IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case Number 2011-CP-10-4348

Thomas Easterling,.....Appellant,

v.

Burger King Corporation and Capital Restaurant Group, LLC,.....Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 20, 2011, Plaintiff-Appellant Thomas Easterling filed a Complaint against Defendants-Respondents Burger King Corporation and Capital Investment Group, LLC [hereinafter

referred to collectively as "Burger King"] in the court of Common Pleas asserting negligence causes of action for losses and damages sustained by Mr. Easterling during a violent attack that occurred at the Burger King restaurant located at 945 Folly Road in Charleston County on July 8, 2008.

The Defendants all filed Answers denying liability. Following the completion of discovery, Burger King filed a Motion for Summary Judgment with the circuit court, submitting there was no genuine issue as to any material fact and Burger King had no duty to protect invitees from criminal acts on their premises.

The circuit court held a hearing on the motion on Monday, November 18, 2013. Plaintiff submitted his Memorandum in Opposition to Defendants' Motion for Summary Judgment to the circuit court during the hearing. After oral arguments, the circuit court convened, taking the motion under advisement and informed counsel to submit any proposed orders by 5:00 PM on Friday, November 22, 2013, and instructed the parties that a ruling would be forthcoming in ten (10) days following the hearing. Plaintiff timely submitted his Proposed Order. Defendants elected not to submit a proposed order to the circuit court.

However, before the deadline for the submission of proposed orders and before Plaintiff submitted his proposed order, the circuit court signed a Form 4 Order granting Defendant's Motion on November 19, 2013. However, Plaintiff's counsel received a Form 4 Order granting the Defendants' 12(b)(6) "Motion to Dismiss" and not an order regarding the motion for summary judgment. Incredibly, the circuit court's Form 4 Order failed to rule on the Defendant's Motion for Summary Judgment, as well as the specific issues raised by the Plaintiff in opposition to summary judgment, including the duty of care Burger King owed the Plaintiff.

Upon receipt of the Form 4 Order granting Defendants' "Motion to Dismiss," Plaintiff immediately sought clarification from the circuit court, as there was no "Motion to Dismiss" before

the circuit court and the ruling was made prior to the submission of the requested proposed orders on the appropriateness of summary judgment. In response to Plaintiff's inquiries, the circuit court issued a subsequent Form 4 Order, this time granting summary judgment in favor of the Defendants that was received by Plaintiff on December 16, 2013. Again, the circuit court's form order did not address any of Plaintiff's arguments properly presented before the court.

On December 13, 2013 the Plaintiff filed a Motion for Reconsideration of the summary judgment pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Specifically, the Plaintiff asked the circuit court to reconsider its judgment on the grounds that Plaintiff believed the circuit court had misunderstood, failed to fully consider, and failed to rule on summary judgment issues and arguments, and the Plaintiff respectfully requested reconsideration by the circuit court. Plaintiff further argued that the circuit court's Order rendered Plaintiff unable to address the circuit court's ruling on appeal when there is no record as to how the circuit court arrived at its decision or how it ruled on the argument and issues raised by the Plaintiff in his Motion for Reconsideration. Plaintiff's motion was denied on January 15, 2014 and Plaintiff received notice of such on January 21, 2014 by way of another Form 4 Order from the circuit court, again without explanation or addressing any issues raised by the parties.

On January 21, 2014 the Plaintiff served the Notice of Appeal on the Defendants and filed its Notice of Appeal on February 21, 2014, appealing the orders granting summary judgment for Burger King and denying Plaintiff's Rule 59 motion. Plaintiff received the Trial Transcript of the Hearing on May 23, 2014.

STATEMENT OF FACTS

This case stems from an attack on the Plaintiff-Appellant Thomas Easterling which occurred on July 8, 2008, at the Burger King restaurant located on Folly Road in Charleston, South

Carolina. En route home from work at approximately 10:00 PM, Mr. Easterling stopped at Burger King to purchase dinner. He entered the drive-thru lane at Burger King and shortly thereafter was rear-ended by Gary N. Eastwood (the attacker) who was driving a truck positioned behind Mr. Easterling in the drive-thru lane. "Before I [Easterling] placed an order is where he [Eastwood] struck my car for the first time." (Easterling Deposition 35:9-11). Mr. Easterling did not engage Eastwood after the first initial contact. "At that point, I thought maybe it was an accident...I just wanted to get my food and go home." (Easterling Deposition 36:3-6). Mr. Easterling thereafter placed his order at the drive-thru speaker menu and entered the drive-thru lane. Once in the drive-thru lane, Mr. Easterling was blocked in by all sides, with a car immediately in front of him, Eastwood's truck behind him, the Burger King building on his left and a curb with a drop-off ditch on his right.

