Rel: February 15, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170512

Hinkle Metals & Supply Company, Inc.

v.

Diane Brown Feltman

Appeal from Jefferson Circuit Court
(CV-16-900071)

SELLERS, Justice.

Hinkle Metals & Supply Company, Inc. ("Hinkle"), appeals from a judgment based on a jury verdict in favor of Diane Brown Feltman. We affirm.

I. Facts and Procedural History

Hinkle is in the business of selling heating, ventilation, and air-conditioning supplies and equipment. Hinkle maintains an office in both Birmingham and Pelham and a warehouse at its Birmingham office. At all times relevant to this action, Gabriel Butterfield was employed as a branch manager at Hinkle's Pelham office.

On September 11, 2015, a GMC Sierra pickup truck, owned and driven by Butterfield, struck Feltman, a pedestrian, as she was attempting to cross 20th Street in downtown Birmingham. As a result of that accident, Feltman sustained multiple injuries. On January 7, 2016, Feltman sued Butterfield and Hinkle, alleging that Butterfield, while acting within the line and scope of his employment with Hinkle, had been negligent and wanton in causing the accident and that Hinkle was vicariously liable based on a theory of respondeat superior.

Hinkle filed a motion for a summary judgment on all claims against it, arguing that it was not vicariously liable for Butterfield's alleged actions because, it said, Butterfield was not acting within the line and scope of his employment with Hinkle at the time of the accident. Following

the submission of briefs and a hearing on that motion, the trial court denied Hinkle's motion for a summary judgment.

The case eventually proceeded to trial on the issue whether Hinkle was vicariously liable for Butterfield's negligence and the extent of damages.[1] At the close of Feltman's case and again at the close of all the evidence, Hinkle moved for a judgment as a matter of law ("JML") on the ground that Feltman failed to submit substantial evidence showing that Butterfield was acting within the line and scope of his employment at the time of the accident; each of those motions was denied. The jury returned a verdict in favor of Feltman in the amount of $375,000, finding Hinkle vicariously liable for Butterfield's negligence. After the trial court entered a judgment on the verdict, Hinkle filed a renewed motion for a JML or, in the alternative, a motion to alter, amend, or vacate the judgment. That motion was denied, and Hinkle filed this appeal.

II. Motion for a JML

[1]Before trial, Feltman voluntarily dismissed the wantonness claim and Butterfield stipulated to his own negligence.

On appeal, Hinkle first argues that the trial court erred in denying its renewed motion for a JML on the respondeat superior claim.

> "The standard of review applicable to a ruling on a [renewed] motion for [a JML] is identical to the standard used by the trial court in granting or denying [a motion for a JML]. Thus, in reviewing the trial court's ruling on the motion, we review the evidence in a light most favorable to the nonmovant, and we determine whether the party with the burden of proof has produced sufficient evidence to require a jury determination. ...
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> "....
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> "... In ruling on a [renewed] motion for a [JML], the trial court is called upon to determine whether the evidence was sufficient to submit a question of fact to the jury; for the court to determine that it was, there must have been 'substantial evidence' before the jury to create a question of fact. See, § 12-21-12(a), Ala. Code 1975. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)."

American Nat'l Fire Ins. Co. v. Hughes, 624 So. 2d 1362, 1366-67 (Ala. 1993)(internal citations omitted); see also Cheshire v. Putman, 54 So. 3d 336, 340 (Ala. 2010).

> "To recover for damages for injuries sustained in an automobile accident against the driver's employer upon a theory of respondeat superior, it is incumbent upon [the] plaintiff to prove that the

> collision occurred while the driver was within the scope of his employment, and happened while he was in the accomplishment of objectives within the line of his duties."

Perdue v. Mitchell, 373 So. 2d 650, 653 (Ala. 1979)(citing Cook v. Fullbright, 349 So. 2d 23 (Ala. 1977)). Thus, Feltman had the burden of presenting substantial evidence showing that the accident occurred while Butterfield was acting within the line and scope of his employment with Hinkle. See Williams v. Hughes Moving & Storage Co., 578 So. 2d 1281, 1283 (Ala. 1991).

