

ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case Number: 2014-000338

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case Number 2011-CP-10-4348

RECEIVED

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SC Court of Appeals

Thomas Easterling.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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TABLE OF AUTHORITIES

<u>Bass v. Gopal</u> , 716 S.E.2d 910 (S.C. 2011).....	8, 9, 20
<u>Bowen v. Lee Process Sys. Co.</u> , 536 S.E.2d 86 (S.C. Ct. App. 2000).....	23
<u>Bullard v. Ehrhardt</u> , 324 S.E.2d 61 (S.C. 1984)	8, 14, 15
<u>Caldwell v. K-Mart Corp.</u> , 410 S.E.2d 21 (S.C. Ct. App. 1991)	22
<u>Callen v. Cale Yarborough Enters.</u> , 442 S.E.2d 216 (S.C. Ct. App. 1994).....	12, 13, 15, 17
<u>Grant v. Mount Vernon Mills</u> , 634 S.E.2d 15 (S.C. Ct. App. 2006).....	7
<u>Huggins v. Citibank, N.A.</u> , 585 S.E.2d 275 (S.C. 2003)	8
<u>Jensen v. Anderson County Dep't Soc. Servs.</u> , 403 S.E.2d 615 (S.C. 1991)	8
<u>Legette v. Piggly Wiggly, Inc.</u> , 629 S.E.2d 375 (S.C. Ct. App. 2006).....	20
<u>Luckie v. Piggly-Wiggly Southern Inc.</u> , 325 S.E.2d 844 (Ga. 1984).....	22
<u>McCullough v. Goodrich & Pennington Mortg. Fund, Inc.</u> , 644 S.E.2d 43 (S.C. 2007)	8
<u>Miletic v. Wal-Mart Stores, Inc.</u> , 529 S.E.2d 68 (S.C. Ct. App. 2000)	13, 15, 18
<u>Milligan v. Winn-Dixie Raleigh</u> , 254 S.E.2d 798 (S.C. 1979).....	20
<u>Moore v. Weinberg</u> , 644 S.E.2d 740 (S.C. Ct. App. 2007).....	7
<u>Munn v. Hardee's Food Systems, Inc.</u> , 266 S.E.2d 414 (S.C. 1980)	8, 14, 15
<u>Pittman v. Grand Strand Entm't, Inc.</u> , 611 S.E.2d 922 (S.C. 2005)	7
<u>Staubes v. City of Folly Beach</u> , 529 S.E.2d 543 (S.C. 2000)	21
<u>Ulmer v. Ulmer</u> , 632 S.E.2d 858 (S.C. 2006).....	21
<u>Woodson v. DLI Props., LLC</u> , 753 S.E.2d. 428 (S.C. 2014).....	23
<u>Zurich Am. Ins. Co. v. Tolbert</u> , 662 S.E.2d 606 (S.C. Ct. App. 2008)	7

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting summary judgment to Respondents Burger King Corporation and Capital Restaurant Group, LLC?

STATEMENT OF THE CASE

On June 20, 2011, Plaintiff-Appellant Thomas Easterling ("Plaintiff") filed a Summons and Complaint against Defendants-Respondents Burger Corporation and Capital Investment Group, LLC (collectively, "Burger King") in the Court of Common Pleas asserting causes of action arising from an incident that occurred on or about July 8, 2008. On July 8, 2011, Burger King filed an Answer denying liability.

On April 26, 2013, Burger King filed a Motion for Summary Judgment on the grounds that there was no genuine issue as to any material fact and that Burger King was entitled to judgment as a matter of law. Specifically, Burger King asserted that it owed no legal duty to Plaintiff. Burger King submitted a Memorandum in Support of Summary Judgment and Plaintiff Easterling submitted a Memorandum in Opposition to Summary Judgment. The trial court held a hearing on November 18, 2013. The trial court took the motion under advisement and, on November 26, 2013, the court filed a Form 4 Order granting Burger King's "Motion to Dismiss." On December 9, 2013, the trial court filed a Form 4 Order amending its November 26, 2013 Order and granting Burger King's Motion for Summary Judgment. Specifically, the Order stated:

This case before the Court on Defendants Burger King and Capital Restaurant Group's Motion for Summary Judgment. After hearing argument and reviewing pleadings, Defendants' Motion for Summary Judgment is hereby GRANTED. This Order is intended to amend the Order entered by the Court on November 26, 2013.

On December 13, 2013, Plaintiff filed a Rule 59 Motion for Reconsideration. On January 15, 2014, the trial court issued a Form 4 Order denying Plaintiff's Rule 59 Motion.

Plaintiff then filed this appeal, appealing the Orders granting summary judgment to Burger King and denying Plaintiff's Rule 59 Motion for Reconsideration.

