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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

RECEIVED
JUN 27 2012
SC Court of Appeals

Appellate Case No. 2012-208267

Ida Lord, Appellant,

v.

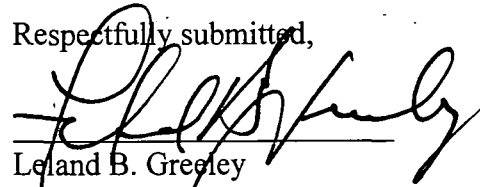
D & J Enterprises, Inc. d/b/a Cash on the Spot Respondent.

MOTION TO DISMISS APPEAL

The above-named respondent, by and through its counsel of record, Leland B. Greeley, does hereby move this Court pursuant to Rule 240, SCACR, for an Order dismissing the appeal of the Appellant.

The basis of this motion is that Respondent respectfully submits that Appellant failed to timely affect the appeal as demonstrated in the accompanying Memorandum and the Appeal should be dismissed pursuant to Rule 203(d)(3), SCACR.

Respectfully submitted,



Leland B. Greeley
128 East Main Street, Suite 102
Post Office Box 2981
Rock Hill, South Carolina 29732
(803) 329-0088
Attorney for Respondent

Rock Hill, South Carolina

June 26, 2012.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2012-208267

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SC Court of Appeals

Ida Lord, Appellant,

v.

D & J Enterprises, Inc. d/b/a Cash on the Spot.....Respondent.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

The above-named respondent, by and through its counsel of record, Leland B. Greeley, does hereby submit this Memorandum in support of an Order of the Court dismissing the appeal of the Appellant.

Statement of Case

On June 19, 2009, Appellant filed this action against the Defendant D& J Enterprises, Inc. d/b/a Cash on the Spot. Respondent timely filed its Answer. Respondent later filed a Motion to Dismiss or in the Alternative for Summary Judgment. The Motion was heard by the Honorable John C. Hayes, III, Circuit Court Judge for the Sixteenth Judicial Circuit. On October 26, 2011 Judge Hayes issued an Order granting summary judgment to the Respondent. The Order was filed with the York County Clerk of Court on October 27, 2011 and a copy was mailed the same day to all counsel of record. (See attached copy of Order Granting Summary Judgment to Defendant).

Discussion

Following receiving the Order of the Court granting summary judgment, on November 7, 2011, the Appellant filed with the Court and served Respondent by mail, a Motion to Alter or Amend and for Reconsideration of the Judgment pursuant to Rule

59(e), SCRCP. Appellant's motion was scheduled by the Clerk of Court to be heard on January 18, 2011.

At the hearing the Court noted that there was no evidence the Appellant had satisfied the requirement of Rule 59(g), SCRCP, requiring the Judge to be served with the Motion to Amend within 10 days of its filing. The Court allowed Appellant to present an argument with the contingent that proof of service on the Court under the Rule be provided. (See Attached Transcript, pp. 29-34). Appellant did not provide proof of service.

Rule 59 (e), SCRCP provides that a motion to amend or alter a judgment shall be filed not later than 10 days following receipt of the Judgment. The Appellant did file its motion with the Clerk within the 10 day time period. However, Appellant did not satisfy Rule 59(g) by providing the Judge with a copy within 10 days of the filing.

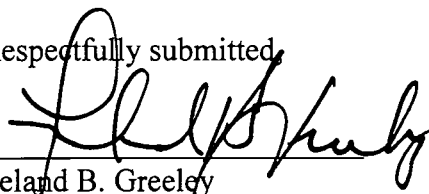
Rule 59 (f) provides that the time for appeal shall be stayed upon the timely filing of a motion.

In this case, a timely filing of the appeal was not made. Rule 203(b)(1), SCACR, provides that "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

The Notice of Appeal was filed and served by the Appellant on February 21, 2012. (See attached copy of the Notice of Appeal). However, since the Appellant did not comply with Rule 59(g), SCRCP, the time for filing began to run on October 27, 2011. The time for filing was not stayed due Appellant's noncompliance with Rule 59(g). Thus, the deadline for filing the Notice of Appeal in this case was 30 days from October 27, 2011, plus an additional 5 days due to service by mail by the clerk's office, for a deadline of December 1, 2011.

Due to Appellant not timely serving the Notice of Appeal, it is respectfully submitted that this appeal should be dismissed pursuant to Rule 203(d)(3), SCACR.

