

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**WACKENHUT SECURITY AND
ROZIVITO HOSKINS, INDIVIDUALLY AND AS
AN EMPLOYEE OF WACKENHUT SECURITY**

APPELLANT

VS.

Cause No.: 2010-CA-00480

ERNIE FORTUNE

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI, FIRST
JUDICIAL DISTRICT**

BRIEF OF APPELLEE

Oral argument is not requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

- I. Ernie Fortune, Appellee
- II. Rozivito Hoskins, Appellant
- III. G4S Secure Solutions Inc. f/k/a/ The Wackenhut Corp., Appellant
- IV. Honorable Winston Kidd, Circuit Judge
- V. Honorable Matthew A. Taylor, Esq., Honorable Michael Wolf, Esq. and Honorable Smith Boykin, Esq. attorneys for Appellant
- VI. Honorable J. Ashley Ogden, Esq. and James W. Smith, Jr., Esq. and the firm of Ogden & Associates, PLLC. attorneys for Appellee
- VII. Honorable Robert F. Wilkins, Esq. and the Rocky Wilkins Law Firm, Attorney for Appellee

RESPECTFULLY SUBMITTED, this the 14th day of June, 2011.

BY: J. Ashley Ogden

J. Ashley Ogden

OF COUNSEL:

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee does not request oral argument. Oral argument is unnecessary and would be a needless use of judicial time and resources. The issues in this appeal are not such that oral argument is necessary. Plaintiff/Appellee concedes that the trial court committed reversible error by denying Defendants' Proposed Jury Instruction D-11. Plaintiff, by separate motion, respectfully requests that this cause be dismissed and remanded to the Hinds County Circuit Court for a new trial.

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STATEMENT OF THE ISSUES

1. Whether the trial court properly allowed testimony from expert economist Dr. James Henley
2. Whether the trial court erred in excluding evidence and testimony of Plaintiff's alcohol use.
3. Whether the trial court properly denied Defendant's Motion in Limine to exclude evidence of future surgeries.
4. Whether the trial court properly allowed substitution of Plaintiff's expert witness economist at trial.
5. Whether the trial court properly allowed documentary evidence to be redacted following admission into evidence and publication to the jury.
6. Whether the trial court erred in refusing proposed jury instruction D-11 regarding contributory negligence.
7. Whether the trial court properly refused proposed jury instruction D-26 regarding use of reasonable force.
8. Whether the trial court properly excluded evidence of Plaintiff's prior bad acts.
9. Whether the trial court properly excluded referenced to Plaintiff's status as "homeless."
10. Whether the trial court properly applied the "collateral source" rule at trial.

STATEMENT OF THE CASE

This case is an action for damages by Ernie Fortune ("Fortune") against defendants Wackenhut Security and Rozivito Hoskins, Individually and as an Employee of Wackenhut Security, (Collectively referred to as "Appellants") for failing to keep the premises in a reasonably safe condition; failing to supervise and regulate the conduct and activities of Appellants so as to protect guests from physical harm; failing to exercise ordinary care in the discharge of their responsibility to prevent and protect patrons from incidents; allowing an atmosphere of violence to exist or develop on its premises; negligently hiring a person whom the Defendants knew or should have known was a person of violent propensities; negligence in failing to adequately train the personnel employed and on duty at the restaurant; negligence in retaining employees whom the Defendants knew or should have known were persons of violent propensities; assault and battery of the Plaintiff through the ratification due to the Defendants failure to discharge employees responsible for the attack and subsequent injury; failing to remedy a dangerous condition which the Defendants caused to exist or of which the Defendants knew or should have been aware of and failing to render aid to the Plaintiff.

Plaintiff sought damages for past, present and future medical and other expenses; loss of income and wages; past, present and future physical pain and suffering; past, present and future emotional distress and mental anguish; permanent physical impairment, scarring and disfigurement; permanent loss of the use of his right arm; and other damages.

