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)
(Hon. Todd Edelman)

Brief of Appellee
Advanced Construction Group, LLC

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CERTIFICATE OF COUNSEL

Case No. 24-CV-0946

Gerardo Varela v. Advanced Construction Group, LLC, et al.

Certificate required by Rule 28(a)(2)
Of the Rules of the District of Columbia
Court of Appeals

The undersigned, counsel of record for the Appellee, Advanced Construction Group, LLC, certifies that the following listed parties appeared below: Gerardo Varela, represented by John T. Everett and Catherine Beale of Chasen Boscolo Injury Lawyers; Advanced Construction Group, LLC, represented by Robert B. Hetherington and Brittany M. Becker of McCarthy Wilson LLP; Lamont Anthony Jones, *pro se*.

These representations are made in order that the judges of this Court, *inter alia,* may evaluate possible recusal.

Respectfully submitted,

By: /s/ Amy Leete Leone
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This appeal is from a jury verdict in favor of the Defendant below, Advanced Construction Group, LLC.

I. STATEMENT OF THE ISSUES

A. Did the Trial Court properly instruct the jury on negligent hiring or supervision, including its instruction that ACG is not responsible for Plaintiff's harm if later criminal acts committed by a third person caused Plaintiff's harm and a reasonably prudent person in ACG's position would not have anticipated those later acts and protected against them?

B. Did the Trial Court abuse its discretion by responding "yes" to the jury's question concerning the shooting?

II. STATEMENT OF THE CASE

Mr. Gerardo Varela filed a Complaint against Lamont Anthony Jones ("Jones") and Advanced Construction Group, LLC ("ACG") claiming, in part, that ACG negligently hired or supervised one of its employees, Jones, who intentionally shot Mr. Varela several times. (A18-21). A default judgment was entered against Jones, who was incarcerated as a result of the underlying shooting. (A5).

At the conclusion of a five-day jury trial, the jury returned a verdict in favor of Defendant ADC. (A630). Specifically, the jury determined that Plaintiff Varela did not prove by a preponderance of the evidence that Defendant ACG's negligence caused him damage. (A630). The jury also awarded Plaintiff Varela

compensatory and punitive damages against Defendant Jones. (A630). The instant appeal ensued.

III. STATEMENT OF THE FACTS

A. ACG Hires Mr. Jones

ACG provides floor covering installations for commercial projects in the D.C. Metropolitan Area. (A235). ACG's work includes procuring the required flooring materials, setting up the installations on job sites, and either performing or hiring subcontractors to perform the actual flooring installations. (A235). ACG's corporate office is located in Alexandria, Virginia and its warehouse is located in District Heights, Maryland. (A236). In August 2018 ACG hired Lamont Jones to manage its warehouse and deliver flooring materials to job sites. (A178; A242).

The owners of ACG were familiar with Mr. Jones because they had interacted with him on previous flooring installation jobs. (A240; A274). Specifically, the former ACG warehouse supervisor recommended Mr. Jones as an employee. (A240; A287). The two owners of ACG and its bookkeeper interviewed Mr. Jones before deciding to hire him. (A179; A244; A.277; A287). They also "asked around" on numerous job sites about Mr. Jones, talked to other subcontractors for whom Mr. Jones performed work, and were informed that he was "a knowledgeable guy in the industry" and would "be a good warehouse guy." (A245-46; A277). However, at trial, ACG acknowledged that the company did not

obtain his driving record, conduct a criminal background check on Mr. Jones, or ask him if he had any criminal convictions prior to hiring him. (A245-47; A278).

Nonetheless, there was evidence that ACG was aware that Mr. Jones had prior criminal convictions. (A182). Those prior criminal convictions consisted of:

- In 1992 Jones pled guilty in New Jersey to "ROBBERY-BI/FEAR/WHILE 1ST/2ND DEG CRIME W/ WEAP, ETC" (A637).
- In 1999 Jones pled guilty in New Jersey to "Conspiracy" to commit a crime. (A643).
- In 2012, 2013, and 2014 Jones pled guilty in Prince George's County, Maryland to "CDS Possess/Marijuana." (A.645-47).

Jones had no other criminal charges or convictions prior to the underlying incident in October 2018.

