THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

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

Decided Without Oral Argument
Appellate Case No.: 2022-000113

Ray D. Fowler, ...Petitioner,

v.

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

Of whom Pilot Travel Centers, LLC and Myra Lashay Dixon are Respondents .....Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2023.

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS AND THE CIRCUIT COURT ERR IN HOLDING THAT A PERSON WHO INTERVENES IN DEFENSE OF ANOTHER WHO IS BEING ATTACKED ASSUMES THE RISK OF BEING INJURED AND THEY ARE THEREFORE BARRED AS A MATTER OF LAW FROM MAKING A NEGLIGENCE CLAIM BY THE DOCTRINE OF ASSUMPTION OF THE RISK?**

STATEMENT OF THE CASE

This case stems from an injury which occurred on May 20, 2018 when Petitioner's leg was broken when he tried to stop the on duty manager of Respondent Pilot Travel Centers, LLC from being beaten during an altercation with two off duty drunken employees of Pilot Travel Centers, LLC. The off duty employees of Pilot Travel Centers, LLC showed up drunk that morning after being out all night at a strip club. T.J. Jarre Bates and Rico Shamar Sellers came into the store in an extremely intoxicated condition. After they had been there for approximately thirty minutes, Mr. Bates got in a fight with Respondent Myra Lashay Dixon and began beating her. When the Petitioner tried to intervene to protect Ms. Dixon, his leg was broken by Mr. Sellers.

The Petitioner filed suit again Pilot Travel Centers, LLC, Myra Lashay Dixon and the two drunken off duty employees. An Amended Summons and

Complaint was subsequently filed and the Respondents filed Answers and Amended Answers. After discovery, Respondents Pilot Travel Centers, LLC (hereafter Pilot) and Dixon moved for summary judgment on the grounds that the Petitioner had assumed the risk of his injury when he intervened on behalf of Ms. Dixon after she was attacked.

The Motion was argued in the Circuit Court via computer video hearing on October 21, 2021 by the Digital Courtroom Recorder project. Memoranda with accompanying exhibits including photographs and DVDs had been sent to the judge prior to the date the Motion was argued by computer. An Order Granting Summary Judgment was issued on October 29, 2021. (Order Granting Summary Judgment, R. pp. 2-15). After a Motion to Alter and Amend the Order was denied, the Petitioner appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed the Circuit Court's grant of summary judgment to the Respondents on the grounds of assumption of the risk. It held that the Circuit Court did not err in finding Respondents' duty of care did not encompass the risk involved in fighting and that the Petitioner had impliedly assumed the risk inherent in fighting when he intervened on behalf of Myra Dixon and was therefore barred from recovery pursuant to *Hurst v. East Coast Hockey League*, 371 S.C. 33, 637 S.E.2d 560 (2006); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008); and *Cole v. Boy Scouts of America*, 397 S.C. 247, 725 S.E.2d 476 (2011).

The Petitioner filed his Petition for Rehearing with the Court of Appeals on November 28, 2023. The Petition for Rehearing was denied by Order of the Court

of Appeals on December 14, 2023. This Petition follows.

FACTS

Viewing the evidence before the Lower Court in a light most favorable to the Petitioner, Rico Shamar Sellers and T.J. Jarre Bates came to the Pilot on May 20, 2018 (a Sunday) at 6:35 a.m. in an extremely intoxicated condition. (R. pp. 124, 15-16, 119-120). They had been out all night at a strip club and had come straight from the strip club to Pilot. (R. pp. 12-13, 127-128). They were both employees of Pilot Travel Center, however they were off duty at the time when they showed up intoxicated that Sunday morning. (R. pp. 131-133; Cayce Police Department Body Cam Video Separate Disc). They had extensive interaction with Myra Lashay Dixon and other employees of Pilot (close conversations, putting their arms around them, talking extensively, and coming behind the counter, etc.). (R. pp. 135-140). After they had been there for approximately 20 minutes, Myra Dixon asked them to leave. When they did not, after another delay she called the police at 6:58 a.m. after the strippers who had gotten off duty showed up and Mr. Bates and Mr. Sellers became more unruly. (R. p. 143). After the strippers left through the front door, Mr. Bates and Mr. Sellers followed them out. Ms. Dixon followed them out. (R. p. 122). However, when Mr. Sellers tried to get back in, Ms. Dixon attempted to stop him and he began to beat her. (R. pp. 123, 145, 133-134).

The Petitioner, Ray D. Fowler, had simply stopped there that Sunday morning as he frequently did on his way to work. He and his co-worker were

going to work that Sunday and they usually stopped there so his co-worker could get a cup of coffee and Mr. Fowler could smoke a cigarette. (R. pp. 149-150). He had no knowledge that off duty employees had been there loitering and causing trouble for approximately thirty minutes. As he was smoking his cigarette and preparing to leave that morning all of a sudden he saw Mr. Bates begin to beat Ms. Dixon. (R. pp. 133-134, 145). He went to intervene in an attempt to protect Ms. Dixon when he was attacked by Rico Shamar Sellers and his leg was broken presumably by a karate kick from Mr. Sellers. (R. pp. 151-152). Both Mr. Sellers and Mr. Dixon reeked of alcohol and were obviously intoxicated that morning and they had been there for over thirty minutes when this unfortunate incident occurred. The police arrived ten minutes after Ms. Dixon called them while the beating of the Petitioner was still going on. (R. p. 155). The level of Mr. Bates' and Mr. Sellers' intoxication is obvious from the body cam video disc.

