

ORAL ARGUMENT – 04/16/02
01-0643
WAL-MART STORES, INC V. RODRIGUEZ

ALEXANDER: False imprisonment is an intentional tort. To be actionable, the lawsuit must be predicated upon knowing misconduct on the part of the defendant. Mere negligence or other mistake in providing information to the authorities does not give rise to liability even if it results in a misidentification of the plaintiff and ultimately leads to arrest and imprisonment. Rather to be actionable the citizen must go further and actually specifically request or direct the police to make the apprehension.

Probably the clearest statement of the contours of request to direct appears in the Restatement Second of Torts, §45A, comment C. And it's put very simply as this. The words or actions must be arise to the level of this: Officer, arrest that man. In this case we don't have any evidence of knowing misconduct. At best we have summary judgment evidence of negligent conduct on behalf of Wal-Mart. There is no evidence in this case that Wal-Mart knew that any of the information it provided was false. There is no evidence even that Wal-Mart had serious doubts as to the information that appeared on the form that was provided.

I think that there are three cases in particular that this court should focus on in order to get an idea of the contours of false imprisonment. The first one is the grandfather case, a decision by this court, Joske v. Irvine. That's the case that was decided in 1898. That is the case that uses the language "request or direct." In other words, to be actionable there must be an actual request or direct by the citizen to make the arrest. That language is consistent with the instigation language that the court refined in the restatement of 45(a), comment C, which deals with instigation. And there is no real reason for this court at this point to depart from the rule that was laid down in 1898.

The second case the court should look at I believe is Smith v. Snead. A decision by the eminent jurist Woody Jones, that deals with the issue of false imprisonment. And that is a case that makes clear that mere mistakenly providing information to the police, mistaken _____ cannot give rise to liability unless the citizen goes further and actually directs the arrest.

The final case that the court should scrutinize very, very closely is the case of Leon's Shoe Stores. It's a 1957 decision by the Waco CA. It really is the case on which the CA's decision in this case turned. Because what the CA determined in this case was that the failure by Wal-Mart to make full disclosure of material facts was sufficient for liability to attach. Now if you read the Leon's Shoe Store case superficially, there will be a clear understanding as to how that came about. One of the things I would urge the court to do is to have one of the briefing attorneys key cite Leon's Shoes. See what other CAs have done in handling that case. And what the court will find is that there is not really a body of law that has developed setting forth a duty to disclose. However, the duty to disclose language appears in Leon's Shoes. The court held in Leon's Shoes that there was a duty on behalf - under the circumstances of that case there was duty on behalf of the citizens to make full disclosure. Now what the court will see is when you focus on that duty language, and it's really critical, that there is no citations in the authority. It's merely a bald statement that's made,

but it's understandable I believe, and I've been struggling with the decision because it is not a model of clarity. However when you really study it, focus on what the credit manager in that case said and did. What did the credit manager do, because I think what you will find is that in that case the conduct of the credit manager came as close as you can possibly get to being a knowing misrepresentation.

O'NEILL: I'm a little bit confused on where you're drawing the line between knowing misrepresentation and request or direct. Are you saying that as long as this form is filled out, then there can never be liability even if intentional misinformation is put on there, because it's not a request or direct for an arrest?

ALEXANDER: No. Your confusion is understandable because the line is not cleanly drawn in the cases.

O'NEILL: Your answer to my question is no?

ALEXANDER: No it is not no. My answer to the way you framed your question is liability could attach. Because the word I heard you use was knowing provide information.

O'NEILL: And that seems to me to be the proper focus. When you say that this cannot be a request or a direct for an arrest, then it just seems to me that that theory says that as long as you turn this over to the DA and the decision is left up to him, this can never be the basis of liability. But it seems like the more appropriate inquiry is, was the information on this document intentionally false.

ALEXANDER: That's the inquiry.

O'NEILL: So request or direct is really irrelevant.

ALEXANDER: The case law isn't crystal clear on this. If you deliberately provide false information to the authorities, if you deliberately withhold material information, it appears that the case law would say that liability can attach. The key is was it done deliberately.

O'NEILL: So that's the focus rather than request or direct.

ALEXANDER: That's fine. Yes. Let's focus on that. Now what happened here, the...

BAKER: If you agree with Justice O'Neill, then are you saying that the cases you cite that talk about direct are not applicable to this scenario because we're going to look at a different standard or elements of whether there's liability?

ALEXANDER: I think that there is a way to look at it.

BAKER: Having said that, that then takes care of two of the three cases that you discussed. Is that right? And we get to Hornsby as to whether that case will support the claim by

Rodriguez?

