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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 BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT THE PLAINTIFF ASSUMED THE RISK OF HIS INJURIES AS A MATTER OF LAW AND THAT HE WAS THEREFORE BARRED FROM RECOVERY AGAINST PILOT TRAVEL CENTERS, LLC AND/OR MYRA LASHAY DIXON?

STATEMENT OF THE CASE

On May 20, 2018, the Plaintiff's leg was broken when he tried to stop a fight between the on duty manager of Pilot Travel Centers, LLC, Myra Lashay Dixon and two off duty employees of Pilot Travel Centers, LLC (hereafter Pilot) who had shown up drunk that morning after being out all night at a strip club. T.J. Bates and Rico Shamar Sellers became involved in a fight with Myra Lashay Dixon and when the Appellant tried to intervene to protect Ms. Dixon, his leg was broken.

The Appellant filed suit against Pilot Travel Centers, LLC, Myra Lashay Dixon and the two drunken off-duty employees, T.J. Bates and Rico Shamar Sellers. Pilot Travel Centers, LLC and Myra Lashay Dixon filed an answer to the Complaint. (See Amended Summons and Complaint of Ray Fowler, R. pp. 29-34; Amended Answer of Defendants Pilot Travel Centers, LLC and Myra Lashay Dixon, R. pp. 43-49). (The Summons and Complaint was amended because T.J. Jarre Bates gave his brother's name to the police upon arrest and, therefore, the Appellant initially filed suit against his brother. When the ruse was discovered, the Summons and Complaint was amended to bring it in the correct name of T.J. Jarre Bates).

After discovery, the Respondents Pilot and Myra Lashay Dixon moved for summary judgment. (Pilot and Dixon's Motion for Summary Judgment, R. pp. 19-20). Appellant and Respondents both submitted memorandums concerning the summary judgment motion. (Respondents' Motion in Support of Summary

Judgment, R. pp. 91-106; Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, R. pp. 84-90). The Motion was argued on the computers on October 21, 2021 by the digital courtroom recorder project. Memoranda with accompanying exhibits had been sent to the judge prior to the date the Motion was argued by computer. (Transcript of Hearing, R. pp. 50-82). An Order granting summary judgment was issued on October 29, 2021. (Order Granting Summary Judgment, R. pp. 2-15). A Motion to Alter and Amend the Order Granting Summary Judgment was then filed by the Appellant. (Motion to Alter and Amend the Order Granting Summary Judgment, R. pp. 21-22). The parties submitted memoranda supporting and opposing Appellant's Motion to Alter and Amend the Order Granting Summary Judgment and that Motion was decided on the memorandum of the parties. (Plaintiff's Brief for Alteration and Amendment of Order Granting Summary Judgment, R. pp. 109-112; Defendant's Brief Opposing Alteration and Amendment of Order Granting Summary Judgment, R. pp. 113-117). The Motion to Alter and Amend the Order Granting Summary Judgment was denied by Order of the Circuit Court dated January 6, 2022 and this appeal followed. (See Order Denying Plaintiff's Motion to Reconsider, R. pp. 17- 18).

STANDARD OF REVIEW

Only a mere scintilla of evidence is required to defeat a motion for summary judgment when the burden of proof is by a preponderance of the evidence. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 684 S.E.2d 769 (S.C. App. 2009). In determining whether any triable issues of fact exist the evidence and all

inferences which can reasonably be drawn therefrom must be viewed by the court in a light most favorable to the non-moving party. If triable issues exist, those issues must go to the jury. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (S.C. 2006). [All] ambiguities, conclusions and inferences arising from the evidence must be construed against the moving party. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

