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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2019-CP-32-00607
Appellate Case No.: 2022-000113

Ray D. Fowler, ...Appellant,

v.

Pilot Travel Centers, LLC, d/b/a Pilot Flying J,
Myra Lashay Dixon, et al., T.J. Jarre Bates, and
Rico Shamar Sellers, of whom Pilot Travel Centers, LLC
and Myra Lashay Dixon are Respondents .....Respondents.

FINAL REPLY BRIEF OF APPELLANT

Submitting Counsel:

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ARGUMENT

I. THE RESPONDENTS AND THE CIRCUIT COURT MISAPPLIED THE LAW OF ASSUMPTION OF RISK TO THE FACTS OF THIS CASE INSTEAD OF THE LAW OF COMPARATIVE NEGLIGENCE

The Respondents argue, and the Circuit Court held, that persons who intervene on behalf of other persons being beaten in an effort to protect them from injury have assumed the risk of their own injuries and are therefore completely barred from recovery as a matter of law in South Carolina. In other words, in South Carolina, assumption of the risk bars any recovery by a person who is injured while seeking to protect someone else from physical violence.

The Circuit Court has held this proposition as a matter of law. It has issued summary judgment. The respective positions and identities of the parties, including the person who the Plaintiff sought to protect, are irrelevant as any intervention into a violent conflict is assuming the risk of injury, and therefore recovery is completely denied regardless of the circumstances or identity of the parties. This ruling flies in the face of the Supreme Court's holding in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508, S.E.2d 565 (1998). *Davenport* stated that the doctrine of assumption of the risk as a complete bar to recovery had been subsumed by South Carolina's adoption of comparative negligence and that a plaintiff was not barred from recovery by the doctrine of assumption of the risk unless the degree of fault arising therefrom is greater than the negligence of the defendant.

In *Davenport*, the South Carolina Supreme Court expressly rejected the law of Georgia, which retains assumption of the risk as an absolute defense even though Georgia is a comparative fault jurisdiction. Respondents' reliance on Georgia case law is therefore completely misplaced. Respondents' Brief additionally fails to mention that Georgia's assumption of the risk scheme is a statutory scheme as opposed to a common law scheme. See OCGA § 51-11-2. "OCGA § 51-11-2 provides the statutory basis for the assumption of risk defense, stating that "no tort can be committed against a person consenting thereto if that consent is free, is not obtained by fraud, and is the action of a sound mind." *Carter v. Scott*, 320 Ga. App. 404, 750 S.E.2d 679 (2013). Therefore, the Georgia cases cited by the Respondents are wholly irrelevant to this discussion.

Under South Carolina law, assumption of the risk remains as an absolute bar, as opposed to a facet of negligence to be weighed by a jury, only when the conduct of the plaintiff in assuming the risk outweighs the negligence of the defendant as a matter of law. This is not the circumstance in the instant case.

The cases cited by the Respondents involve intentional premediated conduct on the part of the plaintiff engaging in activity which they knew involved an inherent risk of injury with an opportunity to reflect upon and appreciate the danger. Thus, the plaintiff was barred from recovery when he intentionally attended a picnic and played in a softball game as a catcher. The plaintiff attempted to block home plate from a base runner attempting to score and was injured. *Cole v. Boy Scouts of America*, 397 S.C. 247, 253, 725 S.E.2d 476, 479 (211). A plaintiff who was warned

not to enter a house because it contained an aggressive raccoon and who nevertheless drove to the house, entered the house and attempted to catch the raccoon with his bare hands could not recover when he was bitten. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008).

In the instant case, the Appellant simply came to a convenience store as he did every morning and was suddenly confronted with a violent situation. He did not have time for cool reflection. In an instant, he was confronted with a choice of intervening to attempt to protect a woman who was suffering a beating or simply watch a woman being beaten. "It all happened so fast." (Depo. of Ray Fowler, Page 91, R. 182). His adrenaline was running and he intervened when he saw a drunken man grab Ms. Dixon and draw his other hand back in a fist to hit her. (Depo. of Ray Fowler, pp. 91-95, R. pp. 182-186)." He did not have time to make a cool intelligent choice. Given the circumstances, it is clearly a jury question as to whether or not he was negligent and if that negligence outweighed the negligence of the Respondent Pilot Travel Center and Myra Dixon in failing to promptly remove drunken belligerent employees from the premises, or have them removed by the police. This is a jury question.

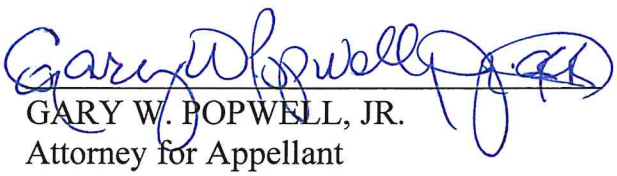
To hold otherwise is to hold that any time a person attempts to protect a third party from a violent assault, they have assumed the risk of any injury which might befall them at the hands of the aggressor regardless of the situation, circumstances or identities of the parties. Thus, even if a woman or a child is being savagely beaten by a large, intoxicated man, any person who seeks to intervene in effect "gets what

they asked for" and cannot recover. The Appellant does not believe this is the law of South Carolina and that this is a question for a jury to determine after weighing all of the facts and circumstances surrounding this unfortunate incident.

CONCLUSION

The Order of the Circuit Court painted with much too broad a brush in granting summary judgment to the Respondents in this case given the facts and circumstances of the Appellant's serious injuries suffered at the Pilot Travel Center. The Appellant has raised questions of fact which should be heard and weighed by a jury, especially in light of the Circuit Court's reliance on Georgia law which has been expressly rejected by the South Carolina Supreme Court concerning the defense of assumption of the risk.

Respectfully submitted,

By: 

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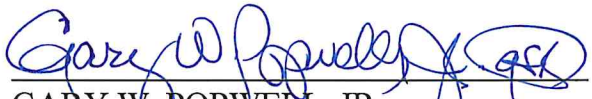
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

By: 

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