Rel: October 27, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0008

Dolgencorp, LLC

v.

Deborah Renae Gilliam

Appeal from Tuscaloosa Circuit Court
(CV-16-900392)

SELLERS, Justice.

Dolgencorp, LLC, appeals from a judgment entered on a jury verdict in favor of Deborah Renae Gilliam. We reverse the judgment and render a judgment for Dolgencorp.

I. Facts

On March 14, 2016, Daisy Pearl White Freeman was operating her vehicle in the parking lot of the Northwood Shopping Center in Northport. Freeman lost control of the vehicle, ran over a six-inch curb, crossed a sidewalk, and crashed through the storefront of a Dollar General store, striking Gilliam -- a customer of the store. Gilliam sustained serious and permanent injuries. According to the Alabama Uniform Traffic Crash Report ("the traffic report") contained in the record, Freeman reported that, immediately before the accident, she had been traveling across the shopping center parking lot when the vehicle's steering wheel began to shake, the vehicle jerked to the left, and the vehicle's brakes failed. The traffic report also indicated that witnesses had observed Freeman's vehicle traveling across the parking lot at a "high rate of speed." The traffic report listed the speed limit in the parking lot at 15 miles per hour; it was estimated that Freeman's vehicle had been traveling approximately 33-34 miles per hour when it collided with the Dollar General storefront. Gilliam commenced an action in the Tuscaloosa Circuit Court against, among others, Dolgencorp, which owns the Dollar General store, alleging that Dolgencorp had been negligent

and wanton in failing to erect barriers such as bollards outside the store's entrance, which, she claimed, could have prevented Freeman's vehicle from crashing into the storefront and injuring her. Dolgencorp moved for a summary judgment, arguing, among other things, that Gilliam's claims were precluded as a matter of law by Albert v. Hsu, 602 So. 2d 895 (Ala. 1992) (holding, in relevant part, that a driver crashing into a business's building is not a foreseeable occurrence that would give rise to a duty on the part of a business's owner to protect persons in the building from such a crash). The trial court denied Dolgencorp's motion for a summary judgment, and the case proceeded to a jury trial. At the close of Gilliam's evidence, Dolgencorp moved for a judgment as a matter of law ("JML"), pursuant to Rule 50, Ala. R. Civ. P., reiterating its summary-judgment arguments. The trial court granted the motion as to the wantonness claim, but it denied it on the negligence claim. At the close of all the evidence, Dolgencorp renewed its motion for a JML on the negligence claim; the trial court denied the motion. The jury returned a verdict in favor of Gilliam, awarding her $381,000.[1] The trial court entered a

[1]According to the Gilliam, "[t]he jury found, pursuant to the Trial Court's instructions, that Gilliam had not yet been made whole by the

judgment on the jury's verdict. Dolgencorp filed a renewed motion for a JML, which was denied by operation of law. This appeal followed.

II. Standard of Review

> "When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).

III. Discussion

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previous pro tanto settlements with other tortfeasors and charged [Dolgencorp] with making up only the $381,000 difference."

The issue on appeal is whether, under the facts presented, the trial court erred in denying Dolgencorp's motions for a JML on the negligence claim based on this Court's holding in Albert. To prevail on her negligence claim, Gilliam was required to prove (1) that Dolgencorp owed her a duty of care, (2) that Dolgencorp breached that duty, (3) that she suffered a loss or injury, (4) and that Dolgencorp's breach was the actual and proximate cause of her loss or injury. Albert, 602 So. 2d at 897. The existence of a duty is a question of law to be determined by the trial court, and, in the absence of a duty, there can be no negligence. Id. In determining whether a duty exists in a given situation, courts consider a number of factors, most importantly whether the injury was foreseeable by the defendant. Smitherman v. McCafferty, 622 So. 2d 322, 324 (Ala. 1993). "'[F]oreseeability must be based on the probability that harm will occur, rather than the bare possibility.'" Ex parte Wild Wild West Soc. Club, Inc., 806 So. 2d 1235, 1241 (Ala. 2001) (citation omitted).

It is undisputed that, at the time of the accident, Gilliam was a business invitee of Dolgencorp; thus, Dolgencorp owed her a duty to exercise reasonable care in maintaining its premises in a reasonably safe condition. See Unger v. Wal-Mart Stores East, L.P., 279 So. 3d 546, 550

(Ala. 2018). Gilliam claims that Dolgencorp owed her a duty to erect protective barriers such as bollards outside the Dollar General store's entrance to protect her from the type of injury that she suffered as a result of the vehicle crashing through the storefront. However, under this Court's holding in Albert, Dolgencorp had no such duty. In Albert, a driver backed her vehicle across a parking lot, over a curb, across a sidewalk, and through the wall of a restaurant, striking and ultimately killing a child who was seated in the restaurant. The mother of the child sued, among others, the restaurant owners, alleging that the restaurant building had been negligently designed and that protective barriers should have been erected around the building. The trial court entered a summary judgment in favor of the restaurant owners. This Court affirmed the summary judgment, holding (1) that "any foreseeability [of harm] inferred from the facts of this case is too remote to give rise to a duty owed and breached," 602 So. 2d at 897, and (2) that there was no causation, because the "operation of the vehicle" caused the child's death, id. at 898. In so holding, this Court noted the majority view regarding the legal foreseeability of vehicle incursions:

> "'We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. In a sense all such occurrences are foreseeable. They are not, however, incidents to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If as a matter of law such occurrences are held to be foreseeable and therefore to be guarded against, there would be no limitation on the duty owed by the owners of establishments into which people are invited to enter. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.'"

