, that a shoplifter was preparing to exit the store. Jones, who was also in possession of a walkie-talkie, asked if he should do anything and claims to have been told to "kind of like delay" Beckham. (R. p. 179, Dep. Tr., p. 35, line 23 - p. 36, line 4). After Beckham walked outside, she encountered Jones, who had stopped in his truck near the exit. After a very brief exchange, Beckham began running through the parking lot toward Decedent's waiting vehicle. (R. p. 203, Dep. Tr. p. 132, lines 2 - 7; R. p. 204, Dep. Tr. p. 134, lines 11-17; R. p. 222, Dep. Tr. p. 206, lines 10-15). The Decedent put her car in gear and drove toward Beckham to close the gap. Beckham jumped into the back seat on the driver's side of the vehicle as it continued to move, (R. p. 545, lines 20-25; R. p. 547, lines 11-15; R. p. 549, lines 16-25), and the Decedent immediately put her car into reverse to avoid Jones, who was driving toward her. After the Decedent was able to turn her car around to drive toward the exit with Jones behind her, a Wal-Mart employee, who had just walked outside and saw what was occurring, yelled out to Jones to get the tag. (R. p. 560, line 9 - p. 561, line 3; R. p. 559, line 19).[3] Hancock

[3] Jones claims he heard someone saying to get the tag multiple times, while Wal-Mart employees have testified that the request was only yelled out once.

and Jones left the parking lot and turned onto Highway 9 By-Pass. Although the testimony pertaining to the routes taken by the parties after the encounter in the parking lot differs, Hancock ultimately lost control of her vehicle about two miles from Wal-Mart, leaving the roadway, and colliding into a tree. Jones was not involved in the accident, and there was no evidence of contact between the vehicles.

There were two distinct causes of action on which Appellant sought recovery in the Second Amended Complaint. (R. pp. 119-129). First, Appellant alleged the accident was caused by the negligence of Jones in pursuing Hancock, for which negligence USSA and Wal-Mart were alleged to be vicariously liable. Second, Appellant contended USSA and Wal-Mart were liable for the negligent hiring, training, supervision and entrustment of a vehicle to Jones (sometimes referred to herein collectively as the "negligent hiring" cause(s) of action). Appellant asserted he was entitled to recover under the causes of action for both wrongful death and survival.

The first 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 on Friday, April 9, 2010, oral argument on motions for directed verdict was deferred until the end of the day for efficiency purposes and to minimize the jury's down time. In the interim, the defense case proceeded with testimony from all witnesses being called on behalf of Wal-Mart.[4] After that testimony was completed and the jury was dismissed, Wal-Mart moved for a directed verdict in the negligence action, arguing (1) there was no negligence on the part of Wal-Mart, (2) no evidence 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

[4] At trial, Respondents were all represented by the same counsel, as USSA had agreed to defend and indemnify Wal-Mart from any liability based on its contractual obligations to Wal-Mart under the Master Security Services Agreement.

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. (R. p. 564, lines 5-10; R. p. 569, lines 1-12). While there was fairly extensive evidence presented at trial against USSA on the negligent hiring, training and supervision of Jones[5], no evidence supporting the elements of such cause(s) of action was offered against Wal-Mart during the trial. The only acts of alleged negligence by Wal-Mart addressed at the directed verdict stage were those of Wal-Mart's employees in involving Jones in the situation, asking Jones to obtain Hancock's license tag number and failing to try to tell Jones to stop his pursuit. (R. p. 563, line 2 - p. 564, line 5; R. p. 564, line 23 - p. 568, line 25; R. p. 569, line 12 - p. 573, line 14). Appellant never disputed Wal-Mart did not employ or have *respondeat superior* liability for Jones (R. p. 563, lines 23-24), never argued there were any grounds establishing liability against Wal-Mart under any cause of action other than negligence through its own employees, and most importantly, never advised the trial court it also needed to rule on Appellant's cause of action against Wal-Mart for negligent hiring, training, supervision or entrustment.