STATEMENT OF FACTS

This case arises from a July 8, 2008 incident that occurred at the drive-thru and parking lot of the Burger King restaurant located at 945 Folly Road in Charleston, South Carolina. At approximately 10:00 p.m., Plaintiff-Appellant and Defendant Gary Eastwood (hereinafter referred to as "Eastwood") were both in the drive-thru lane at the subject Burger King. Defendant Eastwood was directly behind Plaintiff in line. Plaintiff and Eastwood did not know each other prior to this incident. (R. at 458, p. 28:10-12). Prior to Plaintiff placing his order at the drive-thru speaker, he was rear-ended by Eastwood. (R. at 460, p. 35:3-18). Plaintiff assumed this was an accident and took no action in response to being rear-ended. (R. at 460, p. 36:1-10). He did not report the collision to anyone at Burger King or call the police. (R. at 461, p. 38:10-14, 39:2-8). According to Plaintiff, Eastwood then began spinning his tires by pushing the accelerator while keeping his foot on the brake. (R. at 460, p. 36:19-37:15). At this time, there were approximately 3 cars in front of Plaintiff waiting to be served. (R. at 460, p. 37:6-11). Plaintiff took no action in response to Eastwood spinning his tires, did not inform Burger King that this was occurring, and did not call the police. (R. at 461, p. 39:6-8). As Plaintiff moved forward to the drive-thru window to pick up his food, Eastwood rear-ended him again. (R. at 461, p. 40:9-16). After the impact, Plaintiff got out his car to see how much damage was done to the vehicle. (R. at 462, p. 42:5-7). Plaintiff did not request that Burger King call the police at this time or at any other time. (R. at 462, p. 42:17-19). After Plaintiff inspected the damage to his vehicle, he turned

towards Defendant Eastwood's vehicle and Eastwood exited his truck. (R. at 462, p. 44:20-24). Eastwood approached Plaintiff in a "very aggressive" fashion. (R. at 462, p. 44:20-45:9). Eastwood lunged at Plaintiff in a tackling manner, which caused Plaintiff to fall backwards. (R. at 462-63, p. 45:20-46:23). Suddenly, Eastwood proceeded to violently bite off Plaintiff's nose. (R. at 463, p. 48:7-25). Plaintiff estimates that only approximately two minutes elapsed between the time he got out of his car and the time he was attacked by Eastwood. (R. at 467, p. 64:13-65:7). Notably, he further estimates that approximately between one and two minutes elapsed between the time Plaintiff got of his car and the time Eastwood exited his car. (R. at 471, p. 78:22-79:19). Thus, Eastwood attacked Plaintiff within one minute or less after getting out of his car. (R. at 467, p. 64:13-65:7; R. at 471, p. 78:22-79:19). Plaintiff concedes that the attack was "totally unexpected" and occurred "quickly." (R. at 463, p. 47:7-10; R. at 470, p. 75:10-16). He further concedes that when Eastwood got out of his vehicle, Plaintiff "had no idea what he was going to do." (R. at 470, p. 76:3-7).

At the time of this incident, Burger King Manager Kimberly Jones was working the drive-thru window. (R. at 480-81, p. 21:18-22:12). It was her responsibility to take the drive-thru orders while customers were at the drive-thru speaker and to provide them with their food at the pick-up window. Jones testified that she recalled taking both Plaintiff's and Defendant Eastwood's orders. (R. at 485-86, p. 39:21-42:13; R. 486, p. 44:1-9). When a car pulls up to the drive-thru speaker box, Jones can hear everything going on in and around that car through her headset. (R. at 484, p. 36:13-20; R. 485-86, p. 41:6-42:3). Through her headset, when a car is at the drive-thru speaker, Jones can hear both inside of the person's car, as well as noises occurring outside of the person's

car – including horn blowing, yelling, and the like. (R. at 484, p. 36:13-20; R. at 485-86, p. 41:6-42:3). Jones did not hear any such noises through her headset during this entire incident. (R. at 484, p. 36:13-20; R. at 485-86, p. 41:6-42:3; R. at 485-86, p. 40:9-42:10; R. at 486, p. 44:1-15; R. at 486, p. 44:21-45:25). Specifically, at this point in time, she heard no unusual or alarming noises, screeching/spinning tires, horn blowing, cursing, yelling, or the like. (R. at 484, p. 36:13-20; R. at 485-86, p. 41:6-42:3; R. at 485-86, p. 40:9-42:10; R. at 486, p. 44:1-15; R. at 486, p. 44:21-45:25).

The first point at which Jones became aware of Eastwood's behavior was when the car in front of Plaintiff pulled up to the drive-thru window. (R. at 494-95, p. 77:14-78:10). Jones was completely unaware of Eastwood's behavior until that point. (R. at 485-86, p. 39:21-42:10; R. at 486, p. 44:21-45:25; R. at 494-95, p. 77:14-78:10). When the car in front of Plaintiff pulled up to the drive-thru window, Jones became aware that a customer in the drive-thru line was yelling and honking the horn. (R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-78:10). Jones did not know which customer was engaging this behavior until Plaintiff pulled up to her window. (R. at 489, p. 55:20-56:10). Jones estimated that the car in front of Plaintiff was at her window for approximately 5 minutes. (R. at 495, p. 78:11-79:3).

When Plaintiff pulled up to the drive-thru window, Jones observed Eastwood blowing his horn and yelling. (R. at 486, p. 44:5-45:25; R. at 487, p. 48:4-49:13). Jones thought that perhaps Eastwood was in a rush and frustrated, which is not unusual for a busy night. (R. at 486, p. 44:5-45:25; R. at 487, p. 46:10-22). Jones never observed Eastwood screech or spin his tires – only honking his horn and yelling. (R. at 487, p. 48:4-18). After Plaintiff received his food and began to exit the drive-thru, he was rear-

ended by Eastwood. (R. at 489, p. 56:11-57:22). At this time, Plaintiff was first in line at the drive-thru and could have exited the drive-thru and parking lot if he chose to do so. (R. at 494, p. 76:4-19; R. at 495, p. 79:4-10). Rather than choosing to leave the premises, Plaintiff chose to exit his vehicle. (R. at 490, p. 58:2-25). Eastwood, in turn, got out of his vehicle as well. (R. at 490, p. 58:2-25).