ALEXANDER: I think Hornsby is the key case. I agree.

BAKER: Well the CA cited the Bossin v. Towber.

ALEXANDER: It cited Bossin. Let me tell you what Bossin did. Bossin merely cited Hornsby. In one sentence this is what it says: the lack of full disclosure to the authorities may result in liability. That's the extent of the discussion in Bossin. It's important to note that in Bossin the ruling - it was a summary judgment case - and ultimately the judgment was for the defendants. So it's not a case in which the Bossin court was saying you can have - was in fact predicating liability on a failure to disclose. So Bossin was essentially parity Hornsby and moving on. So Hornsby is the key. Hornsby is the key case.

HECHT: So you think this statement that was filed was a request or was not a request?

ALEXANDER: In the way the courts have looked at this, it was not a request. It was the provision of information to the authorities.

HECHT: Why would you provide it if you didn't - why would a merchant provide this information if he didn't hope that there would be a prosecution?

ALEXANDER: Here's why. What did they hope for? IN this case they hoped to get back \$197. They hoped that maybe authorities would phone this person, write this person to get the money back by means short of arrest.

PHILLIPS: It's signed by a complainant. Do you have this in front of you. Read from the last sentence.

ALEXANDER: Based upon my best understanding, and actually it's cut off you will see, but basically it's based upon the information provided here is provided based on the best of my knowledge and my understanding is that...

PHILLIPS: If charges are filed a warrant will be issued for the maker who may be put in jail.

ALEXANDER: If charges are filed. It does not say file charges. That's a big distinction in the case law.

PHILLIPS: But it's a complainant.

ALEXANDER: It's a complainant saying, the person walked out of my store with \$197; I want the money back.

PHILLIPS: I didn't know that any person had the right to tell the police to file charges.

I thought that there was always an element of official _____.

ALEXANDER: Well this is what's really interesting about. Go back to the restatement: Officer, arrest that man. That's the standard. In other words when we talked about _____ go back to request or direct, it really is going that far.

PHILLIPS: So wouldn't you arrest that man, or might you consider arresting that man is not enough?

ALEXANDER: Is not enough. And here is the key. And this is so critical. I think it is fair to say, and once again we're in the summary judgment context, so I don't want to guild the lilly in terms of the evidence. I need to slam my client because we're in summary judgment _____. It was arguably, reasonably foreseeable that the provision of the information that appears on the form could lead to an arrest.

HECHT: Isn't it more than that? I mean isn't it well known that throughout Texas maybe the whole country that when merchants have hot checks they send them over to the DA and they hope that the DA will wring the money out of them one way or the other?

ALEXANDER: Well you just used the magic words: One way or the other. Is it prosecutorial discretion. The hands are not tied. What we're trying to encourage is citizens providing information. What we're hoping for is that when you have a situation like this, and you look at it from the standpoint of prosecutor looking at a form, do you see a single name on that form. No. Is there a blank space? There's the question again, can you identify, positively identify this person in court? What's the answer? Blank. What's the prosecutor doing arresting in this situation? Was that requested? No.

O'NEILL: My understanding was that you sort of concede that this is a rabbit trail. The real issue is the intent of the person who filled out the form.

ALEXANDER: Let's get back to it. If you, and this is the way the case seems to shake out, and again they are not models of clarity.

O'NEILL: What it boils down to is the _____ failure to disclose information constitute an intentional tort?

ALEXANDER: If it is done deliberately. That's the key language - knowingly.

BAKER: But there's a difference between deliberately and knowingly. I think deliberately gets closer to a malicious intent. But I want you to answer me on this. It says, Rodriguez introduced evidence that Wal-Mart knew that its identification system could provide an erroneous driver's license number in relation to a company check. And if they had fully disclosed that fact and given the information that would have disproved Rodriguez's complicity. Finally that these kind of issues are questions of fact for the jury rather than a legal question as you're arguing.

ALEXANDER: I'm going to stick with _____.

BAKER: The question though is, is what they've stated is that enough to raise a fact question so that Wal-Mart wasn't entitled to a summary judgment?

ALEXANDER: No.

BAKER: And why not, because it wasn't deliberately done?

ALEXANDER: Because it wasn't - let me quote other language from the CA's opinion. This is these quotes. "No evidence was presented to show that Wal-Mart knew the information it provided was false."

BAKER: Well but now you're talking about the _____...

ALEXANDER: I'm talking about the form.

BAKER: No, you're talking about the malicious prosecution...

ALEXANDER: I am. I'm lifting language from other sections in the intent...