ARGUMENT

I. IT IS NOT THE LAW OF SOUTH CAROLINA THAT A PERSON WHO INTERVENES ON BEHALF OF ANOTHER PERSON WHO IS BEING ATTACKED HAS IMPLIEDLY ASSUMED THE RISK OF THEIR OWN INJURY AND ARE THEREFORE BARRED FROM RECOVERY AS A MATTER OF LAW BECAUSE THEY VOLUNTARILY EXPOSED THEMSELVES TO A KNOWN RISK OF INJURY INHERENT IN SUCH INTERVENTION.

This is a case of first impression in this state. The issue is whether any person who seeks to intervene on behalf of another that has been attacked has assumed any risk of injury to themselves as a matter of law and cannot bring a claim if they are injured.

The Circuit Court and the Court of Appeals have ruled that a person intervening on behalf of another who is being attacked assumes the risk of injury as a matter of law (Primary Implied Assumption of Risk) and therefore is barred from recovery in a negligence action. They equate the actions of the Petitioner in this case with the action of a person who voluntarily joins a softball game at a boy scout picnic and is injured while blocking third base during the course of the game. *Cole v. Boy Scouts of America, supra.* They also equate Mr. Fowler's actions with a person who voluntarily attends a hockey game and is struck by an errant puck. *Hurst v. East Coast Hockey League, supra.* They also equate it with a person who despite being warned not to enter a house because it contains an aggressive raccoon, intentionally drives to the house, enters the house, attempts to capture the raccoon and is bitten. *Singleton v. Sherer, supra.* All of those cases involved plaintiffs who were knowingly, voluntarily, and intentionally engaging in activities which by definition carried known risks of injury.

By contrast, the Petitioner was simply waiting outside a store smoking a cigarette while his co-worker went inside to get a cup of coffee that Sunday morning on their way to work. No one had called him that morning to warn that drunken off duty employees were hanging around Pilot that morning causing trouble and he should go up there if he wanted to fight. He was confronted with a sudden, unexpected choice of whether to try to stop a woman from being beaten by a grown man or stand idly by and watch her being beaten so as not to "assume any risks" of injury to himself. This case would only be analogous to the cases cited by the Court

of Appeals and the Circuit Court if the plaintiff in *Singleton v. Sherer* would have been barred by primary implied assumption of the risk if he had not been warned of the presence of an aggressive raccoon in the house and nevertheless been invited over and the raccoon had suddenly appeared and attacked a woman without warning. If he would have been barred similarly to the Petitioner had he intervened to try to protect the woman from the sudden raccoon attack, then *Singleton* is analogous. Otherwise, it certainly is not.

The Circuit Court and the Court of Appeals emphasized that the Petitioner stated in his deposition that he knew the risks involved in fighting. However, they do not acknowledge that he stated in his deposition that "It all happened so fast". (R. p. 182). The only evidence in the record is that he had absolutely no warning of any problem whatsoever until Mr. Bates began to beat Ms. Dixon. Whether or not he acted appropriately and reasonably under the circumstances is a question for a jury to weigh and consider whether or not he was negligent and compare it with any negligence on the part of the Respondents in allowing the off duty drunken employees to loiter about for twenty minutes before calling the police.

This Court abolished the traditional defense of assumption of the risk in the case of *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998). This case is given extremely short shrift by the Circuit Court with no explanation at all as to how the facts of the instant case are incongruous with *Davenport* and it is not cited at all by the Court of Appeals. The Petitioner respectfully submits that the Court of Appeals' opinion basically ignores

the precedent set forth by this Court in *Davenport* concerning weighing various degrees of negligence when plaintiffs have voluntarily encountered risks incidental to an activity like walking down a dark stairway or on an icy or wet sidewalk or swimming without a lifeguard on duty (which is properly analogous to the action here). Instead it focuses solely on activities which by their very definition carry the risks which wound up injuring the plaintiffs in those cases and the plaintiffs knowingly, deliberately and voluntarily engaged in those activities as their primary goal at the time rather than having those risks sprung upon them suddenly and without warning. This ignores the clear precedent of this Court and should be reversed. The Court of Appeals affirmed a Circuit Court order which approvingly cited Georgia law when *Davenport* specifically rejected Georgia law on assumption of the risk.

It is not and should not be the law of South Carolina that any good Samaritan who intervenes when a person is being attacked or is in danger (whether by another person, an animal or in other dangerous circumstances such as in a house fire, struggling in the water, etc.) assumes the risk of their own injury if they intervene in an attempt to rescue a person in danger and save them from harm. In those cases, the jury should weigh the relative reasonableness and unreasonableness of the parties to determine whether or not any negligence of the plaintiff outweighs that of any defendant for causing the underlying danger or failing to warn or guard against it despite notice. The plaintiff here was not intentionally engaging in a risky course of conduct. He was smoking a cigarette minding his own business when he was

suddenly confronted with an attack by a man on a woman. It is not inherently risky to smoke a cigarette at a convenience store while waiting for a co-worker.

CONCLUSION

For the reasons stated, the Petitioner asks that this Court grant this Petition for Writ of Certiorari to consider this novel question of law in the State of South Carolina.

Respectfully submitted,

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January 12, 2024.