Eastwood then proceeded to attack Plaintiff. (R. at 490, p. 58:2-59:6). Jones estimated that the time that elapsed between the time Plaintiff was rear-ended by Eastwood to the time Plaintiff was injured was approximately "a minute." (R. at 493, p. 71:2-15). She further estimated that the time that elapsed between Plaintiff getting out of his car to the time he was hit by Eastwood was a matter of "seconds." (R. at 492, p. 69:10-18). Jones did not have time to call the police from the time Plaintiff got out of his car to the time he was injured by Eastwood. (R. at 493, p. 70:12-72:14). As soon as Jones observed Plaintiff's injury, she called the police. (R. at 493, p. 72:2-14). Jones acted as quickly and as best as she could under these highly unusual circumstances. (R. at 493, p. 72:2-14).

Jones had no recollection of the police ever being called to Burger King for any issues other than automobile accidents. (R. at 483-84, p. 33:8-34:17). She was not aware of any violent crimes, fights, or physical altercations ever having occurred at the subject Burger King. (R. at 483-84, p. 33:8-34:17; R. at 493, p. 73:12-23; R. at 496, p. 84:1-6). Jones did not consider the subject Burger King to be an unsafe place to work or in an unsafe area. (R. at 495-96, p. 81:12-82:3). Although she has observed frustrated patrons in the drive-thru window, she has never seen their frustration rise to the level of a physical altercation or any other crime, much less rise to the level of the incident at

issue. (R. at 496, p. 82:4-83:6). Prior to this incident, she had never witnessed anyone intentionally rear-end another patron in the drive-thru or anywhere else at Burger King. (R. at 496, p. 83:7-21).

Master Deputy Will Muirhead of the Charleston County Sheriff's Office responded to this incident. (R. at 538, p. 7:21-23). The area where the subject Burger King is located was part of Deputy Muirhead's jurisdiction. (R. at 538, p. 7:24-8:5). Deputy Muirhead responded to a call indicating a fight was in progress and placed Defendant Eastwood under arrest. (R. at 538, p. 8:18-20; R. at 539, p. 9:10-13). The investigation revealed that Eastwood was the aggressor and literally bit Plaintiff's nose off. (R. at 539, p. 9:10-21). The investigation further revealed that Eastwood attacked Plaintiff because Eastwood thought he was in a "war." (R. at 708-711). He showed no remorse and even "bragged" to the police about the incident in graphic detail. (R. at 708-711). Deputy Muirhead testified that this was a unique, spontaneous incident and that he had never dealt with a similar incident. (R. at 539, p. 10:1-16). His investigation revealed that this was a quick altercation, which lasted only minutes. (R. at 539, p. 10:17-23). Muirhead stated that his investigation did not reveal any "notice" on the part of Burger King. (R. at 539, p. 12:7-25). Deputy Muirhead classified this as a "random criminal attack" that occurred without warning. (R. at 540, p. 13:1-13). It evolved in a matter of seconds and was not foreseeable. (R. at 540, p. 13:4-14:1). This incident had nothing to do with Burger King other than the mere fact that it occurred on its premises. (R. at 540, p. 10-13).

Deputy Muirhead further testified that the subject Burger King is not an unsafe establishment. (R. at 540, p. 14:2-6; R. at 542, p. 22:8-20). The subject Burger King is

not an establishment that attracts criminal activity. (R. at 542, p. 22:8-20). Muirhead stated that he had responded to incidents at this Burger King before, but they were minor disturbances, such as auto accidents, frauds, and the like – “nothing felonious.” (R. at 540, p. 14:10-16). Specifically, with the exception of this incident, Muirhead testified that he never responded to any assaults or other physical altercations at the subject Burger King. (R. at 540, p. 15:20-16:14). In Muirhead’s experience, a drive-thru is not a common area for criminal activity. (R. at 541, p. 17:25-18:6).

ARGUMENT

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 662 S.E.2d 606, 607-08 (S.C. Ct. App. 2008), aff’d, 692 S.E.2d 523 (S.C. 2010). “[S]ummary 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.” Pittman v. Grand Strand Entm’t, Inc., 611 S.E.2d 922, 925 (S.C. 2005). “[T]he evidence and all inferences that can reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” Moore v. Weinberg, 644 S.E.2d 740, 743 (S.C. Ct. App. 2007). “Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings.” Grant v. Mount Vernon Mills, 634 S.E.2d 15, 17 (S.C. Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 17-18.

I. THE TRIAL COURT DID NOT ERR WHEN GRANTING BURGER KING'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND BURGER KING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

"In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury." McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 644 S.E.2d 43, 46 (S.C. 2007). "In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff." Bass v. Gopal, 716 S.E.2d 910, 912 (S.C. 2011). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." Id. "Generally, there is no common law duty to act." Jensen v. Anderson County Dep't Soc. Servs., 403 S.E.2d 615, 617 (S.C. 1991). Whether a duty exists is a question of law for the court. Huggins v. Citibank, N.A., 585 S.E.2d 275, 276 (S.C. 2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." Id.