After considering arguments of counsel, the trial court granted Wal-Mart's motion for directed verdict on the negligence action, holding there was no evidence of negligence by Wal-Mart and, alternatively, even if Wal-Mart was negligent, there was no evidence such negligence was a proximate cause of the accident based on lack of reasonable foreseeability. (R. p. 573, lines 15-22). Appellant claims to have sought clarification of the ruling three times, but was stopped (R. p. 573, line 23 - p. 574, line 9), with the unstated, but disingenuous, implication

[5] Such evidence included, but was not limited to whether USSA conducted a thorough background screening of Jones for information pertaining to his criminal history and driving record, whether USSA failed to correctly interpret a pre-employment drug screen, whether USSA questioned discrepancies on Jones's job application and other pre-employment records, whether USSA failed to suspend Jones's employment upon failure to timely receive security guard licensing approval from the state, and whether USSA appropriately trained Jones on the handling of pursuits and requests made by customers (*i.e.*, Wal-Mart) for assistance.

evidently being that Appellant may have raised the trial court's failure to rule on the negligent hiring, supervision and retention claim against Wal-Mart. Appellant was not, however, as he claims, barred by the trial court from seeking clarification of the directed verdict in favor of Wal-Mart. Rather, although Appellant was initially stopped from repeated attempts at continued argument after the court initially ruled, Appellant returned to the issue very soon thereafter, before the trial court adjourned for the day, making an oral motion for reconsideration. (R. p. 576, line 15 - p. 578, line 23). Again, Appellant only addressed his position that there was sufficient evidence of Wal-Mart's breach of duty and proximate causation to submit Wal-Mart's alleged negligence to the jury. (See id.). The trial court advised it would render a decision on the motion for reconsideration when the trial resumed on Monday, April 12th. (R. p. 578, line 23).

Over the intervening weekend, while the matter was still under advisement, Appellant also served a 22-page memorandum in support of Appellant's motion for reconsideration. (R. pp. 249-270). Yet, even though Appellant fully briefed the issue, the memorandum only addressed alleged acts of negligence/breach of duty and proximate causation against Wal-Mart for creating and/or escalating the situation, and failing to make an effort to stop it. (See id.). Appellant never contended any acts on the part of Wal-Mart supported the separate cause of action pled for negligent hiring, training, supervision and/or entrustment, nor did Appellant ask the trial court to rule on such claims. This is despite that the parties had also argued a motion for directed verdict in favor of USSA on that very issue, which the trial court denied. (R. p. 574, line 15 - p. 575, line 25). On the morning of April 12th, the trial court not only acknowledged its review and consideration of Appellant's memorandum, but asked if Appellant was seeking any "additional arguments other than what is in the motion." (R. p. 579, lines 8-11). Appellant affirmed he was relying on the written motion and did not offer further argument, at which point the trial court

denied the motion for reconsideration. (R. p. 579, lines 8-15). In short, Appellant abandoned any negligent hiring, training and supervision claims against Wal-Mart where he submitted no evidence at trial on those claims and did not raise or seek a ruling from the trial court on such claims. Appellant also never later sought to have Wal-Mart put on the verdict form for the jury to consider its liability for negligent hiring, training, supervision and/or entrustment. (Verdict Form, R. p. 272-274; see generally, R. p. 581, lines 14-18; R. p. 596, line 25 – p. 599, line 16 (discussion of verdict form)).

The trial proceeded to verdict against both USSA and Jones. After six days of trial, during which the jury had the benefit of all testimony and evidence to be offered in the case by both sides on all causes of action[6], the jury quickly returned a verdict, finding Hancock was 65% negligent and Jones/USSA were 35% negligent in causing the accident. (Verdict Form, R. p. 272-274). On Plaintiff's negligent hiring, training and supervision cause of action, addressed separately on the verdict form, the jury found USSA was negligent in hiring Jones, but such negligence was not a proximate cause of the accident. (See id.).

In Plaintiff's Rule 59 Motion to Alter or Amend the Judgment and for a New Trial, Appellant again asserted the trial court erred in directing a verdict in favor of Wal-Mart. (R. pp. 279-281). As before, Appellant's arguments only spoke to Appellant's cause of action against Wal-Mart for negligence, specifically evidence supporting the elements of duty, breach and proximate causation. Moreover, Wal-Mart's alleged duty to the decedent was not premised on either an employer/employee relationship (necessary for establishing a negligent hiring and supervision action) or on *respondeat superior* liability, but rather was premised on an independent duty on the part of Wal-Mart to control the conduct of a *third party* where Wal-Mart

[6] By virtue of the fact that the trial court deferred oral arguments on the motions for directed verdict until after all of the witnesses for Wal-Mart had testified, the jury actually had the benefit of the complete testimony and cross-examination of those witnesses. There was no evidence excluded at trial by virtue of Wal-Mart's directed verdict.

negligently or intentionally created the risk. (R. p. 279). Appellant contended the error required a new trial as to all defendants for the sole purpose of having a jury compare Decedent's negligence with defendants' combined negligence in causing the accident. At no time did Appellant address a cause of action existing at any point against Wal-Mart for negligent hiring, training, supervision and/or entrustment. There were also no alleged points of error directed to the verdict separately rendered by the jury in favor of USSA on the negligent hiring cause(s) of action.[7]

