THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Diane S. Goodstein, Circuit Court Judge

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

Gerald Bass, ... Petitioner,

v.

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

of whom Gopal, Inc. is, ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a premises liability case arising from a crime that occurred on September 28, 1999, at a Super 8 Motel located in Orangeburg, South Carolina. On that date, the Petitioner Gerald Bass was a guest at the motel, which was owned and operated by the Respondent Gopal, Inc., when he was shot by an unidentified assailant.

Bass filed a complaint alleging a negligence cause of action against both Gopal, Inc. and Super 8 Motels, Inc. ("SMI").[1] Bass alleged that Gopal was negligent in failing to provide certain security measures such as a uniformed security guard and an electronic surveillance system on the premises.

Gopal and SMI filed motions for summary judgment which were heard by Circuit Court Judge Diane S. Goodstein on January 4, 2006. Judge Goodstein entered an order on May 1, 2006, granting both Gopal and SMI's motions for summary judgment. She ruled that the Defendants did not owe any legal duty to Bass because they had no knowledge of prior crimes at the motel and that SMI did not own or operate the motel because it was only the franchisor. Judge Goodstein further ruled that Bass' negligence exceeded the negligence of the Defendants, if any, as a matter of law.

[1] The appeal against Super 8 Motels, Inc. has been dismissed. This was confirmed in the October 20, 2009 letter from the Supreme Court Clerk of Court.

Bass subsequently filed a Rule 59(e) motion and submitted the affidavit of Danny W. McDaniel in support of his motion. McDaniel had not been identified as a lay or expert witness during discovery or prior to the entry of summary judgment. On June 23, 2006, Judge Goodstein denied Bass' Rule 59(e) motion. (R. 15).

Subsequently, Bass filed an appeal to the Court of Appeals. On July 1, 2009, the Court of Appeals issued a unanimous decision affirming summary judgment for both Gopal and SMI. The Court of Appeals ruled as follows:

> All of the evidence with any probative value indicates that the security measures that Gopal already had in place were adequate. Bass' own expert witness admitted that the motel's perimeter lighting was appropriate; the motel's room doors were appropriate and met statutory requirements; and Bass would have stayed safe in his motel room. Under all the circumstances, Gopal provided reasonable protection for its guests against injuries from criminal acts.

Bass v. Gopal, Inc., 384 S.C. 238, 680 S.E.2d 917, 921 (Ct. App. 2009). The Court of Appeals also affirmed summary judgment on the comparative negligence defense. The Court explained that "the only reasonable inference that may be drawn from the evidence is that Bass' negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence. Therefore, Bass' comparative negligence was a proper ground on which to grant summary judgment to Gopal and SMI." 680 S.E.2d at 922.

Bass filed a petition for rehearing, which was subsequently denied by the Court of Appeals. Thereafter, Bass filed a petition for writ of certiorari, which this Court has granted.

STATEMENT OF FACTS

On September 28, 1999, Gerald Bass was a guest at a Super 8 Motel located in Orangeburg, South Carolina, which was owned and operated by Gopal, Inc. Bass and his roommate, Wayne Kinlaw, who were residents of Lumberton, North Carolina, were in Orangeburg on business. They had been renting a motel room at the Super 8 Motel for a number of weeks -- since June or July 1999, while performing refrigeration work at a local Bi-Lo grocery store. (R. 108-110, 114-115).

On September 28, 1999, Bass was secure in his room behind a locked door at approximately 10:00 p.m., when he heard a knock on his door. (R. 115-116, 119). Bass and his roommate did not see anyone outside their door and did not answer the door. (R. 116, 118). After about two or three minutes, there was another knock. (R. 119). They looked through the window and saw a black male, who is the same person that Bass had had an unusual encounter with earlier that evening at a convenience store across the street. Bass and Kinlaw did not open the door. (R. 116, 120, 126). Likewise, they did not alert the front desk nor contact law enforcement. (R. 126). The same individual knocked a third time about ten or fifteen minutes later. On this occasion, Bass and Kinlaw just opened the door and stepped outside without even looking first who was there. (R. 126-127). Kinlaw returned to the room, but Bass spoke to the individual who demanded his money. When Bass refused, the individual shot him in the leg with a small caliber weapon. (R. 127-129).