Respectfully submitted,



Leland B. Greeley
128 East Main Street, Suite 102
Post Office Box 2981
Rock Hill, South Carolina 29732
(803) 329-0088
Attorney for Respondent

Rock Hill, South Carolina

June 26, 2012.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP4602671

Ida Lord	D&J Enterprises Inc	Cash On The Spot
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Leeland Greeley	Attorney for: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/John C. Hayes, 222
Circuit Court Judge

2049
Judge Code

10-26-11
Date

For Clerk of Court Office Use Only

This judgment was entered on 27th day of October, 2011, and a copy mailed first class or placed in the appropriate attorney's box on 27th day of October, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Arthur Kerr Aiken Aiken & Hightower 2231 Devine Street Suite 201
Columbia, SC 29205
Robert Reeves Robert J Reeves PC PO Box 1297 Fort Mill, SC 29716

Leland Greeley Leland B. Greeley, PA P.O. Box 2981 Rock Hill, SC 29732

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

lasted approximately six seconds. Due to the video, law enforcement was able to identify the male by DNA taken from a pen he had put in his mouth at the table.

Phillip Watts was subsequently arrested, and on May 15, 2008, he was indicted by the York County Grand Jury for the crime of Assault and Battery with Intent to Kill against Ms. Lord, and also Possession of a Firearm during the Commission of a Violent Offense. On April 27, 2009, prior to the filing of this action, Watts plead guilty but mentally ill to the indicted charges and was sentenced by South Carolina Circuit Judge Lee Alford to a term of life without parole with the South Carolina Department of Corrections.

DISCUSSION

Summary judgment is appropriate when it is clear that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *City of Columbia v. A.C.L.U.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In ruling on a motion for summary judgment, the evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. *Café Assocs. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).

In the present case, D & J Enterprises, doing business as Cash on the Spot, is a corporation in the business of offering check cashing, pay day lending, Western Union money transfers, and selling money orders. Thus, on the day of the incident, Cash on the Spot was a merchant.

At the time of the criminal act at issue, the law governing the scope of the duty of merchants to protect invitees against criminal acts of third parties in South Carolina was governed by Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (S.C. App.

2000), *citing* Shipes v. Piggly Wiggly St. Andrews, Inc. 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977). Since the hearing in this matter, however, the South Carolina Supreme Court has issued Bass v. Gopal, Inc., Op. No. 27054 (October 10, 2011). In Gopal, the Court abandoned the imminent harm test and adopted the balancing approach previously discussed in Miletic. It should be noted, however, that in Gopal the Supreme Court explicitly stated that their holding neither created a new duty nor altered the duty that existed previously.¹ Although the court believes that Gopal applies prospectively, the undersigned has analyzed the facts of this case under both Shipes and Gopal.

1. Shipes - Imminent Harm Test

Prior to the issuance of Gopal, South Carolina followed what is known as the imminent harm test. The imminent harm test, adopted by the Supreme Court in Shipes, holds that "[u]nder South Carolina law, a merchant or restaurant owner is not charged with the duty of protecting its customer against criminal acts of third parties when it did not know or have reason to know that such acts were occurring or about to occur." Id. at 330, 529 S.E.2d at 69, *citing* Callen v. Cale Yarborough Enterprises, 314 S.C. 204, 206, 442 S.E.2d 216, 218 (Ct. App. 1994). "In order to establish a duty under this approach, a plaintiff must demonstrate a landowner or merchant is aware of the specific imminent harm about to befall him or her." Id. at 331.

Plaintiff asserts that because Mr. Starnes, President of D&J Enterprises, was aware of Mr. Watts' previous crimes and warned his employees that "a madman was on the loose," D&J Enterprises was aware of the specific imminent harm about to befall Mrs. Lord, and, therefore, had a duty to protect her. The court disagrees.

¹ "Indeed, our courts have consistently imposed a duty on business owners to employ reasonable measures to protect invitees from foreseeable harm. . . . In adopting a balancing approach, we do not alter this duty . . ." Gopal, pg. 6 of 9.

PC 747

There is no evidence before the court that Defendant had reason to know or knew of the specific imminent harm about to befall Ms. Lord. As a preliminary matter, there is no history of criminal acts occurring on the premises of Cash on the Spot. Furthermore, Cash on the Spot had a security video operating at the time of the shooting. The video captured the shooting of Ms. Lord, as well as the moments leading up to the shooting. In the video, Mr. Watts was seated at the Western Union document table, posing as a customer in the ordinary course of business. When Ms. Lord approached the clerk's window, Watts casually got up from his seat, walked up behind Ms. Lord, as if he too were approaching the window after her, suddenly grabbed her around the neck from behind, pulled a pistol from his belt, and shot her in the head. Less than six seconds elapsed from the time he grabbed Ms. Lord around the throat to the time he left the building. At no time prior to Mr. Watts grabbing Ms. Lord was there any out of the ordinary behavior that would have put either Ms. Lord, or Ms. Boyd behind the counter, on notice that Mr. Watts was about to shoot Ms. Lord. Counsel for Plaintiff concurred with the facts as shown on the video and stated by Mr. Greeley at the hearing.

