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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-3873

Catalina London Limited f/k/a Alea London Limited..... Respondent

vs.

Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room..... Appellants

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PETITION FOR REHEARING

The Appellants, pursuant to Rule 221 of the South Carolina Appellate Court Rules, move this Court for rehearing and reconsideration of its Opinion No. 2016-UP-439 submitted September 1, 2016, filed October 26, 2016 and received by counsel for Appellant on October 28, 2016. The basis of this Petition is the attached Memorandum of Law.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.

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November 8, 2016
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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

On October 26, 2016, this Court issued Opinion No. 2016-UP-439 affirming the Circuit Court granting summary judgment in this case. The Appellant requests reconsideration and rehearing pursuant to South Carolina law based on the following grounds:

I. THE COURT OF APPEALS ERRED IN ITS UNPUBLISHED OPINION IN NOT APPLYING THE FACTS TO THE LAW IN THIS CASE.

While this Court cites numerous cases regarding the assault and battery exclusion, it does not provide any evidence from the case or from the Record on Appeal as to how the law applies to the facts. As stated above, summary granted may be granted only when there is no genuine issue of material fact. Because this Court cites no facts in its grant of summary judgment, its opinion affirming the circuit court is erroneous as a matter of law.

See *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (S.C. 2003) (summary judgment is a drastic remedy and should be cautiously invoked so that litigant will not be improperly deprived of trial on disputed factual issues). In this case the Court offers no explanation or evidence from the Record in response to the evidence and testimony offered by both Narruhn and Cato regarding what happened on that fateful night. See Narruhn Affidavit: "I was there with some friends and we had gone there to dance since we had heard it was a great place to go dancing. I was on the dance floor and heard what sounded like balloons popping." (R. p. 503). Under these circumstances, it is never appropriate to grant summary judgment when further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, *rehearing denied* (S.C. 2008). Finally, the Record on Appeal reveals numerous evidentiary facts and conclusions or inferences which may be drawn from them such as whether or not an assault and/or battery occurred. Thus as a matter of law summary judgment should have been denied and this Court should have reversed the grant of summary judgment by the circuit court. *Hord v. Roper Hospital, Inc.*, 377 S.C. 503, 661 S.E.2d 113, *rehearing denied* (S.C.App. 2008).

II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT.

It is well settled in South Carolina that summary judgment should never be granted if there is a scintilla of evidence. See *Hancock v. Mid-South Management*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009). In this case, this Court discusses none of the factual evidence which allowed for a grant of summary judgment. In its opinion, the Court only cites case law as to whether the assault and battery exclusion of the policy of insurance in this case applied. The facts of the case are not presented, nor listed by the Court, nor does the Court

discuss in detail the reasons for the grant of summary judgment. Appellant suggests that this is error as a matter of law.

In its Opinion, this Court does not discuss the evidence offered which would lead it to the conclusion that summary judgment should be granted when it writes: "[A]n assault occurs when a person has been placed in reasonable fear of bodily harm by the contact of the defendant." See *Mellen v. Lane*, 377 S.C. 261, 277, 659 S.E.2d 236, 245 (Ct.App. 2008).

In fact, the only evidence in the record is that Narruhn nor anyone else was aware that a gun had been fired. (R. p. 503). Narruhn testified that she was simply trying to enjoy herself at the club and that she did not know, nor had she ever met Arden Cato. See Affidavit of Narruhn dated September 27, 2013) (R. pp. 503-504). Further, Narruhn testified that she did not know the person who fired the gun, nor had she had any altercation or argument at The Red Room. (R. pp. 503-504). Also, there was no evidence in the record about any person or persons having reasonable fear of bodily harm the night of the shooting. The only evidence in the record other than Narruhn's testimony is that of Cato who testified that he did not intend to hurt Narruhn. (R. p. 312, lines 14-25; R. p. 313, lines 1-4). Thus, because there was no evidence of reasonable fear of bodily harm from the conduct of Cato the assault and battery rule cited by this Court has not been met. It is a jury issue and not an issue for summary judgment as to whether Narruhn or anyone else was placed in a reasonable fear of bodily harm and accordingly this Court should not have affirmed the grant of summary judgment without specific citation to evidence in the record. Indeed, all the evidence in the record points solely to Appellant's position.

Appellant also takes issue with this Court's holding that "There is a well-recognized distinction between criminal assault and a civil action for assault and battery. In civil actions, the intent while pertinent and relevant is not an essential element." Appellant cites to the South Carolina Law of Torts, Third Edition, by F. Patrick Hubbard who states that battery "is the actual infliction of an unlawful, unauthorized violence on or touching of the person of another regardless of degree." Appellant also notes that in Chapter 6 of the same book both assault and battery are listed under intentional torts. Professional Hubbard in his book notes: "Battery has two elements: (1) a harmful or offensive touching without consent; (2) an intent to commit the touching or to cause an apprehension of such touching." See South Carolina Law of Torts, Hubbard, p. 416. While Hubbard cites no South Carolina cases for his proposition, it does appear that intent is required for battery. As indicated previously, Cato testified he had no intent to injure Narruhn. Thus Appellant believes the Court erred in finding that intent is not required element for battery.

