

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROGER L. McCLUNG,)
)
 Plaintiff,)
)
 v.) No. 98-2849-M1/Bre
)
 DELTA SQUARE G.P., INC.)
 and SAMUEL M. LONGIOTTI,)
)
 Defendants.)

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence. You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

Now let me outline for you the parts of the charge so that you can follow it more easily. First, I will outline for you the contentions and theories of the parties. Second, I will instruct you as to the burden of proof and upon which party the law places that burden in the case, and I will give you some rules to help you as you consider the evidence. Third, I will outline for you the law to apply in determining the legal issues with respect to liability. Fourth, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

Plaintiff's Contentions

_____Roger McClung, the plaintiff in this action, claims that Dottie McClung, his wife and mother of their three children, was carjacked from the parking lot of Delta Square Shopping Center, 5000 American Way, Memphis, Tennessee on Friday, September 7, 1990 and then subsequently raped and murdered. The plaintiff also contends that because of the extent of previous criminal incidents on or in the immediate vicinity of the Delta Square Shopping Center parking lot, the carjacking of his wife was foreseeable. Mr. McClung further contends that defendants Delta Square and Samuel Longiotti are experienced, multi-state shopping center developers and property managers, and knew or should have known of the prior criminal incidents and therefore had a duty to take reasonable precautions to protect customers coming to the shopping center. Mr. McClung also contends that Delta Square and Samuel Longiotti breached their duty to take reasonable steps to protect their customers by failing to provide any security to protect the customers such as Dottie McClung.

Plaintiff contends that the Delta Square Shopping Center is in a high crime area and that the level of criminal incidents between May 1989 and September 1990 (over 164 criminal incidents in 17 months according to Memphis Police Department reports) on or in the immediate vicinity of the Delta Square Shopping Center

parking lot and the foreseeability of harm and the gravity of that harm placed a high burden on the defendants to have adequate security on the premises.

Plaintiff Roger McClung asserts that defendant Delta Square's and Samuel Longiotti's conduct, acts and omissions, were the direct and proximate cause and legal cause of the carjacking, abduction, rape and murder of his wife Dottie McClung and that he is entitled to recover damages on behalf of Dottie McClung.

_____Plaintiff further asserts that defendant Delta Square's and Samuel Longiotti's conduct, acts and omissions, were not only negligent, that is, below the standard of care, but were willful and reckless.

Contentions of Delta Square
and Samuel Longiotti

Delta Square and Samuel Longiotti contend that the security measures implemented for Delta Square on or before September 7, 1990, including those implemented during the construction of the premises, satisfied and met any of its duties. Delta Square and Samuel Longiotti deny that they breached any duty to the plaintiff. Delta Square and Samuel Longiotti deny that anything that they did or did not do caused the plaintiff's injuries or damages and further deny that there was an act or omission on their part which constituted a legal and proximate cause of the plaintiff's injuries or damages. Delta Square and Samuel Longiotti contend that the actions of Joseph Harper constituted the cause in fact and a superseding or intervening cause of plaintiff's damages, and that the damages sustained by the plaintiff, if any, were directly and proximately caused by the acts or omissions and negligence of the City of Memphis Police Department, Wal-Mart Stores, Inc., Ferrell Towing Services, and State Farm Automobile Mutual Insurance Company.

Delta Square and Samuel Longiotti deny that Dottie McClung was abducted from the Delta Square parking lot.

Delta Square and Samuel Longiotti assert that Joseph Harper was a classic sociopath who would have abducted Dottie McClung

even in the presence of security guards patrolling the parking lot or cameras surveilling the parking lot. Defendants further contend that Harper was brought in close proximity to the Delta Square Shopping Center by an incredible chain of events which no one could possibly predict or foresee, and that nothing exceptional or unusual about the shopping center attracted Joseph Harper to it.

Burden of Proof
and Consideration of Evidence

Now that I have outlined for you the theories of the parties, I will instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When a defendant denies the material allegations of a plaintiff's claim, the law places upon the plaintiff the burden of supporting and making out his/her claim upon every material issue in controversy by the greater weight or preponderance of the evidence.

