In The

Supreme Court of Virginia

RECORD NO. 090659

CITY OF ALEXANDRIA,

Appellant,

v.

J-W ENTERPRISES, INC.
and
WILLIAM D. TROUT,

Appellees.

REPLY BRIEF OF APPELLANT

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J-W Enterprises, Inc. relies upon incorrect legal principles, misconstrued evidence, and conclusory statements contradicted by the record when it asserts Officer Carl Stowe was working solely as a police office on behalf of the City of Alexandria (the "City") when he shot and killed Aaron Brown.

I. The trial court erred in dismissing Officer Stowe's dual role.

The trial court erred in accepting J-W Enterprises, Inc.'s incorrect legal argument that Officer Stowe had to be acting solely as a police officer or solely as its security guard at any one time. (App. 638-639.) Accordingly, the trial court concluded, "At the moment of the shooting, Officer Stowe was an agent of the City performing a police function, not a private function with the defendant J-W Enterprises." (App. 637.) This mixed conclusion of law and fact, which is demonstrably incorrect, lies at the heart of this appeal.

The City agrees that Officer Stowe was acting in part (albeit in a grossly negligent way) in his role as a City of Alexandria police officer as he killed Aaron Brown by continuing to shoot into the side of the vehicle in which Aaron was riding as it passed by. (App. 42-43, 245-246.) Officer Stowe was also acting as J-W's agent at that time and in the events leading up to the shooting – as Stowe violated police

directives in chasing Brown and his companions into the IHOP parking lot and in then seeking to stop their speeding vehicle in order to help the restaurant collect its unpaid bill. Officer Stowe's admitted purpose at all times when he was on the parking lot was to get IHOP's bill paid, albeit by improperly using his police uniform and gun to intimidate non-payers. (App. 44.) Because Officer Stowe was acting as both the City's and J-W's agent, J-W ought to be held accountable in the City's contribution action.

The court's conclusion that Officer Stowe could not be both the City's and J-W's agent at the same time stands contrary to this Court's explicit holding in *Clitchfield Coal Corporation v. Redd*, 123 Va. 420, 96 S.E. 83 (1918). While J-W seeks to dismiss the significance of *Clitchfield* by arguing that "[t]he case did not involve police officers" (Br. at 16), this Court found that the matter of the detective's dual status as an "officer of the law" had already been determined, and held, "The fact that he was an officer, however, did not preclude him from acting also in the capacity of an agent of the defendant." *Id.* at 431.[1] In *Clitchfield*, the defendant indirectly employed its law officer through a private detective agency, which

[1] In its discussion, the Court interchangeably used the phrases "officer of the law" and "police officer". *Id.* at 431-432.

was the entity that "primarily" employed the officer. Here, J-W directly employed Officer Stowe. In *Clitchfield,* the private detective/law officer "looked to the defendant for his instructions, was subject to its orders and directions…" *Id.* at 433. Here, too, Officer Stowe looked to William D. Trout (J-W's president and IHOP's owner), who made decisions whether to send Officer Stowe after a customer who had left without paying. (App. 362.) Mr. Trout thus acknowledged his control over the actions of Officer Stowe, contrary to J-W's claim that "no evidence indicated" such control. (App. 362-363; Br. at 17.) Officer Stowe knew his job, as directed and ratified by IHOP's owner, and pursued and confronted customers who walked out on their bills between 40 and 50 times during his ten years working for the restaurant. (App. 29-30, 33, 59.)

J-W ignores this and other detailed evidence in asserting that the evidence is "overwhelming" that Officer Stowe was "acting as a police officer" when "all events took place and not as an agent of J-W." (Br. at 19.) The evidence actually was overwhelming that he was acting as an agent of J-W. Officer Stowe did testify that he believed he was acting as a police officer when he pursued Aaron and his friends into the parking lot and tried to get their vehicle to stop. (App.