The court finds that Defendant did not know or have reason to know of the specific imminent harm about to befall Mr. Lord. Therefore, under the imminent harm test, Defendant had no duty to protect Ms. Lord from the criminal actions of Mr. Watts.

2. Gopal - Balancing Test

In Gopal, the South Carolina Supreme Court adopted the balancing test originally formulated by the California Supreme Court in Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207 (1993), and since adopted by the Supreme Court of Tennessee in McClung v. Delta Square Limited Partnership, 937 S.W.2d 891 (Tenn. 1996). The balancing

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approach “seeks to balance the degree of foreseeability of harm against the burden of the duty imposed.” Id. at 901. “The more foreseeable a crime, the more onerous is a business owner’s burden of providing security.” Id. Under this approach, “the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk.” Id.

Applying the Gopal balancing test to the evidence in this case, the court must determine (1) if the crime was foreseeable, and (2) given the foreseeability of the criminal act, determine whether Defendant’s security measures were reasonable.

As a preliminary matter, the court finds that Defendant’s knowledge of two prior armed robberies, both involving shootings and occurring at two distant and unrelated locations across the County, is not sufficient to make the occurrence of a third crime, at an unrelated location, foreseeable. However, the deposition testimony of Darrell Starnes, owner of D&J Enterprises, clearly indicates that Defendant actually did foresee the possibility of a third criminal act, and even warned his employees “to be on their toes, to look for suspicious people” because “there was a madman . . . on the loose.” The court recognizes that Mr. Starnes was acting in good faith to protect his employees from an improbable, but potentially serious, criminal act. Of course, the court cannot determine that the crime was not foreseeable when the Defendant did in fact foresee the possibility of the crime which later occurred. Therefore, the undersigned finds that the Plaintiff has produced at least a scintilla of evidence that the crime was foreseeable.

Once evidence of foreseeability is established, the court must next determine whether Plaintiff has provided any evidence that the security measures taken by the

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Defendant were unreasonable given the risk. Here, as in Gopal, Plaintiffs contend that the appropriate security measure would have been to place a security guard at the entrance of Cash on the Spot. Plaintiff submitted, via affidavit, the following opinions of its expert, Robert M. Clark:

1. . . . D&J had a duty, in the exercise of reasonable care, to post a security guard at the entrance to [Cash on the Spot] to provide reasonable protection for its employees and customers against the threat of a serial armed robber who had shot two store clerks and a bystander in two previous armed robberies of businesses.
2. The armed robbery attempt during which Ida Lord was shot most probably would not have occurred if D&J had posted a security guard at the entrance [Cash on the Spot].

Plaintiff's expert appears to base the foregoing conclusion on the following facts: 1) Two prior armed robberies, both involving shootings, occurred in York County on January 28 and February 5, 2008; 2) D&J was aware of both armed robberies/shootings; 3) D&J had previously installed bullet-proof glass, cameras, and panic buttons to protect its clerks and deter criminal acts; and 4) D&J, like the two previous businesses which were robbed, was a small business that has cash on hand and is usually manned by one or two employees.

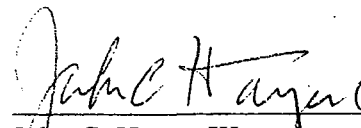
In Gopal, the Supreme Court found that "the hiring of security personnel is a significant economic burden. Considering a business's economic interest, it is difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises." The facts of this case are no exception. There is no evidence of prior crimes on the premises of Cash on the Spot. Therefore, if the rationale of the Plaintiff is taken to its logical conclusion, every business in York County that was manned by one or two people and had cash on hand had a legal

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duty to hire a security guard from February 5 onward, either until the assailant was caught or to some unknown time in the future when the threat was no longer imminent. Imposing such a heavy burden on small businesses, based on these facts, is both unreasonable and economically unfeasible.

Viewing the facts in the light most favorable to Ms. Lord, D&J Enterprises, doing business as Cash on the Spot, did not have a duty to hire a security guard, and the security measures that were implemented by D&J Enterprises were reasonable.