After Appellant's post-trial motions were denied, Appellant filed a Notice of Appeal, framing the issue before the South Carolina Court of Appeals as "[w]hether the trial court erred when it granted a directed verdict in this negligence action in favor of Wal-Mart." (Br. of Appellant to the Ct. of Appeals, R. p. 291). The separately pled cause of action for negligent hiring, training, supervision and/or entrustment was not included in the issue as framed before the Court, nor was the jury verdict in favor of USSA on the negligent hiring cause of action included in the issue on appeal. Rather, both the issue framed for the Court, as well as entirety of Appellant's arguments were directed to circumstances surrounding the pursuit, specifically the alleged negligent acts or omissions by Wal-Mart in enlisting Jones's involvement, allegedly encouraging him to pursue the Decedent, and failing to tell Jones to stop, all of which Appellant had characterized in his post-trial motion as independent negligent acts by Wal-Mart that created a risk and thereby created a corresponding duty to control the conduct of another person. Appellant made no contention that such evidence or testimony supported or could be used to establish the elements of a negligent hiring, training or supervision cause of action and even expressly stated "Jones was not a Wal-Mart employee." (R. p. 301). Rather, Appellant contended

[7] Frankly, it would be hard to imagine how Appellant could have appealed the jury's verdict on the negligent hiring action as to USSA where the jury rendered its verdict with the benefit of all of the evidence.

that "[b]ecause there was evidence that Wal-Mart employees did not comply with Wal-Mart's policies, there was evidence that Wal-Mart breached its duty of care." (R. p. 302.). In addition, while Appellant contended the trial court's error in directing a verdict in favor of Wal-Mart required a new trial as to *all defendants*, Appellant never expanded his request for relief to state or even imply he was seeking a retrial on all *causes of action*. Rather, as he had asserted in post-trial motions, Appellant argued only that he was entitled to have a jury compare Decedent's negligence with the combined negligence of all defendants as it related to the accident, which relief is not applicable to negligent hiring claims. See Longshore v. Saber Sec. Servs., 365 S.C. 554, 562-63, 619 S.E.2d 5, 10 (Ct. App. 2005) (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; the plaintiff had nothing to do with the defendant's hiring, training or supervision). In a split decision, the directed verdict was upheld. See Roddey v. Wal-Mart Stores East, LP, 400 S.C. 59, 732 S.E.2d 635 (Ct. App. 2012).

On certiorari, this Court stated that Appellant was appealing the Court of Appeals' "decision affirming the trial court's grant of Wal-Mart's motion for a directed verdict on [Appellant's] ***negligence claim***." Roddey v. Wal-Mart Stores East, LP, 415 S.C. 580, 583, 784 S.E.2d 670, 672 (2016) (emphasis added). The opinion addressed only the acts and omissions of the various parties as they pertained to the pursuit, and examined Wal-Mart's alleged acts and omissions under the elements required to prove a cause of action for negligence (*i.e.*, duty, breach, causation and damages).[8] This Court ultimately determined the trial court should have submitted to the jury the issues of "Wal-Mart's *negligence and proximate cause*." Roddey v. Wal-Mart Stores East, LP, 415 S.C. at 589, 784 S.E.2d at 675 (emphasis added). There was no

[8] Specifically, section I addressed Wal-Mart's breach of its duty of care, section II addressed proximate causation, and section III addressed apportionment of fault.

discussion of the elements necessary to establish a cause of action for negligent hiring, training, supervision and/or entrustment, nor discussion of the evidence offered at trial against USSA on those claims (*i.e.*, Jones's criminal history, driving record, drug screen, discrepancies on pre-employment documents, eligibility for licensing as a security guard, etc.). The Court did not even mention the verdict rendered separately by the jury on the negligent hiring, training and supervision cause of action as to USSA. Only the jury's findings and apportionment of fault on Appellant's negligence cause of action were referenced in the opinion.

Over USSA's strenuous arguments that it not be included as a defendant during retrial of the case because a jury already apportioned fault between it and the Decedent, the Court granted the relief requested by Appellant and remanded for a new trial as to all defendants so that the jury could apportion fault between the Decedent and defendants collectively. See Roddey v. Wal-Mart Stores East, LP, 415 S.C. at 592, 784 S.E.2d at 676-677 (with Wal-Mart in the mix, "it is conceivable that a jury could find that the collective fault of the defendants was over fifty percent and that Hancock was less than fifty percent at fault"). Accordingly, Appellant received the very relief he expressly requested. While Respondents filed a Petition for Rehearing, specifically addressing the Court's ruling that the negligence action had to be retried against USSA and Jones, it was denied.