BAKER: Which has totally different elements. It is not an issue. Would you say that when they say what they said over here in the false arrest case and what they said over here in the malicious prosecution _____ there is some tension there?

ALEXANDER: Not from the standpoint on the question of intent. On _____. This is the key. See enter(?) is the key because for there to be a false arrest, and I cannot make this point any more strongly stated, you must knowingly, deliberately - you pick the word, I don't think there's _____ decision, difference provide false information. You must know that the information you were providing was false, or you must literally _____.

Let me get back to Hornsby and focus on the credit manager. In that case unlike in our case, the credit manager knew this woman. The credit manager knew that this woman that was being hauled off to jail had an account with the store. Knew that the check that was being written was under circumstances that there should be no prosecution and when directly asked by the police essentially do you know this woman. No. I think there's another woman that has an account with our store but not this woman. If it is truly a knowingly misrepresentation case, that distinction is critical. So back to you question: Can a failure to disclose be actual? Yes, if knowingly, knowing that's the distinction. And there is no evidence of that here.

And Justice Baker why am I drawing on the malicious prosecution part of the deal. Because that's where the discussion that really is material here. That is the center(?) element appears, not in the false arrest. Because the mistake the CA made in this case was to take the language in Hornsby out of context without any authorities and say, ah, there is a duty in a negligence sense.

O'NEILL: Well they are not going to say it's a negligence sense. They are going to say that you knew the system was bad. You knew that the driver's license number had no relationship to the company.

ALEXANDER: And therefore, what you could - did they know that the driver's license number wasn't _____. Did they know that? No. And this is the key. So based upon what they knew they could reasonably foresee that this is something that could happen. That is a negligence analysis.

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RESPONDENT

GEHRING: Perhaps to better understand the issues involved in the case here today, a brief review of the cash and policy of Wal-Mart _____.

O'NEILL: You would agree that this is an intentional tort?

GEHRING: Yes I would.

O'NEILL: And negligence won't you get there.

GEHRING: I agree.

O'NEILL: So what are you relying on to prove intent?

GEHRING: The fact that Wal-Mart at the time that it prepared and filed this complaint knew that its check cashing verification system, a system which it implemented, was trained on, that they knew that that particular system was defective in this particular instance and in the instance of any checks where there were multiple signers. For example, even a husband and wife account. Because the way the system operates is, the first person that comes into Wal-Mart and presents a check, Wal-Mart requires that that person produce personal identification.

O'NEILL: If that's the case, if knowing you have a defective investigation system or reporting system is enough to get you false imprisonment, then couldn't you raise a fact issue in every case? People that do background checks, that for some reason it's not thorough enough system with enough checks and balances, that somehow that can rise to the level of an intentional tort.

GEHRING: Well certainly if it's done knowingly. And in this particular case, there is a wealth of knowing conduct on the part of Wal-Mart to result in a false imprisonment of my client, Mr. Rodriguez.

Again, going back to the way their system works. The first person comes in, they take that individual's driver's license. They look at it. They take that driver's license number and then they put it in their system. And for every other person who presents that particular check, that driver's license number is automatically used as the identification for that purpose.

RODRIGUEZ: Is there evidence of other arrests having occurred because of this problem with the identification system?

GEHRING: I don't know of any other.

RODRIGUEZ: So how would Wal-Mart know? If there's no evidence that this was, there was a pattern of false arrest based on that system, how would Wal-Mart know or why should we charge them with intentional conduct in terms of this particular case?

CEHRING: Their own _____ testified that they knew that this was a deficiency in the system and that it could result in false arrest.

RODRIGUEZ: But they also note human nature is fallible, employee could make mistakes and the rest happened for that reason as well. What I'm asking is, if there's no evidence that there is a pattern or some sort of systemic problem that has resulted in false arrest, how can we charge Wal-Mart with intentional conduct in this case?

GEHRING: Because what they did is they presented a complaint to the Hays County Criminal District Attorneys office. And if you take a look behind Tab 2, a copy of that complaint is provided to the court. The final _____ before the complainant for Wal-Mart signs it says, I hereby swears the above information is true, is correct, and it's complete.

HECHT: Well what's wrong with that? They took the name of the maker and the address off the check. Isn't that a reasonable thing to do?

GEHRING: It would be correct. Except in this case and under the circumstances here what happened is they took the name of the drawer, which was R&C Enterprise, not the maker. Now Wal-Mart knew and understood what the maker was. They understood that the maker is the person that signs the check. R&C Enterprises was a company account on which that check was drawn. So they knew that the maker of the check had been in the _____, not a corporation because they provide - and you have to look at this complaint in the whole context.