After entering the drive-thru lane, Eastwood became belligerent and created a scene by "pushing the accelerator but keeping his foot on the brake, so the tires were spinning. It was making loud screeching noises, and smoke was going everywhere." (Easterling Deposition 37:2-5). As Mr. Easterling and Eastwood moved up in the drive-thru lane, Eastwood began to spin his tires, and, again, struck Mr. Easterling's car from behind with his truck. As described by Mr. Easterling, "when he turned the corner, he began screeching the tires and doing the same thing all over again...after I began to go forward again is when he...let off the brake and hit the rear of my vehicle." (Easterling Deposition 39:22-24; 40:11-13). "The second one [collision] was a hard hit. At that point, it became obvious that he was using his vehicle as a weapon." (Easterling Deposition 40:20-22).

As Mr. Easterling approached the drive-thru window, "the people inside Burger King were looking out the window to see what was going on." (Easterling Deposition 42:11-12). It is

undisputed that employees of Burger King were also made aware of the altercation. Specifically the supervising manager, Kimberly Jones, testified that "the guy [Eastwood] right behind him [Mr. Easterling] was, like, blowing his horn. I mean, just acting out of character. I was like, Oh, Lord, got another drunk one tonight." (Jones Deposition 45:13-17). Not only did the supervising manager know that an altercation had ensued, she also recognized the need to deescalate the situation. She testified that before "Thomas [Plaintiff-Appellant] get to my window, it had already been going on. I was like, man, I have to hurry up and get this man out of the line. Once Thomas get to the window, it get worser..." (Jones Deposition 55:13-17). Burger King manager Jones further testified that when Mr. Easterling "got to my window... the guy behind him was already blowing the horn, yelling out the window." (Jones Deposition 48:21-23). According to manager Jones, the altercation in the drive-thru lane lasted for upwards of "15 to 20 minutes." (Jones Deposition 66:18-22).

Despite Ms. Jones's actual knowledge of the escalating assault, no one from Burger King contacted law enforcement or attempted to intervene.

A. "The guy behind him hits his car."

Q. "Did he [Eastwood] hit the car right in front of the drive-thru window?"

A. "Correct."

Q. "So at that point, did anybody at Burger King call the police?"

A. "No."

(Jones Deposition 57:1, 13, 15, 16, 23-25).

Once able, Mr. Easterling pulled forward and exited his vehicle to assess the amount of damage sustained. While assessing the damage, Eastwood exited his vehicle and attacked Mr. Easterling. "He came at me in way that I knew no good was going to come from what was going

on. He came at me aggressively." (Easterling Deposition 45:2-4). "As he was coming at me, he started to take his shirt off...I put my hands up." (Easterling Deposition 45:22-25). "He lunged at me and put his shoulder here in my stomach and grabbed me around the waist...I hit the curb and tripped and fell backwards down the embankment." (Easterling Deposition 46:13-19).

During the course of this encounter, Mr. Easterling hit his head and was knocked unconscious. Once Mr. Easterling gained consciousness he found Eastwood was on top him. Thereafter, Eastwood gained control of Mr. Easterling's arms, pinning him down and then proceeded **to bite his nose off**. "I'm assuming that I must have hit my head when I hit the ground, because when I came to, he was on my face, biting." (Easterling Deposition 48:12-15). After witnessing the commotion that led to this brutal attack occur for "**15 to 20 minutes**" Burger King Manger finally made the determination to contact law enforcement. "He walked to Thomas, he hit him, they went tussling; he grabbed his face or whatever he did to him; they went down in the ditch. When he get out of that ditch, he just had blood all over him. That's—I say, you all call the police." (Jones Deposition 58:24-25; 59:1-3) (emphasis added). According to manager Jones a police officer at a nearby establishment arrived on the scene "less than a minute" after the call was placed. (Jones Deposition 68:20-25). Incredibly, when asked, how long the commotion leading up to the altercation between Plaintiff and Eastwood lasted from when law enforcement was contacted, manager Jones testified **"maybe 15, 20 minutes for all of that to happen"**. (Jones Deposition 66:10-12, 15-18) (emphasis added).