95-97.) But this testimony does not contradict Officer Stowe's additional testimony that he also acted on behalf of J-W and its IHOP at the same time. (App. 100.) Officer Stowe testified: Part of his duties as he understood them from IHOP management and wait staff was to help get walk-outs to pay their bills. (App. 98.) Officer Stowe understood he was at these times simultaneously performing duties for IHOP while under the umbrella of police work. (App. 100.) He knew his primary purpose in confronting IHOP customers who had not paid their bill was to get them to pay the bill. (App.100.) "If a patron would leave the IHOP without paying, we would stop that individual to see if they could pay their bill," Officer Stowe recounted, adding that his understanding of this procedure came from the prior police coordinator at the IHOP as well as from IHOP managers and conversations with Mr. Trout. (App. 28-29.)

Meanwhile, Officer Stowe understood that under police directives he was not supposed to act as a bill collector. (App. 100.) In fact, the Alexandria Police Department Directive 4.17 on secondary employment explicitly prohibited "*Employment as a bill collector*, repossessor *or collection agent of any kind*, including the distribution of late rent notices." (App. 288.) (Emphasis added.)

When J-W asserts (Br. at 3), “IHOP never told Officer Stowe to go and collect money,”J-W ignores the uncontested evidence that Officer Stowe was working as its collection agent in bringing back customers who had left without paying. (App. 79.) The language of Directive 4.17 shows that it also covered the collection work that Officer Stowe was doing for the IHOP in his capacity as its private security guard. In intimidating walk-outs into returning to the restaurant to pay their bills, Officer Stowe, even though he was not directly collecting money, was acting as a collection agent. Thus, the specific evidence belies J-W’s steadfast argument, and the trial court’s conclusion, that Officer Stowe was only working in his capacity as a police officer and not also in his capacity as a private security guard for the IHOP when he followed a group of non-paying customers, including Aaron Brown, and positioned himself in front of their speeding vehicle to get its occupants to pay their tab. (App. 34-35, 38-39.) This positioning itself violated the Alexandria Police Department Directive 10.32.06(E)(1), which provides that department employees “will not move themselves into or remain in the path of an occupied, *moving* vehicle for any reason except when conducting

routine traffic direction and control." (App. 269.) (Emphasis in original.)

J-W seeks to bolster its argument that Officer Stowe was acting solely in his capacity as a police officer by asserting, "It was a known policy that the IHOP would prosecute people stealing. (App. 78-79.)" (Br. 3.) But the cited pages show that Officer Stowe merely agreed that no policy existed that IHOP would not prosecute people stealing. (*Id.*) The lack of an official policy is not the same thing as a policy requiring prosecution, as evidenced by Mr. Trout's testimony that he did not know of a single occasion where an IHOP customer had been arrested for not paying a bill. (App. 353-354.) Accordingly, Officer Stowe understood that IHOP preferred to simply have walk-outs pay their bills rather than face prosecution, with the attendant toll on managers' time at trial. (App. 45-46.) Of course, the City does not dispute Officer Stowe's testimony that he believed he was acting as a police officer when he pursued walk-outs, stood in front of their vehicle and ended up shooting and killing Aaron Brown. After all, Officer Stowe was carrying his police revolver and wearing his police badge and uniform pursuant to requirements of the City police. (App. 51-52, 73.) But IHOP also required Officer Stowe to be in full police

uniform, with his revolver, during his work as its private security officer, recognizing the usefulness of the “intimidation” factor. (App. 297-298, 345-346, 361.) Furthermore, the Extra Duty Agreement between the City and the IHOP specifically notified IHOP that

> While the City of Alexandria may provide limited insurance coverage for members of the Police Department who take specific law enforcement action while engaged in outside employment, there is no provision that protects employers from liability, workers’ compensation and disability claims arising out of their employment or use of off-duty police officers.

(App. 297.) Thus, from the outset, IHOP recognized the dual nature of Officer Stowe’s work and the fact that it could be held liable for negligent actions by its extra-duty police officer. By contract and by practice, Officer Stowe served J-W and its IHOP both as a police officer and as its private security guard. The trial court erred in seeking to separate these intertwined roles by finding that since Officer Stowe was acting as a City police officer when he shot and killed Aaron, he could not also have been acting on behalf of the IHOP that was paying his wage.

Officer Stowe applied his understanding that the IHOP wanted him to pursue walk-outs and bring them back to pay their bill during the incident that resulted in the shooting at issue. He followed the

walk-outs, intending “to stop them and to have them take care of the tab.” (App. 33.) Then, in the parking lot, he tried to stop their vehicle “[s]o I could have the occupants of the vehicle pay their tab.” (App. 34-35, App. 38-39.)