"The duty of a storeowner to its invitees is to take reasonable care to protect them." Bullard v. Ehrhardt, 324 S.E.2d 61, 62 (S.C. 1984). "This duty does not extend to protection from criminal attacks from third parties unless the storeowner knew or had reason to know of the criminal attack." Id. In other words, "a store is generally not charged with the duty of protecting its customers against criminal acts of third parties when it did not know or have reason to know that such acts were about to occur." Munn v. Hardee's Food Sys., Inc., 266 S.E.2d 414, 414 (S.C. 1980). "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, 716 S.E.2d at 913.

The business owner has a legal duty to protect against such harm only when the criminal act in question was legally foreseeable. Bass, 716 S.E.2d at 913. If the third party criminal act was not legally foreseeable, then the property owner owes no legal duty to the injured party, and the plaintiff's claim should never get to the jury. See id. Therefore, foreseeability is a key element that the plaintiff must prove. Id. In Bass, 716 S.E.2d 910, the South Carolina Supreme Court adopted a "balancing approach" to determine foreseeability in this context. The balancing approach "seeks to balance the degree of foreseeability of harm against the burden of the duty imposed." Id. at 915. "As such, the more foreseeable a crime, the more onerous is a business owner's burden of providing security." Id. The presence or absence of prior criminal incidents is a "significant factor" in determining the amount of security required of a business owner. Id. "As the foreseeability of potential harm increases, so too, does the duty to prevent against it." Id. The balancing approach seeks to appropriately weigh "both the economic concerns of businesses, and the safety concerns of their patrons." Id. The Supreme Court has held that this balancing approach does not alter the well-established duty of a merchant; rather it merely explains "how to determine (1) if a crime is foreseeable, and (2) the economically feasible security measures that are required to prevent the foreseeable harm." Id. at 915-16.

A. Burger King Owed No Duty to Plaintiff Because Eastwood's Attack Was Not Foreseeable, as Burger King Was Not on Notice of Criminal Behavior on the Night of the Incident.

The Court should affirm the trial court's Order granting summary judgment because the undisputed testimony demonstrates that the criminal attack at issue was isolated, spontaneous, and unforeseeable. Prior to the attack, Burger King witnessed

nothing that would indicate that a foreseeable criminal attack would occur. Indeed, Burger King observed nothing more than a patron honking his horn and yelling in the drive-thru. (R. at 484, p. 36:13-20; R. at 485-86, p. 39:21-42:13; R. at 486, p. 44:1-15; R. at 486, p. 44:21-45:35; R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-79:3). Burger King saw no criminal acts, threats of physical harm, physical altercations, or the like prior to Defendant Eastwood's spontaneous physical attack on Plaintiff. (R. at 484, p. 36:13-20; R. at 485-86, p. 39:21-42:13; R. at 486, p. 44:1-15; R. at 486, p. 44:21-45:35; R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-79:3). Thus, Burger King owed no legal duty to Plaintiff because Eastwood's criminal attack was not reasonably foreseeable by Burger King.

Specifically, Manager Kimberly Jones testified that she observed no criminal behavior or threats of criminal behavior prior to the time Eastwood attacked Plaintiff. (R. at 484, p. 36:13-20; R. at 485-86, p. 39:21-42:13; R. at 486, p. 44:1-15; R. at 486, p. 44:21-45:35; R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-79:3). Through her headset, Jones heard nothing out of the ordinary when Plaintiff, Eastwood, or anyone else was at the drive-thru speaker. (R. at 484, p. 36:13-20; R. at 485-86, p. 40:9-42:3; R. at 486, p. 44:1-45:25). It was not until the vehicle directly in front of Plaintiff pulled up to her window that Jones first became aware that someone in the drive-thru line was honking the horn and yelling. (R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-79:3). She did not see or hear tire spinning or any threatening behavior – just honking and yelling. (R. at 487, 48:4-14; R. at 489, p. 55:20-56:10; R. at 494-95, p. 77:14-79:3). At that time, Jones was not aware of which patron was honking and yelling and thought that it may have been Plaintiff. (R. at 489, p. 55:20-56:10). The vehicle in front of

Plaintiff was at Jones' window for approximately 5 minutes. (R. at 495, p. 78:11-79:3). Thus, the record demonstrates that, at a maximum, Jones observed 5 minutes of a patron honking his horn and yelling prior to the time Plaintiff pulled up to her window. This was not unusual for a busy night and was not sufficient to put Jones or anyone else at Burger King on notice that a criminal attack was foreseeable.

Plaintiff then pulled up to the window and Jones was able to observe that the honking and yelling was originating from the vehicle behind Plaintiff, driven by Eastwood. (R. at 489, p. 55:20-56:10). This was the first time Jones observed the behavior and the first time she knew it was emanating from Eastwood's vehicle. Based on Jones' prior experiences at Burger King, she thought Eastwood was likely simply frustrated because Burger King was having a busy night. (R. at 486, p. 44:5-45:25; R. at 487, p. 46:10-22). Jones testified that, in her experience, it is not unusual for frustrated customers to honk their horns or yell if they feel the drive-thru is taking too long. (R. at 486, p. 44:5-45:25; R. at 487, p. 46:10-22). She further testified that she had never seen such frustration rise to the level of a physical assault or any other criminal behavior. (R. at 496, p. 82:1-84:6). Additionally, while dealing with Plaintiff at the window, Jones continued to observe nothing more than Eastwood honking his horn and yelling. (R. at 486, p. 44:5-45:25; R. at 487, p. 48:4-49:13). She continued to observe no criminal behavior, threats of criminal behavior, or anything else that indicated a criminal attack was foreseeable. (R. at 486, p. 44:5-45:25; R. at 487, p. 48:4-49:13). Thus, Plaintiff's assertion that Burger King was on "notice" that a criminal attack was about to occur or that Eastwood's honking his horn and yelling somehow made his subsequent attack on Plaintiff "legally foreseeable" is without basis. It should also be noted that, at this point in