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED



John C. Hayes, III
Circuit Court Judge
Sixteenth Judicial Circuit

#7

York, South Carolina

10/26, 2011.

1 hear ---

2 MR. REEVES: Yes, sir, Your Honor.

3 THE COURT: --- Ida Lord?

4 Before we get started in this I've got a threshold
5 issue. I was a little surprised that I never got a Motion
6 to Reconsider in this case. And usually once I get one I
7 do not have a hearing on it I go ahead and review the
8 motion and issue an order and I was somewhat surprised that
9 I did not get a Motion to Reconsider in this case. So I
10 was surprised when I saw this on the docket. And Rule 59
11 (G) requires that the Court be sent a written notice within
12 ten days of the filing of the motion.

13 MR. REEVES: Yes, sir. We did send it, Your Honor.

14 THE COURT: I don't see any evidence of that and I
15 don't recall getting it. Have you got some evidence that
16 you sent it? The only thing I see in the file is a motion
17 and attached to it is like it was served showing it going
18 to Leland Greeley. And I did not remember getting that
19 quite frankly because I was surprised I was not. So I
20 you've got some indication in your file that I was mailed a
21 copy because I -

22 MR. REEVES: To be honest with you, Your Honor, I did
23 not anticipate this discussion at all but my co-counsel
24 indicated that he did file it.

25 THE COURT: It's filed. No question about mine.

1 MR. REEVES: Yes, sir.

2 THE COURT: No question.

3 MR. REEVES: Okay.

4 THE COURT: The rule requires I be - A party filing a
5 written motion shall provide a copy of the motion to the
6 judge within ten days after the filing of the motion. I
7 was on the rules committee when we added that. The reason
8 we added it was just for this situation where it all of a
9 sudden it pops up and that's something that I should be
10 ruling on and I didn't know it existed.

11 MR. REEVES: I cannot answer that. My co-counsel took
12 care of that and I assumed that's -

13 THE COURT: Well he did take care of it. That's the
14 problem because I don't hear these cases unless I've been
15 timely notified. I'll be glad to go ahead and hear what
16 you have to say since you're here and see if you can
17 confirm that I was provided a copy within the rule.

18 MR. REEVES: Okay, sir.

19 THE COURT: What I'm trying to do is feed everybody
20 out of the same spoon.

21 MR. REEVES: I understand. Yes, sir.

22 THE COURT: I do this routinely. If that rule - if I
23 have not been provided a copy within time I don't hear it.

24 MR. REEVES: Yes, Your Honor. Would it be better,
25 Your Honor, to - for me to provide proof of that or not and

1 once we get --

2 THE COURT: Well why don't you go ahead while you're
3 here I'll be glad to hear from you. I know the case well,
4 I worked real hard on it quite frankly.

5 MR. REEVES: Yes, sir. Yes, sir.

6 THE COURT: It's one of those cases if I remember
7 correctly a new decision popped up in the middle of my
8 slowness in regarding it and I had to rethink and go back
9 and do, so I'll be glad to go ahead and hear what you have
10 to say and then wait to get confirmation from somebody, I
11 guess Mr. Aiken, that rule, he complied with the rule.

12 MR. REEVES: Yes, sir. I'll be very brief, Your
13 Honor.

14 I do have a three page Memorandum in support which I
15 will have filed and then I'll bring it back --

16 THE COURT: I've got the case here.

17 MR. REEVES: May I approach?

18 THE COURT: Yes, sir.

19 (DOCUMENTS RECEIVED UP BY THE COURT.)

20 MR. REEVES: Well, Your Honor, I'm not going to
21 belabor the facts. There's no question you're very
22 familiar with it, your order was very detailed.

23 We simply take the position respectfully that we have
24 met the burden; we're well beyond a scintilla maybe in
25 peppercorn territory. The only evidence in the case has

1 been evidence developed by the Plaintiff. The expert
2 witness supplies a lot of the missing elements. The only
3 thing that I in preparing for today I wanted to think of
4 all the incidences where the law holds business owners
5 responsible for criminal acts and the laws are pleading to
6 that from dram shop liability, respondent superior.
7 Walmart gets sued for their parking lots, hotels get sued
8 for sexual assault and so forth, so it certainly is an area
9 that is not unfamiliar to the Court.

