24-CV-0946

In the

DISTRICT OF COLUMBIA COURT OF APPEALS

GERARDO VARELA

Appellant,

v.

ADVANCED CONSTRUCTION GROUP, LLC, et. al.

Appellee.

Appeal from the Superior Court of the District of Columbia,
Civil Division No.: 2020-CA-004780-B (Hon. Todd Edelman, Judge)

# BRIEF FOR APPELLANT

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## I. LIST OF PARTIES

Plaintiff/Appellant Gerardo Varela

Defendant/Appellee Advanced Construction Group, LLC.

Defendant Lamont Anthony Jones

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## IV. FINALITY STATEMENT

This matter arises from a Final Judgment disposing of all parties' claims following a jury trial. That Final Judgment, dated September 16, 2024, was entered in favor of Defendant, Advanced Construction Group, LLC and against Plaintiff Gerardo Varela in the amount of $-0- with interest, thereon at the statutory rate and their costs of action.

## V. STATEMENT OF ISSUES

1. Whether the Trial Court erred by giving The District of Columbia Civil Pattern Jury Instruction 5.14, Intervening Cause, to the jury.

2. Whether the Trial Court erred by making a factual determination in response to the jury's note asking if the shooting Varela could be an intervening cause.

## VI. STATEMENT OF THE CASE

This case arises out of workplace shooting that occurred at the C.W. Harris Elementary School in Washington, DC. Defendant Advanced Construction Group, LLC (hereinafter "Defendant ACG") hired Defendant Lamont Jones a few months earlier to manage their warehouse and deliver construction materials to jobsites. Defendant Jones had a long and violent criminal history of which Defendant ACG was aware because they knew him from prior jobs. Defendant ACG hired Defendant Jones and placed him in a warehouse in another state with no supervision over his

daily activities, free access to company vehicles and equipment, and freedom to come and go as he pleased.

On October 26, 2018, Defendant Jones got in an argument with workers from another subcontractor while delivering flooring materials to the elementary school. Defendant Jones left and returned to fist fight the workers outside the school. After the fight, Defendant Jones retrieved a gun, took an ACG pick-up truck, and returned to the school where he shot the worker's manager, Gerardo Varela, in the face, neck, and abdomen.

Mr. Varela filed a claim for negligent hiring and supervision against Defendant ACG and claims of assault and battery against Defendant Jones. Defendant Jones pled guilty to the shooting and was sentenced to prison. He never responded to the litigation and default judgment was entered against him.

The jury trial occurred over 4 days of testimony. At the conclusion of which, Defendant ACG requested an instruction on intervening caused arguing that the act of Defendant Jones shooting Mr. Varela was an intervening cause severing the negligence of Defendant ACG. The Court gave the instruction over Mr. Varela's objection. During deliberations, the jury sent a note asking "could the shooting by Jones count as a third person criminal act?" Mr. Varela again argued that the intervening cause instruction was improper, but also the Court should only instruct the jury that they must rely on the evidence and the jury instructions. The Court

stated that they prefer to answer the juror's questions and told them "yes." Shortly after answering the jury's question, the jury returned a verdict that Defendant ACG was negligent in their hiring and supervision of Defendant Jones, but that negligence was not a cause of injury to Mr. Varela.

## VII. STATEMENT OF FACTS

On April 22, 1992, Defendant Lamont Jones pled guilty to aggravated assault with a deadly weapon and robbery with intent to inflict bodily harm for which he was given a lengthy prison sentence. *See* Trial Transcript, 9/9/24, at 153:3-9 (A176; A637; A639). Defendant Jones was released in 1999 then arrested in the same year on felony counts of forgery and conspiracy for which he pled guilty on March 24, 2000. *Id*. at 153:21-154:11 (A176-177; A643). Defendant Jones then relocated from New Jersey to Maryland. *Id*. at 154: 12 -21 (A177). From 2011 – 2013, Defendant Jones pled guilty to marijuana possession crimes on three separate occasions. *Id*. (A177; A645-647).