time, Plaintiff was first in line at the drive-thru and could have exited the drive-thru line and the Burger King establishment if he felt threatened or otherwise foresaw a criminal attack was about to occur. (R. at 494, p. 76:4-19; R. at 495, p. 79:4-10).

After Plaintiff received his food and began to pull forward, Eastwood rear-ended Plaintiff. (R. at 461, p. 40:9-16; R. at 489, p. 56:11-57:22). Rather than leaving Burger King, Plaintiff chose to exit his vehicle and Eastwood attacked Plaintiff within approximately one minute or less. (R. at 462, p. 42:5-7; R. 462-63, p. 44:20-48:25; R. at 490, p. 58:2-25). It is undisputed that this unforeseeable attack occurred extremely quickly. (R. at 463, p. 47:7-10; R. at 470, p. 75:10-16; R. at 470, p. 76:3-7; R. at 492, p. 69:10-18; R. at 493, p. 70:12-72:14). It is further undisputed that the attack was "totally unexpected" and that neither Plaintiff nor Burger King "had any idea what [Eastwood] was going to do" when Eastwood got out of his car. (R. at 463, p. 47:7-10; R. at 470, p. 75:10-16; R. at 470, p. 76:3-7; R. at 492, p. 69:10-18; R. at 493, p. 70:12-72:14). Thus, Burger King had no notice and no appreciable time to react in any way that could have even arguably prevented this isolated, spontaneous, unforeseeable criminal attack.

As demonstrated above, Plaintiff's assertion that Burger King "witnessed 15-20 minutes" of commotion leading up to the criminal attack is not supported by the record. At most, Burger King observed between 5 and 10 minutes of a patron honking his horn and yelling before he spontaneously and unforeseeably attacked Plaintiff. This is not sufficient to establish foreseeability of a criminal physical assault.

A storeowner's duty to a patron for the criminal attack of a third party has been addressed by our courts on numerous occasions. The South Carolina Court of Appeals addressed a strikingly similar incident in Callen v. Cale Yarborough Enters., 442 S.E.2d

216 (S.C. Ct. App. 1994). In Callen, the Court of Appeals affirmed summary judgment for a Hardee's restaurant in a matter arising from a physical altercation in the drive-thru. Id. at 216-18. While in the drive-thru lane waiting to place an order, the plaintiff got into an argument with the occupants of the vehicle in front of him. Id. at 217. The occupants got out of their car and approached the plaintiff's car. Id. The plaintiff then exited his car and the occupant of the other car suddenly physically assaulted the plaintiff. Id. The Callen Court found that summary judgment was proper because the plaintiff conceded that the "incident and fight happened very suddenly, without warning." Id. at 217-18. That is the precise situation in this case. Here, just as in Callen, Plaintiff concedes that the attack was "totally unexpected," occurred "quickly," and that he "had no idea what [Eastwood] was going to do" when he got of his car. Thus, summary judgment should be affirmed because the undisputed testimony demonstrates that the assault occurred without warning that a physical assault was going to occur. As noted above, the incident was not foreseeable to either Plaintiff or Burger King.

By way of another example, in Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68 (S.C. Ct. App. 2000), the South Carolina Court of Appeals affirmed summary judgment for Wal-Mart when it was sued by a customer who was attacked by a third party in the parking lot. In affirming summary judgment, the Court noted that the plaintiff testified that "the attack occurred so quickly that even she had no warning the men were about to attack her." Id. at 332. The Court stated that Wal-Mart "simply had no notice" and, thus, had no duty to protect the plaintiff. Id. at 333. That is the very situation in this case. As noted previously, Plaintiff concedes that the attack was "totally unexpected," occurred "quickly," and that he "had no idea what [Eastwood] was going to do" when he

got out of his car. Prior to the physical assault, neither Plaintiff nor Burger King ever heard any threats of physical assault from Eastwood or anyone else. (R. at 471, p. 80:1-3). Thus, just as in Millitec, the “the attack occurred so quickly that even [Plaintiff] had no warning [Eastwood was] about to attack [him].” If the attack was not foreseeable to Plaintiff, it certainly was not foreseeable to Burger King.

Additionally, in Bullard v. Ehrhardt, 324 S.E.2d 61 (S.C. 1984), the South Carolina Supreme Court affirmed summary judgment for a bar when it was sued by a customer who was hit by a beer bottle. In Bullard, a customer was asked to leave the bar because he was too intoxicated. Id. at 61-62. The customer returned within seconds and threw a beer bottle that struck a customer in the eye. Id. The Supreme Court held that the bar was not responsible because the bar “had no forewarning [the assailant] would throw the bottle.” Id. at 62. The Court further noted, “It happened spontaneously leaving no time for her to try to prevent something she had no knowledge or reason to know would happen.” Id. The Bullard decision is analogous to the case at hand, as Burger King had no knowledge or reason to know Eastwood would physically assault Plaintiff. Just as throwing the customer out of the bar was not sufficient to create foreseeability in Bullard, a customer blowing his horn and yelling in his car was not sufficient to create foreseeability in this case. Both Bullard and this case involve instantaneous acts by third parties which could not have been reasonably anticipated and which left no time to react to prevent them.