10 In this case, and perhaps the focus was too specific
11 in this case, the threat by the bad man was simply part of
12 a larger threat. In going back and reviewing the case we
13 are certainly not abdicating that everyone that deals with
14 cash has to have a private security guard. That would be
15 outrageous absolutely. What we are saying is in looking at
16 the facts of this particular business and it's particular
17 location and at this particular time, and I'm not speaking
18 of the time of the mad man on the loose, I'm speaking in
19 sense of in the testimony by the defendant, February is one
20 of their busiest times. Everyone starts getting their tax
21 refunds in January and the month of February, each year, is
22 their heaviest time; heaviest business. They have the most
23 cash on site. A Hundred Thousand Dollars a week as I
24 recall was going through that shop in February. If you
25 take the time to put bars on your window, put bullet proof

1 glass, video cameras, you're certainly aware that bad
2 things can happen. Those are all steps taken to protect
3 the employees and their cash. They know they are a target.
4 They broadcast it in the name of their business. You find
5 out that there is a serial robber going around, it gets
6 your attention to the point that you have a meeting with
7 your employees. In conjunction with the busiest month of
8 every year the largest amount of cash on site, that is the
9 thirty days where you probably should consider extra
10 security measures. And it can be an off duty sheriff's
11 deputy, it can be a private security guard. Its not
12 unreasonable. But whether you agree with me or not it at
13 least gets me to a jury respectfully. And the jury can
14 decide if they did everything that was reasonable or not.
15 So in that regard, Your Honor, we do feel like we've met
16 the burden and we respectfully request that you reconsider.
17 Thank you, sir.

18 THE COURT: All right. Mr. Greeley.

19 MR. GREELEY: Your Honor, if it may please the Court,
20 I respectfully disagree with opposing counsel in regards to
21 this. I believe that the Court's order very adequately
22 took into play the most current law, South Carolina law in
23 issuing its opinion in November. It cites culpable, it
24 talks about culpable, it talks about the balancing test, it
25 applies the facts as they existed and as they existed at

1 the time and they have not changed to that and I believe
2 that the order is very complete and is correct in it's
3 ruling.

4 In regards to the particular business, particular
5 time, particular place; there's no evidence in this record
6 whatsoever that the mad man had any particular knowledge of
7 the business of Cash on the Spot and when it had a -- when
8 its busiest time of the year if it was in February. And
9 also it shows that the businesses that had been robbed by
10 this person, two businesses previous to this one, were not
11 under the same like as our business. One was a seafood
12 store and one was a convenient store in a whole other
13 community. So I believe that the Court's order is
14 sufficient and thorough and correct and would ask the court
15 to stay the order as issued. Thank you.

16 THE COURT: I'm gonna take it under advisement but I do
17 need to get something and again I presume it has to come
18 from Mr. Aiken because he apparently is the one who filed
19 and we will file the Memorandum.

20 MR. REEVES: He is in trial so I will get it to you no
21 later than tomorrow.

22 THE COURT: That will be fine.

23 MR. REEVES: Thank you, sir.

24 -- END OF THE TRANSCRIPT IN THE MATTER OF IDA LORD
25 VERSUS D&J ENTERPRISES 2010-CP-46-03586. --

ROBERT J. REEVES +
ARTHUR K. AIKEN +
A. BEA HIGHTOWER +
GREGORY D. SPINK +
J. TYLER BURNS +



Reeves, Aiken & Hightower LLP
INJURY AND CRIMINAL ATTORNEYS

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February 21, 2012

The Honorable Tonya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Ida Lord v. D&J Enterprises, Inc., d/b/a Cash on the Spot
CA No: NOT YET ASSIGNED
Circuit Court Case No.: 2009-CP-46-2671

Dear Ms. Gee:

Enclosed for filing please find the original and three (3) copies of the Notice of Appeal with attached Proof of Service in the above-referenced matter. Please return the date-stamped copies to me in the enclosed, self-addressed, stamped envelope at your earliest convenience.

By copy of this letter I am serving a copy of the Notice of Appeal on all attorneys of record in this matter.

Please do not hesitate to contact me if you have any questions or need anything further.

Thank you for your assistance in this matter.

Sincerely,

Andrea Stobbe
Paralegal for Reeves, Aiken and Hightower
andrea@aikenandhightower.com

Enclosures

cc: Leland B. Greeley
York County Clerk of Court
Ida Lord

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-2671

Ida Lord.....Plaintiff/Appellant

v.