Mr. Easterling's nose was recovered on the premises and was later reattached through surgical intervention. Mr. Easterling has undergone three surgeries and requires additional surgeries to help correct visible deformities caused by the attack at the Burger King restaurant.

ARGUMENT

In this instant appeal, Plaintiff-Appellant does not have the benefit of knowing the basis of the circuit court's grant of summary judgment, because the circuit court failed to rule on any of the arguments presented by the parties, and, instead, issued three (3) Form 4 orders containing no analysis whatsoever. As such, the Plaintiff-Appellant addresses all arguments he presented to the lower court regarding why the circuit court should have denied Defendant's motion for summary judgment or granted Plaintiff's Rule 59 motion.

I. THE CIRCUIT COURT ERRED IN GRANTING BURGER KING'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANTS HAD NOTICE AND CREATED AN UNREASONABLE DANGEROUS CONDITION ON ITS PREMISES.

The standard of review of an order granting summary judgment under Rule 56, SCRCP, is well-established:

> When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law... In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. ...If triable issues exist, those issues must go to the jury.

Pye v. Estate Of Fox, 369 S.C. 555, 557, 633 S.E.2d 505 (2006). As will be seen, applying this standard, Burger King was not entitled to judgment as a matter of law, because there are genuine issues as to material facts, and Burger King owed a duty of care to Mr. Easterling.

A. BURGER KING HAD ACTUAL NOTICE AND OWED PLAINTIFF-INVITEE A LEGAL DUTY TO PROTECT AGAINST FORESEEABLE HARM

An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Jensen v. Anderson County Dept. of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). An invitee is a person who enters the

premises of another at the express or implied invitation of the owner or possessor.[1] An invitee may best be understood as a business visitor[2] or one who enters the premises on a matter of mutual interest or advantage.[3]

Generally, a person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty. Wintersteen v. Food Lion, Inc., 542 S.E.2d 728 S.C. (2001). "Perhaps a clearer description of a business owner's duty, then, is that a business owner has a duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm." Bass v. Gopal, Inc., 395 S.C. 129, 135, 716 S.E.2d 910, 913 (2011).

Moreover, the duty owed by an owner or possessor of land extends to warning or protecting an invitee against the criminal acts of third persons, if the owner or possessor knows or has reason to know that the acts are occurring or are about to occur.[4] Liability may be predicated upon the possessor's failure to exercise reasonable care to discover that such criminal acts are likely to occur.[5]

Plaintiff was clearly an invitee as defined under South Carolina law; he entered Burger King, a public establishment, for the purposes of purchasing dinner. As such, Burger King owed Mr. Easterling the duty of exercising reasonable care for his safety, and the Burger King Defendants are liable for the injury resulting from their breach of this duty.

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[1] Parker v. Stevenson Oil Co., 245 S. C. 275, 140 S. E. 2d 177 (1965).

[2] Rikard v. J. C. Penney Co., 233 F. Supp. 133 (D. S. C. 1964).

[3] Crocker v. Barr, 303 S. C. 1, 397 S. E. 2d 665 (Ct. App. 1990), rev'd on other grounds, 305 S. C. 406, 409 S. E. 2d 368 (1991).

[4] Shipes v. Piggly Wiggly, St. Andrews, Inc., 269 S. C. 479, 238 S. E. 2d 167 (1977); Munn v. Hardee's Food Systems, Inc., 274 S. C. 529, 266 S. E. 2d 414 (1980); Bullard v. Ehrhardt, 283 S. C. 557, 324 S. E. 2d 61 (1984); Restatement Second, Torts § 344 (1986).

[5] Shipes v. Piggly Wiggly, St. Andrews, Inc., 269 S. C. 479, 238 S. E. 2d 167 (1977).

In Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977) the Court quoted with approval from the Restatement of Torts: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care *until he knows or has reason to know that the acts of the third person are occurring, or are about to occur.* Jeffords v. Lesesne, 343 S.C. 656, 662, 541 S.E.2d 847, 850 (Ct. App. 2000) (emphasis added). It is undisputed that Burger King's manager had actual knowledge of the altercation prior to the Plaintiff sustaining the egregious injury of having his nose bitten off. (Jones Deposition 66:18-23). Specifically, Burger King manager Jones witnessed the commotion that included the attacker spinning his truck's tires and yelling, starting "15 to 20 minutes" prior to calling the police. (Jones Deposition 66:18-22). As such, it is without question that Burger King knew or had reason to know that the acts of the third person were occurring or were about to occur.