FACTS

On the Sunday morning of May 20, 2018, T.J. Bates and Rico Sellars entered the Pilot Flying J in Cayce, South Carolina at 6:35 a.m. (See Plaintiff's Exhibit B, Photo from Video, R. p. 124). They were off duty employees of Defendant Pilot Flying J. (See Plaintiff's Exhibit A, Depo. of Defendant Dixon, pp. 15-16, R. pp. 119-120). Mr. Bates and Mr. Sellars had been out at a strip club all night and had come straight from the strip club to the Pilot Flying J. (See Plaintiff's Exhibit C, Depo. of Rico Shamar Sellars, pp. 12-13, R. pp. 127-128). They were drunk and had a very strong odor or alcohol about them. (See Plaintiff's Exhibit D, Witness Statement of Andre Lee, R. p. 131; Plaintiff's Exhibit E, Pilot Travel Centers Accident Report, "Two Wendy's employees came in intoxicated", R. p. 132; Plaintiff's Exhibit F, Cayce Incident Report, R. p. 133). It is beyond question that T.J. Bates was extremely intoxicated, loud, boisterous and belligerent on the morning of May 20, 2018 as incontrovertibly shown on the Cayce Police Department Body Cam of his arrest. (See Plaintiff's Exhibit, Complete Cayce Police Department Body Cam, R. Separate Disc).

The manager on duty, Respondent Myra Dixon, spoke closely with Rico Sellars at 6:37 a.m. that morning. (See Plaintiff's Exhibit G, R. p. 135). She talked to him again at 6:38 a.m, 6:39 a.m. and 6:43 a.m. (See Plaintiff's Exhibit H, I, and J, R. pp. 136-138). Ms. Dixon talked with Defendant T.J. Bates at 6:44 a.m. that morning. He put his arm around her. (See Plaintiff's Exhibit K, R. p. 139). At 6:41 a.m., the strippers which Defendants Bates and Sellars had been partying with at the strip club came in. (Plaintiff's Exhibit L, R. p. 140). At 6:49 a.m., Respondent Dixon came back to the Wendy's area where Mr. Bates and Mr. Sellars were talking to the strippers. She talked with them and Defendant Bates grabbed at her as she walked away at 6:51 a.m. (Plaintiff's Exhibit M, R. pp. 141-142). Rico Sellars denied that Ms. Dixon ever asked him or T.J. Bates to leave Pilot Flying J that morning. (See Plaintiff's Exhibit C, Deposition of Rico Sellars, pp. 20-21, R. pp. 129-130).

Despite the numerous interactions and the level of intoxication of Mr. Bates, Respondent Dixon did not call the police until 6:58 a.m. (Plaintiff's Exhibit N, R. p. 143). When she talked to the 911 dispatcher, she never complained about Defendant Bates or Defendant Sellars. She only complained about the strippers and a man in a green shirt who was throwing things. (Plaintiff's Exhibit A, Deposition of Myra Dixon, p. 25, R. p. 121). At 7:00 a.m., the strippers walked out followed by T.J. Bates. (Plaintiff's Exhibit P, R. 144). At 7:01 a.m., Myra Dixon followed the strippers and T.J. Bates outside. (Plaintiff's Exhibit A, Deposition of Myra Dixon, p. 30, R. p. 122). After Ms. Dixon came outside,

Ralph Farmer and the Appellant pulled into Pilot Flying J. Mr. Farmer and the Appellant stopped at the Pilot Flying J every morning on their way to work and Mr. Farmer would get a cup of coffee and maybe a snack. That was their basic routine every morning. (Plaintiff's Exhibit S, Deposition of Ralph Farmer, pp. 24-25, R. pp. 149-150). At 7:08 a.m., T.J. Bates tried to walk back into the store and was grabbed by Myra Dixon, whereupon he began beating her. (Plaintiff's Exhibit A., Deposition of Myra Dixon, p. 31, R. p. 123; Plaintiff's Exhibit Q, Statement of Ray Fowler, R. p. 145; Plaintiff's Exhibit F, Cayce Incident Reports, R. pp. 133-134). When Appellant attempted to keep T.J. Bates from beating Respondent Dixon, he was attacked by Rico Sellars and T.J. Bates. Rico Sellars karate kicked Appellant Fowler in the leg breaking his leg. (Plaintiff's Exhibit S, Deposition of Ralph Falmer, pp. 35 and 50, R. pp. 151 and 152; Plaintiff's Exhibit X, Statement of Myra Dixon, R. p. 158; Plaintiff's Exhibit R, Photograph of Plaintiff, R. p. 146; Plaintiff's Exhibit T, Photograph of Plaintiff's broken leg at the scene, R. p. 153). The police arrived at the Pilot Flying J at 7:08:32. (See Plaintiff's Exhibit V, Photograph from Cayce Police Cruiser Dash Cam arrived at the scene 7:08:32, R. p. 155).