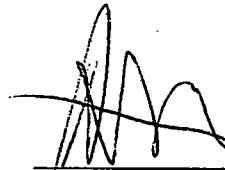
D&J Enterprises, Inc. d/b/a Cash on the Spot.....Defendant/Respondent

NOTICE OF APPEAL

Appellant, Ida Lord (Lord), appeals the Order signed by the Honorable John C. Hayes on October 26, 2012, which granted summary judgment to the Respondent, D&J Enterprises, Inc, d/b/a Cash on the Spot (D&J). Appellant received written notice of entry of the Order signed October 26, 2011 on October 28, 2011. On November 7, 2011, Appellant timely filed and served a Motion to Alter or Amend and for Reconsideration of the Order signed October 26, 2011. By Order signed January 30, 2012, the Honorable John C. Hayes, III denied Appellant's Motion to Alter or Amend and for Reconsideration. Appellant received written notice of the entry of the Order signed on January 30, 2012 on February 3, 2012. Appellants also appeal the Order signed January 30, 2012. Copies of both Orders appealed from are attached.

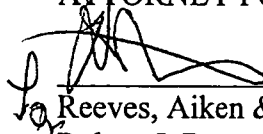
February 21, 2012

(SIGNATURE AND OTHER COUNSEL OF RECORD ON FOLLOWING PAGE)



Arthur K. Aiken

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-2671


Ida Lord.....Plaintiff/Appellant

v.

D&J Enterprises, Inc. d/b/a Cash on the Spot.....Defendant/Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties by mailing a copy of the Notice of Appeal to each attorney of record: Leland B. Greeley, Leland B. Greeley, PA, PO Box 2981, Rock Hill, SC 29732 on February 21, 2012.



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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Ida Lord,)

Plaintiffs,)

v.)

D & J Enterprises, Inc. d/b/a)
Cash on the Spot.)

Defendant.)

ORDER GRANTING SUMMARY)
JUDGMENT TO DEFENDANT)

C.A. No.: 09-CP-46-2611

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, S.C.

2011 OCT 27 PM 3:00

FILED-RECEIVED

D & J Enterprises, d/b/a Cash on the Spot, filed a motion to dismiss and for summary judgment. Both Defendant and Plaintiff filed memorandums in support of their positions on the issues. The motion was heard before this Court on Monday, August 29, 2011. Both parties were represented by counsel.

At the beginning of the hearing both parties agreed that this Court, in reaching its ruling, could consider evidence outside the pleadings pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Cash on the Spot, located on the corner of Highway 901 and South Cherry Road in the County of York, is a business for cashing checks, providing loans, and also offers the service of wiring money. On February 14, 2008, during regular business hours, the Plaintiff entered the premises to conduct business. While in the business, a male person was seated at a table appearing to be filling out paperwork for a wire transfer. As Ms. Lord walked past the table and approached the window, the male stood, reached under his clothing, pulled out a pistol, and immediately shot Ms. Lord in the head. The male then fled the premises. The incident, which was captured on the business's security video,

lasted approximately six seconds. Due to the video, law enforcement was able to identify

the male by DNA taken from a pen he had put in his mouth at the table.

Phillip Watts was subsequently arrested, and on May 15, 2008, he was indicted by the York County Grand Jury for the crime of Assault and Battery with Intent to Kill against Ms. Lord, and also Possession of a Firearm during the Commission of a Violent Offense. On April 27, 2009, prior to the filing of this action, Watts plead guilty but mentally ill to the indicted charges and was sentenced by South Carolina Circuit Judge Lee Alford to a term of life without parole with the South Carolina Department of Corrections.

DISCUSSION

Summary judgment is appropriate when it is clear that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *City of Columbia v. A.C.L.U.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In ruling on a motion for summary judgment, the evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. *Cafe Assoc. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).

In the present case, D & I Enterprises, doing business as Cash on the Spot, is a corporation in the business of offering check cashing, pay day lending, Western Union money transfers, and selling money orders. Thus, on the day of the incident, Cash on the Spot was a merchant.

At the time of the criminal act at issue, the law governing the scope of the duty of merchants to protect invitees against criminal acts of third parties in South Carolina was governed by *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (S.C. App.

J. Miller

167, 169 (1977). Since the hearing in this matter, however, the South Carolina Supreme Court has issued Bass v. Gopal, Inc., Op. No. 27054 (October 10, 2011). In Gopal, the Court abandoned the imminent harm test and adopted the balancing approach previously discussed in Miletic. It should be noted, however, that in Gopal the Supreme Court explicitly stated that their holding neither created a new duty nor altered the duty that existed previously.¹ Although the court believes that Gopal applies prospectively, the undersigned has analyzed the facts of this case under both Shipes and Gopal.