Preponderance of the evidence -- means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

You as members of the jury are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you, or whose deposition testimony has been read to you and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You will note the manner and demeanor of witnesses while on the stand. You must consider whether the witness impressed you as one who is telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness for knowing the facts about which he or she testifies; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience and your common

observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which witnesses you believe have testified to the truth and which witnesses you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which

way the scales should turn on a particular issue, then the jury must find against that party upon whom the burden of proof has been cast in accordance with these instructions.

There are two kinds of evidence -- direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Expert Witness - Generally (76-9)

You have heard testimony from Paul Leyton, Michael Brookshire, Lawrence Wayne Talley, Lloyd Phelps, and Chris McGoey. An expert is allowed to express his or her opinion on those matters about which the expert has special knowledge, training, or experience. Expert testimony is presented to you on the theory that someone who is experienced or knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing each expert's testimony, you may consider the expert's qualifications, the expert's opinions, the expert's reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness' testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Law Enforcement Witnesses (7-17)

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the city or state government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. You as jurors have the duty of determining the believability of the testimony of all witnesses and giving a witness's testimony such weight as you believe it deserves under all of the circumstances you have observed, and this includes the testimony of police witnesses. Such testimony is to be judged by the same standards as any other testimony.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

Deposition Testimony (74-14)

Some of the testimony before you is in the form of deposition answers which have been received in evidence or played in open court through a video deposition. A deposition is simply a procedure where the attorneys for one side may question a witness or an adversary party under oath before a court stenographer prior to trial and the testimony is preserved in writing and/or videotape. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial.

Stipulated Facts

The parties have stipulated that certain matters of fact are true. They are bound by this agreement and in your consideration of the evidence you are to treat these facts as proven.

The following facts have been stipulated by the parties:

1. On Friday, September 7, 1990, Mrs. McClung made two purchases from Wal-Mart, the anchor tenant at the Delta Square Shopping Center, one at 11:57 a.m. and one at 12:16 p.m.
2. On Saturday, September 8, 1990, Mrs. McClung's body was discovered in rural Crittenden County, Arkansas.

Admitted Facts

The parties in this litigation have admitted that certain matters of fact are true. They are bound by these admissions and in your consideration of the evidence you are to treat these facts as proven.

The following facts have been admitted by the parties:

1. On Friday, September 7, 1990, between the hours of 11:30 a.m. and 1:00 p.m., the decedent Mrs. Dorothy McClung was abducted and subsequently raped and murdered by Joseph Alexander Harper, II ("Harper").
2. Harper was subsequently arrested, charged and convicted for the kidnapping, aggravated rape and murder of Mrs. Dottie McClung. Subsequent to sentencing to prison, Harper committed suicide while in custody.
3. Immediately before September 7, 1990, Harper lived in Chattanooga, Hamilton County, Tennessee. On Wednesday, September 5, 1990, Harper abducted at gunpoint a Rabbi in Chattanooga and stole his automobile, a 1987 Volvo. Earlier on September 5, 1990, Harper had robbed another individual of approximately \$2,400.00. Harper drove the stolen 1987 Volvo to his house, where his brother heard sounds coming from the trunk of the Volvo. Harper's

brother later reported this incident to his father, who notified the Chattanooga Police Department of the auto theft and kidnapping. Harper subsequently released the Rabbi from the trunk of the Volvo.

4. At approximately 9:20 p.m. on Wednesday, September 5, 1990, the Chattanooga Police Department reported to the National Crime Information Center ("NCIC") that the 1987 Volvo was stolen. The report included the car's Tennessee license plate number, color, make, model, year, and vehicle identification number ("VIN"). At approximately 10:35 p.m. on September 5, 1990, the Chattanooga Police Department transmitted a "BOLO" ("be on the lookout") teletype bulletin to the southeastern states plus Cleveland, Ohio and Volusia County, Florida, alerting law enforcement agencies that Joseph Alexander Harper was wanted for kidnapping, two counts of armed robbery, and stolen vehicle. The "BOLO" described Harper and included his date of birth (he was sixteen years old) and description. The "BOLO" also described the 1987 Volvo and indicated that Harper was armed with a .38 caliber revolver.
5. At approximately 3:00 a.m. on September 6, 1990, the Juvenile Court Judge in Chattanooga, Tennessee, issued warrants for Harper for kidnapping and two counts of

armed robbery and for auto theft. This information was entered into the NCIC system.

