

No. 26012 -- Jane Doe v. Wal-Mart Stores, Inc., a corporation; B.C. Associates Limited Partnership, a limited partnership; and Robert Belcher; and Jane Doe v. Wal-Mart Stores, Inc., a corporation

FILED

December 13, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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December 14, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the majority's decision to reverse the judgment below, and to remand this case for a new trial. I write separately to emphasize that when a large corporate defendant such as Wal-Mart, an institution with significant power and financial resources, uses obstructive tactics to make litigation difficult for injured victims and their attorneys, a circuit court must deal with these tactics head-on and use its power to level the playing field.

A quick search of reported cases reveals that Wal-Mart parking lots are a virtual magnet for crime. A host of rapes, robberies and murders have occurred in the past few years which resulted in litigation against Wal-Mart.¹ While the average customer wouldn't reasonably expect that criminals prowl

¹A search of the reporters revealed the following cases: *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054 (E.D.Ky. 1995) (customer shot during armed robbery in Wal-Mart parking lot); *Goins v. Wal-Mart Stores, Inc.*, 1995 WL 638607 (E.D.La. 1995) and *Goins v. Wal-Mart Stores, Inc.*, 2001 WL 1511987 (La. 2001) (plaintiff's daughter abducted at gunpoint while walking through Wal-Mart parking lot and raped); *Wal-Mart Stores, Inc. v. McDonald*, 676 So.2d 12 (Fla.App. 1996) and *Merrill Crossings, Assoc. v. McDonald*, 705 So.2d 560 (Fla. 1997) (plaintiff shot in Wal-Mart parking lot); *C.A. v. Wal-Mart, Inc.*, 683 So.2d 413 (Ala. 1996) (plaintiff abducted from Wal-Mart parking lot and raped); *McClung v. Delta Square Limited Partnership*, 937 S.W.2d 891 (Tenn. 1996) (customer abducted from Wal-Mart parking lot, raped and murdered); *Willmon v. Wal-Mart Stores, Inc.*, 957 F.Supp. 1074 (E.D.Ark. 1997) (customer abducted from Wal-Mart parking lot, raped and murdered); *Benton Investment Co., Inc. v. Wal-Mart Stores, Inc.*, 704 So.2d 130 (Fla.App. 1997) (plaintiff shot in Wal-Mart parking lot in attempt to steal her purse); *Wal-Mart Stores, Inc. v. Nicholson*, 1998 WL 224744 (Tex.App. 1998) (customer robbed at gunpoint, almost kidnaped, from Wal-Mart parking lot); *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848 (5th Cir. 1999) (customer's (continued...))

through Wal-Mart parking lots looking for victims, these lawsuits prove that Wal-Mart has absolute knowledge of the criminal activity routinely occurring on its doorstep.

But even with the knowledge that its parking lots are crime magnets, Wal-Mart did nothing to prevent crimes against its customers -- customers such as the plaintiff in this case. While Wal-Mart was putting cameras and security guards inside its stores to prevent theft, Wal-Mart's Vice President of Loss Prevention, Dave Gorman, indicated in 1996 that only 276 of Wal-Mart's 2,500 stores had outside security patrols and only 400 had outside cameras. *See* "An Interview with Wal-Mart's Dave Gorman on the Chain's New Parking Security Program," 7 *Parking Security Rep.* 10 (June 1996) (*quoted in* Gilbert Adams, III, *et al.*, "Big Box Retailers: Discovery Abuse," 36 *Trial* 39, 40 n. 11 (April 2000)).

In the instant case, the record suggests that Wal-Mart improperly narrowed -- with the circuit court's support -- the plaintiff's right of discovery about crimes at Wal-Mart stores to mean "the incident had to be reported to Wal-Mart within three days and it had to involve a person who had just been or was patronizing a Wal-Mart store." The circuit court also geographically limited the plaintiff's discovery to the area surrounding southern West Virginia.²

¹(...continued)

purse snatched from Louisiana Wal-Mart parking lot); *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762 (La. 1999) (customer robbed at gunpoint in parking lot of Sam's Wholesale Club, a Wal-Mart subsidiary); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000) (plaintiff abducted at knifepoint from Wal-Mart parking lot and raped); *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (2000) (customer abducted at gunpoint from Wal-Mart parking lot and robbed); and *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000) (plaintiff suffered injuries during purse snatching in Wal-Mart parking lot).

²The circuit court ruled that the plaintiff could only discover information "within a geographic area encompassing parts of . . . Eastern Kentucky." Wal-Mart responded to the plaintiff's discovery requests by stating that no similar criminal assaults had occurred at stores within this geographic area. (continued...)