During his time in Maryland, Defendant Jones worked in the construction field. *Id*. at 189:1-4 (A212). The work often required Defendant Jones to be on restricted job sites including government sites that performed security background checks. *See Id*. at 159: 2–23 (A182). However, Defendant Jones would fail the background checks based on his criminal history and was regularly denied access. *See Id*. (A182). Defendant ACG's President Chad Sparrow knew that Defendant

Jones was black-balled from these restricted areas due to his criminal history based on personal knowledge obtained while working at a prior employer. *See* Trial Transcript, 9/9/24, at 160:3–161:1 (A183-184).

Defendant ACG is a commercial flooring contractor headquartered in Virginia, but they also maintain a warehouse in District Heights, Maryland. *See* Trial Transcript, 9/10/24, at 8:7, 9:1-6 (A235; 236). In August of 2018, Defendant ACG's warehouse manager was leaving the company, and he recommended an acquaintance to fill his position, Defendant Lamont Jones. *See* Trial Transcript 9/9/24: 155: 3-22 (A178). Defendant ACG's Managing Partner, Larry Walston, and President, Chad Sparrow, met with Defendant Jones for an interview and hired him solely based on the meeting. *See* Trial Transcript, 9/10/24, at 17:15-18 (A244). Defendant ACG did not perform a background check, complete an application, or check additional references. *See* Trial Transcript, 9/9/24, at 157: 11-20; 9/10/24, 11:11 (A180; A238). Defendant ACG then placed Defendant Jones in a supervisor position in their District Heights warehouse far away in another State. *See* Trial Transcript, 9/9/24, at 157: 11-20 (A180).

Following the hire, Defendant ACG's only supervision of Defendant Jones was a daily phone call to give him a work assignment. *Id*. at 163:22-25; 165:12-25 (A186; A188). Defendant ACG gave Defendant Jones free access to company vehicles. *Id*. at 162:12-163:20 (A185-186). Defendant Jones did not need to clock

in or out. *See* Trial Transcript, 9/9/24, at 166:4-25 (A189). Defendant Jones also testified that while working in the warehouse he was in a heated argument with other workers who tried to "jump" him. *Id*. at 167:8-22 (A190). Defendant Jones claims he reported the altercation to his ACG supervisor in Virginia. *Id*. at 4-22; 171:17-172:6 (A27; A194-195). Defendant ACG denied receiving this report. *See* Trial Transcript, 9/10/24, at 68:8-10 (A295).

On October 26, 2018, Defendant Jones delivered flooring materials to a construction site at the C.W. Harris Elementary school in Washington, DC. *See* Trial Transcript, 9/9/24, at 172:11-13 (A195). Defendant Jones made the delivery using an ACG box truck around 2:00 PM. *Id*. at 172:14:19 (A195). During the unloading process, Defendant Jones got into another argument with workers from a subcontractor, Jerry's Carpeting, LLC. *Id*. at 174:5-14 (A197). Defendant Jones then moved the box truck and came back to the school where he got into a first fight with the workers. *Id*. at 183:2-184:11 (A206-207). At trial, Defendant Jones testified that he did not know whether the owner of Jerry's Carpeting, Gerardo Varela, was present at the time of the fight. *Id*. at 184:12-18 (A207). Mr. Varela testified that he was not present at the time of the fight and that his workers did not report the fight. *See* Trial Transcript, 9/11/24, at 68-69 (A410-411).

Defendant Jones left the elementary school and returned to the ACG warehouse where he exchanged his company box truck for a company pickup truck.

Trial Transcript 9/9/24 at 175:2-16 (A198). Defendant Jones then picked up a gun and returned to the elementary school. *Id*. at 14-15 (A37-38). Upon seeing Defendant Jones walking up the sidewalk, Mr. Varela came out to see why he had returned. Trial Transcript, 9/11/24, at 69:15-20 (A411). Defendant Jones then shot Mr. Varela in the face, neck, and abdomen. (A411-412). Defendant Jones fled and returned to the ACG warehouse. Trial Transcript, 9/9/24, at 187:11-21 (A210). At trial, Defendant Jones testified that he didn't have anything against Mr. Varela: "It's not personal. I don't know him." *Id*. at 200:21-23 (A223).