Butterfield and three other individuals who were employed by Hinkle at the time of the accident testified at trial: Tim Pate, the general manager of Hinkle; Randy Bergman, the branch manager of Hinkle's Birmingham branch; and Mike Violet, the manager of Hinkle's warehouse in Birmingham. Karen Milbrodt, a records custodian for Verizon Wireless, a cellular-telephone-service provider, introduced Butterfield's call records into evidence. And, finally, Trent Draper, a former radio-frequency engineer, provided an expert opinion regarding historical cell-site analysis of Butterfield's call records from the date of the accident.

The undisputed evidence presented at trial indicated that, as a branch manager, Butterfield was responsible for managing the Pelham branch's employees, inventory, customer orders, deliveries, and sales. At times, his job duties required him to make deliveries to customers or to travel to Hinkle's Birmingham office to pick up parts or equipment needed at the Pelham branch. Butterfield was paid a car allowance as part of his compensation, and he received fuel reimbursement, which was intended to compensate him for travel to and from work and for travel related to company business.

It was further undisputed that, on the day of the accident, Butterfield drove from Hinkle's Pelham branch to Birmingham in his GMC Sierra pickup truck between 10:00 a.m. and 10:30 a.m. Using the navigation system installed in the truck, Butterfield activated voice directions to the Jefferson County courthouse, where he intended to file for a homestead exemption for his personal residence. The accident occurred at approximately 10:30 a.m. at the intersection of 20th Street and 5th Avenue North while Butterfield was attempting to make a left turn onto 20th Street. At 10:34 a.m., Butterfield called 911 to report the accident, and the police arrived

shortly thereafter. Immediately after the accident, Butterfield placed three calls to Randy Bergman and notified him of the accident. Butterfield then continued to the courthouse to file for the homestead exemption; his filing was time-stamped at 11:16 a.m.

The primary factual dispute at trial related to Butterfield's actions after filing for the homestead exemption. Butterfield testified that on the morning of the accident he delivered breakfast to one of Hinkle's regular customers, Champs Air Solutions ("Champs"),[2] but that he did not recall running any other work-related errands for Hinkle that day. Butterfield further testified that he thought he returned directly to Pelham after filing for his homestead exemption, but he was not certain.

At trial, counsel for Feltman questioned Butterfield about a transfer-request form that was completed at 9:00 a.m. on the morning of the accident. Butterfield testified that the transfer-request form concerned an air-handler unit ordered by Champs that needed to be transferred from Hinkle's Birmingham

[2]Although it is not entirely clear from the record, the parties' briefs suggest that Champs is located in the Pelham area.

warehouse to the Pelham branch for delivery to Champs. Butterfield acknowledged that this form included the term "PU PICKUP OUR TRK," which he stated "means anything other than shipping, FedEx, UPS, or putting on our transfer truck." However, Butterfield testified that he did not know when or how that part was actually transferred from Birmingham to Pelham.

Counsel for Feltman also questioned Tim Pate about a sales-order form for an air-handler unit and a condensing unit Hinkle sold to Champs. Pate testified that the sales order was printed in Pelham at 2:06 p.m. on the day of the accident and that it included Butterfield's initials as the person who had entered the sale. Pate acknowledged that the sales order included a signature at the bottom that indicated that it was received by the customer sometime after 2:06 p.m. Pate testified that he did not have any personal knowledge as to when or how the air-handler unit was transferred from the Birmingham warehouse to the Pelham branch on the day of the accident.

During the testimony of Milbrodt, a records custodian for Verizon Wireless, Butterfield's call records from the date of

the accident were admitted into evidence. Subsequently, Draper was called as a witness to provide an expert opinion based on historical cell-site analysis of Butterfield's call records. Draper testified that he had over 20 years experience in the telecommunications industry as a radio-frequency engineer and that, although he was working in south Alabama at the time of trial, he had previously worked as a radio-frequency engineer in the Birmingham area. Draper testified that Butterfield's call records included cell-site information for each call, such as the cell tower and the sector through which the call was connected.[3] Draper testified that he used a propagation modeling software, Atoll,[4] to generate coverage maps of the Verizon Wireless cell towers in parts of Jefferson County and Shelby County that highlighted the areas best served by each cell tower. Draper testified that, based on those maps and the cell-site information included in a person's call records, he

[3]As Draper explained, cell towers typically have multiple antennas mounted on the towers that cover different sectors; he refers to those antennas as different "faces" of the cell tower. Likewise, Draper indicated that if there are three antennas on a cell tower, then each "face" provides network coverage to a 120 degree, pie-shaped area or sector.