J-W asserts that Officer Stowe was “engaged in the performance of a public duty such as the enforcement of the general laws not only when he pursued the thieves but especially when he attempted to make a police stop…” (Br. at 14.) However, no evidence shows that Officer Stowe sought to arrest the individuals for stealing, either when he chased them or when twice he stood in front of their vehicle. Had he wanted to make a future arrest, Officer Stowe agreed he could have simply obtained the license tag number of the vehicle as it drove away, instead of running to stand in front of the moving vehicle. (App. 105-06.) But Officer Stowe’s admitted purpose was not to conduct an arrest but to help IHOP collect its bill.

In *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 292 S.E.2d 366 (1982), in contrast, the officer was simply directing traffic, and, unlike Officer Stowe who carried out IHOP directions to go after walk-outs, the theater retained no power whatsoever to control its officer’s performance. In other cases cited by J-W, *Marks v. Crawford*, 882 F.

Supp. 530 (E.D. Va., 1993), and *N.&W. Ry. Co. v. Haun*, 167 Va. 157, 187 S.E. 481 (1936), this Court determined the officers were acting in their public capacity as police officers as they made arrests. Officer Stowe was seeking to help IHOP collect its bill, not seeking to make an arrest. In that respect, this case is more similar to *Goldbolt v. Brawley*, 250 Va. 467, 463 S.E.2d 657 (1995), where this Court found that the private employer of an off-duty officer may be held liable for the officer's tortious acts when he is engaged in the protection of private property rather than enforcement of general laws. In helping IHOP collect its tab, Officer Stowe was protecting his employer's private property – its right to be paid for food served.

II. This case falls under the dangerous instrumentality exception to the independent contractor rule; in any case, Officer Stowe was acting as J-W's employee at the time of the shooting.

J-W does not dispute that Officer Stowe's loaded weapon was a dangerous instrumentality. Nor does J-W dispute the existence of the dangerous instrumentality exception to the general rule that a principal is not liable for the torts of its independent contractor. Without explanation, or any citation to authority, J-W simply asserts that "the Appellant's dangerous instrumentality argument is additional proof that the use of a gun by Officer Stowe, given the evidence, had

to have been outside the scope of his employment." (Br. at 24.) This argument does not make sense. J-W appears to claim that Officer Stowe's negligent use of his deadly weapon had to be outside the scope of his employment because J-W would never authorize negligent use of a deadly weapon. For that matter, neither J-W nor the City nor any employer would authorize any negligence by its employee. Adoption of such reasoning would eradicate the law of *respondeat superior* altogether, along with the dangerous instrumentality exception. But that is not the law.

In any case, Officer Stowe was acting as J-W's employee, not as an independent police professional at the time of the shooting. Under IHOP's contract with the City, Officer Stowe was required to wear his full police uniform, and was not allowed to undertake any action to benefit the restaurant. (App. 297-298.) Also, Officer Stowe knew he was not supposed to work as a bill collector under City police directives, though he admitted to doing that for the IHOP. (App. 100.) Had he been working strictly as an independent police professional, he would have followed the directives of his department. But Officer Stowe did not follow those directives when it came to bill collecting because of his loyalty to the IHOP. Meanwhile, IHOP's

owner exercised control in deciding when to send Officer Stowe after a customer who had walked out without-paying. (App. 362-363.) Based on his years of working for the restaurant, Officer Stowe knew when to pursue such walk-outs, and, thus, the control exercised by Mr. Trout continued even when he was not there, when managers and/or waiters told Officer Stowe of customers leaving without paying their bill. In the case at hand, IHOP's control trumped the professional directives forbidding Officer Stowe from being involved in any kind of collection work and from standing in front of moving vehicles when he wasn't working traffic control. It is this control that is the determinative factor in making Officer Stowe the co-employee of J-W and its IHOP with respect to the actions in issue. *McDonald v. Hampton Training School for Nurses*, 254 Va. 79, 86, 486 S.E.2d 299, 303 (1997).