B. <u>Mr. Jones was a well-liked employee with no reported problems.</u>

Prior to the underlying incident, Mr. Jones was a well-liked employee:

> Q. And prior to October 26th, of 2018, how was he as an employee?
> A. He was well liked among the office staff, various other subcontractors like him. He was a good guy. No issues with him whatsoever.
> Q. How was his demeanor?
> A. Lamont is a level-headed guy. He just wants to come to work and get the job done.
> Q. At any time prior to, October 26, 2018, did you receive any complaints about his job performance?
> A. No.
> Q. Were you having any issues at all with the performance of his job?
> A. No.
> Q. Did you receive any indication, prior to October 26th, of 2018, that he would shoot someone?

A. Absolutely not.

(A.268).

Similarly, the President of ACG described Mr. Jones as a good employee:

> Q. And prior to October 26 of 2018, how was he as an employee, Mr. Sparrow?
> A. He was a good employee overall. We never had complaints. He did his job. He showed up on time, delivered material. Never had a complaint about the general contractors. That was the main feedback we would look for, make sure he was there on time doing his duties.
> Q. Did he have a good attitude?
> A. Yes.
> Q. Any complaints received from anybody concerning his job performance?
> A. Nope.
> Q. Any issues with his job performance?
> A. No.
> Q. Any indication at any time, prior to October 26 of 2018, that he would shoot somebody?
> A. No.

(A289-90).

In addition, the human resources manager for ACG testified that, in her experience, there were no attitude issues or problems with Mr. Jones during his employment with ACG. (A239; A529).

Mr. Jones testified that two or three weeks before the October 26, 2018 incident, employees of Jerry's Carpet (the company owned by Plaintiff Varela) approached him in the ACG warehouse "acting like they wanted to jump me[.]" (A190; A195). Plaintiff Varela denied that any such incident occurred. (A405-06).

Mr. Jones further claimed that he informed his supervisor, Sylvia Germaine, of this incident. (A190). However, Ms. Germaine denied being informed by Mr. Jones or anyone else about this incident or that he was having any problems with employees of Jerry's Carpet. (A239; A526-27).

C. The Underlying Incident

ACG hired Plaintiff Varela's company, Jerry's Carpet, to install flooring materials at C.W. Harris Elementary School in Washington, D.C. (A403-04). On the morning of the incident, Plaintiff Varela and Mr. Jones visited several different Home Depot locations together looking for materials that were required for Jerry's Carpet to perform its work at C.W. Harris Elementary School. (A443). As Plaintiff Varela explained, he did not have any problems with Mr. Jones and he was "normal":

> Q. And in fact, you saw him on the morning of the occurrence, first at the Home Depot, in Upper Marlboro, correct?
> A. Correct.
> Q. And you spoke to him and the right materials were not at that Home Depot, correct?
> A. Correct.
> Q. In fact, you had to go to several Home Depots to get the right materials, correct?
> A. Correct.
> Q. But when you spoke with him on those three occasions that you saw him on the morning of the incident, you didn't have any problems with him, did you?
> A. No.
> Q. No. That's not correct?
> A. That's correct. I didn't have problems with him.

Q. In fact, in your deposition you described him as normal and that you had not issues with him, correct?

A. Correct. I didn't have a problem.

(A443).

Later that day, Plaintiff Varela and Mr. Jones arrived at C.W. Harris Elementary School. (A444). Mr. Jones was delivering the flooring materials, specifically plywood, in an ACG box truck. (A195). As Jerry's Carpet employees were unloading the plywood from the back of the truck, one of the employees was struck in the head by a piece of plywood. (A195-96). After that occurred, Mr. Jones testified that this individual "started cursing me, starts calling me a n**** [expletive] and spitting in my direction and all of this type of wild stuff." (A197). After the materials were unloaded, Mr. Jones moved the box truck and walked back to CW Harris Elementary School to make peace with these Jerry's Carpet employees. (A201; A207; A217-18). Instead, at 2:14 pm on October 26, 2018, he was jumped by the employees in the street and beat up. (A217-18). There is no dispute that this incident occurred, as it is depicted in a video what was presented to the jury. (A151).

