

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Nov 28 2023

SC 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.

PETITION FOR REHEARING OF APPELLANT

The Petitioner, Appellant Ray D. Fowler, hereby petitions this Court for rehearing of this Court’s Decision affirming the Circuit Court’s grant of summary judgment for Respondents in this action as set forth in the attached Memorandum.

Submitting counsel:

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**APPELLANT’S MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Appellant Ray D. Fowler respectfully submits that this Court has overlooked or misapprehended the correct construction and application of the law of Assumption of the Risk to the facts of this case in finding that the Trial Court was correct in determining that the Appellant assumed the risk of his injuries and was therefore barred from making a negligence claim against the Respondents.

ARGUMENT

Viewing the evidence in a light most favorable to the Appellant and construing all inferences arising in and from the evidence in a light most favorable

to the Appellant, there is ample evidence of negligence on the part of the Respondents.

The Respondents were aware that two of their off duty employees showed up drunk and reeking of alcohol on the morning in question, and nevertheless let them wander freely about the store and premises for over thirty minutes causing trouble and being belligerent until finally Respondent Dixon, calling for police assistance. Although the police arrived very quickly, it was too late as a physical altercation had already started between the manager of the Respondent Pilot Travel Centers, LLC, Respondent Dixon, and one of the drunken off duty employees when he began beating her. There is also ample evidence that the Appellant had no notice that Respondent Pilot Travel Centers, LLC's off duty employees had been out all night at a strip club and were extremely drunk. He simply saw a large man begin beating the female manager of Pilot Flying J. He tried to intervene to stop the beating.

This Court has ruled that as a matter of law he is barred by assumption of the risk from making this claim regardless of the Respondents' negligence. This incorrectly applies the law of assumption of the risk to this case instead of comparative negligence as set forth in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998).

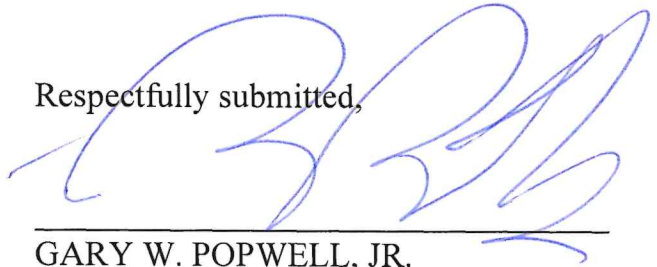
The Appellant respectfully submits that the cases cited by the Court are inapplicable to the facts at hand and this Court has misapplied the law of assumption of the risk.

The Court has determined that that the Appellant's actions in intervening to stop a woman from being suddenly beaten by a man in public is factually and legally analogous to intentionally going to a hockey game and being struck by a puck during the game while sitting in the stands as a spectator. *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 637 S.E.2d 560 (2006). It has also held it is similar to other cases involving an injury during a home plate collision at a softball game and being bitten by a raccoon while trying to catch it even after being warned not to enter the home where it was roaming freely because it was vicious and should not be interfered with. *Cole v. Boy Scouts of America*, 397 S.C. 247, 725 S.E.2d 476 (2011); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008). In those cases, the plaintiffs intentionally set out on a course of conduct which naturally exposed them to the danger which ultimately caused their injury.

In the instant case, the Appellant had no inkling there was any kind of trouble or that belligerent drunks were hanging around the Pilot Flying J when all of a sudden he saw a man begin to beat a woman with his fists. He acted instinctively and immediately. He had no time for cool reflection or to set up a plan or intentional course of conduct to expose himself to danger. As he clearly stated in his deposition, "it all happened so fast". (Depo. of Ray D. Fowler, p. 91, R.182). Given this evidence, it can hardly be stated as a matter of law that the negligence on the part of the Appellant, if any, exceeds that of the Respondents so as to completely bar the Appellant under primary implied assumption of the risk.

In the cases cited by the Court, the plaintiff deliberately and knowingly set out on a course of conduct which put them in harm's way. In this case, the Appellant went to a convenience store when he was suddenly confronted with a woman being beaten in public by a large drunken man and he had to make a split second choice. The decision affirming the trial Court's grant of summary judgment to Respondents should be reversed.

Respectfully submitted,



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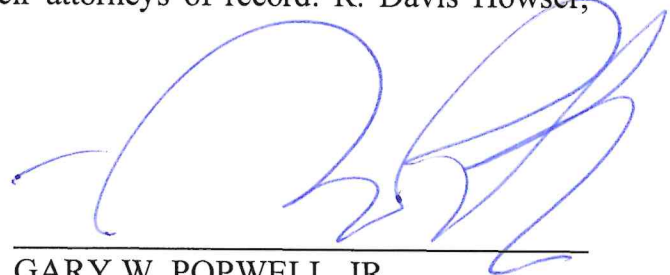
v.

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and Myra Lashay Dixon are Respondents Respondents.

PROOF OF SERVICE

I certify that I have served one (1) copy of the *Petition for Rehearing of Appellant and Appellant's Memorandum in Support of Petition for Rehearing* on the Respondents as follows via Email to their attorneys of record: R. Davis Howser, Esquire - rdhowser@hnblaw.com.

November 28, 2023.



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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
1220 Senate Street
Columbia, South Carolina 29211

**Re: Ray Fowler -vs- Pilot Travel Centers, LLC, d/b/a Pilot Flying J – 3008
Charleston Highway, Cayce, South Carolina, Myra Lashay Dixon, T.J. Jarre
Bates, and Rico Shamar Sellers
Appellate Case No.: 2022-000113**

Dear Ms. Kitchings:

Attached for filing is the Petition for Rehearing of Appellant and Appellant's Memorandum in Support of Petition for Rehearing, in the above-referenced matter.

Please return clocked copies of via email.

Respectfully submitted,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: R. Davis Howser, Esquire (*Via Email: rdhowser@hnblaw.com*)