THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 29 2015
SC Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Trial Court Judge

Case No. 2012-CP-17-295

Ebony Bethea.....Appellant,

v.

Derrick Jones, John Doe, Individually and
As employee/agent of Citi Trends, Inc., Citi
Trends, Inc., and Palmetto Properties, Inc.
Of Whom Citi Trends, Inc., and Palmetto
Properties, Inc. are.....Respondents.

PETITION FOR REHEARING AND REHEARING EN BANC

Appellant hereby moves and petitions, pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules, as well as other applicable law, for an Order granting rehearing en banc, and in the alternative rehearing by the panel in this case. This Court issued its decision in this matter on July 15, 2015, and Appellant received notice of the same on July 21, 2015. See Op. No. 2015-UP-350. This petition is therefore timely. See Rule 221(a), SCACR (providing that the petition for rehearing must be received within 15 days of the court's decision).

Appellant understands that this Court has deliberated on this matter and issued its opinion

accordingly. Nevertheless, Appellant respectfully believes that the opinion should be withdrawn and reversed, based upon specific points which the Court may have overlooked or misapprehended as set forth below. Appellant further wishes to incorporate all of her prior arguments in order to preserve those arguments for later review.

I. Appellant requests rehearing en banc because consideration by the full Court is necessary to maintain uniformity of its decisions and this matter involves a question of exceptional importance.

A. Rehearing en banc is necessary for this Court to maintain uniformity of its decisions.

This case is the progeny of Bass v. Gopal, a case without a lot of interpretative citations at the appellate level, but a case that changed the test by which a business owners' duty to provide security measures is guided. The sole exception, and a case that does interpret the balancing test is Lord v. D&J Enterprises, Inc., 757 S.E.2d 695, 407 S.C. 544 (S.C. 2014), which held that there was evidence of a duty since "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., at 700, 556 (citing McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 901 (Tenn. 1996)). Instead, in that case the Court found that there was no evidence that preventative security measures were unreasonable, a basis upon which this Court nor the Trial Court reached their decisions in this case, and which Appellant's expert's affidavit clearly contradicts and provides evidence to refute.

As a result, and in order to maintain uniformity of decisions under the balancing test adopted in Bass, this Court should rehear this matter en banc, in order to draw on the wisdom of the full Court.

B. Rehearing en banc is necessary because this matter involves a question of exceptional importance.

This case essentially involves the issue of whether a business can disregard its own policies, fail to consider taking any security measures at all, and then escape liability when a criminal act does occur against one of its patrons. The same is an issue of exceptional importance in a state where the crime rate is more than 50% greater than the national average, and criminal acts in public places are almost ubiquitous. As a result, this matter should be heard en banc, on the basis of its exceptional importance to the state and the law that governs it.

II. The Court may have overlooked that the foreseeability of crime in a location is based upon a multitude of factors and that Plaintiff must only show that a scintilla of evidence exists as to foreseeability to withstand a motion for summary judgment.

At the heart of this case is the question of whether Respondents, as the owner of the shopping center in which Citi Trends is located, and the operator of the store itself, owe patrons such as Appellant a duty to protect them from foreseeable dangers. In answering this question, the Court cited Bass v. Gopal for the proposition that "[A] business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm." 395 S.C. 129, 135, 716 S.E.2d 910, 912 (2011).

Importantly, in reaching its decision, the Bass Court examined, extensively, the state of the law with regard to the duties of business owners to their invitees in other jurisdictions before rejecting the primary theories which had been adopted both previously in this state, and elsewhere. First, Bass concluded that the prior or similar incidents test, and the imminent harm rule, both of which had been employed in earlier cases such as Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000), were either outmoded or violated public policy.

