THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Opinion No. 4576 (S.C. Ct. App. filed July 1, 2009)

Case No. 2004-CP-38-1164

Gerald Bass, Petitioner,

v.

Gopal, Inc. and
Super 8 Motels, Inc., Respondent.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court of Appeals fully examine all of the evidence and the duty of care as established by expert testimony or did it rely solely upon the evidence of prior criminal activity to reach its conclusions?

2. Did the Court of Appeals ignore the evidence of negligence of the innkeeper when considering the evidence of negligence of the Plaintiff and whether it exceeded that of the innkeeper.

STATEMENT OF THE CASE

This action was filed in Orangeburg County against the Defendants[1] alleging negligence on their part by failing to provide appropriate security at the hotel. The proximate result alleged was a gun shot wound to the Plaintiff. [App, pp 19-23] After discovery was taken, the Defendants moved for Summary Judgment alleging no duty was owed to the Plaintiff and that the Plaintiff's negligence exceeded any negligence of the Defendants as a matter of law. [App, pp 34-41] The two primary issues were the evidence presented with regard to prior criminal activity in the area and whether the negligence of the Plaintiff in stepping outside the room exceeded any negligence of the Defendant. The Court heard the Summary Judgment Motion and granted it on these grounds. [App, pp 4-14]. Subsequently, the Plaintiff filed a Motion to Alter or Amend supported by an affidavit of an expert witness. [App, pp 71-96] The Court denied that Motion without any hearing. [App, p 15] The Court of Appeals affirmed the judgment of the circuit court. Bass vs Gopal, Inc. and Super 8 Motels, Inc., 384 S.C. 238, 680 S.E.2d 917 (S.C.App. 2009). [App pp 238-245] Petitioner sought a writ of certiorari to review that decision, which was granted by this Court.

[1] The issues involving the Franchisor have been abandoned and the Petition for Certiorari is limited solely to issues regarding Gopal, Inc.

FACTS

The Plaintiff and his supervisor were guests at a Super 8 hotel operated by Gopal, Inc. which operated the hotel as a franchisee for Super 8 Hotels, Inc. On the night in question, the Plaintiff had been at a local convenience store. Later in the evening, someone knocked on his door at the hotel. He did not see anyone at the door. The door was equipped with a peep hole. Additionally, the room had a plate glass window and was an exterior corridor hotel. [App., pp 108-130].

There were two more knocks at the door. At no time did the Plaintiff or his roommate call the front desk or any third party. The third time the door was knocked upon, the Plaintiff and his roommate opened the door. He recognized the man as someone who had been at the convenience store earlier. His roommate stepped back inside. The man attempted to rob the Plaintiff and the Plaintiff told him he would not give him any money. The man shot the Plaintiff in the leg. [App, pp 125, l 8 - 130, l 21].

This event occurred in the evening. The hotel did not have a security guard, any security cameras or other security measures beyond the dead bolt lock and the peep hole. No one from the hotel made any rounds this evening.

The Plaintiff submitted the affidavit of an expert witness who testified the measures were insufficient for the security of the hotel as it was in a "high crime" area. However, the statistics did post-date the incident in question. [App pp 45-47, 162-188] The Defendant submitted deposition testimony regarding the area and the answers to hypothetical questions by the expert. [App. 141-188]. In support of the Motion to Alter or Amend, the Plaintiff submitted a new affidavit explaining the statistics prior to the date of the incident were not available. [App. 74-95].

There were other statistics presented concerning the crime in the area.

The Court granted the Motion for Summary Judgment to the Defendant. [App. 4-14]. It later denied the Rule 59 Motion of the Plaintiff. [App p 15]. This case was appealed to the Court of Appeals, which after oral argument affirmed the lower court. [App. 238-245]. A Motion for Reconsideration was made and it also was denied. [App pp 246-248, 255]. The Petitioner file a Writ of Certiorai to the Court of Appeals with this Court, which was granted on September 23, 2010.

ARGUMENTS

I. The Court of Appeals failed to give consideration to the complete evidence and duty of care established by expert testimony and relied solely on the lack of evidence of prior criminal activity

In its opinion the Court focused on the evidence of other crimes and found this evidence did not exist, was not presented, or was not specific enough with regard to the actual location. However, when establishing the duty owed by the innkeeper, the testimony of the experts was that the innkeeper failed to provide the appropriate level of security. [App, pp 46, 76] The experts' testimony by affidavit stated that in this location in this county, the innkeeper should have installed fixed or roving cameras and should have had security guards on duty. This was especially true because of the exterior hallway which granted the general public access to the room. [App, pp 45-47]. Further, the second expert witnesses affidavit established that he was familiar with the area from his experience as a law enforcement officer and that it was a high crime area which was confirmed by the statistics for the entire county. [App pp 74-96]. The experts also testified that the dead bolt and peep hole were not sufficient security measures. [App pp 45-47, 74-96]. By

ignoring this testimony and evidence from the experts, the Court essentially is resurrecting the "first bite" rule and allowing an innkeeper to avoid any liability if no prior crime occurred in the area, no matter how deficient the security at an inn may be. Thus, there is too much emphasis on the existence of prior crimes and not on the entire evidence before the Court. This is especially true in light of the fact that the statistics for this area were lost by the City of Orangeburg and were not available to be presented to the Court. [App, pp 74-95].