In discussions of counsel regarding evidence in preparation for retrial of the case, Appellant asserted his intention to not only retry the negligence action, but to fully re-litigate the cause of action for negligent hiring, training, supervision and/or entrustment, which would require introduction of significant additional evidence regarding the USSA security guard application process, background checks, drug screening procedures, licensing with the state, details of the training conducted at USSA offices, etc. Accordingly, the parties requested court

intervention to address the scope of the evidence on retrial. Regardless of how Respondents initially couched or titled the motion to bring the issue to the trial court's attention, which does not restrict the relief that can be granted by the trial court, see, e.g., Cole Vision Corp. v. Hobbs, 394 S.C. 144, 153, 714 S.E.2d 537, 542 (2011); Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("It is the substance of the requested relief that matters, regardless of form in which the request for relief was framed."), the intent and purpose of the request for relief was clear. Specifically, it was Respondents position that, while a new trial was granted as against all defendants, it could have only been granted for Appellant's negligence cause of action, as it was the only cause of action before the appellate courts for review. Appellant failed to preserve any issue pertaining to negligent hiring, training, supervision and entrustment against Wal-Mart, where Appellant offered no evidence to support the elements of those causes of action against Wal-Mart at trial and did not insure those claims were raised to and ruled upon by the trial court, either during the directed verdict stage or in post-trial motions. Appellant further failed to preserve for appeal the verdict separately rendered by the jury on that cause of action in favor of USSA, as to which the jury concluded, after consideration of all of the evidence, that the negligent hiring, training, and supervision of Jones was not a proximate cause of the accident. The trial court agreed with Respondent's position that the negligent hiring, training and supervision cause of action had not been appealed and had presented no issue for determination by the appellate courts. (Order of November 2, 2016, R. pp. 1-9). Accordingly, the unappealed verdict on that issue was the law of the case and was *res judicata* between the parties. For those reasons, evidence to be offered for purposes of establishing negligent hiring, training, and supervision, already conclusively determined not to have been a proximate cause of

the accident, would be irrelevant and properly barred during retrial. The trial court did not bar evidence relevant to negligence in connection with the pursuit and accident.

Appellant filed a Rule 59 motion to reconsider and/or alter and amend (R. pp. 353-363), which was denied (R. pp. 10-11). Appellant further sought a stay of the trial (R. pp. 431-435), which was also denied (R. p. 12). Accordingly, Appellant filed a Notice of Appeal, followed by a Petition for a Writ of Supersedeas (R. pp. 438-450) to stay further proceedings in the trial court. Although Respondents filed a Response in opposition to Appellant's Petition for Writ of Supersedeas and a Motion to Dismiss the Appeal (R. pp. 504-511), the Court of Appeals granted Appellant's requested relief (R. pp. 13-14). This Court then certified this case on Appellant's motion. (R. p. 15).

ARGUMENT

The trial court did not err in barring evidence to be offered for purposes of establishing a cause of action for negligent hiring, training, supervision and entrustment where the only cause of action properly before the trial court on remand for a new trial was Appellant's negligence action.

Respondents readily concede a new trial was granted against all defendants; however, it could only have been granted as to all defendants on Appellant's negligence cause of action, which was the only cause of action ever before the courts on appeal. Accordingly, the exclusion of evidence that Appellant seeks to offer for purposes of establishing, and having a jury determine liability for, a cause of action for negligent hiring, training, supervision and entrustment, which is no longer a part of the case, does not in any way contravene the express relief granted by the Supreme Court. During retrial, Appellant will have the benefit of the very relief he sought on appeal. Specifically, a jury will be able to compare the negligence of the Decedent against the collective negligence of all defendants. Appellant's fear that the ruling of the trial court will somehow result in the exclusion of evidence shown to be relevant and not

unfairly prejudicial in the negligence action simply because it may have also been relevant to another cause of action that is no longer before the jury is nonsensical and should be disregarded.