Under the imminent harm rule, used as the basis for denying liability in Shipes v. Piggly

Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977), the business owner owed no duty to protect an invitee from third party assault. The Bass Court specifically rejected this doctrine. It further held that the prior incidents rule, enunciated in cases such as Taylor v. Hocker, 101 Ill. App. 3d 639, 428 N.E.2d 662 (Ill. App. 1981), violated public policy; because recovery was predicated upon the occurrence of an identical or nearly similar prior event, the first victim of any crime would always lose. Finally, it rejected as overly burdensome to business the "totality of the circumstances" doctrine. The Court settled instead on a balancing test, first adopted in Ann M. v. Pacific Plaza Shopping Cntr., 6 Cal. 4th 666, 25 Cal. Rptr. 137, 863 P.2d 207 (Cal. 1993) and since accepted in several other jurisdictions. See, e.g., McClung v. Delta Square Ltd. P'ship, 937 S.E.2d (Tenn. 1996).

Under the balancing test, although the presence or absence of prior criminal activity is a significant factor in the analysis, the absence alone does not foreclose the duty to provide some level of security if other factors exist. As an initial matter, common sense would seemingly suggest that operations which intentionally target, and establish facilities in areas of urban distress, like Respondents, are more likely to suffer violent crimes than businesses in suburban malls. As Mr. Hodge notes, this fact, alone, would tend to make it more foreseeable to such businesses that crime would occur on their premises. R. at 436, 438, Hodge Affidavit ("formal corporate statement of placing stores in 'urban distressed areas'"). As Mr. Hodge also notes, see Affidavit, ¶ 18, Respondents either knew, or should have known, of the significantly higher incidence of violent crime in the City of Dillon, and in the neighborhood in which they were located. R. at 438. They had a duty to take reasonable steps to protect their invitees from becoming the victims of such crimes on their premises. This attestation under oath by Appellant's expert witness, standing alone, provides a scintilla of evidence on a factor of

foreseeability thereby creating a duty from Respondents to Appellant making summary judgment on this issue improper.

Foreseeability of criminal activity can be demonstrated by expert testimony, by criminal activity reports prepared by law enforcement agencies, or by another method acceptable to the Court. In the present action, Appellant produced the Affidavit of Michael A. Hodge, Board Certified in Security Management, certified as a Security Officer by the Department of Defense, and a retired Secret Service Agent. R. at 434-35. Mr. Hodge reviewed both Dillon City police records/incident reports, and the FBI's Uniform Crime reporting statistics in order to reach his conclusions regarding the level of safety, the extent of violent crime, and the foreseeability of criminal activity in the vicinity of the store at which Appellant was shot.

Mr. Hodge's research revealed that violent crime is prevalent in the area in which the particular Citi Trends store at issue is located. In a general sense, FBI statistics show that the violent crime rate of the State of South Carolina is 56% greater than the national average, and the rate within Dillon City is 359% higher than the State as a whole. Specifically, Mr. Hodge studied actual crime reports from the police department and concluded that the area within one half-mile of the Citi Trends store had a high record of police incident reports of violent crime. These figures, especially when combined with Citi Trend's corporate policy of locating its stores in "distressed urban neighborhoods," led him to draw one conclusion: **in his expert opinion, the lack of security measures taken by Defendants falls well below the standard of reasonable care within the industry**. Affidavit of Michael Hodge, ¶ 12, (a) – (l). This statement under oath by Appellant's expert witness, provides more than a scintilla as to duty since foreseeability and breach are so inextricably intertwined as the Bass Court noted.

Respondents' focus on the foreseeability of a violent attack by Derrick Jones on Ebony

Bethea as individuals is a misleading red herring. It is highly unlikely that any particular event, any singular attack by one individual on another, would ever be foreseeable. That violent crime of some type would occur is, however, highly foreseeable, and Respondents had a duty to ensure that they took reasonable measures to protect the public under Bass. As demonstrated above and throughout Appellant's briefing at least a scintilla of evidence exists as to foreseeability and thereby duty, and as a result the Trial Court's grant of summary judgment should be overruled, and this Court's prior Order withdrawn and replaced.