Mr. Jones then left the scene in the ACG box truck and returned the truck to the ACG warehouse in District Heights, Maryland at 2:36 pm. (A218). Again, there was video evidence presented of this action and the specific timing. (A151). Mr. Jones did not tell anyone, including any co-employee or supervisor at ACG,

about the fight or the fact that he was jumped by Jerry's Carpet employees at C.W. Harris Elementary School. (A218-19). He then switched vehicles and got into an ACG pickup truck. (A218). At that point, Mr. Jones went home, changed his clothes, got a gun, and returned to C.W. Harris Elementary School about one and one-half hours later, at 4:00 pm. (A199; A209; A218). Again, this timing was documented with video evidence. (A151-53). By that time, Mr. Jones had finished his work for the day. (A220). When Mr. Jones arrived at the school, he encountered Plaintiff Varela, the owner of Jerry's Carpet, and shot him.[1] (A175).

D. Jury Trial

The case proceeded to a jury trial on the issues of Defendant ACG's liability and damages. At the close of Plaintiff's case, the trial court granted Defendant ACG's motion for judgment on all of the counts against it [Count I- Negligence; Count II – Negligence Per Se; Count III – Agency; Count V – Reckless, Wanton and Willful Conduct; and Count VI – Breach of Contract] except Count IV – Negligent Hiring or Supervision.[2] After all of the trial testimony was presented, the Court instructed the jury.

[1] Lamont Jones pled guilty to attempted murder and, at the time of trial, was completing his sentence for that crime. (A175).

1. Jury Instructions

There are two jury instruction that are at issue for this appeal. First, the trial court instructed the jury on Plaintiff Varela's negligent hiring and supervision claim as follows:

> I'm going to instruct you on the element of this claim brought in this case, which is negligent employment an employer has a duty to use reasonable care to select employees who are competent and fit for the work assigned to them and not to use the services of incompetent or unfit employees. When an employee fails to carry out this duty and as a result [a] third person is harmed, then the employe[r] may be held liable even though the harm was brought about by the act of the employee that was beyond the scope of his employment. In this case, Mr. Varela claims that he was harmed by Lamont Anthony Jones and that ACG is responsible for that harm because ACG negligently hired or supervised Mr. Jones.
>
> To establish this claim, Mr. Varela must prove that it is more likely than not that all of the following occurred: One, that Mr. Jones was unfit to perform the work; two, that ACG knew or should have known that Mr. Jones was unfit and that his unfitness created a risk to others; three, that Mr. Jones's unfitness harmed Mr. Varela; and four, that ACG's negligence in hiring and supervising Mr. Jones was a substantial factor in causing Mr. Varela harm. If you find that Mr. Varela has proven all of these elements, all four of them, then you must find in favor of Mr. Varela. If you find that Mr. Varela failed to prove any of these four elements, then you must find in favor of ACG.

(A592-93). Plaintiff had no objection to the above-quoted jury instruction. (A506-07).

Second, on the issue of causation, the trial court further instructed the jury:

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[2] Plaintiff also conceded that there was no evidence to support his claim for negligent training. (A469).

> If you find that ACG was negligent, you must decide whether later criminal acts or omissions by someone else were an intervening cause of any harm to Mr. Varela. ACG is not responsible for any harm to Mr. Varela, if later criminal acts or omissions by a third person caused the harm to Mr. Varela [] and the reasonably prudent person in ACG's circumstances would not have anticipated the later acts or omissions and protected against them. If a reasonably prudent person in these circumstances would have anticipated the third person's acts or omission and protected against them then ACG is still responsible for Mr. Varela's harm.

(A594). Plaintiff objected to this instruction because he did not believe the facts supported the instruction:

> We, of course, object to 5.14. I believe that 5.22 covers all of our facts in this case. I don't know that the facts weigh out that there was an intervening cause outside of the chain of events that Mr. Jones – that set Mr. Jones – that Mr. Jones set in motion that day. He was of a violent nature and he was on this collision course with Mr. Varela from the get go. From, if you believe Mr. Jones, it was at the warehouse and then earlier in the day during a confrontation and then a fight, when he comes back to fight them. And when that doesn't work he goes and gets a weapon. It's all the same chain of events that puts him there to try to kill Mr. Varela.