1. Shipes - Imminent Harm Test

Prior to the issuance of Gopal, South Carolina followed what is known as the imminent harm test. The imminent harm test, adopted by the Supreme Court in Shipes, holds that "[u]nder South Carolina law, a merchant or restaurant owner is not charged with the duty of protecting its customer against criminal acts of third parties when it did not know or have reason to know that such acts were occurring or about to occur." Id. at 330, 529 S.E.2d at 69, citing Callen v. Cale Yarbrough Enterprises, 314 S.C. 204, 206, 442 S.E.2d 216, 218 (Ct. App. 1994). "In order to establish a duty under this approach, a plaintiff must demonstrate a landowner or merchant is aware of the specific imminent harm about to befall him or her." Id. at 331.

Plaintiff asserts that because Mr. Starnes, President of D&J Enterprises, was aware of Mr. Watts' previous crimes and warned his employees that "a madman was on the loose," D&J Enterprises was aware of the specific imminent harm about to befall Mrs. Lord, and, therefore, had a duty to protect her. The court disagrees.

¹ "Indeed, our courts have consistently imposed a duty on business owners to employ reasonable measures to protect invitees from foreseeable harm. . . . In adopting a balancing approach, we do not alter this duty. . . ." Gopal, pg. 6 of 9.

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There is no evidence before the court that Defendant had reason to know or knew

of the specific imminent harm about to befall Ms. Lord. As a preliminary matter, there is no history of criminal acts occurring on the premises of Cash on the Spot. Furthermore, Cash on the Spot had a security video operating at the time of the shooting. The video captured the shooting of Ms. Lord, as well as the moments leading up to the shooting. In the video, Mr. Watts was seated at the Western Union document table, posing as a customer in the ordinary course of business. When Ms. Lord approached the clerk's window, Watts casually got up from his seat, walked up behind Ms. Lord, as if he too were approaching the window after her, suddenly grabbed her around the neck from behind, pulled a pistol from his belt, and shot her in the head. Less than six seconds elapsed from the time he grabbed Ms. Lord around the throat to the time he left the building. At no time prior to Mr. Watts grabbing Ms. Lord was there any out of the ordinary behavior that would have put either Ms. Lord, or Ms. Boyd behind the counter, on notice that Mr. Watts was about to shoot Ms. Lord. Counsel for Plaintiff concurred with the facts as shown on the video and stated by Mr. Greeley at the hearing.

The court finds that Defendant did not know or have reason to know of the specific imminent harm about to befall Ms. Lord. Therefore, under the imminent harm test, Defendant had no duty to protect Ms. Lord from the criminal actions of Mr. Watts.

2. Gopal - Balancing Test

In Gopal, the South Carolina Supreme Court adopted the balancing test originally formulated by the California Supreme Court in Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207 (1993), and since adopted by the Supreme Court of Tennessee in McClung v. Delta Square Limited Partnership, 937 S.W.2d 891 (Tenn. 1996). The balancing

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approach "seeks to balance the degree of foreseeability of harm against the burden of the duty imposed." Id. at 901. "The more foreseeable a crime, the more onerous is a business owner's burden of providing security." Id. Under this approach, "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." Id.

Applying the Gopal balancing test to the evidence in this case, the court must determine (1) if the crime was foreseeable, and (2) given the foreseeability of the criminal act, determine whether Defendant's security measures were reasonable.

As a preliminary matter, the court finds that Defendant's knowledge of two prior armed robberies, both involving shootings and occurring at two distant and unrelated locations across the County, is not sufficient to make the occurrence of a third crime, at an unrelated location, foreseeable. However, the deposition testimony of Darrell Starnes, owner of D&I Enterprises, clearly indicates that Defendant actually did foresee the possibility of a third criminal act, and even warned his employees "to be on their toes, to look for suspicious people" because "there was a madman . . . on the loose." The court recognizes that Mr. Starnes was acting in good faith to protect his employees from an improbable, but potentially serious, criminal act. Of course, the court cannot determine that the crime was not foreseeable when the Defendant did in fact foresee the possibility of the crime which later occurred. Therefore, the undersigned finds that the Plaintiff has produced at least a scintilla of evidence that the crime was foreseeable.