Furthermore, contrary to J-W's claim that the IHOP was not able to fire Officer Stowe (Br. at 5), Mr. Trout testified he would have made sure that Officer Stowe would not have continued to work at the IHOP had he determined the officer's work was other than what he was hired to do. (App. 383-384.) Conclusory and self-serving opinions by Mr. Trout and Maaza Henry that Officer Stowe was an independent contractor do not decide this issue involving a mixed

question of law and fact. *See e.g., Russo v. White*, 241 Va. 23, 28 (Va. 1991).

J-W also argues: "Even if the relationship was an employment one, then clearly the actions taken by Officer Stowe would have been outside the scope of employment once he left the restaurant, attempted to stop a moving vehicle, and shooting [sic] at the driver in order to protect himself." (Br. at 24.) But Officer Stowe testified he sought to stop the vehicle by standing in its path in order to help IHOP collect its tab, contrary to police directives against bill collecting and such confrontations with vehicles. Thus, Officer Stowe's firing of his gun undisputably arose from his work for J-W and its IHOP restaurant.

III. The trial court's error of law as to Officer Stowe's dual agency led to it finding no proximate cause as to J-W.

The trial court found that the "concurring actions" of Officer Stowe and the young man driving the vehicle in which Aaron rode proximately caused the shooting death of Aaron Brown. (App. 637.) J-W agrees with this conclusion. (Br. at 25.) The City also agrees. The only point of dispute centers on Officer Stowe's role. If the trial court was wrong in its legal conclusion that Officer Stowe, as a police officer, could not also have been the agent of J-W, his private

employer, then its corresponding conclusion concerning proximate cause also is wrong. For all the reasons discussed above, Officer Stowe was acting within the scope of his employment by J-W, and was acting as its agent when he shot Aaron. Because Officer Stowe's act was a proximate cause of the youth's death, J-W cannot escape liability on grounds of lack of proximate cause.

The trial court also erred in concluding as a matter of law that because the City stipulated that Officer Stowe was acting in self-defense, he could not have been negligent. In fact, Officer Stowe was negligent both in violating City police directives that would have prevented the shooting incident from occurring and in re-aiming and continuing to fire his revolver into the side of the vehicle as it passed by him.

IV. The trial court incorrectly concluded the City voluntarily settled because it enjoyed absolute immunity.

The trial court drew the incorrect legal conclusion that the City did not have to pay Aaron's estate anything in the underlying case because it "has absolute immunity for governmental acts" including police actions. (App. 639-640.) But the City can be held liable for an employee's gross negligence. *Couplin v. Payne*, 270 Va. 129, 136 (Va. 2005) (Citations omitted.)

The City established at trial that while Officer Stowe fired his first shot or two in self-defense into the front of the vehicle, he then re-aimed and fired several more rounds into the side of the vehicle as it passed by. (App. 42-43.) One of those rounds hit the passenger window, and Officer Stowe believed that was the shot that killed Aaron. (App. 43.) The City's expert testified Officer Stowe should have stopped shooting rather than re-aiming his weapon and firing rounds into the side windows when the danger had passed. (App. 245-246.) This evidence and evidence of Officer Stowe violating City directives in his work for J-W establishes an issue of gross negligence that negates any immunity.

J-W's separate argument that contribution is not appropriate because Officer Stowe could only have served as the agent of the City or J-W at any point in time – but not both – suffers from the same misinterpretation of the law that led the trial court astray.

CONCLUSION

Legal errors, not any genuine issue of fact, led the trial court to enter judgment for J-W. The undisputed evidence and the correct application of law entitle the City to judgment. Wherefore, the City of Alexandria respectfully requests that the Court set aside the verdict

for the defendant and enter judgment, finding the City is entitled to contribution from J-W Enterprises, Inc. of the sum of $550,000, which is half the money the City paid in settling the claim brought by the Estate of Aaron Brown.

Respectfully Submitted,
CITY OF ALEXANDRIA, VIRGINIA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October 2009, fifteen paper copies and one electronic copy on CD of the foregoing Reply Brief of Appellant was hand-filed with the Clerk at the Supreme Court of Virginia and a copy of the foregoing Reply Brief of Appellant was mailed, via U.S. Mail, postage prepaid, to:

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