The trial and Court of Appeals ruled there was no duty owed by the Defendant to the Plaintiff and relied upon the line of cases including Miletic v Wal-Mart Stores, Inc., 3396 SC 327, 529 SE2d 68 (Ct. App. 2000); Callen vs. Cale Yarborough Enterprises, 314 SC 204, 442 SE2d 216 (Ct. App. 1994); and Shipes vs. Piggly Wiggly St. Andrews, Inc., 269 SC 479, 238 SE2d 167 (1967). The Callen case involved a criminal attack at a restaurant and the Miletic and Shipes cases involved criminal attacks at retail establishments. The Appellant courts held these attacks were not foreseeable and therefore no duty arose. The Court placed emphasis on the fact these facilities did not have a record of such criminal actions taking place and were not the type of businesses which attract a climate of crime. The cases explained their reasoning by stating the proprietors should have some reason to know such acts might occur.

On the other hand, cases which did find liability for the criminal actions of a third party involved a hotel, a bowling alley and a bar. In Daniel vs. Days Inns of America, Inc., 292 SC 291, 356 SE2d 129 (Ct. App. 1987), liability was found in a split opinion with the basic agreement being that even though a innkeeper is not an insurer of a guest's safety, the innkeeper can be liable for actions of third parties. The two judges differed slightly in their reasoning, Justice Cureton stated that "Although a proprietor of a hotel is not an insurer of the safety of his guests against improper acts of other guests or third persons, he is bound to exercise reasonable care in this

respect for their safety, and may be held liable on grounds of negligence for failure to do so." Id. at 296. The expert's opinion was similar to that expressed in this case as he testified:

he had reviewed the crime statistics for Anderson County and the State for 1983 and stated that the

> County has a very high rate of serious crime such as murder and rape. He further stated there had been incidents of thefts, vandalisms, domestic disturbances and armed robbery on the hotel's premises. He concluded that, based on the above incidents, the hotel "should have been placed on notice that they had security problems and that they should have taken steps to provide adequate and reasonable security for the protection of its premises.

Id. at 297-8.[2] The question is whether there was sufficient evidence to place the Owner on notice and to create a duty to take some steps to protect his guests. If so, should he have taken more specific steps which might have prevented this attack from occurring. The trial and appellant courts found that there was not sufficient evidence. However, both of these rulings are tied to the argument that no statistics were presented with regard to this particular location. However, as shown by Danny McDaniel's affidavit and exhibits, the statistics were unavailable through no fault of the Plaintiff. [App, pp 74-78]. Further, both experts gave testimony that additional security measures were necessary and the testimony of McDaniel was based on his personal knowledge from working in this area as a patrolman. [App p 76]. The ruling of the Court of

[2] While it is true the statistics were from a period of time after the assault and battery which occurred in this case. The affidavit submitted by the second expert in support of the Motion to Alter or Amend did contain other statistics. Further, that affidavit contained proof the statistics were not available because of a computer problem with the City of Orangeburg. Thus, the Plaintiff has met his duty with regard to the concerns expressed in the Miletic case as it is clear violent crimes often were carried out in the county of Orangeburg prior to this event.

Appeals essentially requires a plaintiff to present evidence of particular types of crime in this area before the innkeeper can be liable. This gives the innkeeper one free assault on his guests if such statistics are not available. The Plaintiff presented sufficient evidence of the failure of the innkeeper to undertake adequate security measures and the trial court ruling should have been reversed and remanded for trial against the innkeeper, Gopal, Inc.

The other cases were liability had been found involved bars, Jeffords vs Lesesne, 343 SC 656, 541 SE2d 847 (Ct. App. 2000) and Watts vs. Metro Security Agency, 346 SC 235, 550 SE2d 869 (Ct. App. 2001), a bowling alley which served beer, Dallon vs. Golden Lanes, Inc. 320 SC 534, 466 SE2d 368 (Ct. App. 1996); and a auditorium where beer was served, Martin vs Greenville Memorial Auditorium, 301 SC 242, 391 SE2d 546 (1990). When the analysis of these cases is boiled down to its essential element, it appears the Court gave consideration to the nature of the activity at the location and whether it created any form of knowledge to the responsible party that some type of accident or event of injury could occur.