Moreover, Plaintiff's security expert, Dr. George Kirkham, testified that the Burger King supervising manager "reasonably should have known, and should have been trained in such a way that she reasonably recognized that the situations she described posed an imminent risk to—potential imminent risk—to invitees who were at the facility." (Kirkham Deposition 127:24-25; 128:1-3). The assault was "foreseeable, obviously not that this man was going to have his nose chewed off in this event but...it was foreseeable that an incident could well occur, could foreseeably occur, where someone would get hurt." (Kirkham Deposition 130:6-7, 14-16). "Harm, in this case, was reasonably foreseeable, though the exotic form that it took of biting off someone's nose, it could have been any number of other forms of harm, all of which were...some form of physical harm to an invitee." (Kirkham Deposition 146:16-20).

Plaintiff has provided admissible summary judgment evidence that Burger King's supervising manager witnessed the attack occurring for a lengthy period of time and, nonetheless,

consciously chose to allow the assault to ensue instead of contacting law enforcement or attempting to intervene.

Moreover, the instant case is distinguishable from cases in South Carolina that have found no notice of foreseeable harm on a merchant's premises and, thus, no duty. In Callen, the Court supported the defendant's argument that the defendants did not have notice when the plaintiffs were *spontaneously* attacked by assailants in the drive-thru at a Hardee's restaurant, and "Callen, [plaintiff] admits the incident and fight happened very suddenly, without any warning," and it wasn't until "*after learning of the fight*, employees of Hardee's called the police and reported the incident." Callen v. Cale Yarborough Enterprises, 314 S.C. 204, 205, 442 S.E.2d 216, (S.C. Ct. App. 1994) (emphasis added).

In Bullard v. Ehrhardt, 324 S.E.2d 61 (S.C. 1984), the bar asked the future assailant to leave after displaying signs of having too much to drink. The assailant later returned to the bar and, within seconds, threw a beer bottle that hit and injured the plaintiff. The Court found the bar "had no forewarning Billy [the patron] would throw the bottle. It happened *spontaneously* leaving no time for her [the bartender] to try to prevent something she had no knowledge or reason to know would happen." Id. (emphasis added).

In Munn, the Court ruled in favor of the Defendant [restaurant] because the group involved in the altercation "met under circumstances of a *spontaneous* nature...outside of the building and not in the presence of employees of the appellant." Munn v. Hardee's Food Systems, Inc., 274 S.C. 529, 531, 266 S.E.2d 414, 415 (1980) (emphasis added). In Miletic, the Court ruled that Wal-Mart (the Defendant) did not have "a duty under South Carolina law to protect her [Plaintiff] from an attack like the one she suffered...no incidents occurred on that particular night to put Wal-Mart on notice..." Miletic v. Wal-Mart Stores, Inc., 333 S.C. 529 S.E.2d 68 (S.C. Ct. App. 2000).

Therefore, the common ground among all of these cases is that element of spontaneity—the transpiring events that created the injury were spontaneous in nature and did not afford the Defendant business establishments or their employees any notice in order to react and act. In contrast, in this case, Burger King's supervising manager witnessed "15 to 20 minutes" of commotion leading up to the injury and failed to alert the police until after an attack on the Plaintiff had already ensued and escalated to the point that the attacker had bitten Plaintiff's nose off. (Jones Deposition 66:18-23). The altercation at Burger King did not happen "spontaneously," and Burger King had more than ample time to react at multiple points prior to the injury ultimately occurring. Again, after fifteen to twenty minutes of commotion and then after the brutal attack, the Burger King's manager testified to finally calling the police, who arrived on the scene within a minute or two from the call. (See Jones Deposition 66:18-23).

Accordingly, the circumstances of Plaintiff's attack at Burger King did not occur spontaneously; rather the attack culminated after fifteen to twenty minutes of commotion, which included honking the horn, yelling and spinning the tires. The Burger King manager witnessed this commotion and yet did not contact the police. At any point Burger King could have contacted the police and an officer would have arrived shortly thereafter based on the evidence in this case.