6. At some point between Wednesday, September 5, 1990 and Friday, September 7, 1990, Harper drove the stolen 1987 Volvo to Memphis. At some point prior to arriving in Memphis, Harper replaced the Tennessee license tag on the 1987 Volvo with a Georgia license plate.
7. On Friday morning, September 7, 1990, at approximately 9:30 a.m. Harper was involved in an automobile accident in Memphis, Tennessee, at the intersection of Lamar and Airways boulevard while driving the stolen 1987 Volvo. Ronnie W. Weddle, an officer assigned to the Memphis Police Department Traffic Division, was dispatched to the scene of the accident at approximately 9:40 a.m. and arrived at the scene at approximately 9:57 a.m. Officer Weddle has been a Memphis police officer since 1974. While at the scene of the accident, Weddle investigated the circumstances surrounding the accident. Incident to the investigation of the accident, Weddle learned that Harper was sixteen years of age, that his date of birth was August 9, 1974, and he had a Tennessee Driver's License. Harper gave Officer Weddle an Atlanta, Georgia address as his address and stated that the owner of the 1987 Volvo in which he was driving was Kenneth Harper, his father, with a Chattanooga, Tennessee address.

Officer Weddle also obtained the vehicle identification number of the 1987 Volvo.

8. Witnesses at the scene of the accident, including the parents of the driver of the other vehicle involved, informed Weddle that Harper was acting "suspicious" and that he was "lying" about his circumstances, that there were too many "inconsistencies" in his story, too many addresses and names, including the statement by Harper that he was the son of a Rabbi. Because of Harper's age, conflicting statements, and conflicting information about his insurance, these witnesses asked Weddle to run a check to see if the Volvo driven by Harper was stolen.
9. When Weddle realized that he did not have any juvenile traffic tickets, Weddle's supervisor Sgt. N.C. Hopper of the Memphis Police Department was dispatched to the scene. Sgt. Hopper arrived on the scene to deliver the juvenile traffic tickets to Weddle.
10. A witness at the scene of the accident also expressed the suspiciousness of Harper to Sgt. Hopper and asked Sgt. Hopper to check the car to see if it was stolen. Sgt. Hopper advised Weddle "to run the car through NCIC" and left the scene.
11. The Memphis Police Department has a sophisticated communications bureau with extremely modern equipment enabling officers to access the NCIC system to check (a)

driver's license information (a "DLC" request), (b) vehicle registration (a "REG" request or a "VIN" request), (c) information with regard to stolen articles (a "QA" request), (d) information with regard to stolen firearms, and (e) information as to whether automobile license plates are stolen (a "QV" request). The Memphis Police Department has established a separate radio transmission frequency designated "Station B" for officers to make inquiries and request information from various data banks and computer networks including the NCIC system.

12. Notwithstanding the suspicious circumstances surrounding Harper and his conflicted statements, despite the fact that Harper was a juvenile over three hundred miles from Chattanooga and approximately four hundred miles from Atlanta in an expensive late model automobile, and despite the explicit requests by witnesses at the scene and Sgt. Hopper to "check to see if the car was stolen", Weddle negligently or willfully and/or with gross negligence and reckless disregard failed to request information from the Memphis Communications Center/Dispatcher with regard to (a) registration of the 1987 Volvo (a "REG"), (b) the vehicle identification number (a "VIN"), (c) Harper's driver's license (a "DLC"), or (d) Harper himself (a "Q-W" request) which

would have determined whether there were any warrants outstanding with respect to Harper. Officer Weddle merely requested a "Q.V." on the Georgia license tag. A "Q.V." inquiry will reveal only whether that particular license plate has been report stolen. A "Q.V. and REG" will supply information regarding the vehicle to which the license plate was issued, including the name and address of the owner and description of the vehicle (make, model, color, year). Any other request, other than a "Q.V.", would have supplied information to Officer Weddle revealing that the vehicle being driven by Harper was stolen and did not match the information supplied by Harper, and that Harper was wanted by Chattanooga authorities. Weddle merely issued a juvenile citation to Harper for failure to yield right-of-way and let him go.