Likewise, in Munn v. Hardee’s Food Sys., 266 S.E.2d 414 (S.C. 1980), the Supreme Court held that Hardee’s restaurant was entitled to judgment as a matter of law in a case involving a criminal attack. In Munn, the plaintiff was fatally injured when

he was stabbed in the Hardee's parking lot. Id. at 414. In finding in favor of the restaurant, the Court noted that the plaintiff and assailant "met under circumstances of a spontaneous nature" and that the incident was "momentary and impulsive." Id. at 415. The restaurant owed no duty to the plaintiff because the incident happened "spontaneously leaving no time for [Hardee's] to prevent something [it] had no knowledge or reason to know would happen." Id.; Bullard, 324 S.E.2d at 61 (citing Munn, 266 S.E.2d 414). Thus, just as in this case, the only connection between the Munn incident and the restaurant was that the attack happened to occur on the restaurant's premises. This is not sufficient to create a legal duty on the part of the restaurant.

Therefore, summary judgment should be affirmed because Burger King owed no legal duty to Plaintiff. Callen, Miletic, Bullard, and Munn demonstrate that the attack was not legally foreseeable by Burger King. As set forth in detail above, Burger King saw nothing more than several minutes of a patron blowing his horn and yelling prior to the attack. Burger King witnessed no criminal acts, threats of criminal acts, or any otherwise unusual or threatening behavior prior to the abrupt, unanticipated assault. This unprecedented attack was not foreseeable to either Plaintiff or Burger King. It was clearly the result of an unstable, unpredictable person who thought he was in a "war" and later showed no remorse. No one could have predicted that this unfortunate incident would occur. Just as in Callen, once Plaintiff and Eastwood exited their vehicles, the attack occurred suddenly and without warning, leaving no time for Burger King to react in a way that would have prevented the attack. Thus, the Court should follow the precedent set forth in the above-cited cases and affirm summary judgment.

B. Burger King Owed No Duty to Plaintiff Because Eastwood's Attack Was Not Foreseeable, as Burger King Is Not a Business That Attracts Crime, Is Not Located in a Dangerous Area, and Did Not Have Notice of Relevant Prior Crimes.

The Court should affirm the trial court's Order granting summary judgment because Burger King is not a business that attracts crime, is not located in a dangerous area, and did not have notice of similar prior incidents.

The subject Burger King is not located in a high-crime area. In support of his contention that Burger King was on notice of relevant prior incidents, Plaintiff first points to a crime grid concerning the half mile radius surrounding the Burger King location. The grid apparently sets forth a tally of crimes in the area from 2002-2012. However, Plaintiff's own expert testified the grid cannot be relied upon because he has not studied the area statistics as compared with other parts of Charleston County. (R. at 526, p. 113:1-115:17). The expert further stated that the statistics in the grid are "off-subject" because it is too "onerous" and "burdensome" to expect a business owner to be aware of everything going on in the area. (R. at 511, p. 53:2-13; R. at 526, p. 113:1-115:17). According to Plaintiff's own expert, the statistics in the grid in this case are an "aside" and are not relevant to the analysis of whether the incident at issue was legally foreseeable by Burger King because the focus should be on the Burger King location itself (R. at 511, p. 53:2-13; R. at 526, p. 113:1-115:17). Additionally, even if the Court believes that the statistics in the grid could be relevant in some way, Plaintiff's expert concedes that there is no evidence in the record that shows that the area surrounding this Burger King is any more dangerous than other portions of Charleston County, the State of South Carolina, or anywhere else. (R. at 511, p. 53:2-13; R. at 526, p. 113:1-115:17). Therefore, Plaintiff's assertion that the attack was foreseeable because of

crimes in the surrounding area is not supported by the evidence in the record or the testimony of his own expert.

Additionally, Burger King is not the type of business whose mode of operation is to attract or provide a climate for crime. Burger King is simply a fast food restaurant. This issue was addressed by the Court of Appeals in Callen v. Cale Yarborough Enters., 442 S.E.2d 216 (S.C. Ct. App. 1994). In affirming summary judgment for a fast food establishment in a case involving an assault in the drive-thru, the Callen Court held, "Hardee's is a fast food restaurant which serves no alcohol. It certainly does not fit the description of an operation which attracts or provides a climate for crime." 442 S.E.2d at 218. Burger King is a fast food establishment which is undoubtedly very similar to Hardee's. Thus, under Callen, as a matter of law, Burger King is not the type of business that attracts or provides a climate for crime. As a result, Plaintiff cannot establish foreseeability in this manner.