III. The Court may have overlooked that the duty of a business owner under the balancing test requires that the business owner spend a dollar on increased security until the last dollar buys a dollar in reduced safety to its guests, and that the Respondents did not consider security for their guests at all.

Similar to the totality of circumstances approach in some ways, the balancing test allows the business owner to weigh the relative gain of each dollar spent in security against the economic feasibility of spending each additional dollar. It **permits the business to balance** the foreseeability of criminal activity against the cost of heightened security measures intended to protect invitees. While the balancing test does not establish any kind of bright line test that would determine what type or how much security must be provided, let alone what the cost of the security must be, the Court stated that the appropriate point was that at which the business owner "increase[ed] its expenditures on security until the last dollar buys a dollar in reduced expected crime costs... to the [owner's] guests." Id. at 139, 716 S.E.2d at 915 (quoting Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 514 (7th Cir. 2007)).

The duty then is **not a duty that permits a business owner to do nothing at all**. In fact, a business owner must actually examine the prevalence of crime and based upon that spend money to protect its patrons such that the last dollar spent buys a dollar in reduced expected

crime costs to the owner's guests.

The significance of the balancing test in the instant action cannot be understated, and does not appear to have been fully considered. Rather than looking to the presence of reasonable security in light of the foreseeable level of criminal activity in the shopping center and Citi Trends store, the Trial Court focuses exclusively on the possibility that, on December 27, 2010, Derrick Jones might decide to shoot his ex-girlfriend, and this Court seemingly made its decision based upon that analysis. However, were the duty of business owners dependent on a showing that the owner might be able to predict whether or not any specific individual would commit a particular crime on a given day, there would never be any duty, under any circumstances. Such an argument essentially mirrors the old "prior incidents" rule that has been specifically rejected.

Under the balancing test set out in Bass, a Plaintiff need only show – and certainly all she need demonstrate in order to withstand summary judgment – is that Respondents failed to provide adequate security to protect patrons, generally, in light of known risks existing at Citi Trends and the surrounding shopping center and parking lot. Here, and as the record supports Respondents did not take patron safety into account when making financial decisions at all. See R. 110-115. Therefore, the Respondents fail to meet their duty under the balancing test if any crime at all was foreseeable. That along with the facts above create a scintilla as to the duty owed to Appellant and subsequent breach thereof.

IV. The Court may have overlooked that duty can also be created by a company's own policies and guidelines, and that in this case Respondent Citi Trends had such policies and failed to follow them.

"The standard of care in a given case may be established and, defined by the common law, statute, administrative regulations, industry standards, or a defendant's own policies and guidelines." Madison ex rel. Bryant v. Babcock Center, 638 S.E.2d 650, 659, 371 S.C. 123, 140

(S.C. 2006); Tidwell v. Columbia Ry. Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918) (relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury); Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages).

In this case, Citi Trends has an internal procedure requiring its employees to greet all customers within 20 seconds of the customers entering the store, and Citi Trends corporate representative testified under oath that local stores are given no leeway to deviate from this policy. R. 177, 193. Council Dep. 15:7-14, 31:3-6. The video, photographs and statement of the assailant in this matter indicate he was not greeted in any way upon entering the store. In fact, the assailant stated under oath "it wasn't nobody really paying attention" and that if there had been "employees keeping a better watch on the store" or greeting him that he "wouldn't have [shot Ebony Bethea]." R. 426-429. Moreover, Appellant's expert witness attested that Citi Trends "violated their own internal policies of greeting customers within a reasonable amount of time of entering the premises, which, if abided by would have deterred the shooter..." R. 436.

Therefore, and in addition to the above, this provides at least a scintilla of evidence as to Respondent Citi Trends' duty through its own policies, breach thereof, and proximate cause.

V. The Court may have overlooked that its decision as to Palmetto Properties is based on an argument that the Trial Court did not rule upon, and is misapprehended.