From time to time in these proceedings, the Court has been asked to strike or disregard certain testimony of witnesses. Where I have sustained a motion to strike I have, at that point in the proceedings, indicated that you should disregard that testimony. Of course, if you have any notes regarding testimony that was subsequently ordered to be struck, you should clearly mark through those notes and not refer to them in any way in your deliberations.

As I have indicated on every occasion where I sustained a motion to strike, just as on every occasion which I sustained an objection to a question, you should disregard the answer given and the question that was propounded; it should be as though that question and that answer had never been heard by you.

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party or witness has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty, but it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

There is one legal theory of recovery in this case, that is negligence, sometimes more specifically referred to as premises liability negligence theory.

Negligence

In this case, the plaintiff alleges that the defendants, Delta Square G.P., Inc. (Delta Square) and Samuel Longiotti, were negligent in failing to provide reasonable and adequate security measures for the Delta Square Shopping Center's parking lot and that this negligence was the cause in fact and the proximate cause of Dottie McClung's death.

Negligence - Defined (3.05)

Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under the same circumstances.

A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.

Elements

_____In order to establish a claim of negligence, the plaintiff must prove the following elements:

1. That the defendant you are considering owed Dottie McClung a duty of care;
2. That the defendant you are considering breached that duty through conduct falling below the applicable standard of care;
3. That an injury was suffered by Dottie McClung;
4. That the injury would not have occurred but for the breach of duty of the defendant you are considering; and
5. That the breach of duty of the defendant you are considering was the proximate cause of Dottie McClung's injuries.

Duty

The first element that the plaintiff must prove by a preponderance of the evidence in a negligence claim is that the defendant you are considering owed Dottie McClung a duty of care.

A duty is a legal obligation owed by one person to another - in this case, defendant owed to plaintiff - to conform to the standard of care of a reasonable person for protection against unreasonable risks of harm.

A business ordinarily has no duty to protect customers from the criminal acts of third parties which occur on its premises. The business is not to be regarded as the insurer of the safety of its customers, and it has no absolute duty to implement security measures for the protection of its customers. However, a duty to take reasonable steps to protect customers arises if the business knows, or has reason to know, either from what has been or should have been observed or from past experience, that criminal acts against its customers on its premises are reasonably foreseeable, either generally or at some particular time.

The duty to take reasonable steps to protect customers arises if the store owner or premises owner knows or has reason to know, either from what was or should have been observed or from past criminal activity, that crimes against its customers on its premises are reasonably foreseeable, either at some particular time or in general.

Thus, in order to establish a duty of care, the plaintiff need only show that the defendant you are considering knew or had reason to know that criminal acts against customers were reasonably foreseeable.

In determining whether criminal incidents like the criminal activity that resulted in Dottie McClung's death were reasonably foreseeable, you are to consider the prior incidents that occurred on the premises and in the immediate vicinity of the Delta Square Shopping Center. Furthermore, you are to consider all prior criminal activity. It is not necessary that prior crimes be identical to the ones that caused Dottie McClung's death.

Notice, Knowledge - Duty of Inquiry (P-9)

The means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appear from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts, then this person may be found to have had actual knowledge of those facts, the same as if he made such inquiry and had actually learned such facts.

That is to say, the law will charge a person with notice and knowledge of whatever he would have learned, upon making such inquiry as it would have been reasonable to expect him to make under the circumstances.

Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain condition has existed for a substantial period of time, and that the defendant had regular opportunities to observe the condition, then you may draw the inference that he had knowledge of the condition.

Imputed Knowledge (P-10)

Under the imputed knowledge rule, the knowledge of an employee is imputed to his employer and the knowledge of an agent is imputed to the principal.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in this case.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required, in the use of ordinary care, will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. To put it another way, any increase in foreseeable danger requires increased care.

The second element that the plaintiff must prove by a preponderance of the evidence to establish a claim of negligence against the defendants is that the defendant you are considering breached a duty of care owed to Dottie McClung through conduct falling below the applicable standard of care.

In determining whether the defendant you are considering breached the duty of care owed to Dottie McClung, it must be shown that that defendant failed to provide reasonable/adequate security measures to protect the Dottie McClung and other customers of the Delta Square Shopping Center from foreseeable harm.