(A515). The trial court gave the instruction over Plaintiff's objection, explaining:

> It is an intervening cause. Anything that's an act of another human is an intervening cause. This is an intervening cause. Your argument is it's a foreseeable intervening cause. Their argument was unforeseeable base[d] on the fact that – well, we don't need to rehash all of that. I do think this instruction, it's a little bit overlapping of 5.22 instruction [negligent employment]. But it does include concepts that are relevant here and that is important for the jury to know. It doesn't really – it's a little bit it reaches the same sort of conclusion in terms of what the jury needs to decide. It says that they are not responsible for the criminal acts by a third person caused the harm and a reasonably prudent person in their circumstances would not have anticipated them and protected against them. That's the same thing as

> what the other instruction says. If and it says, if a reasonably prudent person in the circumstances would have anticipated the acts or omission and protect against them then ACG is still responsible for their harm. I think it's appropriate. It explains the concept. I will describe this is not necessary but appropriate as an instruction. So I will read that at that point.

(A515-16).

2. <u>Jury Questions</u>

During jury deliberations, the jury sent several notes asking clarification questions. (A610-17; 622-23). Two of these questions concerned the previously given instructions on causation:

> 1) Could ~~Does~~ the shooting crime by Jones count as a "third-person" criminal act?
> 2) Could you please give a couple examples in an unrelated case?

(A635). Upon receipt of this note the Court informed counsel that his inclination was to respond as follows:

> [A]s to the first question, yes, the shooting by Jones can be an intervening cause. And, secondly, to decline to give examples of other intervening causes.

(A623). In response, counsel for Plaintiff Varela initially objected, arguing that the criminal act was not an intervening cause and, in this case, an intervening act could only be performed by someone other than the employee Jones. (A624). The trial court explained that, in accordance with the provided jury instructions, the issue for ACG's liability is not whether the criminal act was an intervening cause, but whether it was reasonably foreseeable to ACG. (A625).

Counsel for Varela then reversed his position and agreed that the shooting by Jones could be an intervening cause: "I agree with the analysis. I also agree with what you said initially was that both could be the intervening causes. Whether it's the acts of the fight … or Mr. Jones' actions. So now I don't believe it is fair to just say, well, only Jones." (A626). The Court explained that the specific question asked by the jury was whether "the shooting crime by Jones" could "count as a 'third person' criminal act" and it intended to simply respond "yes" and refer them to the negligent employment and intervening cause instructions. (A626-27).

Indeed, the Court responded to the jury's first question:

> 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.
>
> In terms of giving examples in an unrelated case, I'm not able to do that, which would essentially be a modification or change to the instruction. So, again, on this issue, the intervening cause and negligent employment instruction both reflect how you should deal with this question.

(A627-28).

3. Jury Verdict

With respect to Defendant ACG, the verdict sheet, to which all parties agreed, included two separate jury questions:

1. Do you find that plaintiff, Geraldo Varela, has proven by a preponderance of the evidence the defendant, Advanced Construction LLC, was negligent in it's hiring or supervision of Anthony Jones? (emphasis added)

2. Do you find that plaintiff, Geraldo Varela, has proven by a preponderance of the evidence that the defendant, Advanced Construction Group LLC's negligence caused damages to the plaintiff?

(A630). The jury answered "Yes" to Question 1 and "No" to Question 2. (A630). Thus, the jury found that ACG was either negligent in its hiring or in its supervision of Jones. Nonetheless, the jury did not find that this negligent hiring or supervision caused Plaintiff's damages.

IV. SUMMARY OF ARGUMENT

This case concerns the foreseeability component of a claim for negligent hiring or supervision. Appellant argues that, when a plaintiff is injured as a result of an employee's criminal act that occurs outside the scope of his employment, off his employer's premises, and after his working hours, his employer nonetheless may be liable for negligent hiring or supervision of that employee even if that criminal act was not reasonably foreseeable to the employer. This is not the law in the District of Columbia. Reasonable foreseeability is a basic requirement of any negligence claim and negligent hiring or supervision is no different. If harm to a plaintiff is not reasonably foreseeable to the defendant, then there is no legal causation. A defendant cannot be legally responsible for the damages caused by a criminal act if that act is not reasonably foreseeable. In order to hold an employer liable for harm caused by a criminal act committed by its employee, a finder of fact must determine that the employee's criminal act was reasonably foreseeable to the

employer. The intervening cause jury instruction helps to explain this legal concept and it was appropriately given to the jury.