HECHT: The DA knows that. When the DA looks at this he can see that R&C Enterprises and can't sign a check.

GEHRING: And I understand that. And the DA also sees where you look down two more lines where a driver's license is provided, which is the driver's license number of my client. And the DA's office also knows that that driver's license number is easily ascertained as to the identity of a person, and that goes to an individual and not a corporation. And so on the one hand Wal-Mart falsely provided the maker of the check, and on the other hand it false represented that Rodriguez was in fact the maker when he was not.

RODRIGUEZ: Is this also actually partly a problem with the DA's office? During the investigation shouldn't the DA have made a call either to Wal-Mart or to R&N or to the holder of this driver's license number to verify whether - you know who actually wrote the check and whether

there was a problem with that _____?

GEHRING: Yes they could have. Certainly an investigation is the law enforcement and prosecutorial function, but the problem with that is that investigation by the prosecutors and law enforcement is based on the information that's provided to them. Now the information that was by Wal-Mart says the possessor of this driver's license number 0755077 was guilty of theft by check. Now that was sufficient information for a prosecutor then to go forward and prosecute Rodriguez based on that information.

ENOCH: Let's go backwards a little bit. Is there any evidence that the cashier who took this check, the back of which had this driver's license put on it, know that the driver's license number that was being put on that check did not belong to the person who signed the check?

GEHRING: I don't know that the cashier had actual knowledge that it did not belong to the maker of that check, but they did have knowledge that...

ENOCH: At least know how the system works.

GEHRING: Right. Took 8 driver's license number, which may or may not be the _____.

ENOCH: So the cashier that put this check in the system knowing the driver's license is going to be going on there does not know, and there's no evidence that they knew that the person that was writing this check was not the person who wrote the first check?

GEHRING: That's correct.

ENOCH: Now the person who takes the first check, going back to the first check that's given, and the person presents it, the cashier is taking the person who presents the check at his word that he signs on that account. He's an assign on the account right. Right? Because otherwise he wouldn't accept the check.

GEHRING: That may be. Or perhaps the boss could sign the check and send the employee down there and Wal-Mart uses the driver's license number because they've got a live body at the other end of that...

ENOCH: We do know on the first check presented that this person does have the authority to sign on that check, and that driver's license number is put on the back of that check. Correct?

GEHRING: That's correct. Or has the authority to take the check down there. Now whether Rodriguez actually signed his signature on there or not, I don't even know if that question was even asked. My understanding is on this particular check, obviously that came back, Rex Long did.

ENOCH: In these circumstances Wal-Mart fills out the charge sheet and gives truthful information: this check has the following information on it, but fails to tell the police that we don't know whether the person that signed this check matches up with the driver's license number. They say we don't know that. And the police department goes out and finds Rodriguez, and they pick him up for questioning. And Rodriguez says, I didn't sign that check. And then they call and they find out Mr. Long actually signed this check, and he says he signed it, and they don't arrest Mr. Long and they release Rodriguez. How would the outcome in this case have been different?

GEHRING: In other words, had Wal-Mart made full disclosure?

ENOCH: Which is what you're arguing here.

GEHRING: That's right. Had they made full disclosure, we wouldn't be here.

ENOCH: Wouldn't they have still picked up Rodriguez based on the driver's license number and questioned him about it and determined that well he didn't sign on this check and then call Mr. Long and find out he actually wrote on the check?

GEHRING: They may well have been able to call Mr. Rodriguez and simply asked him and have him come down voluntarily to take a look at the check. People do that all the time - come down to the DA's office voluntarily. The DA call people in for investigative purposes and things like that. At least he would have had the opportunity to come in.

ENOCH: But isn't that the fault of the DA's office not making the call first as opposed to just running part of this information into the warrant's data based?

GEHRING: No. Because they were misinformed and misrepresented by Wal-Mart as to the true nature of the facts. Wal-Mart represented that the possessor of this driver's license number was guilty of theft by check. Wal-Mart failed to represent to the DA's office that its own system was so defective that this may or may not be the correct maker of the check. Had they provided that information to the law enforcement and DA authorities, then they would have been able to exercise intelligent discretion as to whether or not to affect Rodriguez's arrest. That's the key to the whole thing.

HECHT: What's the difference between that and negligence?

GEHRING: This was done knowingly. They knew their system was inherently defective. They knew they failed to provide the DA's office with that critical information, which was material and certainly intended to prove or contend to prove Rodriguez's innocence. This was _____ information that they withheld.

