

**FIRST DIVISION  
BARNES, P. J.,  
MERCIER and BROWN, JJ.**

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**June 21, 2019**

**NOT TO BE  
OFFICIALLY  
REPORTED**

**In the Court of Appeals of Georgia**

A19A0689. QUINN v. HULSEY et al.

MERCIER, Judge.

Brandon Lanier was crossing the street when he was fatally struck by a pickup truck being driven by Riley Hulsey. Nancy Quinn, as administrator of Lanier's estate and Lanier's mother's estate (hereafter, the estate), filed an action for personal injury and wrongful death against Hulsey and Hulsey's employer, TriEst Ag Group, Inc. (collectively, the defendants). As to Hulsey, the estate asserted negligence and reckless conduct claims; as to TriEst, the estate asserted claims of vicarious liability and negligent entrustment, hiring, training and supervision. The trial court granted the defendants' motion for partial summary judgment on the estate's claim for punitive damages against TriEst and on the estate's claim against TriEst for negligent entrustment, hiring, training and supervision. The court denied the defendants' motion

for partial summary judgment on the estate's claim for punitive damages against Hulsey.

After a trial, a jury returned a verdict in which it found both parties negligent, assigning 50 percent fault to Lanier and 50 percent fault to the defendants. The estate filed a motion for new trial, which the trial court denied. The estate appeals, contending that the trial court erred by allowing the defendants to argue the defense of "legal accident"; by allowing the defendants to present evidence of Hulsey's good character and to appeal to the jurors' sympathies; and by granting partial summary judgment to TriEst on the negligent entrustment, hiring, training and supervision claims. For the reasons that follow, we affirm.

Viewed in the light most favorable to the jury's verdict, the evidence shows that on April 11, 2014, Hulsey was driving a pickup truck owned by his employer, TriEst, to run an errand for the employer. Traveling on Fifth Street in Tifton, Georgia, Hulsey stopped the truck at a red light at the intersection of Fifth and Main Streets. He turned on his right turn signal. He looked to his left and right and, while his light was still red, turned right onto Main Street. Lanier, who had been standing on the corner of the intersection, entered the crosswalk to cross Main Street directly in front of Hulsey's truck. There was evidence that when Lanier entered the crosswalk, his traffic light was

still green but it displayed a “DON’T WALK” sign. As Hulseley turned right, his truck struck and ran over Lanier, killing him. Hulseley had turned right less than one second after Lanier stepped into the street. Hulseley testified that he did not see Lanier until after the truck struck him. The tragic incident was captured on the dashboard camera of a police vehicle that was stopped at the intersection at the time of the collision, and the video recording was played at trial.

The estate asserts that Hulseley’s negligence proximately caused the collision because he violated OCGA § 40-6-123 (a), which prohibits a person from turning a vehicle at an intersection “unless and until such movement can be made with reasonable safety.” The defendants maintain that Lanier was negligent because he violated OCGA § 40-6-22 (2), which provides that when a pedestrian-control signal exhibits flashing or steady “DON’T WALK” words or symbols, “[n]o pedestrian shall start to cross the roadway in direction of such signal[.]”

1. The estate contends that the trial court erred by allowing Hulseley and TriEst to argue the defense of “legal accident,” when the trial court had granted the estate’s motion in limine to prohibit the defendants from arguing that defense to the jury. We find no basis for reversal.

In *Tolbert v. Duckworth*, 262 Ga. 622 (423 SE2d 229) (1992), the Supreme Court held that a particular pattern jury instruction on “accident” should no longer be given inasmuch as its “reference to the word ‘accident’ creates confusion because of the difference between the legal definition of ‘accident’ and the commonly understood meaning of the word as an unintended act.” Id. at 623 (1).<sup>1</sup>

The defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury. The standard instructions on negligence, proximate cause, and burden of proof are sufficient to instruct the jury that the plaintiff may not recover when an injury occurs without the defendant’s fault.

Id. at 623-624 (1) (citations and punctuation omitted). In *McGee v. Jones*, 232 Ga. App. 1, 6 (5) (499 SE2d 398) (1998), this Court added that “[t]he defense cannot argue to the jury ‘legal accident,’ because such defense was abolished.” Id. It is an

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<sup>1</sup> The *Tolbert* court quoted the pattern jury charge on “accident” as follows: “If you should find from the evidence in this case that neither plaintiff nor defendant were guilty of negligence, then any injuries or damages would be the result of an accident. The word ‘accident’ has a specific and distinct meaning, as it is used in connection with this case. Accident is strictly defined as an occurrence which takes place in the absence of negligence and for which no one would be liable. 1 Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 237 (3 ed. 1991).” Id. at 623 (1) (punctuation omitted).

appellant's responsibility to show that the violation of a motion in limine was harmful.

*Verde v. Granary Enters.*, 178 Ga. App. 773, 773-774 (2) (345 SE2d 56) (1986).

In the hearing on its motion in limine, the estate argued that the defendants should not be allowed to argue the defense of accident, as such would imply that no one was at fault. The court ruled that the parties could not argue the defense of accident.

The estate complains that the defendants violated the ruling on the motion in limine by including in their opening statement the following:

You may find that this was just a terrible accident and no one was negligent, no one was at fault, under the circumstances. And if that's what you find, the plaintiff does not win this case. That's the law in the state of Georgia and Judge Iannazzone will talk with you at the appropriate time.