V. ARGUMENT

A. Standard of Review

This Court reviews for abuse of discretion a trial court's assessment of whether a jury instruction is supported by the evidence. *Brown v. United States,* 139 A.3d 870, 875 (D.C. 2016). The Court looks at the instructions as a whole and assesses whether they constitute prejudicial error. *See Campbell-Crane & Associates, Inc. v. Stamenkovic,* 44 A.3d 924, 934 (D.C. 2012). Absent prejudice, an erroneous instruction will be deemed harmless, i.e., not an "abuse" of discretion. *Id.* at 935. The Court reviews de novo the contents of the instructions actually given. *Id.* When the question is whether the challenged instruction was proper, it is one of law and no deference is accorded to the trial court's ruling. *Wilson-Bey v. United States,* 903 A.2d 818, 827 (D.C. 2006).

When a jury sends a note requesting further clarification of its instructions on the law, "[t]he decision on what further instructions, if any, to give in response to a jury question lies within the sound discretion of the trial court." (citations omitted) *Yelverton v. United States,* 904 A.2d 383, 387 (D.C. 2006). Although a trial judge is not prohibited, in its discretion, to "go beyond a simple and correct

answer to the jury's question[,]" if a judge does so, special care must be taken to assure that any supplemental instruction is fairly balanced. *Id.* at 388-89.

B. The Trial Court properly instructed the jury on intervening cause, which only becomes a superseding cause if it was not reasonably foreseeable by the Defendant.

At trial, Appellant initially objected to the intervening cause instruction, arguing that it was not supported by the facts. Specifically, he argued that the instruction was inappropriate because there was only one uninterrupted chain of events that "Mr. Jones set in motion that day" that culminated with the shooting. (A515). As shown herein, the instruction was appropriate because the issue for the jury was not whether the shooting was unforeseeable based on Mr. Jones's conduct that day; it was whether the shooting was unforeseeable as to Defendant ACG. If the shooting was an unforeseeable criminal act, then it superseded ACG's alleged negligent hiring or supervision of Mr. Jones.

Importantly, Appellant's argument on appeal wholly ignores the other potentially intervening criminal act presented by the facts: the attack on Mr. Jones by Plaintiff Varela's employees. That criminal act by those third parties also supports the intervening cause instruction, which was specifically raised by counsel for ACG when requesting the intervening cause instruction. (A482). At trial, counsel for Plaintiff Varela even acknowledged that the fight between the

Jerry's Carpet employees and Mr. Jones was potentially an intervening cause. (A623).

Nevertheless, the facts showed that Mr. Jones was a well-liked employee who did not have a violent history, did not have any problems at work, and who spent time with the shooting victim earlier the same day without incident. The evidence showed that ACG had no knowledge of any altercation involving Mr. Jones prior to the shooting. Accordingly, the intervening cause instruction was entirely appropriate as to ACG's alleged liability to the Plaintiff for the shooting.

1. <u>Proximate cause requires that the resulting harm is reasonably foreseeable to the tort defendant.</u>

In order to establish that a defendant is negligent, it must be shown that the defendant owed plaintiff a duty of care, breached that duty, and the breach of duty proximately caused plaintiff's injuries. *Kohler v. HP Enterprise Services, LLC,* 212 F.Supp.3d 1, 20 (D.D.C. 2016); *Tarpeh-Doe v. U.S.,* 28 F.3d 120, 123 (D.C. Cir. 1994). For a claim of negligent hiring or negligent supervision, the causal relationship between the breach of duty and the harm complained of requires the plaintiff to establish, at a minimum, that the alleged breach was a "substantial factor" in causing plaintiff's injuries. *Id.; see also Lacy v. District of Columbia,* 424 A.2d 317, 319-21 (D.C. 1980). The harm must also be "foreseeable in light of the quality or conduct of the employee 'which the employer had reason to suppose would be likely to cause harm.'" *Kohler, supra,* (citations omitted).