Furthermore, the Defendants' recitation of facts in its Memorandum in Support of Summary Judgment is inaccurate, self-serving, and wholly inconsistent with the requirement that, on summary judgment, the facts and evidence must be viewed "in the light most favorable to the non-moving party." Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). Instead, Defendants presented the facts in the light most *unfavorable* to Mr. Easterling. Defendants' Memorandum in Support of Summary Judgment misled the circuit court to believe that this incident was "isolated, spontaneous, and unforeseeable" and the "incident occurred in a

matter of minutes and was completely unexpected." However, this position is not supported by admissible summary judgment evidence, much less is it present in a light most favorable to the Plaintiff. Again, Plaintiff and the Burger King supervising manager testified that the drive-thru lane process was taking a long time that night and there was a long, drawn out time period from when chaos erupted to the culmination of the Plaintiff being attacked. While the actual amputation of Plaintiff's nose may have happened quickly, the altercation leading up to the amputation occurred over a time span lasting "15 to 20 minutes," providing ample time, as Plaintiff's premises and security expert testified, for Burger King to know or have reason to know that an act was occurring or was about to occur that could result in physical harm. "When considering a motion for a directed verdict, neither the appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence." Fickling v. City of Charleston, 372 S.C. 597, 603, 643 S.E.2d 110, 114 (Ct. App. 2007).

B. BURGER KING HAD NOTICE OF PRIOR INCIDENTS AND VOLUNTARILY ASSUMED A DUTY OF CARE

Burger King possessed actual knowledge of prior criminal incidents, creating an affirmative duty to provide security personnel or the implementation of other security measures to protect its customers from foreseeable harm. "In adopting a balancing approach, we do not alter this duty, but merely elucidate how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." Bass v. Gopal, Inc., 395 S.C. 129, 139, 716 S.E.2d 910, 915 (2011). Under the balancing test laid out in Bass, "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but its absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." Bass v. Gopal, Inc., 395 S.C. 129, 139, 716 S.E.2d 910, 915 (2011).

In the instant case, discovery revealed that this particular Burger King had many criminal disturbances take place on its premises before the date of the incident, placing it on notice of prior criminal incidences. For example, a crime grid covering a half mile radius of the Burger King location reveals two thousand (2,000) incidents were reported from 2002 through 2008 to the Charleston County Sheriff's Office of which two hundred and twenty-six (226) were assaults. One in particular was an armed robbery that took place while the victim was in this exact Burger King drive-thru lane. As a result, **Burger King hired an off duty police officer to assist with the drive-thru and to escort employees to and from their cars after work.** (Jones Deposition 37:21-25; 38:1-25; 39:1-20) (emphasis added). Dr. Kirkham also testified "because of the type of establishment they're operating, they should be aware of what are the problems with fast food lanes...." (Kirkham Deposition 133:24-25; 134: 1). Dr. Kirkham further states, "[t]he records that you've obtained in the course of this litigation relating to fights and suspicious persons, suspicious vehicles, so-on; those things were accessible to them, too... they should have addressed these way back before the 8th of July 2008." (Kirkham Deposition 134:6-9; 16-18).

"In adopting a balancing approach, we do not alter this duty, but merely elucidate how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." Here, the attack was foreseeable given the actual notice the manager had as well as the prior incidents that had taken place on and around the premises. See Bass 716 S.E.2d at 915. In addition, our Supreme Court has held that "a business...in a high crime area without evidence of prior criminal incidents may be required to institute less costly measures to offset an elevated risk of harm, such as installing extra lighting, fences, locks, or security cameras, or simply training existing personnel on best security practices." Id. at 917. (emphasis added). Here, Burger King failed to put in place economically feasible

security measures to prevent such harm - one of which was basic training of their personnel. Thus, not only was Burger King aware of prior criminal incidents, Burger King failed to simply train its existing personnel on best security practices.

Burger King's manager who was on duty at the time and is a witness to the incidents said that she was certified to be a Burger King manager but could not relay any specific training she received on crisis management:

> Q. "During this certification process, do you recall Burger King- did any of the certification process have anything to do with crisis management or..."
>
> A. "Yeah. I remember they had that in there."
>
> Q. "Do you recall what they were requiring managers to do?"
>
> A. "In certain situations, I just- I was- yeah, they did have the steps of what- steps you're supposed to take in situations that happened. They do have steps in there."
>
> Q. "What do they say is supposed to happen?"
>
> A. "I don't know. I would say I just used my instinct as a human; if something happened, I'd take the steps that I feel is right to take."