The issue that the parties presented to the Trial Court, with respect to duty, was whether a

business owner under these facts owed a duty to an invitee to protect her from the acts of a third party given the foreseeability of criminal acts in the location at issue. The controlling law on that issue is the balancing test under Bass v. Gopal, 395 S.C. 123, 716 S.E.2d 910 (2011).

This Court's decision as to the duty of the landlord is based upon Jackson v. Swordfish Inves., L.L.C., where a grant of summary judgment was upheld in a negligence action against a commercial landlord, stating absent an exception, a landlord owes no duty to protect a tenant's customers from the criminal acts of third parties. 365 S.C. 608, 613-14, 620 S.E.2d 54, 56-57 (2005). Importantly, Jackson was decided prior to Bass, and as a result Appellant would contend that the Bass court created such an exception with its adoption of the balancing test six years after Jackson. In any event, the argument under Jackson was not relied upon by the Trial Court, as that Court considered the Respondents' duty under the balancing test set forth in Bass, and this Court should analyze the duty owed to Appellant through the same lens, albeit with a different result given the evidence demonstrated in the record.

CONCLUSION

Appellant is required to show no more than the existence of a genuine issue of material fact in order to withstand a motion for summary judgment. She has done considerably more. Respondents asked the Trial Court to focus on whether or not they could have foreseen that, on December 27, 2010, Derrick Jones would enter onto their property and shoot the Plaintiff. In so holding, the Trial Court deviated from the legal standard as set forth in Bass. The question is whether Respondents should have foreseen that there was a likelihood of violent crime occurring on their property, and whether they could have taken reasonable and cost-effective measures to prevent it.

Appellant has set forth evidence showing that the incidence of violent crime in the

neighborhood in which she was injured is high. She has also provided evidence showing that Respondents neither investigated these statistics nor took steps to prevent crime from entering upon their own land and injuring third parties, business invitees on the property. Most tellingly, the testimony of Derrick Jones was that had any of the inexpensive security measures Respondents declined to put in place – including placing signs, making certain that visitors knew of the possibility that there would be a police presence, or that they would be shown on a video camera, or that a security guard or store employee would approach them – existed, he would never have left his car with a firearm, would never have entered Citi Trends while carrying a gun, and would never have accosted Appellant.

Appellant has come forward with facts sufficient to demonstrate that Respondents owed her a duty and breached it. She has also shown that their breach was the proximate cause of her injuries. Appellant would, consequently, respectfully argue that the Trial Court's Order granting Summary Judgment was in error, should be reversed, and that the case be remanded to the Trial Court for a trial on the merits.

Attorneys for Appellant

July 21, 2015

Roy T. Willey IV, Esquire
Eric M. Poulin, Esquire
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Counsel of Record for Respondents:

Catherine G. Griffin
Baker, Ravenel, Bender
P.O. Box 8057
Columbia, SC 29202
(803) 799-9091
FOR RESPONDENT CITI TRENDS

Robert W. Buffington
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
(843) 722-3366
FOR RESPONDENT PALMETTO

RECEIVED
JUL 29 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Trial Court Judge

Case No. 2012-CP-17-295

Ebony Bethea.....Appellant,

v.

Derrick Jones, John Doe, Individually and
As employee/agent of Citi Trends, Inc., Citi
Trends, Inc., and Palmetto Properties, Inc.
Of Whom Citi Trends, Inc., and Palmetto
Properties, Inc. are.....Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for rehearing en banc / rehearing by panel on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 28, 2015, addressed to attorney of records Catherine G. Griffin, PO Box 8057, Columbia, SC 29202, and Robert W. Buffington, PO Box 340, Charleston, SC 29402.

July 28, 2015

Roy T. Willey IV, Esquire
62 Columbus Street
Charleston, SC 29403
(843) 614-8888
Attorney for Appellant

Counsel of Record for Respondents:

Catherine G. Griffin
Baker, Ravenel, Bender
PO Box 8057
Columbia, SC 29202

Robert W. Buffington
Haynsworth Sinkler Boyd, P.A.
PO Box 340
Charleston, SC 29402