Likewise, Plaintiff is unable to establish foreseeability on the basis of prior criminal incidents at the subject Burger King. Deputy Muirhead testified that he never responded to any violent crimes or felonies at this Burger King. (R. at 540, p. 14:2-16; R. at 542, p. 22:8-20). Likewise, at his deposition, Plaintiff's expert testified that he was not aware of any assaults or similar crimes in this specific drive-thru. (R. at 525, p. 111:10-112:1). He testified that he reviewed documents and incident reports from local law enforcement, none of which revealed any similar incidents. (R. at 525, p. 111:10-112:1; R. at 535, p. 152:9-20). Yet, in his Brief, Plaintiff attempts to demonstrate foreseeability by pointing to one armed robbery in the Burger King drive-thru. However, Plaintiff fails to mention that the armed robbery occurred in 2004 – approximately 4

years prior to the incident at issue in this case. (R. at 157). One incident in the drive-thru that occurred in 2004 cannot reasonably establish foreseeability for this particular incident. Indeed, crimes unfortunately occur at many businesses at one time or another and it is unreasonable to expect that a single event several years prior should even arguably put that business on “notice” so as to create a legal duty. Other prior incidents at the subject Burger King include car accidents, petit larceny, forgery, property damage, minor disturbances, and the like – none of which are violent crimes and none of which are similar to this incident. (R. at 141-157). Thus, the record reveals that the 2004 armed robbery was the one and only prior incident at this Burger King that is even conceivably similar to the incident at issue. This is not sufficient to establish notice or foreseeability. See, e.g., Miletic, 529 S.E.2d 68 (S.C. Ct. App. 2000). In Miletic, in affirming summary judgment for Wal-Mart, the Court of Appeals noted that in the 2 years prior to the incident, the only crime involving Wal-Mart was larceny – no assaults or otherwise violent crimes. Id. at 70-71. That is the very situation in this case. In the 2 years prior to this incident, no assaults or violent crimes occurred at the subject Burger King. Therefore, the Court should affirm summary judgment because South Carolina case law and the record demonstrate that the subject Burger King is not a business that attracts crime, is not located in a dangerous area, and did not have notice of similar prior incidents.

Additionally, Plaintiff’s assertions that Burger King failed to institute “economically feasible security measures” is without basis. First, the issue of whether Burger King had such security measures in place is only addressed when and if Plaintiff first establishes that the crime was legally foreseeable. As discussed in detail above, the attack in this

case was not foreseeable. Furthermore, Plaintiff's expert failed to offer any opinion that extra security measures such as security guards, extra lighting, fences, security cameras, locks, or the like would have prevented this incident. In his Brief, Plaintiff asserts that Burger King should have hired an off duty police officer or security guard. However, Plaintiff's own expert disagrees with this position. (R. at 528, p. 122:6-124:15). Specifically, Dr. Kirkham testified, "[W]e don't have enough information right now to know who and how and when security or off-duty police should be deployed there. May not need any." (R. at 528, p. 122:6-124:15). The only opinion offered on this issue is that Burger King failed to properly train their employees as to how to handle situations such as this one. First, Manager Kimberly Jones testified that she went through manager training. (R. at 479-80, p. 14:1-19:20). This training included instruction to contact police in an emergency. (R. at 547-50, 698, 699). Moreover, the record establishes that Burger King handled this isolated, spontaneous, unforeseeable act appropriately. Burger King witnessed nothing more than several minutes of a patron honking his horn and yelling – acts which did not in any way indicate that a physical assault was about to occur. As soon as the "quick" and "totally unexpected" attack occurred, Burger King called the police. Regardless of Kimberly Jones' training and experience in such matters, she acted as quickly and as best as she could under these unusual circumstances. It is not reasonable to require an employee to call the police each and every time a patron blows his or her horn and/or yells while in the drive-thru. It is likewise unreasonable to expect law enforcement to respond to such calls. At the moment the incident escalated, Jones called the police. Therefore, summary judgment should be affirmed because Plaintiff has failed to offer any evidence that Burger King

should have expended additional resources on security measures or that Burger King's security measures were otherwise unreasonable. See Bass v. Gopal, 716 S.E.2d 910, 917 (S.C. 2011) (affirming summary judgment where appellant failed to provide "any evidence that the business's security measures were unreasonable given the risk of criminal activity on the property").

C. There Was No Dangerous Condition on Burger King's Premises at the Time of the Incident.

The embankment adjacent to the drive-thru lane was not a dangerous or hazardous condition. "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, 375 (S.C. Ct. App. 2006) (quoting Milligan v. Winn-Dixie Raleigh, 254 S.E.2d 798, 799 (S.C. 1979). There is no admissible testimony in the record that the embankment created a dangerous condition. Plaintiff's expert is a criminologist with a background in law enforcement. (R. at 499-502, p. 6:5-17:22). His training and experience relates solely to crime prevention and investigation. (R. at 499-502, p. 6:5-17:22). Plaintiff has failed to retain an expert in engineering, architecture, or a similar field who is qualified to offer opinions as to building codes, industry standards, or other issues that pertain to whether the embankment was a dangerous condition. Additionally, the record lacks any evidence that the embankment violated any such codes or standards.