As indicated, Bass had been staying at this same motel for a number of weeks continuously (except on weekends) and had had no problems or concerns about his safety. (R. 109-113). He did not witness any criminal conduct during that time – either at the hotel or in its general vicinity. (R. 124). During his stay, he had no concern that the motel was located in anything other than a good neighborhood or part of town. (R. 123).

In addition, the owner and operator of the motel, Hitesh Patel, testified that he had owned the motel since January 1998, and was not aware of any criminal activity at the motel prior to the shooting involving Bass. (R. 132, 139-140). Patel further testified that he was not aware of any criminal complaints made by anyone in the general area of the motel. (R. 140).

ARGUMENTS

I. The Court of Appeals ruled correctly that Gopal provided reasonable security measures in light of the absence of evidence of prior criminal activity at or near the motel.

The Petitioner Bass alleges that Gopal was negligent in failing to protect him from the criminal acts of the assailant by implementing certain security measures. The Court of Appeals correctly concluded, however, that "Gopal provided reasonable protection for its guests against injuries from criminal acts." *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917, 921 (Ct. App. 2009).

Specifically, the Court of Appeals found that "South Carolina case law imposes a duty on innkeepers to provide to its guests reasonable protection against injuries from criminal acts, and the actual amount of protection required depends on [the] amount and types of criminal activity that have previously occurred on the premises." 680 S.E.2d at 920, n.4, *citing Daniel v. Days Inn of America, Inc.*, 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987). The Court of Appeals further explained that "[w]hile an innkeeper is not the insurer of safety for his guests, he owes to his guests the duty of exercising reasonable care to maintain in a reasonably safe condition those parts of his premises which a guest may be expected to use." 680 S.E.2d at 920, *citing Courtney v. Remler*, 566 F. Supp. 1225 (D.S.C. 1983). *See also, Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp. 2d 653 (D.S.C. 2005).

In applying the standard from these cases, it is clear that Gopal is entitled to summary judgment. In his brief, Bass contends that the Court of Appeals failed to consider the opinions of his expert witnesses. That is not the case. In response to a hypothetical, Bass' own expert witness, Harold Gillens, agreed that, in the absence of criminal activity *prior to September 28, 1999*, it was reasonable for Gopal *not* to provide the security measures he proposed. (R. 159-160). Gillens testified: "I don't believe that I would be bothered if there wasn't, not at all, because I would now say that management had no expectation or knowledge that anything like that would have occurred." (R. 160). Gillens earlier explained his opinion on foreseeability:

> I think my whole opinion to the case and why I think it was foreseeable that an incident would have occurred, whether it was the incident of him getting shot or the next incident of someone else -- something happening in the parking lot, was because I believe in my professional opinion that with given prior incident that occurs inside that zone, that management -- it was reasonably foreseeable that management knew these things were occurring and the possibility exists for it to occur again. *So my whole conclusion is based on if nothing happened and this is first time, there wasn't enough data for him to say that he really needed to spend a bunch of money on a full-time security guard or part-time, or train his employees to do a guard tour, or all those things,* but given all the data that was collected, that I collected, and prior incidents, it led me to believe that there was enough data there to say that such an incident was foreseeable.

(R. 155-156). (Emphasis added). Thus, Gillens opined that, if there was no evidence of criminal activity at the subject motel prior to September 28, 1999, he

did not expect management to spend money on the enhanced security measures, including a security guard or a surveillance system.[2]

The evidence, however, demonstrates without dispute that Gillens was mistaken with respect to the history of criminal activity at the Super 8 Motel. The data on which Gillens relied was *exclusively* post-incident. He relied on data supplied by the Orangeburg Public Safety Department of incidents taking place from January 1, 2000 through October 15, 2004. (R. 145-146, 179-183). Gillens failed to identify any incidents occurring *prior to* September 28, 1999, which he agreed was the probative time period.

