IN THE SUPREME COURT OF TEXAS

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No. 04-0332
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BED, BATH & BEYOND, INC., PETITIONER,

v.

RAFAEL URISTA, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS
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Argued June 10, 2005

JUSTICE BRISTER, joined by JUSTICE HECHT and JUSTICE WILLETT, concurring.

Accidents happen. Sometimes even when no one is negligent. That was the jury's verdict here. As there is evidence to support that conclusion and the jury instruction told them nothing more, the court of appeals erred in setting the verdict aside. So I join in the Court's judgment.

But I would add that the trial court did nothing wrong. It is true the unavoidable-accident instruction has historically been associated only with defendants who blame children or the weather, but (as we noted recently) *that is not what it says*.[1] All it says is that accidents may be nobody's "fault" in the legal sense. I would not presume such a truism erroneous.

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[1] *See Dillard v. Texas Elec. Co-op.*, 157 S.W.3d 429, 433 (Tex. 2005). As the parties' briefs were all filed before we issued *Dillard*, it is not surprising that they did not anticipate our opinion in that case. But whether this instruction might not be erroneous at all was discussed extensively at oral argument.

The assumption that such a simple instruction will "nudge" jurors toward a defense verdict reflects a very low opinion of their intelligence. Do we nudge jurors toward a plaintiff's verdict by listing the defendant *first* in every multi-party negligence or proportionate-responsibility question?[2] Jurors may not know the secret meaning of the unavoidable-accident instruction, but they are not cattle who will be stampeded to an improper verdict by something like this.

In any event, I agree with the Court that this instruction was harmless. The evidence supporting the verdict was not "exceedingly weak," as the dissent concludes. There was no direct evidence of the plaintiff's negligence claim — there were no eyewitnesses and the employee at issue never testified. As the evidence was all circumstantial, it was entirely up to the jury to choose what to infer from it.[3] They did not have to agree anything happened as the Uristas claimed; indeed, their verdict requires us to presume they rejected all of it that reasonable jurors could.[4]

Perhaps reasonable jurors must conclude this wastebasket did not fall by itself. But it may have been teetering on the shelf for a long time, and could have been dislodged by another customer rather than an employee. The store manager's belief about what occurred was not binding on the jury; that one party hesitates to call the other a liar does not prevent jurors from doing so.

And even if the jurors inferred that an employee pushed the wastebasket, they did not have to infer negligence. I doubt using a broom to fetch merchandise is OSHA-approved. But the

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[2] *See, e.g.,* STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–GENERAL NEGLIGENCE PJC 4.1, 4.3, 4.4 (2003).

[3] *See City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005).

[4] *See id.* ("But in every circumstance in which reasonable jurors could resolve conflicting evidence either way, reviewing courts must presume they did so in favor of the prevailing party, and disregard the conflicting evidence in their legal sufficiency review.").

question was whether persons of ordinary prudence (like ourselves, our spouses, or our teenage children) ever do something very much like it. We could hold as a matter of law it was not the safest way, or even that it was a mistake; but the question of negligence was solely for the jury.

Reasonable jurors are not required to find *someone* negligent every time there is an accident. I would stop saying it is error to tell them something we all know is true because of a secret interpretation only lawyers know it has.

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Scott Brister
Justice

OPINION DELIVERED: December 29, 2006