602 So. 2d at 898 quoting Schatz v. 7-Eleven, Inc., 128 So. 2d 901, 904 (Fla. Dist. Ct. App. 1961)) (emphasis added).

Like in Albert, under the facts of this case, there is "no duty and no causation; the facts indicate that the cause of the accident was the operation of the [out-of-control] vehicle."[2] Id. at 898. Stated differently, there is simply no evidence indicating that it was commonplace for vehicles to crash into the Dollar General storefront, which would give rise to a duty on the part of Dolgencorp to erect barriers such as bollards at

[2]Acknowledging that the facts in Albert are indistinguishable from the facts presented here, Gilliam requests that this Court overrule Albert. Albert, however, was not wrongly decided, and Gilliam has presented no persuasive argument for overruling the existing precedent.

the entrance of the store to protect customers from the type of injury that occurred in this case. Gilliam's injury, albeit tragic, was not foreseeable. To the contrary, the evidence indicated that the Dollar General store located in the Northwood Shopping Center was reasonably safe and that the chances of vehicle incursions at that store location were extremely low. The evidence was undisputed that Dolgencorp had leased that Dollar general store location since 1997 and that there had been no prior vehicle incursions at the store. David Kelley, the chief building inspector for the Northport Planning and Inspections Department, stated in his affidavit that "no Northport building code has ever required or prescribed that barriers or bollards be erected to protect sidewalks, storefronts, or retail stores." Daniel S. Turner, a licensed professional engineer, stated in his deposition that, in March 2019, he had performed a weeklong traffic-volume study in the Northwood Shopping Center and that, based on that study, the probability of a vehicle traveling the same path that Freeman's vehicle had traveled on the day of the accident and striking the Dollar General storefront was 1 in 5 million. Gilliam's expert, Robert Reiter, identified three "heightened risk factors" associated with either the design of the shopping center's parking lot or the Dollar General

storefront that, he opined, justified the need for protective barriers in front of the store. Nevertheless, on cross-examination, Reiter agreed that the chances of a vehicle incursion at the Dollar General store were very remote.

IV. Conclusion

Based on the foregoing, Gilliam's negligence claim fails as a matter of law; we therefore reverse the trial court's judgment and render a judgment in favor of Dolgencorp.

REVERSED AND JUDGMENT RENDERED.

Parker, C.J., and Mitchell, J., concur in part and concur in the result, with opinions.

Shaw, Wise, Mendheim, and Cook, JJ., concur in the result.

Stewart, J., dissents.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in reversing the trial court's judgment and rendering a judgment in favor of Dolgencorp, LLC, because this Court's decision in Albert v. Hsu, 602 So. 2d 895 (Ala. 1992), controls the outcome of this case under principles of stare decisis. However, I cannot concur with the main opinion's conclusion in footnote 2 that Albert "was not wrongly decided." ____ So. 3d at ____. Rather than further entrench Albert, I would remain open to reconsidering it in an appropriate case. Specifically, I question whether a vehicle hitting a store should be per se unforeseeable, particularly when there is substantial evidence indicating that the corporate store owner has institutional knowledge that such collisions have happened.

Although Deborah Renae Gilliam has asked us to overrule Albert, she has not articulated an argument as to why we should overrule it. Instead, she simply requests that this Court overrule Albert if it concludes that Albert established a per se rule of unforeseeability or that Albert is otherwise indistinguishable. Without adequate argument providing us a reason why we should overrule precedent, I hesitate to do so. But that same caution prevents me from further endorsing precedent

that may have been wrongly decided. I therefore concur with the main opinion except for its conclusion that Albert was correctly decided.

MITCHELL, Justice (concurring in part and concurring in the result).

I concur with the main opinion except for its full-throated endorsement of Albert v. Hsu, 602 So. 2d 895 (Ala. 1992). ___ So. 3d at ___ n.2. Although the Albert Court reached the right result, its explanation of the law was clumsy, and I have reservations about fully endorsing its reasoning.

In Albert, this Court cited several out-of-state cases applying a per se rule that vehicles crashing into stores is unforeseeable. But the Albert Court did not, itself, adopt a categorical rule; rather, it limited its holding to the facts of that case. Albert, 602 So. 2d at 898 ("The claim in the present case is lacking the essential element of foreseeability." (emphasis added)).

Consistent with this reading of Albert, the main opinion explains that Deborah Renae Gilliam has not presented substantial evidence that the Dollar General store involved in this case (or Dollar General stores generally) is more susceptible to vehicle incursions than other stores. I believe that is the correct approach. Accordingly, except for my reservation about how the main opinion endorses Albert, I concur.