The trial court failed to take into account the difference between a Wal-Mart and a hotel. A visit to Wal-Mart is a short term matter which does not require entrusting your safety to a third party overnight. At a hotel, one must entrust the owner to ensure no preventable injury or attack could occur, especially since one usually spends some time asleep when at a hotel. The opinion of the expert was based upon the nature of the building, the inherent risks and the ease with which cameras could have been installed to monitor the situation and enabled the owner to detect intruders. The Court did not take into account there was no lobby which could be monitored by the night clerk and simply left the exterior halls open to any intruder.[3]

[3] The trial court appears to rely upon the fact the Plaintiff felt "safe" at the hotel. Of course, if he had not felt safe, and continued to stay there, then it would have been evidence of his own negligence. This recital is of no consequence and it is error to rely upon the perception of the

II. The Court ignored the evidence of negligence by the innkeeper when determining that Bass' negligence exceeded that of the Innkeeper.

First, the Court held there was no evidence of a breach of duty of care. As stated above, the affidavits of the two expert witnesses stated that the Innkeeper failed to provide adequate security measures and should have know of the risks to its guests. This evidence was completely discounted because of the lack of crime statistics for this area. As argued above, too much emphasis is placed on the crime statistics and not on the totality of the evidence. Second, the appellant court held that the sole reasonable inference was that the Plaintiff's negligence exceeded fifty percent and the Defendant was entitled to judgment as a matter of law.

Mr. Gillens affidavit specifically addresses these issues and states that roving and fixed cameras and security personnel were required to provide adequate protection. He also noted that the exterior hallways added risk of such an attack taking place. As the facts indicate, the assailant knocked on the door three times. Had the hotel simply had cameras the front desk would have had adequate time to notice a person who was not a guest was wandering the premises knocking on doors and posed some kind of threat. If security personnel were present, they could have taken appropriate protective action and the police could have been called as well. [App, pp 45-47]. The expert testimony of both Gillens and McDaniel presents evidence of the negligence of the innkeeper which is ignored by the Court of Appeals when it states that no probative evidence of a breach of duty was presented. [App, pp 45-57, 72-95]. Further, the Plaintiff did not open the door, his roommate did. [App, pp 127-128]. They both stepped outside and the Plaintiff asked the man to stop knocking on the door. There was no gun presented or other reason for him to have fear he would be shot. [App, pp 127-130]. He never saw a gun until after he was shot. [App, p

guest.

130]. This was the third time the individual has knocked on the door and the Plaintiff did not open the door, his roommate did. He merely was attempting to request that the person stop knocking on the door as they had to arise at 5:15 AM the next morning and did not perceive any threat or warning until after he was shot. In the totality of the circumstances the behavior of the Plaintiff was reasonable and the addition of some appropriate cameras and one security person could have prevented this attack and was a breach of duty owed to the Plaintiff. The Court of Appeals and trial court did not undertake a full analysis of the various duties of the parties.

The court's analysis on this issue is fundamentally flawed. Basically, the Court decided that the Plaintiff should never have left the "safety" of his room. And, it then concludes based upon the cases of Bloom v Ravoira, 339 SC 417, 529 SE2d 710 (2000) and Hopson vs Clary, 3212 SC 312, 468 SE2d 305 (Ct. App. 1996) that this evidence lead only to an inference that Plaintiff's negligence was greater than the potential negligence of the Defendant. This reasoning is unsound. Further as noted in the Bloom case, "We note that our decision is no departure from the rule that summary judgment is a "drastic remedy" which should be "cautiously invoked." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citations omitted)." And further, the Court noted "Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Id. pp

421-425. This evidence was viewed by the Court in a light most favorable to the Defendant, not the Plaintiff.

First, the Bloom case is an obvious situation where someone stepped from a blind spot before two cars into the path of a car and created an unavoidable accident. Here, the third party had knocked on the door three times. There was no evidence that the assailant had a gun or intended any wrongful conduct. The Plaintiff had seen the man earlier at a convenience store. It is not unreasonable to step into the hall and find out what was the purpose of the repeated knocks, than to invite him into the room. In hind sight, this may seem unreasonable, but that is why it is a jury issue as to wether or not his actions were negligent, or whether they were more negligent than the hotel. After all, the hotel could have prevented the assailant from being on the grounds with a security guard and some cameras. Further, there was no security guard on the premises to call. Finally, the large plate glass window could easily have been breached by the assailant.

CONCLUSION

In conclusion, the Petitioner requests that this Court give full consideration to all of the expert testimony and the evidence of negligence and a breach of duty by the innkeeper and reverse the Court of Appeals and the Trial Court and remand the matter for a trial on the merits.

Respectfully submitted, this the ___ day of December, 2010, at Orangeburg, South Carolina.

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