In addition to the circuit court limiting Wal-Mart's responses to the plaintiff's discovery requests, Wal-Mart appears to have just out-and-out hidden evidence from the plaintiff. A standard technique for Wal-Mart is to suggest to trial courts that the plaintiff's cause of action is unique -- even though Wal-Mart's legal department may have handled dozens, hundreds, or even thousands of identical cases. And then Wal-Mart "accidentally" fails to produce important documents which pertain to the plaintiff's lawsuit -- even though it may have already produced those documents in another lawsuit, and even if the plaintiff specifically asks for the documents.³

For example, the average consumer probably thinks being hit and injured by merchandise falling from shelves at Wal-Mart is an uncommon occurrence -- yet it actually happens thousands of times

²(...continued)

However, research reveals a similar criminal assault within this geographic area. In *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054 (E.D.Ky. 1995), the plaintiff was robbed at gunpoint in a Wal-Mart parking lot in Florence, Kentucky, and was shot when she pushed the gun away. It does not appear that information regarding this aggravated robbery was provided to the plaintiff in the instant case.

³A classic example of this type of discovery abuse by Wal-Mart can be found in a recent case from Ohio. The decedent was an employee of Wal-Mart. While the decedent was operating a forklift, the truck he was unloading prematurely pulled away from the loading dock. The forklift fell from the truck and the employee was killed. The plaintiff, the decedent's wife, sued Wal-Mart and was awarded \$2 million in damages. *See Davis v. Sam's Club*, 77 Ohio St.3d 1526, 674 N.E.2d 377 (1997).

During the lawsuit, the plaintiff learned Wal-Mart had withheld documents. A private investigator hired by the plaintiff discovered a 1992 memorandum discussing premature pull-away incidents at loading docks. When the plaintiff specifically requested that Wal-Mart produce information relating to loading dock injury claims, neither the 1992 memorandum nor any other documents were produced. The plaintiff's copy of the 1992 memorandum was used at trial.

A week after Wal-Mart paid the judgment, the plaintiff filed a second lawsuit alleging that Wal-Mart's spoliation of evidence had led her to dismiss certain causes of action, preventing her from recovering additional compensatory and punitive damages. Discovery revealed new documents regarding employee loading dock injury claims recorded in memoranda that were not disclosed by Wal-Mart in the first trial.

The Supreme Court of Ohio concluded that the spoliation claims were separate from the underlying tort action, and that the plaintiff could proceed with her spoliation action.

each year. In several cases, Wal-Mart has been compelled -- usually after extensive litigation -- to produce a list showing more than 18,000 falling merchandise incidents over five years. *See, e.g., Shafer v. Wal-Mart Stores, Inc.*, 176 F.3d 484 (9th Cir. 1999).⁴

In the instant case, Wal-Mart appears to have concealed from the plaintiffs information regarding Mr. Gorman's study of crime in Wal-Mart parking lots. *See* David H. Gorman, "Loss Prevention Racks Up Success," *Security Management* (Mar. 1996) (at page 55) (also available at www.securitymanagement.com/library/000098.html). Mr. Gorman discovered that "80 percent of crimes at Wal-Mart were occurring not in the stores, but outside their walls, either in the parking lots or around the exterior perimeter of the stores." The crimes ranged from "theft, break-in and vandalism of cars" to "purse snatches, muggings, and assaults."

To combat crime, Wal-Mart introduced a roving golf cart security patrol at one store in Tampa, Florida. At that facility, during 1994 there were 226 cars stolen, 25 purse snatches, 32 burglaries, 14 armed robberies, 3 assaults, and 1 arson. When the roving patrol began, "[d]uring the first four months . . . the reported incidents for each of these crimes dropped to zero, and numbers have remained low. Other stores have seen similar declines."

The total cost to Wal-Mart: "up to \$45,000 per year per store, including vehicle leasing and drivers' salaries."

⁴In fact, there are entire Internet sites dedicated to litigation involving customers hit by falling merchandise at Wal-Mart and other stores. *See, e.g.,* www.fallingmerchandise.com and www.walmartsurvivor.com.

The total cost to Wal-Mart to virtually eliminate crime from its parking lots is, at most, by its own reckoning, \$45,000 -- the loss of the plaintiff in the instant case is immeasurable. I believe the obvious disparity a jury would see between these two sums would provide a significant incentive for Wal-Mart to hide Mr. Gorman's report, and his raw data and other suppositions, from the plaintiffs.

Upon remand, the circuit court should eliminate this incentive to engage in discovery abuse like hiding documents, so that Wal-Mart clearly understands that West Virginia courts will not tolerate such misconduct. Circuit courts must make discovery abuse a more expensive alternative than honest disclosures.