A. The Supreme Court opinion did not provide for a new trial as to all causes of action, nor could it have done so.

Appellant continues to try to transform the directive of the Supreme Court that the case be remanded for a new trial against all defendants in the negligence action into a new trial *as to all defendants on all causes of action*, even where there was only a single cause of action before the Court on appeal. Appellant contends the writings of both the majority and dissent "reflect the Court's appreciation of the breadth of [that] holding," (Appellant's Br., p. 10), despite that *nowhere* in the opinion does the majority or dissent expressly or implicitly state that the remand is inclusive of the independent cause of action for negligent hiring, training, supervision and entrustment.[9] Rather, what both the majority and dissent *did* acknowledge was the significance of the Court's decision to require that USSA and Jones again be subjected to the possibility of liability to Appellant *for their negligence* in a second trial, despite that a jury already considered their negligence and found the Decedent to be more at fault. USSA and Jones agree with the characterization of that remedy as a substantial form of relief. Indeed, USSA and Jones strenuously argued they should not be subjected to a new trial where a jury already had the opportunity to consider their negligence and compare it with that of the Decedent, and had exonerated USSA and Jones from liability to Appellant by virtue of the jury's allocation of greater fault to the Decedent. Nonetheless, while they do not agree they should face a new trial for negligence, USSA and Jones accept this Court's determination that the inability of the jury to collectively consider the negligence of USSA, Jones *and* Wal-Mart versus that of the Decedent

[9] In fact, this Court did not even acknowledge that such a cause of action had been litigated in the trial court. The Court's single use of the term "supervise" in its opinion, on which Appellant has placed great significance, does not change that.

could have infected the allocation of comparative fault between the plaintiff and defendants in the negligence action. The same cannot be said for the negligent hiring, training, supervision and entrustment action.

While Appellant contends this Court did not place any limitations on the causes of action to be included in the retrial trial of this case, and therefore interprets this Court's grant of a new trial to be all encompassing, a new trial on one issue is not automatically deemed a new trial on all issues under South Carolina law. In fact, the South Carolina Supreme Court has expressly rejected the proposition that a new trial granted on a single issue must be automatically deemed a new trial upon all issues. See Industrial Welding Supplies, Inc. v. Atlas Vending Co., Inc., 276 S.C. 196, 201 277 S.E. 2d 885, 887 (1981) (overruling South Carolina Elec. & Gas Co. v. Aetna Ins. Co., 233 S.C. 557, 106 S.E.2d 276 (1958) to the extent it held a new trial granted on any single issue must automatically be deemed a new trial upon all issues and declaring the new rule in South Carolina to be "as follows: where there are distinct jury issues, and the issue as to which a new trial is required is separate from all other issues, and the error requiring new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue."). Here, as set forth in Longshore v. Saber Sec. Servs., 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005), the negligence and negligent hiring claims were distinct jury issues, and were appropriately treated as such during the trial of this case and on the verdict form. It is not necessary to have evidence that USSA negligently hired Jones to be able to establish that Wal-Mart, through its own employees, violated its policies and procedures, improperly instructed Jones, a third party, to get the Decedent's tag number, and failed to tell him to stop.

Moreover, the fact of the matter is that this Court did not have to address whether or not the new trial would be limited to negligence or include re-litigation of the cause of action for

negligent hiring, training, supervision and entrustment, where the latter issue was never preserved for appeal against either Wal-Mart or USSA. It is incumbent upon trial counsel to preserve issues for appellate review as an appellate court can only speak to the issue(s) properly before it on appeal. See Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); Austin v. Specialty Transp. Servs., 358 S.C. 298, 315, 594 S.E.2d 867, 876 (Ct. App. 2004) (an appellate court cannot address an issue not raised to the trial court); 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); see also 15 SC Juris Appeal and Error §§ 71-73 (1992 and Supp. 1994). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. See Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). Here, Appellant simply never asked the lower court to rule on whether Appellant's cause of action for negligent hiring, training and supervision of Jones against Wal-Mart should go to the jury. Appellant also never alleged any error in the jury's verdict in favor of USSA on the negligent hiring, training and supervision cause of action. This Court addressed and remanded the case on the only cause of action before it—negligence. The only potential limitations it had to address in that regard were whether or not the new trial would proceed solely against Wal-Mart or whether it should also include USSA and Jones for purposes of apportionment of fault. There is simply no basis for interpreting the Court's silence as granting remand of an issue not before it on appeal.[10]

[10] The cases offered by Appellant in support of the position that this Court has on numerous occasions simply stated it was remanding for a new trial based on the trial court's error in granting a directed verdict (Appellant's Br., p. 10, n.6) are inapposite. In no case cited by Appellant does it appear that the appellate court remanded a case and required a retrial of issues not before it on appeal. In S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 196, 714