(Jones Deposition 17:11-25, 18:1-5).

Plaintiff's security and premises expert, Dr. Kirkham, also testified that Burger King failed to properly train and implement preventable measures to prevent the attack from transpiring and that simply putting in place a proper training process is an economically feasible security measure that could have been in place:

> A. "The most significant thing they [Burger King] could have done would have been to train their employees—managers, line workers, cooks, people working the windows—train everyone there...to recognize suspicious situations... [and to] call the police immediately".

(Kirkham Deposition 132:18-21, 24; 133:7).

Q. "Based on your expert opinion, were there economically feasible security measures that could have been put into place to avoid such harm?"

A. "Absolutely...you can train your people that...security is also your job." (Kirkham Deposition 144:13-16; 145:2-3).

Due to the frequent number of incidents that occurred in the area of 945 Folly Road, including on the Burger King premises, the circuit court should have found the Defendants had notice of prior criminal acts occurring in the area and on its premises in addition to voluntary assuming a duty of care by hiring a police officer to patrol the restaurant at night. Burger King was on notice and could have employed economically feasible security measures such as hiring an off duty police officer, which they had done in the past, or properly trainied their managers and employees on how to react to altercations on the premises.

C. BURGER KING CREATED AN UNREASONABLE AND DANGEROUS CONDITION ON ITS PREMISES AND OWED INVITEE A LEGAL DUTY TO PROTECT FROM HARM

A merchant owes customers only the duty of exercising ordinary care to keep the premises in reasonably safe condition. Legette v. Piggly Wiggly, Inc., 629 S.E.2d 375 (S.C. Ct. App. 2006). Whether a defendant provided reasonably safe premises is a question for the jury. Pinckney v. Winn-Dixie Stores, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition, or (2) *that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.* Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001) (emphasis added).

When the Plaintiff was rammed in the back of his car by the attacker's truck for fifteen to twenty minutes, he had nowhere to go and was unable to exit the drive-thru lane to safety. The Burger King manager testified about the embankment and the drive-thru lane, "I always call it a ditch

because—all you can do is go down and—you can fall and actually hurt yourself when you do down there." (Jones Deposition 30:3-5). The ditch off of the right hand side of the drive-thru is a steep drop-off from the drive-thru lane. "Maybe 3 to 4 feet—I'd say 3 feet, maybe—3 to 2 and a half feet. It's kind of deep." (Jones Deposition 30:10-12). In regards to the width of the drive-thru lane (between the building and the ditch), "only one car can go through there at a time...no going around or nothing or—either you back up or move forward. (Jones Deposition 31:22-25). "You can't get out of there...you're either moving forward or you're moving backwards. There ain't no pulling...around the person." (Jones Deposition 32:10-14).

Plaintiff's premises expert testified "the problem out there on Folly Road at the Burger King is if you—if something happens—you get out of your car because someone's bumped into you...your ability to protect yourself and to retreat is compromised by that damned embankment. And it serves no purpose that I can see except it's foreseeably hazardous." (Kirkham Deposition 140:12-14; 18-21). The drive-thru lane design posed a foreseeable risk to invitees who found themselves in emergency situations. A patron who enters the drive-thru lane has no egress route with an embankment on his right hand side. As Plaintiff's security and premises expert testified, had the embankment (ditch) not been there, the Plaintiff would have had a better chance of defending himself against the attack. Evidence shows Burger King had actual knowledge of a dangerous condition on their property and failed to remedy it which contributed to the Plaintiff not being able to depart from an attack. As cited above in Pinckney, whether a defendant provided a reasonably safe premises is a question for the jury and summary judgment should have been denied.

II. BURGER KING BREACHED THE STANDARD OF CARE OWED WHEN IT DEVIATED FROM ITS OWN INTERNAL POLICIES AND PROCEDURES.

The existence of a duty is not to be confused with the standards of care establishing the extent and nature of the duty in a particular case. See Madison ex rel Bryant, 638 S.E.2d at 656. The standards of care are grounded in common law, statutes, regulations, or a defendant's own policies and guidelines, which allow a fact finder to judge whether a duty was breached or not. Id. "The precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury." Id. at 659.