Mr. Varela survived his catastrophic injuries and filed a negligence claim against Defendant ACG for negligent hiring and supervision of Defendant Jones as well as a claim against Defendant Jones for assault and battery. (A18-23). Defendant Jones never responded to the litigation and a default judgment was entered against him. (A5).

Following a four-day jury trial, Defendant ACG requested an intervening cause jury instruction arguing that Defendant Jones shooting of Mr. Varela was an intervening cause severing the negligent hiring and supervision from the act of Defendant Jones shooting Mr. Varela. *See* Trial Transcript, 9/12/24, at 26:20-30:14; 9/16/24, 5:7–5:22 (A512-516; A624). Mr. Varela objected to the jury instruction arguing that the violent acts of the employee are not an intervening third party. *See Id*. (A512-516; A624). Rather, Defendant Jones is the employee in the

employer/employee special relationship which creates the duty of care under The District of Columbia's case law. *See* Trial Transcript, 9/12/24, at 26:20-30:14 (A512-516; A624). The Court overruled Mr. Varela's objection and provided the intervening cause jury instruction finding that Defendant Jones could be a third-party intervening cause. *Id*. (A512-516; A624).

On the second day of jury deliberations, the jury sent a note asking "could the shooting by Jones count as a third person criminal act." Trial Transcript, 9/16/24, at 3:23-4:1 (A622-623; A635). Again, Mr. Varela argued that the shooting cannot be a separate intervening cause but even if the Court felt otherwise answering this question requires the Court to make a factual determination which is the exclusive province of the jury. *Id*. at 6:1-9:3 (A625-628). Further, the Court should only answer stating that the jury must rely on the evidence presented and the jury instructions. *Id*. (A625-628). Instead, the court responded that they like to answer the jury's questions and instructed the jury that "the simple answer to that question is, yes. In terms of how to analyze that I refer you back to the instructions on intervening cause and on negligent employment." *Id*. (A625-628).

The jury then quickly returned a verdict finding that Defendant ACG was negligent in their hiring and supervision of Defendant Jones but that Defendant ACG's negligence did not cause damages to Mr. Varela i.e. the act of Defendant

Jones shooting Mr. Varela was an intervening cause. Trial Transcript, 9/16/24, at 10:24-11:11 (A629-630).

## VIII. SUMMARY OF THE ARGUMENT

The District of Columbia recognizes a 'special relationship' between employers and employees which lowers the standard of foreseeability when holding the employer responsible for the criminal acts of their employees. The cases establish that the employee is not an independent intervening third party rather they are the other half of the relationship equation. In contrast, the cases where the Court describes the criminal actor as an "intervening third party" are only in the absence of an employer/employee relationship. Thus, it was error for the trial court to give the jury an intervening cause instruction and it was error for the court to answer the jury's note that Defendant Jones could be an intervening third party. Both of which were highly prejudicial based on the verdict which was returned shortly thereafter.

## IX. ARGUMENT

In the District of Columbia, there is a general rule of nonliability at common law for harm resulting from the criminal acts of third parties. *Romero v. Nat'l Rifle Ass'n of Am., Inc.,* 749 F.2d 77, 81 (D.C. Cir. 1984). One limited exception to this general rule of nonliability is the heightened foreseeability principle, by which a defendant may be liable for harm resulting from another's criminal act only if it were

particularly foreseeable to the defendant that a third party would commit the crime. *Workman v. United Methodist Comm. On Relief*, 320 F.3d 259, 263 (D.C. Cir. 2003).

There are two lines of cases in which less specificity is required with respect to evidence of foreseeability: those involving either (1) "a special relationship between the parties to the suit" or (2) "a relationship of control between the defendant and the intervening criminal actor…" *Romero*, 749 F.2d at 81; *see also Workman*, 320 F.3d at 263. In the absence of such relationships or when the circumstances of a particular case do not suggest a duty of protection or a duty to control, then "the evidentiary hurdle is higher" and the risk of criminal act must be precisely shown. *Workman*, 320 F.3d at 264. The rationale for lessening the requirement of heightened foreseeability in cases involving a special relationship between the parties is that "the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other," and therefore, "a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated." *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970).