In determining whether the defendant you are considering took reasonable care under the circumstances, the foreseeability of the harm and the seriousness of the potential harm must be balanced against the burden imposed upon the store owner and the premises owner in providing measures to protect the customers from that harm. You must balance the foreseeability and gravity of the harm against the burden placed on the defendant you are considering to protect against the harm. Where there is a high degree of foreseeability of harm and the probable harm is great, the burden placed on the defendant will be substantial.

You must determine from the totality of the evidence whether the defendant you are considering exercised reasonable care in protecting Dottie McClung under the circumstances. If the defendant you are considering did not exercise reasonable care under the circumstances, the element of breach of duty of care will be satisfied.

The fourth element that the plaintiff must prove by a preponderance of the evidence is that the injury to Dottie McClung would not have occurred but for the breach of duty of the defendant. The plaintiff must show that failure to provide reasonable/adequate security on the Delta Square parking lot by the defendant you are considering resulted in the kidnapping, rape and death of Dottie McClung.

Proximate Cause

Finally, to establish a claim of negligence, the plaintiff must prove by a preponderance of the evidence that the breach of duty of the defendant you are considering was the proximate cause of Dottie McClung's injuries.

To establish proximate cause the plaintiff must prove the following elements by a preponderance of the evidence:

1. The conduct of the defendant you are considering must have been a substantial factor in bringing about the harm being complained of;
2. There is no rule or policy that should relieve the defendant you are considering from liability because of the manner in which the negligence has resulted in the harm; and
3. The harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

(80.18)

Proximate Cause - Defined (P-9)

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

More Than One Proximate Cause (P-9)

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

In order to find the defendant you are considering liable for the death of Dottie McClung, that defendant's negligence in failing to take reasonable steps to protect its customers does not have to be the only cause, the last act or the conduct closest to her death provided that it was a substantial factor in bringing about her death.

Intervening Act

A superseding, intervening cause can break the chain of proximate causation and thereby preclude recovery. An intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have been reasonably foreseen and the conduct of the original wrongdoer was a substantial factor in bringing about the harm.

Harper's abduction of Dottie McClung is an intervening act precluding Defendants' liability if the abduction could not have reasonably been foreseen or Defendants' failure to provide security measures was not a substantial factor in bringing about Dottie McClung's injuries.

Conversely, Harper's abduction of Dottie McClung is not an intervening act precluding Defendants' liability if the abduction could have reasonably been foreseen and Defendants' failure to provide security measures was a substantial factor in bringing about Dottie McClung's injuries.

For a finding of foreseeability, Defendants need not have foreseen Harper's actions - they need only have foreseen the general risk of abduction.

Defendants have the burden of proving by a preponderance of the evidence that Harper's abduction of Mrs. McClung was an intervening act precluding Defendants' liability. It is for you to decide whether Defendant has met that burden.

The foreseeability requirement is not so strict as to require the defendant to foresee the exact manner in which the injury takes place, provided it is determined that the defendant could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. The fact that an accident may be freakish does not per se make it unpredictable or unforeseen. It is sufficient that harm in the abstract could reasonably be foreseen.

Willful and Wanton Conduct (3.30)

Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. It does not require an intent to injure or harm the plaintiff individually. It may be considered by you in determining the amount of fault you will assign to a party.

Although there is more than one defendant in this suit, it does not follow from that fact alone that if one is liable each is liable. Each defendant is entitled to a fair and separate consideration of his or its own defense and is not to be prejudiced by your decisions concerning the other defendant. The instructions govern the case of each defendant so far as they are applicable to it, unless otherwise stated.

You will decide defendant Delta Square's case separately from that of defendant Samuel Longiotti.

Corporation Not to be Prejudiced

The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

Comparative Fault (3.50)

In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then compare the fault of the parties. To do this you will need to know the definition of fault.

A party is at fault if you find that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Fault has two parts: negligence and legal cause. Negligence is the failure to use reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

The second part of fault is legal cause. A legal cause of any inquiry is a cause which, in natural and continuous sequence, produces an injury, and without which the injury would not have occurred. A single injury can be caused by the negligent acts or omissions of one or more persons.