While the factual history above demonstrates the appellate courts could not have remanded the negligent hiring claims, Appellant makes no effort to specifically explain how the cause of action against either defendant was preserved for appeal and/or how the jury's determination that the negligent hiring, training and supervision of Jones was not the proximate cause of the accident is not now the law of the case and *res judicata* between the parties. To circumvent that issue, it is apparently Appellant's strategy to instead convince this Court that the causes of action for negligence and for negligent hiring are so inextricably intertwined and inseparable that they are virtually one and the same and cannot be tried independently. As an initial matter, this position is in stark contrast with Appellant's position at trial that the causes of action are, in fact, separate and to be independently considered by the jury. During discussion of the verdict form, for instance, Appellant took the position that there are two sets of claims, and he "could get a negligent hiring verdict without the negligence verdict." (R. p. 582, lines 6-14; R. p. 597, lines 16-17). Certainly, Appellant recognizes the reverse to be true, *i.e.*, that he could get a negligence verdict without a negligent hiring verdict.[11]

S.E.2d 550, 553 (2011), the court found the trial court erred in directing a verdict for one of the defendants on multiple issues and also found a new trial was warranted on the issue of damages, which had also been raised as an issue on appeal. The Supreme Court expressly recognized there were other issues before it on appeal, which it delineated, but the Court determined it did not need to address them. There is nothing to suggest the Court was reviving an issue not before it on appeal. In addition, the Court noted that the *other* defendant that had been a party to the action had been dismissed at the conclusion of the evidence, which dismissal had not been challenged on appeal. Therefore, the Court recognized that defendant was no longer a party to the case for retrial. See id., 394 S.C. at 197, n.1. In Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006), because the Court's remand did not explain the scope of the issues to be heard or parties to be involved on retrial, those issues were determined by the trial court, which limited retrial to liability and punitive damages (if warranted), but barred a new trial on compensatory damages. See Trial Order in Baggerly v. CSX Transportation, Inc., 2006 WL 5376841 (Nov. 13, 2006). In any event, the only causes of action at issue in Baggerly were common law negligence and negligence under the FELA, which are subject to the same elements of proof. The Court in Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) was not even remanding the case for a new trial. Rather, the Supreme Court ordered reinstatement of the judgment of the trial court, which granted a *nisi additur* of $600,000, and remanded the case back to the trial court for further proceedings in effectuation of that judgment, and not for a second trial.

[11] That is, in essence, what Appellant got during the first trial. The jury found USSA and Jones to be negligent. That negligence just didn't manifest itself into a recovery for Appellant where the Decedent's negligence outweighed it.

This position also ignores that a cause of action for negligence and causes of action falling within the negligent hiring realm are held to be separate and distinct causes of action under South Carolina law, subject to different kinds and quantities of proof. See Longshore v. Saber Sec. Servs., 365 S.C. at 563, 619 S.E.2d at 10-11. Specifically, negligence cases turn on proof of duty, breach, causation and damages, while negligent hiring cases are premised on an *employer/employee relationship* and 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). To invoke a case of "negligent supervision," it is necessary to show *the employer* knew or should have known its employee behaved in a dangerous or otherwise incompetent or unfit manner, and that the employer, armed with this actual or constructive knowledge, failed to adequately supervise the employee. See Ralph King Anderson, Jr., South Carolina Requests to Charge-Civil, 2016, §5-8 (Master and Servant – Negligent Hiring and Supervision). "Negligent supervision" cases can also 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, No. 3:10-cv-2758-JFA, 2012 WL 570197, at *6; see also Degenhart v. Knights of Columbus, 309 S.C. 114, 116-117, 420 S.E.2d 495, 496 (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); Ralph King Anderson, Jr., South Carolina Requests to Charge-Civil, 2016, §5-8 (Master and Servant – Negligent Hiring and Supervision). In recognition of the above, the jury in the first trial was separately charged on the elements of negligence (R. p. 588, line 22 - p. 592, line 8) and on the elements of negligent hiring actions (R. p. 593, line 17 - p. 595, line 2), liability for which was separately determined on the verdict form.

Finally, Appellant would rely on semantics to transform the Court's single reference in its opinion to Wal-Mart's "failure to properly supervise Jones" (Roddey, 415 S.C. at 592, 784 S.E.2d at 676-677) into a sanction by the Court to revive and remand the negligent hiring causes of action against *all* defendants, despite it is evident that the Court was not addressing a negligent supervision cause of action, but rather was addressing alleged acts of negligence by Wal-Mart in their improper instruction to Jones to get the tag. Appellant offers no explanation of how this reference evidences an intention by the Court to revive and remand a negligent hiring cause of action against USSA. In the context in which it appeared, this Court was discussing apportionment of fault *for negligence*. More specifically, when this Court made the statement, it was addressing its disagreement with Chief Judge Few's view that Wal-Mart's liability could only be strictly derivative of that of Jones and USSA. Judge Few had reasoned that Wal-Mart's conduct could have only provided some explanation of what motivated Jones and was, in that sense, "derivative," but could not have affected the jury's apportionment of fault to the Decedent. In addressing that view, this Court simply acknowledged that, because there were independent acts of negligence asserted against Wal-Mart, a jury could find the collective fault of defendants was over fifty percent when those independent acts were also included in the jury's consideration of total comparative fault. This was nothing more than a characterization of Wal-

Mart's acts of alleged negligence. Because a jury could find the collective fault of the defendants was over fifty percent, the only appropriate remedy, as held by this Court, was to remand for a new trial to allow for that determination, but *not* for all other purposes.