"In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care." Caldwell v. K-Mart Corp., 410 S.E.2d 21, 24 (S.C. Ct. App. 1992) (citing Eastern Brick and Tile Co. V. U.S., 281 F. Supp. 216 (D.S.C. 1986)); see also Madison ex rel Bryant, 638 S.E.2d at 659 (citing with favor the following in holding that a defendant's own policies establish standards of care: Elledge v. Richland/Lexington School Dist. Five, 573 S.E.2d 789, 793 (S.C. 2002) (holding evidence of industry safety standards relevant to establishing standard of care in negligence case); Tidwell v. Columbia Ry., Gas & Elec. Co., 95 S.E. 109 (S.C. 1918) (holding relevant rules of defendant admissible in personal injury suit regardless of whether rules were intended for employee guidance, public safety, or both because violation of rules may constitute breach of duty of care and proximate cause of injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of case)).

Burger King failed to follow its own policies and procedures. Burger King's deviation from its own policies and procedures demonstrates its lack of due care under the relevant circumstances. See Peterson v. National Railroad Passenger Corporation, CSX, and Southco Sweeping and Maintenance, Co., 618 S.E.2d 903, 906 (S.C. 2005) (holding company's deviation

from internal maintenance policies admissible to show breach of duty owed). Specifically, Burger King's own policies created the standard of care upon which to judge its actions of failing to protect its invitee's from foreseeable harm. Burger King's supervising manager testified of the training she received with regards to handling a crisis. (Jones Deposition 17:11-25, 18:1-5). Shockingly, she further testified that "we just don't sometimes call the police because people have a confrontation outside that really have nothing to with us. Once we serve them, it's no longer our concern." (Jones Deposition 67:4-7). However, Burger King's own policies and procedures dictate otherwise. In the Burger King management course titled OPS Manual_0608, 02 Management, Safety and Security, provides the following direction: "Dealing with Law Enforcement" in "Threatening Situations: Contact the police whenever the safety of your Guests or staff is threatened." Defendants' Response to Plaintiff's Second Set of Requests for Production, November 11, 2013. In addition, when Burger King trains its managers for their certification process, they are instructed via PowerPoint presentation: "Restaurant Safety and Security – Summary: Contact police in an emergency." Defendants' Response to Plaintiff's Second Set of Requests for Production, November 11, 2013.

Accordingly, Burger King breached its duty as evidenced by its deviation from its own standards and protocols when dealing with a situation that threatens its guests on the premises and requires its managers to call the police. Here, the manager did not phone the police until after the altercation had already taken place, and it was too late. Taking the evidence in the light most favorable to Plaintiff, Burger King breached its duty to Plaintiff as an invitee and violated the standard of care it owed under the circumstances. Thus, summary judgment is not appropriate, and triable issues of fact exist for a jury.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO PROPERLY RULE ON THE ARGUMENTS PRESENTED AS WELL AS VACATE THE SUMMARY JUDGMENT IN RESPONSE TO THE ARGUMENTS MADE IN THE RULE 59 MOTION.

A. CIRCUIT COURT FAILED TO PROPERLY RULE ON THE ARGUMENTS PRESENTED

The Court of Appeals has long admonished the circuit court when the lower court elects to rule on dispositive motions by way of Form Orders. "A trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed. In doing so, the trial court should provide clear notice to all parties and the reviewing court as to the rationale applied in granting ... summary judgment." Bowen v. Lee Process Sys. Co., 342 S.C. 232, 236-38, 536 S.E.2d 86, 88-89 (Ct. App. 2000).

Until recently, Bowen served as a guidance to the circuit courts when ruling on summary judgment motions. Our Supreme Court overruled Bowen in Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) in stating:

> "[i]n *Bowen,* the court of appeals vacated the trial judge's grant of summary judgment because the order was a cursory form order. The court remanded for a written order identifying the facts and accompanying legal analysis upon which the judge relied because, based on the record, the court of appeals determined the propriety of the summary judgment was a rather close question. *Bowen,* 342 S.C. at 240–41, 536 S.E.2d at 90–91. We agree it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. However, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." Thus, such findings and conclusions are not required for appellate review, and, for this reason, we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment. Nevertheless, here, the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision. *See Porter,* 372 S.C. at 568, 643 S.E.2d at 100 (stating that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal").