At the close of evidence, the Court correctly denied Defendant ACG's motion for judgment finding "that Plaintiff's point is essentially correct, that the heightened

foreseeability requirement really just doesn't apply, has not been applied in the context of negligent employment cases like this one." Trial Transcript, 9/12/24, at 6:17-21 (A492). The Court noted that the most extensive discussion on this issue can be found in the Navy Yard shooting mass murder cases. *Kohler v. HP Enterprise Services*, LLC., 212 F.Supp.3d 1 (D.D.C. 2016). *Id*. at 7:5-13:22 (A493-499). While *Kohler* was a U.S. District Court for the District of Columbia case, Judge Collyer provides a comprehensive and exhaustive review of The District of Columbia's law on negligent hiring and supervision. *Id*. Here, the Court stated "I agree with the analysis set forth by Judge Collyer in the *Kohler* opinion. I find that the heightened foreseeability requirement, again, whether it relates to a special relationship between a tort-feasor employee and the alleged tort-feasor employer or whether its because this type of claim is simply excluded from the doctrine. Either way the heightened foreseeability requirement does not apply to the claim here." *Id*. at 13:7-14.

### A. The Violent Acts of Defendant's Own Employee Are Not An Separate Independent Intervening Cause.

As noted, the District of Columbia establishes two lines of cases using the non-heightened foreseeability standard holding a defendant liable for the criminal acts of another: 1) where there exists a special relationship or 2) where there is a relationship of control.

### 1. The 'special relationship' cases involving employer-employees DO NOT consider the employee an intervening third party.

The Court has universally found a 'special relationship' exists within the context of the employer and employee relationship. In *Schecter v. Merchants Home Delivery, Inc*., an employee delivered goods to a customer's home and stole their property. 892 A.2d 415 (D.C. 2006). The Court held that evidence the deliveryman had previously entered a guilty plea to fourth degree burglary constituted sufficient evidence to find that the company owed a duty of care to the plaintiff. *Id*. at 431. In *Phelan v. City of Mount Ranier*, an off-duty police officer shot and killed an individual during a personal dispute. 805 A.2d 930 (D.C. 2000). The Court found that an employer/employee relationship existed between the officer and the police department; however, a lack of prior criminal history made the shooting unforeseeable and negated the negligent hiring and supervision claim. *Id*. at 936. In *Giles v. Shell Oil Corp*., a gas station attendant shot and killed an individual. 487 A.2d 610 (1985). The Court found that an employer/employee relationship did not exist because the defendant parent company, Shell Oil Corp., did not have daily control over the gas station attendant. *Id*. at 612. In *Murphy v. Army Distaff Foundation, Inc*., the Court again found a special employment relationship existed between a retirement facility gardener who shot a trespasser. 458 A.2d 61 (D.C. 1982). The case establishes that awareness of an employee's dangerous behavior or attributes could be sufficient to establish foreseeability under a theory of negligent

supervision. *Murphy, supra* at 63. The D.C. Court of Appeals reversed the trial court and remanded the case for trial on the basis that "[o]ne who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others." *Id*. (*quoting* Restatement (Second) of Agency § 213).

Notably, the employer/employee 'special relationship' cases do not contain a single reference that the violent or criminal acts of the employee are a third-party intervening cause because the tortfeasor is not a *stranger*. The employee in the relationship is the other half of the relationship. They are not independent. There is no harm or claim without the employee nor their violent act. To hold that the employee is an intervening cause raises the burden of causation from the line of cases established by the Court. An intervening cause is some other party or outside force that occurs *between* the negligence of hiring or supervising and the ultimate violent act. The final violent act cannot be an intervening cause. In *Murphy*, the Court does not refer to the gardener as an inventing cause. In *Phelan*, the Court does not refer to the off-duty officer as an intervening cause. In *Schecter*, the Court does not refer to the delivery driver as an intervening cause. For examples of intervening causes in negligent hiring and supervision cases, the Court has reserved this language for the second line of 'special relationship' cases where defendant exercises control over a third party.