The trial was held before a jury of twelve (12) commencing on November 30, 2009 and ending on December 7, 2009. The case was submitted to the jury on instructions delivered by the lower court. The jurors found the issues in favor of the Plaintiff and against the Defendants. The jury found Hoskins to be 75% negligent and Defendants, My Joy, Inc. and Lockett to be 25% negligent. The jury assessed Plaintiff's total damages to be one million dollars (\$1,000,000.00).

On February 10, 2010 the trial court issued an order denying Defendants' post trial motions. Defendant filed their appeal to this Court.

STATEMENT OF THE FACTS

Plaintiff was a daily and frequent customer of the McDonald's restaurant located at 2465 Highway 80 West in Jackson. He was referred to by the employees as a "super-sized" customer because he spent a lot of money at the restaurant. (Tr. 291:1-13). Plaintiff had established a history with McDonalds of going to the McDonalds, buying a drink or food and then coming back in the same day and buying more food or drinks and using the same McDonalds cup. (Tr. 570:15 – 570:27). On July 27, 2008 he made a purchase at McDonalds around 3 pm and returned later that day to buy dinner. (Tr. 573:1-15). Plaintiff brought his same McDonald's cup he had purchased at 3 pm. (Tr. 573:1-5). Plaintiff intended to go to the McDonald's and order a chicken sandwich and get a drink. (Tr. 573:17-15). On the date in question, the owner of the McDonald's location, My Joy, Inc., was under contract with The Wackenhut Corporation to provide security services at the restaurant. (Tr. 472:5-13). The security officer on duty at the time that Plaintiff entered the restaurant was Defendant, Rozivito Hoskins. (Tr. 551:28 to 552:4).

Plaintiff entered the store and went to the fountain drink machine to fill his cup with ice before getting in line at the counter. (Tr. 517:19-25). Plaintiff had established a pattern at McDonalds where he would fix his drink and then go to the counter to purchase his meal. (Tr. 571:10-27). McDonalds had accepted this routine. (Tr. 572:1-3). The night manager on duty on this date, Tracy Lockett, did not know plaintiff, that he was a frequent customer, and did not know his routine. (Tr. 514:11-25). She told Plaintiff he could not bring a cup into the restaurant and take ice from the drink machine because it was not sanitary. (Tr. 517:19-.25; 526:25 to 528:8; 531:2-8). Upon receiving the instruction Plaintiff walked out the door feeling embarrassed because he had been getting ice for months and the other managers did not prohibit him from

doing so. (Tr. 576:11-16). Plaintiff retrieved a dollar and went back in the restaurant and laid a dollar bill on the counter so that he could purchase a drink. (Tr. 576:16-21). He then went to the door to leave. (Tr. 578:17-24). When he reached the door he stopped and turned and began having a conversation with the manager who was behind the counter. (Tr. 580:1-16).

At this point, security guard, Rozivito Hoskins, approached Plaintiff and grabbed him and pushed Plaintiff through the door, down to the ground, and began to beat and stomp on the Plaintiff (Tr. 580:28 to 583:7). Plaintiff curled up into a fetal position on the ground and Hoskins continued to kick the Plaintiff. (Tr. 582:15-21; Exhibit "P-1" Video footage of the attack). Hoskins testified that the Plaintiff threatened him with a knife. (Tr. 552:3 to 560:25). Witnesses to the assault testified that they did not see Fortune brandish a knife or threaten anyone prior to being attacked by Hoskins. (Tr. 217:26-219:4; 230:14-21; 253:23-254:4). The Jackson Police department police report listed a knife found at the scene. (Tr. 209:12-17). Hoskins testified Plaintiff had a pocket knife in his right hand, but it is not visible in the video surveillance. (Tr. 557:4-28). Plaintiff testified he did not have a knife. (Tr. 576:27-28).

SUMMARY OF THE ARGUMENT

Plaintiff concedes that the trial court committed reversible error by denying Defendants' Proposed Jury Instruction D-11 on contributory negligence. There was conflicting evidence presented to the jury regarding whether or not the Plaintiff brandished a knife and threatened anyone prior to being assaulted by Hoskins. The Record provides a foundation in the evidence for a jury instruction on the Plaintiff's possible contributory negligence. The trial court's denial of Defendants' Proposed Jury Instruction D-11 prevented Defendant from presenting its theory of the case. It was reversible error not to instruct the jury on contributory negligence when proof was presented at trial. The Defendants are entitled to a new trial. Appellee by separate motion and within this brief respectfully requests this cause be dismissed and remanded for a new trial.