Our law requires businesses to keep their premises reasonably safe; our law also requires litigants to participate openly and fairly in the discovery process. When Wal-Mart has failed to participate openly and fairly in discovery, courts have routinely imposed massive penalties, ranging from monetary sanctions and attorney's fees to jury instructions allowing juries to draw negative inferences from Wal-Mart's conduct. Some courts have even gone so far as to strike Wal-Mart's answer and defenses. As one court recently stated:

Wal-Mart has drawn sanctions for its pretrial conduct in several other cases. In *Meissner v. Wal-Mart Stores, Inc.*, A-159,432 (Tex. Dist. Ct. Jefferson Co. Apr. 1999), the court fined Wal-Mart \$18 million and entered default judgment in favor of the plaintiff on liability because Wal-Mart withheld evidence. In *Woska v. Wal-Mart Stores, Inc.*, No. 95-3998 (Fl. Cir. Ct. Orange Co. Jan 1998), a Florida court sanctioned Wal-Mart \$7,000 for repeated discovery violations. In the case of *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30 (Tex.App. 1998), a Texas court affirmed the imposition of a \$120,000 sanction against Wal-Mart for repeated discovery abuses. A Nebraska trial court fined Wal-Mart \$5,000 and struck its answer for Wal-Mart's refusal to produce discovery. *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 567 N.W.2d 560 (1997) (affirming the sanctions). Wal-Mart was fined

\$15,000 when a Nevada federal court found that it had destroyed photographs of an accident scene. *Shafer v. Wal-Mart Stores, Inc.*, No. 96-650 (D. Nev. June 1996). Another Texas district court fined Wal-Mart \$5,000 for its repeated failure to obey discovery orders in *Lynch v. Wal-Mart Stores, Inc.*, (Tex. Dist. Ct. Gregg Co. Aug. 1996). One court noted that “Wal-Mart has chosen extreme discovery abuse as a litigation strategy” and fined Wal-Mart \$104,120 plus \$1,000 for every day that Wal-Mart failed to comply. *New v. Wal-Mart Stores, Inc.*, 96-8-10571 (Tex. Dist. Ct. Jackson Co.). It seems Wal-Mart has yet to learn a lesson from the repeated imposition of sanctions.

Empire, Inc. v. Wal-Mart Stores, Inc., 188 F.R.D. 478, 481-82 (E.D.Ky. 1999).⁵

“Unfortunately, nefarious conduct is all too common in lawsuits in which Wal-Mart is a party.” *Wilson v. Wal-Mart Stores, Inc.*, 199 F.R.D. 207 (S.D. Tex. 2001). The circuit court in the

⁵Other courts imposing sanctions on Wal-Mart for misconduct during discovery include *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173 (1st Cir. 1998) (truck driver was injured slipping on icy ramp while making delivery of tropical fish; court instructed jury it could draw a negative inference from the fact that Wal-Mart destroyed documents allegedly stating it placed the delivery on hold, and did not expect deliveries that day); *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508 (Utah App. 1999) (plaintiff tripped and fell in Wal-Mart parking lot; trial court used proper sanction for discovery abuse by excluding testimony of Wal-Mart’s medical expert because Wal-Mart failed to provide expert’s report to plaintiff); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 WL 335558 (S.D.N.Y. 2000) (Wal-Mart required to pay plaintiff’s attorney fees unnecessarily expended due to Wal-Mart’s failure to make an accurate disclosure of its computerized record keeping); *Osterhoudt v. Wal-Mart Stores, Inc.*, 273 A.D.2d 673, 709 N.Y.S.2d 685 (N.Y.App. 2000) (plaintiff slipped and fell on a “spilled substance” in Wal-Mart; plaintiff sought discovery of documents, but Wal-Mart responded it had none. Two years later, manager of store appeared at trial with copies of documents the plaintiff had earlier requested. Appellate court held that, as a sanction, Wal-Mart’s answer should have stricken and liability resolved in favor of plaintiff); *Wilson v. Wal-Mart Stores, Inc.*, 199 F.R.D. 207 (S.D. Tex. 2001) (child burned while wearing garment purchased at Wal-Mart; “Wal-Mart’s approach to discovery throughout this case has been, at best, grossly inappropriate.” As a sanction, trial court deemed Wal-Mart to be manufacturer of garment; determined it would instruct jury that it could infer bad faith from Wal-Mart’s “repeated and protracted concealment of relevant documents and witnesses;” struck several witnesses; and ordered Wal-Mart to pay \$1,000.00 in attorney’s fees to plaintiff); *Wal-Mart Stores, Inc. v. Johnson*, 39 S.W.3d 729 (Tex.App. 2001) (reindeer Christmas decorations fell on plaintiff from a high shelf in Wal-Mart, and Wal-Mart failed to preserve reindeer as evidence; trial court properly gave a spoliation instruction to the jury, allowing jury to draw an inference that the “reindeer, if produced, would be unfavorable to Wal-Mart.”).

instant case should not hesitate to follow in the footsteps of these other courts when weighing Wal-Mart's misconduct. The circuit court, when it reconsiders the instant case, must not allow Wal-Mart to benefit from its "nefarious conduct," its abuse of the discovery process in our courts.

I therefore respectfully concur.