The estate complains that because the statement went uncorrected (i.e., the trial court did not explain to the jury that the defendants' contention that "this was just a terrible accident" did not provide a legal defense to liability), and the statement likely affected the verdict, reversal is required. However, even assuming that the defendants asserted a legal accident defense, reversal is not required because the estate has not established harm. See *Verde*, supra. Under a legal accident defense, no one was

negligent. See *Tolbert*, supra; see also *Handy v. Speth*, 210 Ga. App. 155, 156 (1) (435 SE2d 623) (1993) (explaining that, “[i]n Georgia, ‘accident’ pertains to an injury which occurs without being caused by the negligence of either the plaintiff or the defendant.”). In this case, the jury had before it not only the testimony of witnesses, it had a video recording of the entire incident, which it viewed at trial. The jury determined that Lanier and the defendants were negligent, thus rejecting any legal accident defense. Moreover, the trial court instructed the jury as to negligence, proximate cause, and burden of proof. See generally *Tolbert*, supra. Thus, reversal is not required.

2. The estate contends that the trial court erred by allowing the defendants to introduce evidence of Hulsey’s “good character” and to appeal to the jury’s sympathy on the issue of liability. The estate asserts that the defense improperly vouched for Hulsey’s honesty during opening statement and provoked Hulsey to “break down into tears and weep before the jury which likely influenced the verdict in [the] [d]efendants’ favor.”

In an opening statement, defense counsel remarked that Hulsey “is honest,” that he “told [the estate’s counsel] honestly I did not see Mr. Lanier before this accident happened and I can’t honestly say whose fault it was. That is his honest opinion.” The

estate did not object to the remark at trial. Thus, the issue was waived. See *Burgeson v. State*, 267 Ga. 102, 107 (4) (475 SE2d 580) (1996).

That Hulsey cried while testifying is not grounds for reversal or a new trial. “If a mistrial was demanded in every case when there was an emotional outburst by a party or witness, few trials would be completed.” *Associated Distributors v. Strozier*, 144 Ga. App. 205, 206 (1) (a) (240 SE2d 761) (1977). Likewise, evidence that Hulsey was upset or remorseful after fatally striking Lanier does not require reversal. The estate argued that Hulsey had acted wilfully in causing Lanier’s death and it sought punitive damages from him, making his reaction to the fatal injury relevant.

3. The estate contends that the trial court erred by granting partial summary judgment to TriEst on the estate’s claims of negligent entrustment, hiring, retention and supervision. It asserts that OCGA § 51-12-33 (the apportionment statute) required the jury to compare the negligence of both Hulsey and TriEst to the negligence of Lanier, but that the trial court did not permit the jury to consider TriEst’s negligence because TriEst admitted it would be liable under the doctrine of respondeat superior if Hulsey was found to be negligent.

Under Georgia law, if a defendant employer concedes that it will be vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer is entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention, unless the plaintiff has also brought a valid claim for punitive damages against the employer for its own independent negligence (hereinafter, the "Respondeat Superior Rule").

*Hosp. Auth. of Valdosta v. Fender*, 342 Ga. App. 13, 21 (2) (802 SE2d 346) (2017) (citations omitted).

TriEst admitted that Hulseley was acting within the course and scope of his employment when he struck Lanier, and that TriEst could be held liable under the doctrine of respondeat superior if Hulseley was found negligent. Because TriEst admitted the applicability of respondeat superior, and the trial court granted summary judgment to TriEst on the estate's punitive damages claim against TriEst,<sup>2</sup> TriEst was entitled to summary judgment on the estate's negligent entrustment, hiring, training and supervision claims based on the respondeat superior rule. See *Hosp. Auth. of Valdosta*, *supra*.

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<sup>2</sup> The estate has not challenged the grant of summary judgment on the punitive damages claim it asserted against TriEst.

The estate argues that the apportionment statute requires the trier of fact to consider the fault of all persons or entities who contributed to the injury, even where the claims are based on negligent entrustment, hiring, retention and supervision. However,

the apportionment statute does not apply where a defendant employer faces only vicarious liability under the doctrine of respondeat superior because the employer and employee are regarded as a single tortfeasor. Like claims based on respondeat superior, claims against a defendant employer for the negligent hiring, training, supervision, and retention of an employee are derivative of the underlying tortious conduct of the employee. Thus, where, as here, the employer has admitted respondeat superior liability and the plaintiff is not seeking punitive damages, the claims for negligent hiring, training, supervision, and retention are merely duplicative of the respondeat superior claim.

*Hosp. Auth. of Valdosta*, supra at 23 (2) (citations and punctuation omitted). The estate's reliance on *Zaldivar v. Prickett*, 297 Ga. 589 (774 SE2d 688) (2015) is misplaced because *Zaldivar* did not involve an admission of the applicability of respondeat superior. Id. As recognized in *City of Kingsland v. Grantham*, 342 Ga. App. 696 (805 SE2d 116) (2017), the apportionment statute did not supersede or nullify the respondeat superior rule (also citing *Hosp. Auth. of Valdosta*, supra, for the

principles that: absent a valid punitive damages claim against the employer, claims based on respondeat superior and claims based on negligent retention, hiring and supervision of an employee are derivative of the underlying tortious conduct of the employee; and where an employer has admitted respondeat superior liability, the negligent hiring, retention and supervision claims are merely duplicative of the respondeat superior claims). See generally *McClendon v. Harper*, \_\_ Ga. App. \_\_ (4) (826 SE2d 412, 421-422) (2019) (because employer admitted the applicability of respondeat superior, it was entitled to summary judgment on claims for negligent entrustment, hiring and retention).

*Judgment affirmed. Barnes, P. J., and Brown, J., concur.*