B. The trial court properly recognized that it is the unappealed verdict rendered by the jury in the first trial as to the negligent hiring action that is now the law of the case and *res judicata* between the parties.

Appellant's second argument is entirely premised on his sweeping and, as shown herein above, impossible conclusion that this case was remanded for a new trial as to *all defendants on all causes of action.* Only if it can be shown that the negligent hiring causes of action were (1) properly preserved for appellate review and (2) that the appellate courts, in fact, intended to revive and remand such causes of action as to *both* Wal-Mart and USSA, despite the Court's silence, can Appellant reach the conclusion that a complete retrial as to all defendants on all causes of action is the law of the case. In a second attempt to circumvent that showing and bootstrap a retrial of the negligent hiring claim into the second trial, Appellant contends the law of the case applies both to issues that were "explicitly decided and those that are necessarily involved given the appellate court's ruling," (Appellant's Br., p. 11), thereby implying, without explaining how, the negligent hiring action was "necessarily involved" or "decided" in the ruling for remand of the case.

The cases offered by Appellant in support of the above proposition do not, however, support the conclusion that a retrial of the negligent hiring causes of action was necessarily decided or involved in the Court's ruling. In Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997), for instance, the Supreme Court determined the lower court had discretion under the provisions of the APA to order discovery concerning alleged irregularities in the grievance proceedings at MUSC and that there had been violations of APA provisions regarding

ex parte communication. In arriving at those conclusions, the Court had to have also "necessarily decided" that the APA was applicable to the grievance proceedings in the first place. Therefore, the determination that the APA was applicable also became the law of the case. Appellant does not explain how this Court's determination that a new trial was necessary as to all defendants on the negligence action means that this Court necessarily decided that the negligent hiring causes of action also had to be retried. As explained previously, the relief sought by Appellant as the basis for a retrial of the negligence action against *all* defendants was for purposes of apportionment of fault. The jury was never asked during the first trial to apportion fault between Decedent and any defendant on the negligent hiring actions, nor would it have been proper to do so under the Longshore case.

Appellant also takes issue with the alleged failure of Respondents to have addressed the scope of relief granted by the Supreme Court by way of their petition for rehearing, asserting that by virtue of their failure to have done so, a retrial on all causes of action became the law of the case. For all of the foregoing reasons, however, Respondents found no need to address and seek clarification of issues not before the Court. Had Appellant properly preserved the negligent hiring issue(s) for appeal either as to Wal-Mart or USSA, or had Appellant ever argued that the cause of action for negligent hiring, training, supervision and entrustment should be revived as to either of those defendants, Respondents would have fully briefed that issue. However, as Appellant never raised those issues to the trial court, nor sought a ruling on them, they were simply not before the appellate courts.[12]

Finally, Appellant places great significance on a footnote in Respondents' Brief to the Supreme Court, in which Respondents stated that the appeal did not encompass a request for a

[12] Nor were there even any grounds for appeal as to the jury's verdict on negligent hiring as to USSA, which was based on all of the evidence.

new trial as to the alleged negligent hiring, training, supervision and entrustment claim. Appellant claims the footnote either proactively seeks exclusion of the negligent hiring and supervision cause of action or evidences some acknowledgement that the appellate courts could remand that cause of action for trial. To the contrary, however, Respondents were simply pointing out that the Appellant never sought a new trial on their negligent hiring claims and that the appeal was limited to the negligence cause of action. Neither Appellant, nor the Court, took issue with that factual and procedural statement, and Respondents most certainly would not have sought clarification of the issue in a footnote. It is Appellant who should have sought to insure that the negligent hiring issue was properly preserved for appeal so that the appellate courts had jurisdiction to remand the issue for a new trial, and not the obligation of Respondents to raise and seek a ruling on an issue not on appeal.

C. The trial court did not err in its decision to bar evidence to be offered for purposes of establishing a cause of action against Wal-Mart or USSA for negligent hiring, training and supervision, where the cause of action no longer exists, rendering such evidence irrelevant.