[4]Draper testified that cell-service providers, such as Verizon Wireless, use this software during network planning to create a model of a network.

could make certain conclusions, such as: the approximate geographic area a given cell tower is most likely to serve; the cell tower that best serves a given address; the general geographic area where a call was placed; and the area from which a call could not have been placed. Further, Draper testified that, based on the progression of cell sites serving a mobile telephone over a given period, one could infer the directional movement of the caller.

In relation to Butterfield's call records on the date of the accident, Draper testified that a person located at Hinkle's Pelham branch would not be able to place a telephone call that connected with a cell tower located in downtown Birmingham because the signal would be impeded by Red Mountain and Shades Mountain. According to the call records introduced, a call placed at 12:06 p.m. on the day of the accident from Butterfield's phone to Mike Violet's telephone number was connected using cell tower 78, sector D3. Using one of the coverage maps, Draper pointed out the geographical area best served by cell tower 78, sector D3, and confirmed that Hinkle's Birmingham branch is located within that geographical service area. Another call placed from Butterfield's phone at

12:12 p.m. was connected using cell tower 5, sector D3. Draper pointed out the geographical area best served by cell tower 5, sector D3, and confirmed that the intersection of I-20/I-59 and I-65 is located within that geographical service area. A third call placed from Butterfield's phone at 12:15 p.m. initially connected to cell tower 36, sector D3, and ended while connecting with cell tower 36, sector D2. Draper pointed out the geographical areas best served by cell tower 36, sectors D3 and D2, and confirmed that a section of I-65 South is located in those geographical areas. Draper stated that, based upon the timing of those three calls and the cell towers used to connect those calls, one could conclude that Butterfield's phone was moving "from northeast Birmingham down to [the intersection of I-20/I-59 with I-65] and then south down [I-]65" during that time.

On cross-examination, Draper acknowledged that each call is routed through a network "switching site" that uses a proprietary algorithm specific to each carrier. Draper conceded that he did not have access to the specific algorithms used by Verizon Wireless and, therefore, was not able to take into account every factor that may have affected

the routing of Butterfield's calls on that day. Draper further admitted that certain locations are within the range of multiple cell towers, making it possible for two people standing next to each other to place telephone calls on the same network and to be routed through two different cell towers in two different locations. Finally, Draper conceded that it is possible for a call to be routed through a cell tower despite the caller's not being located within the radius of that tower, but the probability of that happening is low.

Hinkle argues that Feltman failed to present substantial evidence showing that Butterfield was acting within the line and scope of his employment at the time of the accident because, it says, Butterfield was on a personal mission that did not benefit Hinkle. This Court has stated:

> "An employee's tort is not attributable to his employer if it stems from personal motives and objectives of the employee. Plaisance v. Yelder, 408 So. 2d 136 (Ala. Civ. App. 1981). However, the fact that an employee is combining personal activities with the employer's business does not necessarily signify an action outside the scope of employment. Whittle v. United States, 328 F. Supp. 1361 (M.D. Ala. 1971), citing Nelson v. Johnson, 264 Ala. 422, 88 So. 2d 358 (1956). Further, this Court has stated:
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> > "'If there is any evidence in the record tending to show directly, or by reasonable

> inference, that the tortious conduct of the employee was committed while the employee was performing duties assigned to him, then it becomes a question for the jury to determine whether the employee was acting from personal motives having no relationship to the business of the employer.'
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> "Hendley v. Springhill Memorial Hosp., 575 So. 2d 547, 550 (Ala. 1990)."

Hudson v. Muller, 653 So. 2d 942, 944 (Ala. 1995).[5]

Having reviewed the evidence in a light most favorable to Feltman, the nonmovant, as our standard of review requires, we conclude that sufficient evidence was submitted to require a jury determination of whether Butterfield was acting within the line and scope of his employment at the time of the accident. The accident occurred during normal working hours, and Butterfield's job duties sometimes required him to drive from Pelham to Hinkle's Birmingham warehouse to pick up parts. On the morning of the accident, a transfer request was entered for an air-handler unit to be transferred from Hinkle's

[5]In Pryor v. Brown & Root USA, Inc., 674 So. 2d 45, 48 (Ala. 1995), this Court further noted that the "[u]se of a vehicle owned by an employer creates an 'administrative presumption' of agency and a presumption that the employee was acting within the scope of his employment." Despite Feltman's arguments otherwise, that "administrative presumption" is inapplicable here, because the truck driven by Butterfield was not owned by his employer; it was his personal vehicle.