The crux of Plaintiff's argument on this issue appears to be that, once a vehicle enters the drive-thru, it cannot exit the drive-thru lane because of the embankment on the right. First, as noted above, there is no evidence that the design of the drive-thru violated an applicable code or standard or was otherwise improper from an engineering

or architectural standpoint. Many drive-thru lanes across the country are designed in this manner. Moreover, the criminal attack at issue occurred after Plaintiff had already received his food from the drive-thru window. Thus, at the time Plaintiff got out of his vehicle and was attacked, he was first in line in the drive-thru – meaning that he could have exited the drive-thru lane prior to the attack if he chose to do so. Once a vehicle is first in line, the embankment is no longer an issue and there is no impediment to leaving the drive-thru. (R. at 461, p. 40:9-16; R. at 462, p. 42:5-19; R. at 462-63, p. 44:20-46:23; R. at 494, p. 76:4-10; R. at 495, p. 79:4-10). In other words, after being rear-ended by Eastwood, Plaintiff could have simply left the Burger King premises or pulled into the parking lot area of the Burger King. Thus, despite Plaintiff's assertions, at the time of the attack, Plaintiff was not prevented from leaving Burger King and was free to depart the premises. Accordingly, summary judgment should be affirmed because there was no dangerous condition on the premises which proximately caused the incident.

D. Plaintiff Failed to Properly Preserve for Appeal the Issue of Whether Burger King Deviated from Its Own Internal Policies and Procedures.

First and foremost, Plaintiff has failed to properly preserve this issue for appeal. "An appellate court will not consider issues on appeal which have not been preserved for appellate review." Ulmer v. Ulmer, 632 S.E.2d 858, 858 (S.C. 2006). "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 529 S.E.2d 543, 546 (S.C. 2000). Here, issues concerning whether Burger King failed to follow its own policies and procedures were never raised by Plaintiff at the summary judgment stage or in his Rule 59 Motion for Reconsideration.

Thus, the issue was not properly preserved on appeal because it was never raised to and ruled upon by the trial court.

Assuming *arguendo* that the issue was properly preserved, South Carolina case law demonstrates that a company cannot be held liable for deviating from its own internal policies; rather, such evidence is simply relevant on the issue of reasonableness of the company's actions. Caldwell v. K-Mart Corp., 410 S.E.2d 21, 31-32 (S.C. Ct. App. 1991). In other words, failure to comply with internal guidelines does not constitute unreasonableness per se, but can be used as evidence for whatever weight the jury wishes to give it. Id. (citing Luckie v. Piggly-Wiggly Southern Inc., 325 S.E.2d 844 (Ga. 1984)). Thus, the focus of the inquiry in a negligence action is always whether the defendant acted reasonably under the circumstances. However, the plaintiff must first make a showing that the defendant owed a legal duty to the plaintiff. If there is no legal duty, the inquiry stops there. Issues concerning reasonableness come into play only after the plaintiff establishes the existence of a legal duty. As set forth in detail above, Burger King owed no legal duty to Plaintiff because the incident at issue was not legally foreseeable.

Additionally, the record demonstrates that Burger King did follow its own internal procedures in this instance. Burger King training materials instruct managers to "Contact police in an emergency" and to "Contact the police whenever the safety of your Guests or staff is threatened." (R. at 547-50, 698, 699). That is precisely what Manger Kimberly Jones did. Jones called 911 at the moment an "emergency" arose. Prior to the "quick" and "totally unexpected" assault, Jones merely observed a patron honking his horn and yelling – behavior which does not rise to the level of an "emergency." Prior to

the attack, Jones saw no threatening behavior, criminal behavior, or threats of such behavior. This is supported by Plaintiff's own testimony that, at the time Eastwood got out his vehicle, Plaintiff "had no idea what he was going to do." (R. at 470, p. 76:3-7). Once Plaintiff and Eastwood got out of their vehicles, the attack occurred within moments and Jones complied with Burger King's internal policies by calling the police as soon as an emergency arose.

Thus, Jones' actions as manager on the night of the incident did not deviate from Burger King's internal guidelines. Moreover, the issue of whether Burger King deviated from these guidelines was not properly preserved for appeal.

E. The Trial Court Properly Ruled on Burger King's Motion for Summary Judgment.

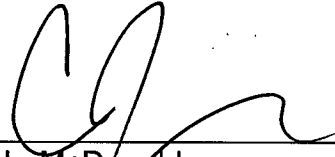
The trial court's Form 4 Order granting summary judgment was proper. The Supreme Court addressed this issue in Woodson v. DLI Props., LLC, 753 S.E.2d 428 (S.C. 2014), wherein the Court affirmed summary judgment and held that the trial court's form order was proper. In so holding, the Court stated that, under Rule 52, "findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56[.]" Id. at 433. The Woodson Court overruled its prior holdings that required written orders identifying the facts and legal analysis relied on by the trial judge and held that form orders in summary judgment motions are entirely appropriate. See Bowen v. Lee Process Sys. Co., 536 S.E.2d 86, overruled by, Woodson, 753 S.E.2d. at 433. Thus, summary judgment was properly granted in this case and should be upheld.

CONCLUSION

Based upon the foregoing, the Court should affirm summary judgment because Burger King owed no legal duty to Plaintiff for this isolated, spontaneous, and unforeseeable criminal attack.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case Number: 2014-000338

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-4348

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SC Court of Appeals

Thomas Easterling.....Appellant,

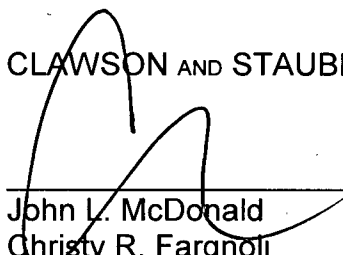
v.

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

CERTIFICATE OF COMPLIANCE

I certify that I have complied with Rule 211(b) of the South Carolina Appellate Court Rules.

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