Proximate cause is "that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *McKethean v. Washington Metropolitan Area Transit Authority,* 588 A.2d 708, 716 (D.C. 1991). Proximate cause encompasses two components: cause-in-fact causation and legal causation. *Lacy v. District of Columbia,* 424 A.2d 317, 320 (D.C. 1980). Cause-in-fact (or "but for") causation can be satisfied if an act is a substantial factor in causing the harm complained of. *Id.* Legal causation means that there is no policy reason or other factor that may relieve a defendant of liability, even if his actions were a cause-in-fact of the harm. *See Butts v. United States,* 822 A.2d 407, 418 (D.C. 2003). One legal factor that may relieve a defendant of liability is when there is an intervening cause that supersedes the negligence of the original actor. *Id.*

An intervening negligent or criminal act by a third party may break the chain of "but for" causation, such that there is no legal proximate cause, if that act was not reasonably foreseeable. *Lacy v. District of Columbia,* 424 A.2d 317, 323 (D.C. 1980). In most cases, because of the extraordinary nature of criminal conduct, a criminal act committed by a third party will break the chain of causation unless the defendant has a "heightened" awareness of the danger of a particular criminal act occurring. *McKethean* at 717. This "heightened foreseeability" is an extremely high standard that "requires proof that the specific type of crime, not just crime in

general, be particularly foreseeable at the relevant location[.]" *Sigmund v. Starwood Urban Inv.,* 475 F.Supp.2d 36, 42 (D.D.C. 2007). Indeed, the heightened foreseeability standard has been described as "exacting," "demanding," "precise," and "restrictive." *Id.* As such, a defendant may not be liable for harm actually caused where the chain of events leading up to the injury appears "highly extraordinary in retrospect." *Id., quoting Morgan v. District of Columbia,* 468 A.2d 1306, 1318 (D.C. 1983).

The Appellant argues, and the trial court found, that there are exceptions to the application of the "heightened foreseeability" standard, including when there is "'a relationship of control between the defendant and the intervening criminal actor[.]'" (Brief of Appellant, p. 9), *quoting Romero v. Nat'l Rifle Ass'n of Am., Inc.*, 749 F.2d 77, 81 (D.C. Cir. 1984). The Appellant primarily relies on the U.S. District Court for the District of Columbia's recently analysis in *Kohler v. HP Enterprise Services, LLC,* 212 F.Supp.3d 1 (D.D.C. 2016), where it found that the heightened foreseeability standard does not apply in a negligent hiring or supervision claim where the crime in question is committed by an employee of the defendant. That case arose out of the 2013 mass shooting at the Navy Yard. As background to the analysis, the Court outlined the extensive history of troubling and bizarre behavior exhibited by the shooter in the months leading up to the shooting, as well as his employer's various responses thereto. *Id.* at 11-15. The

Court ultimately held that the employer may be liable for negligent hiring or supervision of the shooter if the crime committed by its employee was reasonably foreseeable, i.e., the heighted foreseeability standard does not apply.

2. Case law does not support Appellant's argument that an employee's criminal act cannot constitute an intervening cause.

On appeal, Appellant argues that the trial court erred by giving the intervening cause instruction because, as a matter of law, an employee's criminal act cannot constitute an intervening cause to interrupt a negligent hiring or supervision claim, even if it was not reasonably foreseeable to the employer. The argument is not supported by the law.

For example, in *Kohler,* although the Court found that the heightened foreseeability standard did not apply, it is evident that Court understood that an employee's criminal act may still constitute an intervening, superseding cause to a negligent hiring or supervision claim if the harm caused by the crime was not reasonably foreseeable to the employer. The *Kohler* Court's analysis cautioned that an employer is not an insurer of public safety and the risk of harm for which the employer is responsible is only to those foreseeably exposed to the risk of harm by the employee's misconduct. *Id.* at 23. The Court described the employee in this relationship as "a third person subject to the defendant's control or supervision." *Id.* The foreseeability of the risk of harm exists when the defendant employer

knows or should know that its employee is "peculiarly likely to commit intentional or reckless misconduct." *Id.* The Court explained:

> D.C. case law indicates that an employer owes a duty of care to those brought into contact with a third person [i.e., the employer's employee] subject to the defendant [employer's] control or supervision when the defendant knew or should have known that the third person was likely to commit intentional or reckless misconduct. *See Giles v. Shell Oil Corp.,* 487 A.2d 610, 613 (D.C. 1985) ("[I]t is incumbent upon a party to show that an employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge failed to adequately supervise the employee."). In addition, the ensuing harm must be foreseeable in light of the quality or conduct of the employee "which the employer had reason to suppose would be likely to cause harm." (Restatement (Second) of Agency §213[.]