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[2] Bass contends that his two expert witnesses testified by affidavit that "the innkeeper should have installed fixed or roving cameras and should have had security guards on duty." *See*, Brief of Petitioner, p. 3. Bass is mistaken. Even in his affidavit, Harold Gillens opined that such additional security measures would only be needed "based upon the knowledge of prior crimes." (R. 46). Gillen's affidavit testimony may be read as not contradicting his earlier deposition testimony where he stated in no uncertain terms – as discussed above – that an innkeeper is not required to implement such measures as electronic surveillance and guards in the absence of a history of criminal activity on the premises. Nonetheless, to the extent that Gillens' affidavit does contradict the opinions stated in his earlier deposition, it is appropriate and justified to disregard the subsequent contradictory testimony. *See*, *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 633 (2004) (a court may disregard a subsequent affidavit as a sham -- as not creating an issue of fact for purposes of summary judgment -- if the subsequent affidavit contradicts a party's own prior sworn statement). The Court of Appeals therefore correctly construed Gillens as opining that "if no significant criminal activity had occurred at the motel for a period of time prior to Bass' shooting, then the motel's management would have no reason to expect the shooting to occur or to spend money to enhance security." *Bass*, 680 S.E.2d at 921.

As for the opinions of the other expert, Danny W. McDaniel, he was not presented as a security expert but rather "was retained by the attorneys for the Plaintiff to attempt to obtain records regarding crime statistics in the City of Orangeburg prior to the 2000 calendar year." (R. 75). McDaniel did not offer his own opinions on security measures to be taken at the motel. He simply "agreed" with Harold Gillens. (R. 76). He never offered the opinion that Gopal was required to have electronic surveillance equipment or security guards.

Likewise, in responses to interrogatories, Bass produced absolutely no evidence of any criminal activity occurring *prior to* September 28, 1999. *See*, Plaintiff's Responses to Defendants' Second Set of Interrogatories, dated March 24, 2005. (R. 189-190). In addition, Hitesh Patel, the owner and operator of Gopal, Inc., testified that he had owned the motel since January 1998, and was not aware of any criminal activity at the motel prior to the shooting involving Bass. (R. 132, 139-140). He likewise was unaware of criminal complaints made by others in the general area. (R. 140).

Gillens also testified that there are no industry standards for care governing security matters as adopted by the hospitality industry in South Carolina or elsewhere. (R. 142-144). Thus, there are no industry standards requiring that the motel in question have a security guard or electronic surveillance equipment in place.

Finally, Gillens conceded that the subject motel fully complied with all security requirements pursuant to South Carolina statutory law. S.C. Code Ann. § 45-1-90 requires that all motel rooms must be equipped with a locking system on guest rooms and a device, such as view port or side windows, that allows for sight outside the door without the necessity of opening the door. Bass' room complied with these statutory requirements. (R. 148-149).[3]

[3] Gillens further conceded both in his written report and in his testimony that the lighting in the motel's parking lot was adequate. (R. 147). Bass also agreed that he was able to

Thus, because there was no evidence of prior criminal activity at the motel, the Court of Appeals was correct in applying Gillens' own opinions and concluding that "the security measures that Gopal already had in place were adequate." *Bass*, 680 S.E.2d at 921.

In his brief, Bass suggests that the Court of Appeals adopted a "first bite" or "one free assault" rule. That is not the case. The Court of Appeals did not hold that the first crime occurring on a motel's premises can never be actionable regardless of the insufficiency of the security measures. Instead, the Court of Appeals applied the correct standard and treated the history of criminal activity at a motel as an important factor in determining the amount of protection that must be reasonably afforded the hotel's guests. If prior criminal history were not an appropriate consideration, an innkeeper would become the insurer of the safety of its guests, which it is not the law in South Carolina. In other words, an innkeeper would be compelled to adopt security measures that would otherwise not be needed under the circumstances. Clearly, the common law does not require every hotel or motel to have the enhanced security measures that Bass proposed. The statutory law certainly does not require it. Furthermore, Bass is conveniently ignoring that the Court of Appeals did apply the opinions of his very own security

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see outside the room and, without exiting the room, was able to discern the identity of the assailant and confirm that he was the individual encountered earlier at the convenience store. (R. 124-125).

expert who opined that, in the absence of a criminal history at that motel, he did not expect the motel management to provide the security measures he recommended.

Bass also suggests that the Court of Appeals did not consider the opinions of Danny McDaniel, who was not identified as a witness, let alone an expert witness, until *after* Judge Goodstein had already granted the summary judgment motions.[4] Bass first disclosed his second expert witness as part of his Rule 59(e) motion requesting the Circuit Court to alter or amend the judgment based on new evidence. The "new" evidence, however, was simply a new expert opinion, which Bass could have disclosed during discovery and before the Circuit Court entered summary judgment for Gopal. Thus, it would have been appropriate for the trial court and the Court of Appeals not to consider McDaniel's opinions. *See*, *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not").