Birmingham warehouse to its Pelham branch, and a sales-order form indicated that the air-handler unit was marked as sold later that same day. There was no testimony to indicate how the unit was transferred from Birmingham to Pelham. Finally, based on the cell-site information included in Butterfield's call records, one could infer that he was still in the general area of Hinkle's Birmingham warehouse approximately 50 minutes after Butterfield filed for his homestead exemption and that he did not return directly to Hinkle's Pelham branch after filing for the homestead exemption.

Taking all of this into consideration, a fair-minded person could reasonably conclude that Butterfield traveled to Birmingham on the day of the accident for both a personal purpose (to file for the homestead exemption) and a business purpose (to pick up the air-handler unit from Hinkle's Birmingham warehouse). In cases where an employee combines personal activities with the employer's business, this Court has held that the question whether the employee is acting within the line and scope of his employment is a factual question for the jury. See Hudson v. Muller, 653 So. 2d 942,

944 (Ala. 1995). The trial court, therefore, did not err in denying Hinkle's motion for a JML.

Hinkle further argues that it was entitled to a JML because, it claims, the jury's verdict was impermissibly based on an "inference upon an inference." Specifically, Hinkle asserts that, "[i]n concluding that Butterfield was in the line and scope of his employment, the jury inferred that since he was within the same geographic area as [Hinkle's Birmingham branch], he was engaging in some activity of benefit to his employer, adding yet another inference upon Draper's inference [that Butterfield was more than likely in that geographical area]."

Hinkle quotes Khirieh v. State Farm Mutual Automobile Insurance Co., 594 So. 2d 1220, 1224 (Ala. 1992), which provides:

> "An 'inference' is a reasonable deduction of fact, unknown or unproved, from a fact that is known or proved. See, Malone Freight Lines, Inc. v. McCardle, 277 Ala. 100, 167 So. 2d 274 (1964). '[A]n inference cannot be derived from another inference.' Malone, 277 Ala. at 107, 167 So. 2d at 281. An inference must be based on a known or proved fact. Id."

Hinkle has not persuasively demonstrated that Draper's opinion of Butterfield's likely location was an "inference"

merely because the reliability of the methodology he used to reach that opinion was questioned at trial. We note that, although Draper testified during cross-examination that he made some "inferences" in forming his opinion, it is not clear from that line of questioning or from Hinkle's brief on appeal what those inferences were or how they affected Draper's expert opinion. And, as discussed infra, Draper testified that his opinions were based on facts derived from Butterfield's call records and the coverage maps generated using the Atoll software, not on inferences.

Finally, despite Hinkle's contention otherwise, Draper's testimony was not the "sole evidence" supporting the proposition that Butterfield was acting within the line and scope of his employment at the time of the accident. Hinkle has not cited any authority supporting its suggestion that the jury, in order to reach a verdict, could not rely upon an expert opinion of this nature, in addition to the other circumstantial evidence indicating that Butterfield may have traveled to Birmingham in part to further Hinkle's business purposes. We, therefore, are unconvinced that the jury verdict was based on an inference on an inference in this case.

III. Admissibility of Draper's Testimony

Hinkle additionally argues that the trial court erred in denying its motion to exclude Draper's testimony regarding the historical cell-site analysis of Butterfield's call records on the date of the accident. The standard of review applicable to whether an expert should be permitted to testify is well established: The decision is within the discretion of the trial court, and the trial court's ruling will not be disturbed absent a showing that the court exceeded its discretion. Kyser v. Harrison, 908 So. 2d 914, 918 (Ala. 2005); Swanstrom v. Teledyne Cont'l Motors, Inc., 43 So. 3d 564, 574 (Ala. 2009).

A. Rule 702(a)

First, Hinkle argues that Draper's testimony should have been excluded under Rule 702(a), Ala. R. Evid., on the ground that it was not helpful to the jury. Rule 702(a) provides:

> "(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

(Emphasis added.)