If you find that a party was negligent and that the negligence was a legal cause of the injury or damages for which a claim was made, you have found that party to be at fault. The plaintiff has the burden to prove the defendant's fault. If the plaintiff fails to do so, you should find no fault on the part of the defendant. Likewise, the defendant has the burden to prove the plaintiff's fault. If the defendant fails to do so, you should find no fault on the part of the plaintiff. If you find more than one person to be at fault, you must then determine the percentage of fault chargeable to each of them.

You must also determine the total amount of damages sustained by any party claiming damages. You must do so without reducing those damages by any percentage of fault you may have charged to that party. I will instruct you on the law of damages in a few minutes.

If it is my responsibility under the law to reduce the amount of damages you assess against any party by the percentage of fault, if any, that you assign to that party. A spouse's claim for loss of services and consortium is also reduced by any fault assigned to the injured spouse.

A party claiming damages will be entitled to damages if that party's fault is less than 50% of the total fault in the case. A

party claiming damages who is over 50% or more fault, however, is not entitled to recover any damages whatsoever.

Comparative Fault
Basis of Comparison (3.51)

You have been instructed that if you find more than one party at fault, you must apportion the fault of each party.

In making the apportionment of percentage of fault, you should keep in mind that the percentage of fault chargeable to a party/person is not to be measured solely by the number of particulars in which a party/person is found to have been at fault.

You should weigh the respective contributions of the parties/persons, considering the conduct of each as a whole, determine whether one made a larger contribution than the other(s), and if so, to what extent it exceeds that of the other(s).

Additional Factors
For Comparing Fault (3.52)

_____The percentage of fault assigned to any person depends upon all of the circumstances of the case. The conduct of each person may make that person more or less at fault, depending upon all of the circumstances. In order to assist you in making this decision, you may consider the following factors(s) and you may also consider any other factors that you find to be important under the facts and circumstances. But the determination of fault on the part of any person and the determination of the relative percentages of fault, if any, are matters for you alone to decide.

1. Whose conduct more directly caused the injury to Dottie McClung;
2. How reasonable was the person's conduct in confronting a risk, for example, did the person know of the risk or should the person have known of it;
3. Did the person fail to reasonably use an existing opportunity to avoid an injury to another;
4. Was there a sudden emergency requiring a hasty decision;
5. What was the significance of what the person was attempting to accomplish by the conduct?

DAMAGES

In this case, if you find for either of the defendants, you will not be concerned with the question of damages as to that defendant. But if you find in favor of the plaintiff as to either defendant, you will of course be concerned with the question of damages. It is my duty to instruct you as to the proper measure of damages to be applied in such circumstances.

Just because I am instructing you on how to award damages does not mean that I have an opinion on whether or not either defendant should be held liable. If you do not return a verdict for plaintiff, you will not consider the issue of damages.

If you return a verdict for the plaintiff against either defendant, then you must consider the issue of damages. The damages which you may consider are compensatory damages and punitive damages.

Compensatory Damages

Compensatory damages are awarded for the actual injuries suffered by Dottie McClung because of the negligence of the defendant you are considering.

If you do find in favor of plaintiff, then you should award plaintiff such sums as you believe will fairly and justly compensate plaintiff for any damages you believe that Dottie McClung sustained as a result of her abduction, rape and murder.

You shall award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence and are the direct result of the negligent conduct of the defendant you are considering.

In arriving at an award for Dottie McClung's loss of life, you may consider the following items of compensatory damage:

1. The physical pain and suffering experienced by Dottie McClung and the mental or emotional pain and suffering experienced by Dottie McClung between the abduction and her death, including her anguish, distress, fear, humiliation, grief, shame, and worry.

2. The loss of consortium suffered by the decedent's husband, Roger McClung, and the decedent's children, Bridget, Kyle, and Benjamin McClung.

3. Dottie McClung's loss of earning capacity and loss of household services.

4. Dottie McClung's reasonable funeral expenses.

Each of these elements of damage is separate. You may not duplicate damages for any element by also including that same loss or harm in another element of damage.

Personal Injury - Pain and Suffering (14.10)

There is no mathematical formula for computing reasonable compensation for physical pain and suffering or mental or emotional pain and suffering, nor is the opinion of any witness required as to the amount of such compensation.

In making an award for such damages, you must use your best judgment and establish an amount of damages that is fair and reasonable in light of the evidence before you.

