

RECEIVED

Jul 17 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000754
Civil Action No. 2020-CP-2481

Stefani Eddins, Appellant,

v.

Tall Sam I Am, LLC d/b/a Tabbuli, Respondent.

RESPONDENT’S PETITION FOR REHEARING

SWEENEY WINGATE & BARROW, P.A.

Mark S. Barrow
Brandon R. Gottschall
Daniel Q. Atkinson
1515 Lady Street
Columbia, SC 29201
(803) 256-2233

Attorneys for Respondent

Pursuant to Rule 221(a) of the *South Carolina Appellate Court Rules*, Respondent Tall Sam I Am, LLC d/b/a Tabbuli respectfully petitions the Court for rehearing and a new order with regard to the Court of Appeals Unpublished Opinion No. 2024-UP-237 (the “Order”). This Petition identifies two matters for the Court’s renewed attention: (1) the Order identifies an incorrect date as its date of filing, and (2) the Order overlooks the inadmissibility of Appellant’s expert testimony regarding whether temporary overhead lighting constitutes a foreseeable danger in a restaurant setting—which testimony alone forms the basis of the Order’s reversal of the district court below.

I. The Order identifies an incorrect filing date.

As reflected in the public index and in the notice provided by the Court to the parties, the Order was filed on July 3, 2024. The Order, however, indicates that it was “Filed June 3, 2024.” (Op. No. 2024-UP-237 at 1). This error, likely typographical in nature, suggests that this Petition is untimely under Rule 221(a), SCACR, which requires that petitions for rehearing be received by the appellate court no later than fifteen days after the filing of the relevant order or opinion. However, because this Petition is being submitted within fifteen days of the actual date of filing of the Order, July 3, 2024, it is timely under the appellate court rules. Accordingly, Respondent respectfully requests that the Order be corrected in this regard.

II. The Order overlooks the inadmissibility of the expert testimony upon which it solely relies.

The Order’s reversal of the district court below is grounded entirely in the Order’s observation that “Eddins presented expert testimony that temporary light fixtures should have been barriered from patrons and the light’s height and weight posed a foreseeable risk of harm to spectators seated underneath the light fixture.” (Op. No. 2024-UP-237 at 2). The two clauses here describing Appellant’s expert testimony present two aspects of the same conclusion: that this

temporary overhead lighting was a *foreseeable* danger and thus patrons should have been barred from it rather than seated under it. On the sole basis of this conclusory opinion offered by Appellant's experts, the Court determined that there was sufficient evidence in the record to create a jury question as to whether Respondent was negligent in seating Appellant under the light fixture. (*See id.*). The Order appears to also conclude on this same basis that the placement of seating underneath the light fixture constituted a hazardous condition which Respondent's employees should have noticed and corrected. (*See id.* at 3).

The conclusory opinion of Appellant's experts, however, cannot carry the case to a jury because it is not admissible, a point which was demonstrated in Respondent's brief but not examined or commented on in the Court's Order. To be admissible as evidence, expert testimony must be reliable in substance and offered by a person who has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010). The testimony of neither expert proffered by Appellant met this threshold burden. (*See* Respondent's Final Brief at 13–18).

Appellant's first expert, Mark Williams, explicitly admitted that he was unsure of the industry standard regarding usage of stage lights by DJs, which rendered him unqualified to testify regarding this particular usage of a stage light by the DJ in this case. (R.p. 153 (Williams Dep. 75:20–23)). Additionally, the testimony he offered was unreliable because (a) he stated it was based on code sections that may have been both out of date generally and inapplicable in Charleston County specifically, and (b) he was unable to vouch for the scholarly nature of all his cited sources or explain how some of them pertained to the industry standard in Charleston. ((R.p. 160 (*id.* at 105:1–14); R.p. 160 (*id.* at 103:14–19)).

Mr. Williams' testimony was further inadmissible due to its heavy reliance on *res ipsa loquitur* reasoning in opining that the light was dangerous because it was allegedly installed defectively by the DJ. (R.p. 143 (Williams Dep. 35:18–21) (“And if you do those, if you take those actions and you follow manufacturer’s recommendation, it won’t fall off.”); R.p. 158 (*id.* at 95:13–14, 18–20) (“Well, we’ve gone over this before. You can ask me how do I know it wasn’t properly secured. . . . So, if you take all that action and you do all of that, then this wouldn’t have happened.”); R.p. 158 (*id.* at 97:12–14) (“If [the light] had been secured in place, then it wouldn’t have fallen and struck her in the head.”)). See *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App.1991) (The “burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care.”).

Appellant’s second expert, James Rivenbark, is similarly unqualified, having admitted that he knows “very little” about stage lighting and has no background in engineering, lighting design, installation, or maintenance. (R.p. 182 (Rivenbark Dep. 56:2–6); R.p. 182 (*id.* at 55:15–17)). Furthermore, prior to this case, Mr. Rivenbark had never consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18–20)). Lacking any authority, Mr. Rivenbark’s testimony that Respondent should not have seated patrons under temporary light fixtures also lacks reliability, as he was unable to point to any action of Respondent that violated an industry standard, regulation, or code related to the location of the light. (R.p. 202 (Rivenbark Dep. 136:8–19)). Instead, he based his “expert” opinions on his legally erroneous lay opinion that if a patron is injured, the restaurant must have violated its duty of care. (R.p. 173 (Rivenbark Dep. 21:1–7) (“I mean, you know, someone is responsible for what goes on in a restaurant as far as being the operator/owner of the restaurant, what happens there[;] [a] light fell and hit someone in the head[;]

[m]y opinion is that the restaurant's responsible.”). Mr. Rivenbark's testimony is thus also not admissible in this case.

As recognized by the Court's Order, the only evidence presented by Appellant to show that seating patrons under the temporary light set up by a DJ created a foreseeable danger—such that Respondent failed to exercise ordinary care when it laid out the floor plan and seated Appellant under the light—was the testimony of Appellant's two proffered experts. However, because these experts were unqualified as to temporary lighting installation and offered seriously flawed, unreliable testimony, their opinions are inadmissible as evidence in this case. The Court's Order overlooks this critical issue, which renders its reversal of the district court improper, and Respondent accordingly respectfully requests a rehearing.

CONCLUSION

In summary, Respondent seeks a rehearing or a rehearing en banc because the Court erred in reversing the trial court's grant of summary judgment to Respondent, which was proper for the reasons found by the trial court and the reasons set forth above. Respondent also seeks a revised order commensurate with the above and identifying the filed date of the Court's opinion.

July 17, 2024

s/Daniel Q. Atkinson
Mark S. Barrow
Brandon R. Gottschall
Daniel Q. Atkinson
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233
Attorneys for Respondent

RECEIVED

Jul 17 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-100-2481

Stefani Eddins,

Appellant,

v.

Tall Sam I Am, LLC d/b/a Tabbuli,

Respondent.

PROOF OF SERVICE

I certify that we have served Respondent's Petition for Rehearing on July 17, 2024, via email addressed to Appellant's attorneys of record, Michael E. Liska of Gary C. Johnson, P.S.C., mliska@garycjohnson.com, and Justin D. Maines of The Nye Law Group P.C., jd@thenyelawgroup.com.

July 17, 2024

SWEENY, WINGATE & BARROW, P.A.

s/Daniel Q. Atkinson

Mark S. Barrow, SC Bar No. 72835

Brandon R. Gottschall, SC Bar No. 100621

Daniel Q. Atkinson, SC Bar No. 105252

Sweeny, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

Attorneys for Respondent