Appellant also raises whether or not there is evidence in the record that the Plaintiff knew or had a reasonable apprehension of immediate harmful or offensive touching as is required for assault. Hubbard, in his book, indicates: "In determining whether the circumstances are sufficiently threatening, the victim's situation is viewed from the point of view of the reasonable victim." South Carolina Law of Torts, Hubbard, p. 415.

It should also be noted that in the case cited by the Court, *Mellen v. Lane*, 377 S.C. 261, 277, 659 S.E.2d 236, 245 (Ct. App. 2008), there is no discussion about the intent requirement for a battery cause of action.[1]

III. THIS COURT ERRED AS A MATTER OF LAW IN FINDING INTENT WAS NOT AN ESSENTIAL ELEMENT OF ASSAULT AND BATTERY.

The problem with the Court's analysis is that removing intent from the definition of an assault creates an exclusion that swallows up the coverage the policy purports to provide for claims arising from "bodily injuries." South Carolina courts refuse to give effect to policy exclusions that would render the coverage provisions "virtually meaningless." *See Isle of Palms Pest Control v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (1995). The Supreme Court relied on this principle in refusing to adopt the insurer's interpretation of a professional services policy exclusion in the pest control company's commercial liability policy that effectively "excluded coverage for all claims arising from the insured's exterminating services, the very risk contemplated by the parties." *Isle of Palms*, 459 S.E.2d 321.

As long as an assault or battery requires some form of intent or mental state, the mere fact that a gun discharged does not bring the incident within the scope of the assault and battery exclusion of an insurance policy. In this case, it is without dispute that Cato did not intend to shoot Narruhn nor did he know her. (R. pp. 312, 313). To hold otherwise would allow an insurer to escape liability under the assault and battery exclusion under a variety of scenarios. This would necessarily include any accident involving bodily injury in

[1] Hubbard in the book indicates the concept of intent is central to this chapter but the term is not easily defined and contradictory or conclusory uses are common. Hubbard uses Prosser Section 8 of the restatement for the definition of intent which means substantially certain consequences. See Prosser, Section 8, Restatement Section 8A. Prosser defines intent as follows: "Intent is the word commonly used to describe the purpose to bring about stated physical consequences...."

which the victim realized his danger. The hypotheticals are endless. A dropped firearm, a dropped tray, improperly installed equipment falling on a crowded dance floor, etc. Each of these examples could be causally traced to some person's conduct and so long as at least one potential victim realized the danger would induce a reasonable fear of bodily injury coverage would be denied.. It seems nonsensical to find otherwise. Under this Court's reading of the assault and battery exclusion it applies to all claims arising out of any event that causes reasonable fear of bodily harm even if that event was entirely accidental. In this case, the victim, Narruhn, had no fear. She heard a gunshot and simply fell to the floor. (R. p. 503). This ruling would in effect gut the policy's initial grant of coverage regarding claims based on "bodily injuries." Without the assault and battery exclusion, the policy would cover any bodily injury claims so long as the bodily injuries were from an occurrence.

All of this is offered to point out to the Court that summary judgment should not have been granted. Appellants request this Court review the recent opinion of United States District Court Judge David Norton in the case of *Canopius US Insurance, Inc. v. Charles Middleton, Jr.*, Case No. 2:15-cv-3673-DCN in the United States District Court for the District of South Carolina (Charleston Division) held August 17, 2016 which discusses issues in this case.

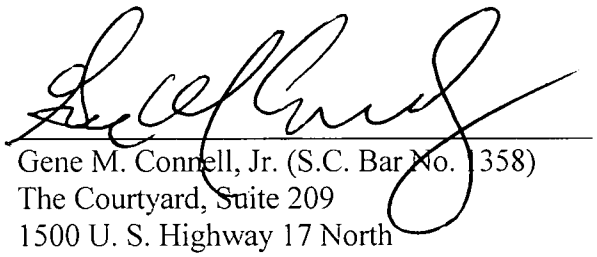
IV. THE COURT ERRED IN NOT ADDRESSING EXCEPTIONS II, III and IV.

In its opinion, the Court decided not to address exceptions II, III and IV. Appellant believes this to be error in that the Court should not have affirmed the circuit court on the assault and battery exclusion to begin with and instead should have addressed all issues raised in the appeal. This is a tragic case in which Appellant Narruhn was rendered

paraplegic from shots being fired in a nightclub, ricocheting off the wall and striking the Appellant. She is a paraplegic from this incident. It is respectfully submitted that the Court provide a detailed basis for its Opinion in this case. The damages to Appellant were serious and life changing and this Court's opinion on this matter should be comprehensive and should address all the issues presented in this case. Accordingly, it is respectfully suggested that this Court reverse its affirmal of the grant of summary judgment and return this matter to the circuit court. Further, it is respectfully requested this Court have oral argument in this case since this Court's ruling on the assault and battery exclusion and its meaning from the viewpoint of the victim is likely to have statewide impact on other cases.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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November 4, 2016
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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served a copy of the **Appellants' Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on Respondent, through counsel of record, by depositing same in the United States Mail, postage prepaid, to:

Mark V. Gende, Esquire
Mark S. Barrow, Esquire
William R. Calhoun, Jr., Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

DATE OF MAILING: November 8, 2016

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 8th day of November, 2016.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26