The Pilot Travel Centers Employee Handbook states that employees loitering, on or off duty, or "hanging out" at or in the Pilot Flying J facility is not allowed. (See Plaintiff's Exhibit U, Pilot Flying J Handbook, p. 37, R. p. 154). Employees who were drunk were not allowed on the premises either on or off duty. (See Plaintiff's Exhibit W, Pilot Flying J Handbook, pp. 52-53, R. pp. 156).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENTS OWED NO DUTY TO APPELLANT FOWLER OR IF A DUTY WAS OWED, NO DUTY WAS BREACHED BY RESPONDENTS WHERE APPELLANT FOWLER ASSUMED THE RISK OF INJURY WHEN HE TRIED TO PROTECT RESPONDENT DIXON.

A retail establishment owes an invitee customer the duty of exercising reasonable care and is liable for any injuries resulting from the breach of this duty, and the degree of care must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. This is an active or affirmative duty. It includes refraining from any act which may make the invitees use of the premises dangerous or result in an injury to him. Thus, Pilot and its manager, Ms. Dixon, had a duty to take reasonable care to protect Mr. Fowler against a foreseeable risk of harm. *Easterling v. Burger King Corporation*, 416 S.C. 437, 786 S.E.2d 443 (S.C. App. 2016). If the storekeeper has actual or constructive knowledge of a dangerous condition and fails to remedy it, then they can be held liable. *Easterling, supra*. It is not essential that the precise manner in which the injuries might have occurred or were sustained be foreseeable or foreseen as it is sufficient if there is a reasonable generalized gamut of greater than ordinary danger of injury and the sustaining of the injury was within this range. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (S.C. 1984). A jury could certainly determine that having drunk and belligerent off duty employees on the

premises could pose a danger to invitee customers of Respondent Pilot. It is clear that a person as intoxicated as T.J. Bates exhibiting the boisterousness and belligerence of Mr. Bates that morning could reasonably be viewed as likely to create a dangerous condition if he stayed on premises that morning. Mr. Bates' condition as shown on the Cayce Police Body Cam speaks for itself. Clearly this could create danger for a customer if allowed to continue uninterrupted. (See Plaintiff's Exhibit, Complete Cayce Police Body Cam, R. Separate Disc). In fact, it did create a danger. Appellant's leg was broken.

Nevertheless it is uncontested that Respondent Dixon allowed the two drunken off duty employees to hang out and linger on premises from 6:35 a.m. until finally calling the police at 6:58 a.m. Even then she did not complain about the drunken employees, but about the strippers and a man in a green shirt. Thus, a jury could conclude that she was on notice of the drunken and potentially dangerous condition of the off duty employees at least since 6:37 a.m. that morning when she first interacted with Mr. Sellars. (See Plaintiff's Exhibit G, R. p. 135). No steps were taken to remedy the situation or warn customers of the situation for over twenty minutes. A jury could reasonably conclude this was negligence on the part of Pilot and its manager, Ms. Dixon.

If Ms. Dixon had known about a spilled drink on the floor of the store and taken no steps to remedy it or warn of it for twenty minutes and a customer slipped in the liquid and fell, a jury could certainly determine that this was negligence. The situation regarding the drunken employees is no different. Thus, there is

ample evidence from which a jury could reasonably determine that the Respondents' breached their duty of care owed to Ray Fowler.

The Circuit Court completely misapplied the law concerning assumption of risk to this case. It held that implied assumption of the risk applied because the Plaintiff expressly assumed a known risk despite the clear law in South Carolina that assumption of the risk barring a plaintiff from recovering from negligence has generally disappeared under the law of comparative negligence in South Carolina. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998).

There is clearly no express assumption of the risk found in a contract in this case. Therefore, unless it can be shown that implied assumption of the risk applies, the Plaintiff is not barred from recovery if his degree of fault arising from assuming the risk is less than the Defendants' negligence in allowing drunken belligerent employees to hang out at the store.