Appellee/Plaintiff reserves argument on all other issues raised on appeal. Defendants are entitled to a new trial based on the reversible error of the denial of Defendants' Proposed Jury Instruction D-11 which would render the decisions on the other issues moot. If the Court does not grant Appellee's motion and requires a full briefing on the other nine (9) issues Appellee/Plaintiff requests fifteen days (15) to fully brief the remaining issues.

STANDARD OF REVIEW

"The standard of review for challenges to jury instructions is as follows: Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Harris v. State*, 861 So. 2d 1003, 1012-1013 (Miss. 2003). The Supreme Court will reverse based on the denial of an instruction if the granted instructions, taken as a whole, do not fairly instruct the jury on the applicable law supported by each party's proof. *Young v. Guild*, 7 So. 3d 251 (Miss. 2009).

ARGUMENT

*Plaintiff reserves argument on the nine (9) issues raised by
Appellants/Defendants not briefed herein.
If the Court requires a full briefing on the other nine (9) issues
Appellee/Plaintiff requests fifteen days (15) to fully brief the remaining issues.*

I. The Trial Court Erred in Refusing Proposed Jury Instruction D-11 Regarding Plaintiff's Contributory Negligence

The trial court committed reversible error by denying Defendants' Proposed Jury Instruction D-11.

The standard of review when considering the grant or denial of jury instructions is whether, taking the evidence in the light most favorable to the party requesting the instruction, and considering

all reasonable favorable inferences which may be drawn from the evidence, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction. *Church v. Massey*, 697 So. 2d 407, 410-11 (Miss. 1997). A party is entitled to have the jury instructed regarding a genuine issue of material fact so long as there is credible evidence in the record which would support the instruction. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 26 (Miss. 1994).

Southland Enterprises, Inc. v. Newton County, 838 So. 2d 286, 289 (Miss. 2003). Considering the evidence in the light most favorable to the Appellants/Defendants, and considering all favorable inferences in the evidence, a reasonable juror could find the facts in accordance with the theory of contributory negligence requested in Proposed Jury Instruction D-11. There is evidence which was presented by the Appellants/Defendants that supports a contributory negligence instruction. Hoskins testified that he asked the Plaintiff to leave the premises. (Tr. 551:28 to 553:20; 559:25 to 560:6). After asking the Plaintiff to leave the premises, Hoskins approached the Plaintiff, who according to Hoskins, brandished a knife. (Tr. 552:3-11). Jackson Police Department officer, Reginald Cooper, testified that a knife was recovered and listed as evidence in the police incident report. (Tr. 209:12). The Wackenhut incident Report stated a fingernail file not a knife was recovered: (Exhibit P-6).

Luckett thought that when Plaintiff re-entered the restaurant with the dollar and placed it on the counter it was an aggressive movement. (Tr. 534:16-535:8). Hoskins testified the plaintiff had a knife that was sizable enough that it was a threat. (Tr. 552:9-11). While the evidence is disputed by other witness testimony this evidence does support Defendants' Proposed Jury Instruction D-11. The theory of contributory negligence was presented by the Defendants' was not represented in the jury instructions. See, *Ford v. State*, 975 So. 2d 859, 863-64 (Miss. 2008) (Defendant is entitled to have jury instructions given which presents his theory of the case). While the video of the incident does not show the Plaintiff brandishing a knife the Defendant


testified that he thought the Plaintiff had a knife. It is arguable that the Defendant should have been allowed to have an instruction on contributory negligence.

CONCLUSION

Plaintiff respectfully requests that the Court remand this cause for a new trial on the issues.

Respectfully submitted this the 14th day of June, 2011.

BY:


J. Ashley Ogden

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

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Honorable Winston L. Kidd
Hinds County Circuit Judge
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Robert F. Wilkins, Esq.
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So certified, this the 14th day of June, 2011.



J. Ashley Ogden