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

Appellate Case No.: 2022-000113
Ct. App. Opinion No. 2023-UP-366 (filed November 15, 2023)

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.

REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. THE RESPONDENTS CONTINUE TO MISTAKENLY CITE THE LAW OF GEORGIA IN SUPPORT OF THEIR CONTENTION THAT INTERVENING IN AN ALTERCATION FOR ANY REASON BARS RECOVERY UNDER THE DOCTRINE OF ASSUMPTION OF THE RISK AS THE LAW OF GEORGIA WAS SPECIFICALLY CONSIDERED AND REJECTED BY THIS COURT WHEN IT REMOVED ASSUMPTION OF THE RISK AS AN ABSOLUTE DEFENSE.

The Respondents once again cite the law of Georgia for the proposition that intervening or engaging in an altercation for any reason bars any recovery under the doctrine of assumption of the risk. *Carter v. Scott*, 320 GA. App. 404, 408, 750 S.E.2d 679, 681 (2013) (*citing Cornelius v. Morris Brown College*, (emphasis) 299 GA. App. 83, 86(3), 681 S.E.2d 730 (2009); *Fagan v. Atnalta, Inc.*, 189 GA. App. 460, 462, 376 S.E.2d 204 (1988). This Georgia law was cited approvingly by the Circuit Court in granting summary judgment to Respondents. As Appellant has noted previously, this Court has specifically considered and rejected Georgia law concerning assumption of the risk as an absolute defense. Even though Georgia is a comparative fault jurisdiction, it still recognizes assumption of the risk as an absolute defense because Georgia's law concerning assumption of the risk is statutory. See OCGA, §51-11-2. This is clearly stated in the Georgia Court's holding in *Carter*, although it is not mentioned by the Respondents or the Circuit Court. This Court specifically rejected Georgia law and adopted the law of West Virginia in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998). "To date, the only comparative fault jurisdictions that have retained the

assumption of risk as an absolute defense are Georgia, Mississippi, Nebraska, Rhode Island, and South Dakota." "Only the Rhode Island Supreme Court has provided a detailed discussion of why it believes the common law form of assumption of risk should survive under comparative negligence." *Davenport*, at 83. South Carolina specifically adopted the West Virginia approach to assumption of the risk. "Thus, West Virginia rejects assumption of risk as a total bar to recovery and only allows the jury to consider the plaintiff's negligence in assuming the risk. If the plaintiff's total negligence exceeds or equals that of the defendant, only then is the plaintiff completely barred from recovery." "Upon considering the purpose of our comparative fault system, we conclude that West Virginia's approach is the most persuasive model." *Davenport*, at 85. This is not complicated or hard to find. Therefore, it is puzzling why the Circuit Court and Respondents cite the law of Georgia which maintains that assumption of risk is an absolute defense in a comparative fault system when that has been specifically rejected by this Court.

II. THIS CASE FALLS SQUARELY UNDER THIS COURT'S HOLDING IN DAVENPORT V. COTTON HOPE PLANTATION HORIZONTAL PROPERTY REGIME, 333 S.C. 71, 508 S.E.2D 565 (1998) AND IS NOT ANALAGOUS TO THE CASES CITED BY THE LOWER COURTS AND THE RESPONDENTS.

It is not the law of South Carolina that as a matter of law any person who acts to assist or protect someone in danger assumes any risk involved in that intervention such that they cannot recover for any injury they might receive. The Circuit Court and the Court of Appeals held (and the Respondents argue) that because the Appellant left a place of safety where he was not in danger to assist a woman who

was being beaten by a much larger man, he is barred by the doctrine of secondary implied assumption of the risk. This argument could be made about any person who incurs any risk while coming to the aid of another person. It is exactly the same as someone trying to save a person who is drowning after they have been negligently knocked into the water. It would apply to the Appellant in the instant case if he had been pushing Ms. Dixon out of the way of a car driven by a drunk driver. It could be said of any situation in which a person is intervening to aid or assist someone in physical danger. By definition, intervening to help them carries a certain risk. This can certainly be weighed by a jury to determine whether or not negligently incurring the risk by the person coming to the aid of the person in danger is outweighed by the negligence which caused the danger in the first place. A jury is fully capable of doing this as set forth in *Davenport*. The Circuit Court, the Court of Appeals and the Respondents are reversing *Davenport* in fact if not in name. That is not their role. While they claim not to argue for the reversal of *Davenport*, they are certainly refusing to apply *Davenport* even though it is perfectly applicable to the instant case. This case is not analogous to the cases cited by the Respondents involving intentionally trying to catch a surly raccoon barehanded after being specifically warned not to go near him. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008). It is dissimilar to engaging in a contact sport or going to a hockey game with full knowledge that pucks are frequently shot into the stands. *Cole v. Boy Scouts of America*, 397 S.C. 247, 725 S.E.2d 476 (2011); *Hurst v. East Coast Hockey League*, 371 S.C. 33, 637 S.E.2d 560 (2006).

A jury may find that intervening to stop a woman from being beaten is negligent. It may find it is more negligent than allowing drunken, belligerent off duty employees to loiter at a convenience store for twenty minutes before taking any steps to have them removed. That is a question for a jury under *Davenport*.

Respectfully submitted,

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