### 2. The 'special relationship' cases involving control DO consider the individual committing the violence an intervening third party.

In the absence of an employer/employee special relationship, the court will consider whether there is a relationship of control between the defendant and the intervening criminal actor. In *Sigmund v. Starwood Urban Investment*, the owner of a parking garage was sued when an individual snuck through a broken gate and placed a pipe bomb in a car. 475 F.Supp.2d 36 (D.D.C. 2007). The Court found that the plaintiff's business invitee status may produce a 'special relationship' lessening the heightened foreseeability standard; however, the plaintiff failed to produce sufficient evidence that the intervening criminal acts were foreseeable. *Id*.

> The DC Circuit has characterized the heightened foreseeability test as "a limited exception to the 'general rule of nonliability' for negligence claim involving the intervening criminal acts of third parties. *Workman*, 320 F.3d at 263 (quoting *Romero v. Nat'l Rifle Ass'n*, 749 F.2d 77, 79-80 (D.C. Cir. 1984). Thus "a defendant may not be held liable for harm actually caused where the chain of events leading to the injury appears 'highly extraordinary in retrospect. *Morgan v. District of Columbia*, 468 A.2d 1306, 1318 (D.C. 1983) (*quoting Lacy v. District of Columbia*, 434 A.2d 317, 320-21 (D.C. 1980)).

Notably, none of these cases involved an employer/employee relationship and all of them reference the tortfeasor as an intervening third party.

*In Board of Trustees of the University of the District of Columbia v. DiSalvo*, a student was attacked by armed assailants in a parking garage and the Court found that the plaintiff failed to establish that the university had an increased awareness of

the risk of violent, armed assault in the parking garage as required to hold a defendant liable for injury resulting from intervening criminal acts. 974 A.2d 868 (D.C. 2009). In *Potts v. D.C.,* the plaintiffs were injured by gunshots from an unknown source while existing the Washington Convention Center. 697 A.2d 1249 (D.C. 1997). The Court again described the violent acts an "intervening criminal act" demanding precise proof of a heightened showing of foreseeability which the plaintiff was unable to meet. *Id*.

The intervening cause instruction would be appropriate under this line of cases because the tortfeasor is not a member of the special relationship or the relationship of control. Here, the tortfeasor is a stranger. The duty created depends on the relationship between the defendant and plaintiff. In the circumstance of the business invitee the relationship is between the merchant and the customer. In the circumstance of the students, the relationship is between the school and the students. Under this line of cases, the tortfeasor is outside the relationship between defendant and plaintiff. The tortfeasor is an unrelated force, i.e. a third party, warranting the intervening cause instruction.

Notably, the cases from both special relationship and outside tortfeasor (i.e. intervening third party) lines of cases were decided on motions before the issue of jury instructions was addressed by the Court. None of the cases went to verdict and therefore none of the cases explicitly address whether an intervening cause

instruction would be appropriate. However, a review of the footnotes to Standard Civil Jury Instructions for the District of Columbia § 5.14, Intervening Cause shows that this instruction only applies to the actions of outside criminal actors. *Lacy v. Dist. of Columbia*, 424 A.2d 317 (D.C. 1980); *McKethean v. Washington Metro. Area Trans. Auth.*, 588 A.2d 708 (D.C. 1991); *Washington Metro. Trans. Auth. v. O'Neill*, 633 A.2d 834 (D.C. 1993); *Bd. of Trustees of Univ. of Dist. of Columbia v. DiSalvo*, 974 A.2d 868 (D.C. 2009); *Dist. of Columbia v. Doe*, 524 A.2d 30 (D.C. 1987). The Court clearly draws a distinction between whether the defendant knew the tortfeasor or not in the plain language of their opinions but also in their reasoning. The employer/employee relationship creates a duty where the employer is in the best position to foresee and prevent harm. The tortfeasor is not a stranger nor an outside third party. The tortfeasor is not intervening because they are present at all times from the negligent acts of the defendant to the plaintiff's injury.