Id. at 28.

Boykin v. District of Columbia, 484 A.2d 560 (D.C. 1984) is another case there this Court referred to an employee in a negligent supervision claim as an "intervening third party." In that case, a student was sexually assaulted by an employee of a District of Columbia public school during the school day and in a school building. A civil suit was filed on her behalf alleging, in part, that the District of Columbia was directly liable for the assault under the theory of negligent hiring or supervision. *Id.* at 561. This Court affirmed the trial court's grant of summary judgment in favor of the District of Columbia on the negligent hiring or supervision count because there was no evidence to show that the employer, the District of Columbia, should have foreseen the intervening criminal

act of its own employee. *Id.* at 565. This Court specifically described the employee's underlying criminal act as "the intervening criminal act of a third party" and explained that the District could only be liable for negligent hiring or supervision "if the danger of that act 'should have been reasonably anticipated and protected against.'" (citations omitted) (emphasis added). *Id.*; *see also Lacy v. District of Columbia,* 424 A.2d 317, 323 (D.C. 1980) (janitor employed by the District of Columbia sexually assaulted student and this court described the crime thusly: "The immediate cause of the injury complained of in the instant case was the intervening criminal act of a third party, the school janitor.").

Indeed, any actor other than the defendant owing the tort duty of care to the plaintiff is a "third party" to that relationship. Only when a criminal act is reasonably foreseeable, will it break the chain of causation from an initial negligent act.

The cases relied upon by Appellant to support his claim that an employee cannot commit an intervening criminal act do not address this issue. One of the cases relied upon by Appellant is *Phelan v. City of Mount Rainier,* 805 A.2d 930 (D.C. 2002). It arose after an off-duty police officer shot and killed a man. His survivors brought a wrongful death claim against the officer's employer under a theory of negligent supervision. *Id.* at 937. As this Court explained in that case, under a theory of negligent supervision an employer may be liable for an

employee's willful act beyond the scope of employment "[w]hen the employer itself breaches a duty of care which proximately results in injury to a third party[.]" (emphasis added) *Id.* Appellant notes that "the Court does not refer to the off-duty officer as an intervening cause[.]" (Brief of Appellant, p. 12). However, because the Court found that the employer did not owe a duty of care to the plaintiff, there was no basis to address proximate cause under the facts of that case.

Another case upon which Appellant relies, *Murphy v. Army Distaff Foundation, Inc.,* 458 A.2d 61 (D.C. 1983), arose out of a gardener's intentional shooting of a trespasser on his employer's grounds. The victim in that case brought a claim against the employer for negligent supervision. The trial court granted the employer's motion for summary judgment. On appeal, this Court determined that there were facts from which a fact finder could potentially find that the employer "knew or should have known that its employee regularly ejected trespassers while armed, and that the employer failed to take reasonable precautionary measures in supervising him." *Id.* at 63. Those facts included that this gardener performed "some security functions" for his employer; that checking the parking lot where the shooting occurred was part of his "normal duties;" that part of his duties included securing and locking up the residential building on the property; and that his employer knew that he previously confronted trespassers on the property. *Id.* at 63-4. Under these facts, the Court remanded the case to the jury for a determination on

negligent supervision. There is nothing about that ruling, however, that supports Appellant's argument that an employee's criminal act cannot constitute an intervening cause. Indeed, whether the employer knew or should have known of its employee's conduct is part of the intervening cause analysis.

Similarly, in *Schecter v. Merchants Home Delivery, Inc.,* 892 A.2d 415 (D.C. 2006), the trial court granted defendant's motion for judgment on plaintiff's negligent supervision claim because it found that the individuals who stole from the plaintiff was not an employee. On appeal this Court found that a reasonable jury could find them to be employees. *Id.* at 431. It remanded the case for trial, including to determine whether the employer's negligent hiring, training, or supervision proximately caused the underlying theft. *Id.* at 432. This in no way precludes a jury from considering whether the crime that directly caused the loss, as committed by the employee, was reasonably foreseeable to the employer.