The same is true for the "new" crime statistics attached to the McDaniel affidavit and addressed therein. Those crime statistics obtained from SLED were available long before the January 4, 2006 motion hearing and long before May 9,

[4] In his Rule 59(e) motion, Bass refers to McDaniel as a "new expert witness" retained "to obtain the evidence from SLED." *See*, Plaintiff's Motion to Alter or Amend Order, para. 7. (R. 72). Bass never presented any reason for the unavailability of McDaniel and/or his opinions prior to the January 4, 2006 motion hearing or the entry of judgment in this case.

2006, when the summary judgment order was entered. The crime statistics were from 1997 through 1999. Bass made no showing that such data was not available prior to January 4, 2006, and/or could not have been presented to the lower court at that time. The fact that Bass did not attempt to obtain such evidence prior to that date does not mean that it was not available.[5]

Nonetheless, as the Court of Appeals explained in footnote #5 of its opinion, the purported "new evidence" in the McDaniel affidavit does not create a genuine issue of material fact. The crime statistics submitted from SLED, as presented by

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[5] In addition, Rule 59(e) may not be used to present evidence that was available but not submitted prior to the entry of judgment. In other words, Rule 59(e) should not be used to supplement the record with otherwise available evidence after judgment is entered. Bass cannot cite any authority from the South Carolina appellate courts allowing for the supplementation of the summary judgment record (or the trial record) by means of a Rule 59(e) motion.

In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), this Court noted that the Rule 59(e) in the Federal Rules of Civil Procedure is "practically identical" to its state counterpart. 602 S.E.2d at 779. As a result, this Court has relied on federal case law in construing Rule 59(e), SCRCP. The federal courts have recognized that one of the limited purposes of Rule 59(e) is "to account for new evidence not available at trial" meaning not available prior to judgment. *See, Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). The federal courts thus impose a burden on the moving party to demonstrate that the new evidence was unavailable at the time that the trial court entered judgment. *Id*. The federal district court in *Nagle Industries, Inc. v. Ford Motor Co.*, 175 F.R.D. 251 (E.D. Mich. 1997), explained that a Rule 59(e) motion "should not be utilized to submit evidence which could have been previously submitted in the exercise of reasonable diligence." 175 F.R.D. at 254. The Eighth Circuit has held that "[a]rguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion." *Peters v. General Service Bureau, Inc.*, 277 F.3d 1051, 1057 (8th Cir. 2002). *See also, BP Amoco Co. v. Sun Oil Co.*, 200 F.Supp.2d 429, 432 (D. Del. 2002) ("a motion for reargument may not be used to supplement or enlarge the record on which the court made its initial decision").

Consequently, Rule 59(e) may not be used to supplement or enlarge the record on which the lower court made its decision. A Rule 59(e) motion may be used only to ask a lower court to reconsider a prior decision, but that reconsideration needs to be based on the same evidentiary record presented.

McDaniel, are for Orangeburg County as a whole and not for Gopal's motel or even the immediate vicinity of that motel. As the Court of Appeals noted, "the affidavit presents county statistics that do not raise a fact issue with respect to the specific location of the motel." *Bass*, 680 S.E.2d at 921, n.5. Contrary to any suggestion by Bass, the *entire county* cannot be considered a "high crime area" that requires every merchant and innkeeper in the county to employ the security measures at issue. Indeed, if Bass' argument were to prevail, *every merchant and innkeeper in Orangeburg County* (and any other county with similar crime statistics) would be required to invest in security personnel and/or surveillance equipment, regardless of the history of criminal activity at their location. Clearly, that is not the law in this State as such a ruling would make all merchants and innkeepers in Orangeburg County the insurers of the safety of their customers, which they are not under South Carolina law.

In sum, the Court of Appeals was correct in finding that there are no genuine issues of material fact so as to preclude summary judgment. As Gillens conceded, the security measures were adequate given the absence of a history of criminal activity at that location or in the immediate vicinity. Gillens agreed that a reasonable innkeeper under such circumstances was not required to provide enhanced security measures such as a security guard and electronic surveillance equipment. Therefore, summary judgment was justifiably and correctly affirmed by the Court of Appeals.