**B. The Trial Court Usurped The Role Of The Jury As Fact-Finder.**

The jury was tasked with determining whether Defendant ACG's negligence proximately caused Mr. Varela's injuries. Assuming, *arguendo*, that Defendant Jones' action of shooting Mr. Varela on a job site while an employee of Defendant ACG justifies the inclusion of the jury instruction for Intervening Cause, the issue then becomes whether the trial court usurped the role of the jury by substantively

answering a jury question during deliberations as to whether Defendant Jones' act of shooting Mr. Varela can be an intervening cause.

The trial court is not the trier of fact in a jury trial. Therefore, the trial judge must take care to avoid weighing the evidence or substituting its judgment for that of the jury. *Burke v. Scaggs*, 867 A.2d 213, 217 (D.C. 2005). The role of the trial judge is to instruct the jury as to the applicable law, while the role of the jury is to apply the law to the facts before it. *Steele v. D.C. Tiger Market*, 854 A.2d 175, 184 (D.C. 2004).

During deliberations, the jury returned a note asking a series of questions. The relevant portion of the note stated, "questions regarding intervening cause: One, could the shooting by Jones count as a third person criminal act?" Trial Transcript, 9/16/24, at 3-4 (A622-623; A635). The judge stated his intention to answer the first question "yes, the shooting by Jones can be an intervening cause." *Id*. at 4 (A623). In response, Plaintiff's Counsel noted his disagreement with the Court's interpretation of intervening cause and upon further discussion stated that instead of answering the question substantively that the trial court should respond by stating the jury "must rely on the jury instructions in front of you and…the evidence that [the jury] ha[s]." *Id*. at 4-5 (A623-624). The trial court disagreed and stated he is a believer in answering questions. *Id*. at 7. When the jury entered the courtroom, the Judge stated "[s]o as to the first question, could the shooting crime by Jones count

as a third person criminal act? The simple answer to that question is, yes. In terms of how to analyze that I refer you back to the instructions on intervening cause and on negligent employment." Trial Transcript, 9/16/24, at 8-9 (A627-628).

The jury was instructed on the law regarding Negligent Employment and Intervening Cause. It was then the jury's role to apply the law to the evidence before it. Here, the jury found that Defendant ACG was negligent in its hiring or supervision of Defendant Jones. The next question it was tasked with answering was do you find that Mr. Varela has proven that Defendant ACG's negligence caused damages to Mr. Varela. Whether Defendant Jones' act of shooting Mr. Varela is an intervening cause was a disputed issue of fact for the jury to resolve, which the judge answered for the jury in open court over the objections of Plaintiff's counsel. If Defendant Jones' act of shooting was an intervening cause, then it breaks the causal connection between Defendant ACG's negligence and Mr. Varela's injuries and therefore Defendant ACG would not be liable for Mr. Varela's injuries. If Defendant Jones' act of shooting was not an intervening cause, then the causal connection between Defendant ACG's negligent conduct and Mr. Varela's injuries remains intact, leaving Defendant ACG liable.

By stating that Defendant Jones' conduct of shooting Mr. Varela could be an intervening cause, the Judge impermissibly stepped into the role of the jury, applied

the facts of the case to the law, and substituted his judgment for that of the jury. Therefore, the jury verdict should be vacated and a new trial granted.

## X. CONCLUSION

The trial court erred in instructing the jury on Intervening Cause, and further erred when it answered a question of fact for the jury during deliberations. Therefore, the jury verdict as to Defendant/Appellee Advanced Construction Group, LLC, should be vacated and remanded to the lower court for further proceedings including a new trial.

Respectfully submitted,

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## XI. CERTIFICATE OF SERVICE

I, John T. Everett, hereby certify that on March 5, 2025, I served electronically and/or by mail a copy of the foregoing Appellant Brief to Appellee Advanced Construction Group, LLC, to the following individuals:

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