

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

JOHNA DIANE ANKROM,
Plaintiff,

v.

Civil Action No.: 15-C-319

WAL-MART STORES EAST, L.P.,
Defendant/Third Party Plaintiff,

ROBERT ALLAN LEIST,
Third-Party Defendant.

AMENDED ORDER

The Court's prior order entered June 28, 2019, is hereby amended to correct mistakes of scrivener and also to clarify the Court's analysis of certain issues of law.

On the 24th day of June, 2019, came the parties, by and through counsel, James G. Bordas III, John Artimez and Todd Wiseman for the Plaintiff and Philip Sbrolla for the Defendant for hearing on Defendant/Third-Party Plaintiff's ("WalMart") Renewed Motion for Judgment as a Matter of Law, or in the alternative, For New Trial and To Amend Judgment; Robert Leist, third-party defendant, did not appear.

WalMart asserted four grounds for their motions and this order addresses each of them:

1. The jury verdict is not supported by the evidence as Plaintiff's injuries were caused by the tortious act of Robert Leist:

A) WalMart argues the evidence showed that deliberate criminal conduct of Leist caused plaintiff's injuries, namely: Leist's decision to run from WalMart asset protection personnel which was "his decision alone" and which resulted in striking the plaintiff.

WalMart relies on appellate decisions holding that under the common law of torts a

property owner has no duty to protect visitors to their property from the deliberate criminal conduct of a third party.

The Court finds WalMart's argument unconvincing. It fails to specify any crime alleged to have been deliberately committed by Leist. Deliberately running from a private security officer is not a crime. Running into someone is not a crime unless the physical contact, not the running, is deliberate. The evidence presented by WalMart shows negligence on Leist's part but not deliberate criminal conduct. Hence, neither WalMart's argument nor the evidence establishes that Leist committed an intentional criminal act.

B) WalMart also contends that Leist's negligence was the only proximate cause of plaintiff's injuries and that it bears no responsibility for them. WalMart argues the evidence shows that the conduct of its security personnel in approaching, stopping and restraining a suspected shoplifter while he was in the vestibule area of the store was reasonable, proper and in accord with West Virginia law and WalMart policy.

WalMart further claims the evidence demonstrates that Leist told security personnel prior to returning into the main body of the store from the vestibule area that he would comply with their directives and that he did walk back in the store with escorts but without restraint, force or struggle. WalMart postulates that under such circumstances it was not foreseeable that Leist would run from security once back inside the main store.

WalMart cites *Ward v. West* in support of its position that in such circumstances a store owner is without liability “when a seemingly peaceful shoplifter is being escorted and he bolts and injures a store customer while not being pursued by store employees.”

The problem with WalMart’s view of the evidence is that the jury reasonably expressed a different perception. The conduct of Leist when confronted by security personnel in the vestibule and the interactions between them was recorded and the recording was admitted in evidence and viewed by the jury. In addition, each party addressed this evidence in closing argument.

The jury’s verdict entailing its apportionment of fault reflected its perception of the video recordings and its assessment of the evidence presented and in the Court’s opinion was reasonable and supported by the evidence. As to the import of *Ward v. West, supra*, the evidence presented at trial and the findings and verdict of the jury distinguish the facts of this proceeding from the facts present in that case.

2. The Court committed error by precluding Walmart from discussing during trial allegations in Plaintiff’s Complaint:

The Complaint included allegations that Walmart employees pursued shoplifter Leist in the store after he ran from security. One such employee was Ryan Clinton who was named as a defendant until Plaintiff dismissed him close to trial. The Court granted plaintiff’s motions in limine to preclude reference to Clinton as a party in the action and further granted her motion to preclude reference or argument to the jury of the chasing allegations set forth in the Complaint.

Walmart contends it was denied the opportunity to use the Complaint's allegations in order to impeach the credibility of plaintiff and her daughter by showing that these allegations were negated by the video recording admitted in evidence and/or that this theory of recovery effectively was abandoned. The argument fails for several reasons.

Allegations made in a complaint have no independent probative value and as to the plaintiff's daughter who testified at trial, she was not a party to the litigation and cannot be impeached by statements or allegations she did not make.

Moreover, Walmart's reference to the Complaint's "pursuit" allegations and its argument that the allegations diminish the credibility of plaintiff or her daughter would confuse or mislead the jury as to what facts plaintiff has a burden to prove, her theory of the case respecting WalMart's liability and the meaning and import of the complaint. The risk of confusing or misleading the jury becomes amplified were the complaint's allegations admitted only for the limited purpose of impeaching a witness's credibility and not as substantive evidence. Further, the probative value of the complaint's allegations, even if admitted for a limited purpose, is substantially outweighed by the risk of unfair prejudice to plaintiff.

3. The Court committed error by failing to instruct the jury on intervening cause:

The premise of Walmart's position is that the act of Robert Leist in running from security upon returning to the main part of its store was an intervening, superseding cause of plaintiff's injuries. The premise is unfounded. The Court properly determined that the evidence failed to establish that Leist's conduct was an intervening cause and did not support an instruction on intervening cause. The evidence presented as to the conduct of Leist and of Wal-Mart security personnel while in the vestibule area where Leist was confronted and subsequently escorted

back into the main body of the store was sufficient to refuse an instruction on independent, intervening cause.

In addition, the Court properly determined that whether Leist's actions were the *sole* proximate cause of Plaintiff's injuries, whether Walmart was guilty of negligence based on the acts or omissions of its security personnel in the vestibule area, whether Walmart's negligence was a proximate cause of plaintiff's injuries and what percentage of fault was attributable to Walmart and to Leist, were all issues properly left to the jury. The effectively found Walmart's arguments 70% persuasive as it allocated that percentage of fault to Leist and 30% to WalMart. The Court finds the jury's verdict to be fair, reasonable and supported by the evidence.

4. The Court committed error by Permitting the jury to consider punitive damages and thereby gave unwarranted credibility to plaintiff's claim:

The Court concluded that the evidence was sufficient to permit the jury to determine whether punitive damages were warranted. The jury did so and determined that no punitive damages should be awarded. Walmart presents no evidence, indication, authority or persuasive argument that in permitting the claim of punitive damages to go to the jury the Court "placed unwarranted and unexplained credibility to plaintiff's claims."

5. The Court committed error by awarding prejudgment interest:

Having examined Walmart's assertion and argument the Court determines it did not abuse its discretion in awarding prejudgment interest under W.Va. Code 56-6-31.

Accordingly, it is **HEREBY ORDERED** that Defendant/Third-Party Plaintiff's Renewed Motion for Judgment as a Matter of Law, or in the alternative for New Trial and to Amend Judgment is **DENIED**.

The Clerk of this Court shall mail copies of this order to:

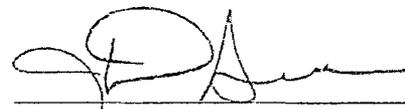
James G. Bordas, III, Esq.
John Artimez, Esq.
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003

Philip J. Sbrolla, Esq.
Matthew C. Schrebe, Esq.
Cipriani & Werner, P.C.
1144 Market Street, Suite 300
Wheeling, WV 26003

Todd Wiseman, Esq.
Wiseman Law Firm, PLLC
1510 Grand Central Avenue
Vienna, WV 26105

ENTER

7-2-2019



J.D. BEANE, Judge