With regard to the element of compensatory damages which compensates for physical pain and mental anguish, you are instructed that it is not necessary that evidence of the value of such intangible emotions be introduced by the plaintiff in order for him to recover for such damages. In that respect, it is not value you are trying to determine, but an amount that will fairly compensate plaintiff for the physical pain and mental anguish that Dottie McClung suffered between the abduction and her death. There is no exact standard for fixing the compensation to be awarded for such elements of damage. Rather, any such award should be fair and just in light of the evidence presented.

In this suit there is a claim for loss of consortium by the plaintiff for himself and for his 3 children, Bridget, Kyle, and Benjamin McClung. Consortium includes those intangible benefits to the family members their wife and mother would have continued to provide such as attention, guidance, care, protection, nurturing, training, companionship, cooperation, affection, and love. If you determine that either defendant is liable, you may, in determining damages in this case, award an amount of money in compensation to the decedent's husband, Roger McClung, for the loss suffered by him and the children, Bridget, Kyle, and Benjamin McClung, for being deprived of the attention, guidance, care, protection, nurturing, training, companionship, cooperation, affection, and love that his wife and their mother would have provided to them but for her wrongful death.

Loss of Earning Capacity

If you find that the plaintiff is entitled to recover damages from either defendant in this case, you may award the plaintiff compensatory damages for Dottie McClung's loss of earnings and loss of household services for her work life. In calculating those damages, you may consider the loss of earnings and loss of household services which Dottie McClung suffered from the time of her injury through the end of her work life.

In making this determination, you may take into consideration the following factors: The number of years Dottie McClung may have been expected to work; her wages and fringe benefits; her likely wage increases due to promotions, seniority, or experience raises; and the effect of inflation or deflation on her future wages.

Although you may not unreasonably speculate with regard to lost future earnings, you may consider any job or occupational changes which Dottie McClung may have made during her life which you find supported by the evidence presented to you in this case.

Since money can earn interest, an amount to cover a future loss of earnings and loss of household services is more valuable to plaintiff if received today than if the same amount is received in the future. Therefore, if you decide to award plaintiff an

amount for Dottie McClung's future lost earning, it must be discounted to present value.

In determining how long Dottie McClung would have lived, had she lived out her normal life, you may consider her work life expectancy at the time of her death.

Maintenance

Finally, when determining the amount of damages based upon life expectancy and earning capacity, there should be a deduction of the decedent's probable living expenses had the decedent lived. These living expenses are those that under the standard of living followed by Dottie McClung would have been reasonably necessary for her to incur in order to keep herself in such a condition of health and well-being that she could maintain her capacity to earn money.

Punitive Damages (14.55)

Plaintiff has asked that you make an award of punitive damages, but this award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damage as a legal result of the defendant's fault and you have made an award for compensatory damages.

The purpose of punitive damages is not to further compensate the plaintiff but to punish the wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is not serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances.

A person acts maliciously when the person is motivated by ill-will, hatred or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon that representation.

If you decide to award punitive damages, you will not assess an amount of punitive at this time. You will report your finding to the court.

Verdict Form

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a foreperson after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your foreperson will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial

consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may have not seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eight of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROGER McCLUNG,)
)
 Plaintiff,)
)
 v.) No. 98-2849-M1/V
)
 DELTA SQUARE G.P., INC.)
 and SAMUEL M. LONGIOTTI,)
)
 Defendants.)

V E R D I C T

We the jury, unanimously answer the questions submitted by
the Court as follows:

1. Do you find the defendant Delta Square G.P., Inc. at
fault?

Answer "YES" OR "NO." _____

[If your answer is "NO" put an "O" in the space provided in
Question No. 4 for this defendant.]

If you find the defendant Delta Square G.P., Inc. at
fault, has plaintiff shown by clear and convincing evidence
that defendant Delta Square G.P., Inc. has acted either

intentionally, recklessly, maliciously, or fraudulently, such that an award of punitive damages is appropriate?

Answer "YES" OR "NO." _____

2. Do you find the defendant Samuel M. Longiotti at fault?

Answer "YES" OR "NO." _____

[If your answer is "NO" put an "O" in the space provided in Question No. 4 for this defendant.]