3. Even if the intervening cause instruction was not directly applicable, it was harmless error to so instruct the jury.

On appeal, this Court looks at the instructions as a whole and assesses whether they constitute prejudicial error. *See Campbell-Crane & Associates, Inc. v. Stamenkovic,* 44 A.3d 924, 934 (D.C. 2012). Absent prejudice, an erroneous instruction will be deemed harmless, i.e., not an "abuse" of discretion. *Id.* at 935.

The facts presented at trial showed that ACG did not have any reason to foresee that Jones would commit a wrongful act, let alone a criminal act against a

third person. The jury heard from Mr. Varela himself that he did not have any problems with Jones. The jury heard that ACG was entirely unaware of any problems between Jones and anyone else. The jury heard that ACG understood that Jones was a well-liked employee.

As the trial court explained when it decided to give the intervening cause instruction, it is somewhat "overlapping" of the negligent employment instruction. (A515-16). While it explains the concept of foreseeability more directly than the negligent employment instruction, both include the requirement of proximate cause; they are simply different ways of explaining it. The trial court concluded its analysis in this regard: "I think it's appropriate. It explains the concept. I will describe this as not necessary but appropriate as an instruction. So I will read that at that point." (A516).

Here, the instruction was specifically requested, not only because Mr. Jones's criminal act could have been an unforeseeable intervening cause, but also because the fight in the street between Mr. Jones and Jerry's Carpet employees could have been an unforeseeable intervening cause. Of course, a party is entitled to an instruction on his or her theory of the case if the instruction is supported by the evidence. *Nimetz v. Cappadona,* 596 A.2d 603, 605 (D.C. 1991).

C. The Trial Court did not abuse its discretion by responding "Yes" to the jury note.

Appellant next argues that the trial court abused its discretion in responding to a jury note. As previously set forth, when a jury seeks clarification of the previously-provided jury instructions, the response lies within the sound discretion of the trial court. *See Yelverton v. United States,* 904 A.2d 383, 387 (D.C. 2006). A judge must take care that any supplemental instruction is fairly balanced. *Id.*

Here, the response provided by Judge Edelman was as concise as it could possibly be. In crafting his response, Judge Edelman was extremely cautious, and even observed that, unlike the other notes that the jury submitted to the Court, this note was not signed by the foreman. (A623). The note at issue did not ask the Court to opine whether the shooting was an intervening cause; it did not even ask whether the shooting could be an intervening cause. Instead, it specifically asked, "Could the shooting crime by Jones count as a 'third-person' criminal act?" (A635).

First, it is clear that the juror submitting the note appreciated the difference between asking the Court to make a factual finding and asking the Court to clarify the jury's choices. The jury note initially asked: "Does the shooting crime by Jones count as a 'third-person' criminal act?" (emphasis added). (A635). The note submitted, however, asked: "Could the shooting crime by Jones count as a 'third-person' criminal act?" (emphasis added). (A635). The change of the inquiry from

"does" to "could" shows that the juror did not intend for the trial court to make a finding of fact or otherwise usurp the jury's role. Moreover, it is notable that the note did not ask whether the shooting crime could be an "intervening cause." Implicitly, it appreciated that the shooting crime could only be an intervening cause if a reasonably prudent person in these circumstances would have anticipated the act and protected against it.

Interestingly, when the trial court and counsel were discussing the appropriate response to this jury note, counsel for Appellant actually agreed that the shooting by Jones could be an intervening cause: "I also agree with what you said initially was that both could be the intervening causes. Whether it's the acts of the fight … or Mr. Jones' actions." (A626). His specific objection, then, was that the trial court's response to the jury note should be to clarify for the jury that either the fight between Jones and the employees or Jones's shooting of the plaintiff could be an intervening cause: "So now I don't believe it is fair to just say, well, only Jones." (A626). Of course, that was not the question asked by the jury and the trial court did not abuse its discretion by failing to list other examples of potential intervening causes.

After answering the specific question in the jury note, "yes," the court also explained: "In terms of how to analyze that I refer you back to the instructions on

intervening cause and on negligent employment." (A627-28). This was not an abuse of the court's discretion.

VI. CONCLUSION

Wherefore, for all of the foregoing reasons, the Appellee, Advanced Construction Group, LLC, respectfully requests that this Honorable Court affirm judgment entered in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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