Hinkle argues that Draper's testimony could not assist the trier of fact to understand the evidence or to determine a fact in issue because, according to Hinkle, Draper's opinion "was little more than speculation that Butterfield was in a certain geographic area at the time calls were placed from his phone." This Court has not previously addressed the admissibility of expert testimony based on historical cell-site analysis.[6] We note that Hinkle does not discuss any authority from other jurisdictions this Court might find persuasive on the issue.

In United States v. Hill, 818 F.3d 289 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit discussed at length whether the admission of expert testimony involving historical cell-site analysis violated Rule 702, Fed. R. Evid., which, like Alabama's rule, requires that an "expert's scientific, technical, or other specialized

[6]Feltman points to Woodard v. State, 123 So. 3d 989 (Ala. Crim. App. 2011), in which the Court of Criminal Appeals rejected an argument that a trial court had improperly allowed testimony from the custodians of records for two cellular-telephone companies. As Hinkle points out, however, the court in Woodard concluded that the records custodians had not provided expert testimony and therefore had not qualified as expert witnesses. In this case, it is undisputed that Draper provided expert testimony.

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The court in Hill noted that "[t]he admission of historical cell-site evidence that overpromises on the technique's precision--or fails to account adequately for its potential flaws--may well be an abuse of discretion," but it found that the expert's testimony in that case "on both direct and cross-examination[7] made the jury aware not only of the technique's potential pitfalls, but also of the relative imprecision of the information he gleaned from employing it in [the] case." 818 F.3d at 299. Thus, it held that the trial court did not exceed its discretion in admitting the expert's testimony because the testimony provided was relevant, probative, and "somewhat helpful to the trier of fact." Id.

We reach the same conclusion here. The record in the present case does not indicate that any "overpromising" occurred. On cross-examination, Draper openly acknowledged the limitations inherent in applying the historical cell-site analysis. It was the jury's responsibility to determine the

[7]Hinkle has not demonstrated that its concerns about the use of historical cell-site analysis to place Butterfield within an approximate area at a specific time could not be properly addressed through cross-examination.

weight to accord Draper's testimony. Bell v. Greer, 853 So. 2d 1015, 1018 (Ala. Civ. App. 2003)(noting that "[i]t is the jury's responsibility, not this court's, 'to determine the credibility of the evidence, to resolve conflicts therein, to find the facts, and to express its findings in its verdict.' Jones v. Baltazar, 658 So. 2d 420, 422 (Ala. 1995)."). Hinkle has not demonstrated that the trial court exceeded its discretion in refusing to exclude Draper's testimony under Rule 702(a), Ala. R. Evid.[8]

B. Rule 703

Finally, Hinkle argues that Draper's testimony should have been excluded under Rule 703, Ala. R. Evid., which provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be

[8]We note that Hinkle omits any discussion of subsection (b) of Rule 702, which provides that expert testimony based on scientific theory, principle, methodology, or procedure must be based on sufficient facts or data, must be the product of reliable principles and methods, and must be the product of reliable application of such principles and methods.

> disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

First, the Court notes that it has been unable to locate in the record any indication that Hinkle directed the trial court's attention to Rule 703 in moving to exclude Draper's testimony. Thus, it appears that any argument based on that particular rule was not preserved for this Court's consideration. Further, Hinkle's appellate brief does not provide any significant discussion of Rule 703 or caselaw applying it, nor does the brief sufficiently expound upon the suggestion that Rule 703 renders Draper's testimony inadmissible. Draper testified on voir dire examination and again before the jury that his opinions were based upon the factual information contained in Butterfield's call records as well as the coverage maps generated using the Atoll software. Moreover, in his testimony, he discussed how the Atoll software is typically used by cell-service providers and the information the software takes into account when generating coverage maps. Therefore, to the extent Hinkle argues that Draper's testimony was inadmissible based on Rule 703 because

his opinion allegedly was not based on "facts or data," that argument is not persuasive.

IV. Conclusion

The trial court did not err in denying Hinkle's motion for a JML or his motion to exclude Draper's expert testimony. We, therefore, affirm the trial court's judgment.

AFFIRMED.

Parker, C.J., and Wise and Stewart, JJ., concur.

Bryan, J., concurs in the result.