Since Appellant abandoned his cause of action for negligent hiring, training, supervision and entrustment against Wal-Mart and did not preserve for appeal any error as to the jury verdict rendered in favor of USSA on the negligent hiring causes of action, the unappealed verdict became the law of the case and *res judicata* between the parties. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Accordingly, the trial court's order cannot be dispositive of and does not bar or strike, *either expressly or implicitly*, a viable cause of action that would otherwise be before the jury on retrial. Rather, it recognizes the proper scope of the case as remanded by this Court and would serve only to limit the evidence to

be offered by Appellant at retrial to such evidence that is shown to be relevant to Appellant's negligence cause of action and not unfairly prejudicial to defendants pursuant to Rules 402 and 403 of the South Carolina Rules of Evidence. Therefore, this is not, as Appellant claims, a dispositive ruling under the guise of another name.

This issue is before the Court because Appellant wants to usher into the second trial a myriad of "bad facts" asserted exclusively against USSA during the first trial for the negligent hiring of Jones (*i.e.*, that Jones should not have been hired due to pending criminal charges, a positive drug screen for past THC use, misrepresentations on his application for registration as a security guard, suspension of his driver's license effective three days prior to the accident, and failure to have been timely licensed as a security guard by the state). Such evidence has no relevance to negligence in causing the pursuit of the Decedent and her sister or negligence in connection with the resulting accident. Nonetheless, Appellant inexplicably contends the trial court's ruling will *completely* strip him of any ability to establish negligence in connection with the accident, including any ability to present the very evidence this Court found so probative as to require a new trial, which is a *non sequitur*.

The evidence this Court examined on appeal as potentially probative of Wal-Mart's negligence was the improper instruction or encouragement of Jones by Wal-Mart employees to get the Decedent's license tag number and evidence of Wal-Mart's acquiescence in the pursuit by failure to tell Jones to stop. These were always treated by Appellant and the appellate courts as alleged acts of negligence by Wal-Mart employees in their interactions with Jones.[13] The acts were never offered to establish a cause of action for "negligent supervision," and Appellant

[13] As discussed, Appellant previously characterized the acts in his post-trial motion as acts that negligently or intentionally created a risk, thereby imposing on Wal-Mart an independent duty to control the conduct of *a third party*. Appellant very plainly and directly admitted Jones was not an employee of Wal-Mart. (Br. of Appellant to the Ct. of Appeals, R. p. 301).

cannot revive that cause of action simply by a change in semantics to now frame Wal-Mart's acts as "negligent supervision" where the substance of the claims has never changed. The trial court's order in no way prevents Appellant from presenting evidence to a jury that Wal-Mart improperly instructed Derrick Jones to get the license tag number and never told him to stop, nor in showing that Wal-Mart's own internal policies and procedures prohibited them from doing what Jones did in pursuing Hancock and Beckham and that, by their interactions with Jones, they procured him to do something they could not do. It is not necessary to have evidence that USSA negligently hired Jones to be able to present the above evidence and argument to the jury, outlined in Appellant's Brief (see p. 14), and will not prevent a jury from finding one or more of the Respondents to be negligent.

CONCLUSION

For the foregoing reasons, the trial court's order *in limine* to exclude evidence to be offered for purposes of establishing a cause of action for negligent hiring, training, supervision and entrustment as to either Wal-Mart or USSA, which has no relevance to Appellant's action for negligence in the causation of the pursuit and resulting accident, should be affirmed. The retrial of this case should be ordered to proceed on Appellant's cause of action for negligence only as to all defendants.

Respectfully submitted,

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August 15, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2016-002248

Travis Roddey, individually and as the Personal Representative of the Estate of Alice Monique Beckham Hancock Deceased .....Appellant,

v.

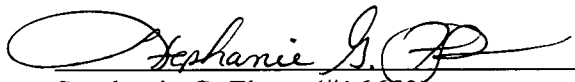
Wal-Mart Stores East LP, U.S. Security Associates, Inc., and Derrick L. Jones, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

August 16, 2017

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on August 16, 2017, she served counsel for Appellant with the Respondents' Final Brief by mailing a copy of the same by U.S. mail with first class postage prepaid to the following addresses:

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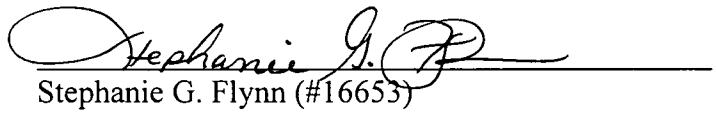

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