If you find the defendant Samuel M. Longiotti at fault, has plaintiff shown by clear and convincing evidence that defendant Samuel M. Longiotti has acted either intentionally, recklessly, maliciously, or fraudulently, such that an award of punitive damages is appropriate?

Answer "YES" OR "NO." _____

3. Do you find Dottie McClung at fault?

Answer "YES" OR "NO." _____

[If your answer is "NO" put an "O" in the space provided in Question No. 4 for the plaintiff.]

4. If you have found any party to be at fault, considering all the fault at One Hundred Percent (100%), what percentage of fault do you attribute to each of the parties?

Dottie McClung	(0-100%) _____%
Delta Square G.P., Inc.	(0-100%) _____%
Samuel M. Longiotti	(0-100%) _____%

5. Decide the total amount of damages sustained by Dottie McClung. Do not reduce those damages by any percentage of fault you may have assigned to Dottie McClung. It is the responsibility of the Judge, after you return your verdict, to reduce the damages you award, if any, by the percentage of fault you assign to Dottie McClung.

(a) Has plaintiff proven by a preponderance of the evidence that Dottie McClung experienced physical pain and suffering and has proven by a preponderance of the evidence that Dottie McClung experienced mental or emotional pain and suffering, as discussed in these instructions, which were proximately caused by the unlawful conduct for which you have found either of the defendants liable?

Answer "YES" or "NO." _____

If your answer to Question No. 5(a) is "YES", then under the laws as given to you in these instructions, state the amount of physical pain and suffering and mental or emotional pain and suffering that the plaintiff should be awarded from the defendants.

AMOUNT: \$ _____

(b) Has plaintiff proven by a preponderance of the evidence that Roger, Bridget, Kyle, and Benjamin McClung have suffered a loss of consortium, including being deprived of the attention, guidance, care, protection, nurturing, training, companionship, cooperation, affection, and love that their wife and mother would have provided to them, which were proximately caused by the unlawful conduct for which you have found either of the defendants liable?

Answer "YES" or "NO." _____

If your answer to Question No. 5(b) is "YES", then under the laws as given to you in these instructions, state

the amount of damages for loss of consortium that the plaintiff should be awarded from the defendants.

AMOUNT: \$ _____

(c) Has plaintiff proven by a preponderance of the evidence Dottie McClung's loss of earnings and loss of household services for her work life which were proximately caused by the unlawful conduct for which you have found either of the defendants liable?

Answer "YES" or "NO." _____

If your answer to Question No. 5(c) is "YES", then under the laws as given to you in these instructions, state the amount of Dottie McClung's loss of earnings and loss of household services for her work life that the plaintiff should be awarded from the defendants.

AMOUNT: \$ _____

(d) Has plaintiff proven by a preponderance of the evidence Dottie McClung's reasonable funeral expenses which were proximately caused by the unlawful conduct

for which you have found either of the defendants
liable?

Answer "YES" or "NO." _____

If your answer to Question No. 5(d) is "YES", then under
the laws as given to you in these instructions, state
the amount of Dottie McClung's reasonable funeral
expenses that the plaintiff should be awarded from the
defendants.

AMOUNT: \$ _____

DATE

FOREPERSON

You have decided that the plaintiff is entitled to punitive damages. You must now decide the amount of those damages. The plaintiff has the burden of proving by a preponderance of the evidence the amount of punitive damages that you should award.

In making your decision you must consider the instructions I have already given you and also the following:

1. The defendant's net worth and financial condition;
2. The objectionable nature of the defendant's wrongdoing, the impact of the defendant's conduct on the plaintiff, and the relationship of the parties;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing the harm;
4. The duration the defendant's misconduct and whether the defendant attempted to conceal the conduct;
5. The amount of money the plaintiff has spent in the attempt to recover the losses;
6. Whether defendant profited from the activity, and if so, whether the punitive award should be in excess of the profit in order to deter similar future behavior.
7. The number and amount of previous punitive damage awards against the defendant based upon the same wrongful act;

8. Whether, once the misconduct became known to the defendant, the defendant tried to remedy the situation or offered a prompt and fair settlement for the actual harm caused; and
9. Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award.

You have already awarded the plaintiff compensatory damages for the purpose of making the plaintiff whole. The purpose of an award for punitive damages is to punish a wrongdoer and to deter misconduct by the defendant or others.