The lower court misapplied primary implied assumption of the risk in this case. The Plaintiff's activity on the morning of May 20, 2018 was stopping at a convenience store he and his co-worker usually stopped at on the way to work in the mornings. He was confronted with a drunken man beating a female manager. He acted instantly. He did not have time for cool reflection and the weighing of risks that morning. He was trying to prevent serious injury to a female who was being beaten by a much larger male.

The cases cited by the lower court do not apply. All of the cases cited by

the court involved plaintiffs who knowingly and voluntarily went to engage in activities and knowingly and intentionally engaged in activities which inherently included the risk which led to their injury. Thus, a plaintiff who goes to a watch hockey game is found to have assumed the risk of being struck by a puck. The court held it is a risk inherent to the game of hockey, and a common, expected and a frequent risk, *Hurst v. East Coast Hockey League*, 371 S.C. 33, at 37, 38, 637 S.C.2d 560, at 562-3 (2006). The lower court also cited a case where a plaintiff was playing catcher in a game of softball. There was a collision at home plate and the Plaintiff was injured. The South Carolina Supreme Court held that collisions at home plate are common in softball and thus it was an inherent risk assumed by the Plaintiff. *Cole v. Boy Scouts of America*, 397 S.C. 247, 253, 725 S.E.2d 476, 479 (2011). The lower court also cited *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008) in finding that the Appellant was barred by assumption of the risk. In that case, the court held that the Plaintiff, who had entered into a house which he knew contained a raccoon, against the specific warning of his father not to enter the house, was barred from recovery after he was bitten under the doctrine of assumption of the risk. The court found that because the plaintiff voluntarily exposed himself to a danger which he understood and appreciated and admitted it was "pretty stupid" in entering the house and confronting the raccoon, he was barred by assumption of the risk as his "negligence exceeded 50%". *Singleton v. Sherer, supra.*

None of those cases is in any away applicable to this case. The Plaintiff did

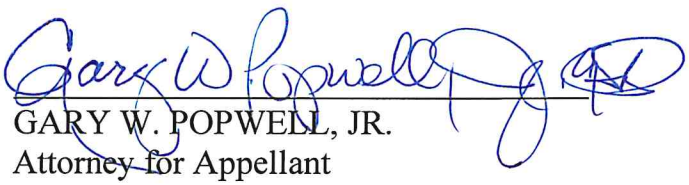
not go to Pilot Flying J on May 20, 2018 for the express purpose of confronting drunken belligerent employees. He did not travel to the Pilot for the purpose of being confronted with a drunken off duty employee beating the on duty manager. He had no idea this was going to happen. Involvement in drunken brawls is not inherent to stopping at a convenience store on the way to work while dodging hockey pucks is a frequent, expected risk of attending hockey games. Being confronted with a large man beating a woman is not a common, inherent risk of stopping at a convenience store like collisions at home plate are common occurrences in playing softball. Neither is stopping at a convenience store analogous to entering a house against express warnings to confront and attempt to capture a raccoon.

The situation confronting the Appellant Fowler was sudden and unexpected, unlike that faced by any of the plaintiffs in the cases cited by the lower court. Therefore, the lower court's application of assumption of the risk was clearly in error. To hold otherwise is to hold that as a matter of law anyone who attempts to intervene on behalf of a woman being suddenly beaten by a man has assumed the risk of any injury he may receive.

CONCLUSION

The lower court erred in granting Respondents' summary judgment under the facts and circumstances of this case. There are clearly jury questions as to whether or not Ms. Dixon was negligent in failing to promptly order the drunken off duty employees off the premises and promptly call the police if they had refused to leave. Whether her actions were prompt given all the facts and circumstances is a question for the jury. Similarly whether Appellant Ray Fowler's action in trying to prevent Ms. Dixon from being beaten was negligent to the extent that it exceeds the negligence of Ms. Dixon is a question for the jury. The court erred in making an ex cathedra weighing of the facts in this case. These are jury questions and the Appellant Ray Fowler is entitled to his day in Court.

Respectfully submitted,

By: 

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CERTIFICATE OF COUNSEL

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

By: _____

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