Woodson v. DLI Properties, LLC, 406 S.C. 517, 526-27, 753 S.E.2d 428, 433 (2014).

The circuit court checked a box indicating the motion for summary judgment was granted based off of the "Oral arguments and Pleadings." However, "a decision on a motion for summary judgment is based on depositions, interrogatories, affidavits, and other evidentiary material provided by the parties." See Rule 56(c), SCRCP; see also Quail Hill, L.L.C. v. Cnty. of Richland, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010) (stating appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP). Woodson v. DLI Properties, LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014).

In this case, the circuit court failed to take into consideration the ample amount of pages of depositions, interrogatories, and other evidentiary material provided by the parties when it ruled on summary judgment. Because the Court of Appeals is unable to ascertain the basis behind the circuit court's order and because genuine issues of material fact exists, Mr. Easterling asks this Court to find that summary judgment was improperly granted.

B. CIRCUIT COURT FAILED TO VACATE THE SUMMARY JUDGMENT IN RESPONSE TO THE ARGUMENTS MADE IN THE RULE 59 MOTION

In addition, the circuit court failed to properly rule on Plaintiff's Rule 59 motion. Because the Plaintiff raised all of the above-referenced arguments in both the summary judgment opposition and the Rule 59 motion, and because South Carolina law would clearly recognize a duty of care in this case, the Plaintiff respectfully submits that the circuit court abused its discretion in denying the Rule 59 motion.

The Plaintiff also respectfully submits that the issue of notice, dangerous condition on the premises, and the voluntary assumption of duty argument have been properly preserved for appellate review even though the circuit court never made a specific ruling on any of the arguments

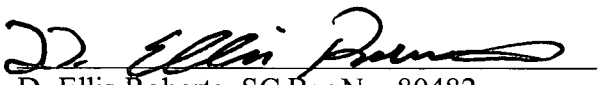
presented. A party cannot force a circuit court to rule on an issue. To preserve the issue for appellate review, however, the party must raise the issues in a Rule 59 motion. If the circuit court still refuses to address the issue, South Carolina law is clear that the issue is preserved for appellate review. Pye v. Estate Of Fox, 369 S.C. 555, 566, 633 S.E.2d 505 (2006)(lawyers cannot force trial courts to address an issue, and a proper Rule 59 request is sufficient without a specific judicial decision on the issue). Because the Plaintiff did explicitly ask the circuit court to rule on his Rule 59 motion, the issues have been properly been preserved for review by this Court.

CONCLUSION

For the reasons stated, the summary judgment entered in favor of Burger King Corporation and Capital Restaurant Group, LLC and against the Plaintiff-Appellant must be reversed and the case remanded for trial.

Respectfully submitted,

McLEOD LAW GROUP, LLC



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June 23, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of South Carolina, is an attorney for the PLAINTIFF and is a person of such age and discretion as to be competent and serve process.

That on June 23, 2014, he served a copy of the attached **INITIAL BRIEF OF APPELLANT** by:

_____ Hand delivering a copy to the attorney for each said party addressed as follows:

✓ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

_____ Depositing a copy hereof with a national recognized overnight courier service, for Overnight delivery, addressed to the attorney for each said party as follows:

_____ Telecopying a copy hereof to the attorney for each said party as follows:

✓ Electronic mail.

ADDRESSEE:

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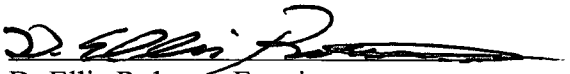

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June 23, 2014

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Thomas Easterling v. Burger King Corporation, et al.
Appellate Case No. 2014-000338
MLG File No. 11-1013

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Brief in the above-referenced matter. Please file the original and return a copy in the enclosed envelope. I am also enclosing for filing a Certificate of Service of this brief and Appellant's Designation of Matter.

Thank you for your assistance in this matter. Please do not hesitate to contact me should you require any additional information.

Sincerely,

Sarah H. Lundquist, paralegal to
D. Ellis Roberts

/shl
Enclosures as stated

cc: John L. McDonald, Esquire
Christy Fargnoli, Esquire

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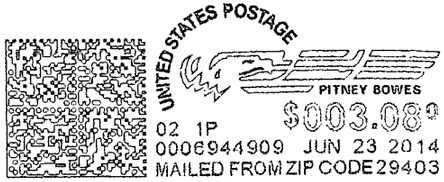

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