Once evidence of foreseeability is established, the court must next determine whether Plaintiff has provided any evidence that the security measures taken by the

JK 4/4/5

~~Defendant were unreasonable given the risk. Here, as in Gopal, Plaintiffs contend that~~

the appropriate security measure would have been to place a security guard at the

entrance of Cash on the Spot. Plaintiff submitted, via affidavit, the following opinions of its expert, Robert M. Clark:

1. . . . D&J had a duty, in the exercise of reasonable care, to post a security guard at the entrance to [Cash on the Spot] to provide reasonable protection for its employees and customers against the threat of a serial armed robber who had shot two store clerks and a bystander in two previous armed robberies of businesses;
2. The armed robbery attempt during which Ida Lord was shot most probably would not have occurred if D&J had posted a security guard at the entrance [Cash on the Spot].

Plaintiff's expert appears to base the foregoing conclusion on the following facts: 1) Two prior armed robberies, both involving shootings, occurred in York County on January 28 and February 5, 2008; 2) D&J was aware of both armed robberies/shootings; 3) D&J had previously installed bullet-proof glass, cameras, and panic buttons to protect its clerks and deter criminal acts; and 4) D&J, like the two previous businesses which were robbed, was a small business that has cash on hand and is usually manned by one or two employees.

In Gopal, the Supreme Court found that "the hiring of security personnel is a significant economic burden. Considering a business's economic interest, it is difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises." The facts of this case are no exception. There is no evidence of prior crimes on the premises of Cash on the Spot. Therefore, if the rationale of the Plaintiff is taken to its logical conclusion, every business in York County that was manned by one or two people and had cash on hand had a legal

jc 7/16

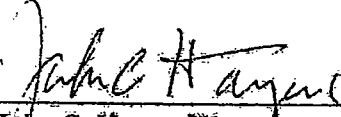
~~duty to hire a security guard from February 5 onward, either until the assailant was~~

~~caught or to some unknown time in the future when the threat was no longer imminent.~~

Imposing such a heavy burden on small businesses, based on these facts, is both unreasonable and economically unfeasible.

Viewing the facts in the light most favorable to Ms. Lord, D&J Enterprises, doing business as Cash on the Spot, did not have a duty to hire a security guard, and the security measures that were implemented by D&J Enterprises were reasonable.

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED



John C. Hayes, III
Circuit Court Judge #7
Sixteenth Judicial Circuit

York, South Carolina

10/26, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Ida Lord,)

Case No. 09-CP-46-2671)

Plaintiffs,)

ORDER)

v.)

D & J Enterprises, Inc. d/b/a)
Cash on the Spot.)

Defendant.)

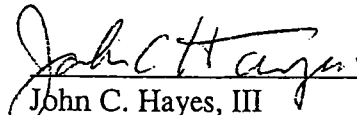
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

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This matter concerns this Courts Order, issued October 26th, 2011, granting Summary Judgment for the Defendant. Plaintiff Ida Lord filed a Motion to Alter and Amend and for Reconsideration, but did not comply with Rule 59(g), SCRPC. The motion was heard before this Court on Wednesday, January 18, 2011. Both parties were represented by counsel.

As Plaintiff has failed to comply with Rule 59(g), her Motion is DENIED.

IT IS SO ORDERED.



John C. Hayes, III
Circuit Court Judge
Sixteenth Judicial Circuit

York, South Carolina

January 30th, 2011.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2012-208267

Ida Lord, Appellant,

v.

D & J Enterprises, Inc. d/b/a Cash on the Spot Respondent.

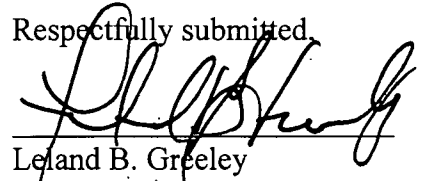
PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss Appeal on each attorney of record as follows:

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Respectfully submitted,



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June 26, 2012.

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SC Court of Appeals

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June 26, 2012

The Honorable Tonya Gee, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Ida Lord v. D&J Enterprises, Inc., d/b/a Cash on the Spot
CA No: 2012-208267
Circuit Court Case No.: 2009-CP-46-2671

Dear Ms. Gee:

Enclosed please find for filing with the Court an original and six copies of Respondent's Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss Appeal along with the required \$25.00 filing fee.

By copy of this letter, I am serving a copy of both on all attorneys of record in this matter.

Please do not hesitate to contact me if you have any questions or concerns or require anything further.

With kindest regards, I remain

Very truly yours,



Andrea Thomas, Paralegal, for
Leland B. Greeley, Attorney for Respondent

/adt

Enclosures

cc: Robert J. Reeves, Esq. and Arthur K. Aiken, Esq., Attorneys for Appellant (w/encls.)
D & J Enterprises, Inc. (w/encls.)