II. The Court of Appeals correctly ruled as a matter of law that the Petitioner's negligence claim is barred by the defense of comparative negligence.

As an alternative ruling granting summary judgment, Judge Goodstein ruled that Bass was comparatively negligent as a matter of law. As Judge Goodstein concluded, the evidence is not conflicting and gives rise to only one reasonable inference -- that Bass' negligence was greater than that of Gopal, if any. In affirming the Circuit Court, the Court of Appeals agreed that "the only reasonable inference that may be drawn from the evidence is that Bass' negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence." *Bass*, 680 S.E.2d at 922.

Recognizing that the comparison of the plaintiff's negligence with that of the defendant is typically a question for the jury, this Court in *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence even when viewed in a light favorable to the plaintiff demonstrated that the plaintiff was more than fifty percent negligent.[6]

[6] The *Bloom* Court also reaffirmed the decision in *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996). In *Hopson*, the Court of Appeals affirmed the trial court's grant

Like *Bloom*, the present case is appropriate for a judicial determination as a matter of law that Bass' degree of fault exceeds fifty percent. As the Court of Appeals concluded, there can be no reasonable inference which may be drawn from the evidence in this record that Bass' fault was fifty percent or less. This conclusion is clear and obvious based upon both admissions by Bass himself and the opinion of Bass' own security expert that Bass was at fault and should not have left the safety of his room.

Bass readily admits in his deposition testimony that he was safe while within his room, which is precisely where he was when the assailant first made contact. Bass observed, "I thought I was safe because I was inside the room." (R. 119). Indeed, he was safe. However, by voluntarily leaving the safety of his locked room and confronting the assailant, Bass subjected himself to the harm. Clearly and without reasonable dispute, Bass would not have been injured if he had remained in his locked room and sought assistance from the front desk or law enforcement. By leaving the safety of his room, Bass was negligent, and a reasonable jury would necessarily conclude that the degree of fault was, at a minimum, greater than fifty percent. Moreover, Bass' high degree of negligence is even more obvious given that he indeed recognized the assailant from their brief

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of a directed verdict where the evidence demonstrated that the plaintiff's negligence was greater than any potential negligence of the defendant.

encounter earlier in the evening at the convenience store, and yet he failed to protect himself by remaining in his locked room and summoning assistance.

Of even more significance, Bass' own security expert testified that his conduct was unreasonable and thus constitutes negligence. Harold Gillens agreed that Bass was safe within his room. (R. 156). He further agreed that Bass went from a safe environment to an unsafe environment by leaving his room, and in doing so, he made himself more vulnerable to criminal activity. (R. 157). Gillens conceded that Bass' conduct was not reasonable:

> Q. I asked was it reasonable in terms of protecting his own security?
>
> A. No, no, no. I mean, no. What he should have done --
>
> Q. Right.
>
> A. -- is stay in the room or call --
>
> Q. Call for assistance.
>
> A. -- the front desk, something of that sort, absolutely, that's the thing.
>
> Q. Okay. So under that hypothetical, you would be critical, you would be critical of his actions?
>
> A. Yeah.
>
> Q. Okay. And you would believe that his actions led to or contributed to the harm that he ultimately encountered, in fact being shot by this individual?
>
> A. Contributing to meaning in the way of stepping out

of a safe zone into a potential hostile zone, yes.

(R. 153). Ironically, Bass now calls the Court of Appeals' analysis "fundamentally flawed," but the Court simply adopted the expert opinions offered by Bass' own security expert that Bass acted unreasonably in leaving the safety of his room.

Based on the foregoing, it is clear that this case fits squarely within the category of cases like *Bloom* and *Hopson* where a court should rule as a matter of law that the plaintiff's negligence is greater than any negligence committed allegedly by the defendants. As a result, both the lower court and the Court of Appeals correctly ruled that Bass' negligence claim is barred by comparative negligence as a matter of law.

CONCLUSION

Based on the foregoing discussion, the Respondent Gopal, Inc. respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals which affirmed the summary judgment entered for the Respondent.

Respectfully submitted,

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