HECHT: As Judge Jefferson asked earlier, they also know that employees sometimes write the number down wrong. Should they tell that?

GEHRING: If they know - first of all. I don't think we can cover every instance where a

person makes an honest mistake. And if it's an honest mistake the case law is very clear that there is no liability.

HECHT: I'm trying to find out the difference between an honest mistake - just thinking this is so unlikely to happen that it never crossed our minds to tell and what you say is the deliberate mistake.

GEHRING: It may well be. Honest mistakes are unlikely to happen infrequently. And when they do of course there is no liability. Why? Because the person was truthful. Now they made an honest mistake if they were truthful. They disclosed the information. In this particular instance, we have Wal-Mart withholding information that is material and final to Rodriguez's guilt or innocence.

HECHT: You and the petitioner have both essentially abandoned the direct or request language of Joske here.

GEHRING: And no, certainly not the respondent. We understand the request and direct language in Joske's and the rest of the cases.

HECHT: All of the argument has focused on whether there's a misstatement.

GEHRING: And the misstatement goes to whether or not requesting or directing occurred. Because here's how it applies. The misinformation, the misrepresentation is applicable to the directing and requesting element of a false imprisonment and false arrest case simply because the information that is provided becomes determinative of whether or not the authorities affect an arrest. It's not the authorities own discretion and own judgment that caused Rodriguez's arrest. It was the false misrepresentation. The suppression of the information by Wal-Mart, which resulted in the arrest.

HECHT: I don't see how a request is any less a request because the information that is provided is false or any more of a request because the information provided was true.

GEHRING: Because the authorities of course are going to rely on the information that is provided to them. Of course they have the discretion to an affect an arrest or not and they have that in every single case. And if that was the test, then we wouldn't have false imprisonment in Texas. Because ultimately law enforcement and prosecutorial authorities will always have the discretion whether or not to affect the arrest.

The question comes down to the informant, the citizen who is recording criminal activity and conduct. If he makes full disclosure, if he fairly presents the information, then the prosecutors and law enforcement can intelligently exercise their discretion based on that information to investigate, not investigate to affect an arrest, whatever needs to be done. The directing and requesting can also occur in the cases where you misrepresent and withhold information because it's your conduct which overrides that of prosecutorial authorities that results in the arrest.

O'NEILL: But would you agree that that's a big of a slipper slope because at any time anyone makes a report to police quite often it can be claimed that they didn't give the whole story. They left a little something out. And under your construct that would get them there. Doesn't there have to be some evidence of animus toward the individual? Doesn't there have to be some evidence that Wal-Mart had it out for Rodriguez specifically as opposed to just giving information that ended up not being the whole story, but there's no evidence that somebody wanted to falsely depict Rodriguez as a hot check passer?

GEHRING: _____ is not a required element or element in false imprisonment. Certainly a malicious prosecution is. Here we're just talking about did you direct or request an arrest?

O'NEILL: But I thought we were back to that that was really the first question before direct or request was intent.

GEHRING: It figures in here because it's the intentional conduct of Wal-Mart and it suppresses the information which directs the arrest in effect because the discretion of prosecutorial authorities is so jaded by the misinformation that is provided to them.

O'NEILL: But again, if it's an intentional tort doesn't the intent have to be directed at Rodriguez here?

GEHRING: I think the intentional aspect has to be directed toward the arrest, not the animus of Rodriguez or any animus towards Rodriguez. In other words, the intent of Wal-Mart here is to get their money. Not they are not going to get it by the phone calls from the DA. But the information they provided on the form of course is false. They are never going to reach my client because the information is not correct. The DA has no way to reach the client if they rely on Wal-Mart giving us his driver's license number saying this man committed theft by check, and so we affect the rest based on that information. This is not just the case of somebody making a report to authorities. This is somebody who swears that the information is true and correct.

ENOCH: And it was true and correct to the best information of the person who filled it out that we have a check that has calling information on it. What your case is is because Wal-Mart set up a system that made it possible to misidentify the sign on the check, not the maker, the maker of the check is actively depicted on the report, but because it makes possible to give information that might not be correct, that is the signer of the check isn't the one whose driver's license is here, you're saying that this is false imprisonment. Isn't what you've given at most a reckless conduct or disregard, maybe it's gross negligence here, but isn't that still one step removed from an intentional tort?

GEHRING: I don't believe so. I believe this is clearly false in the parameters of an intentional tort. Wal-Mart knew what it was doing. This is not a mistake. They knew what their system was capable of and incapable of. And when they swore that this was true and correct without advising the authorities of the exculpatory side of the story

