

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001218-MR

RONALD BAXTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 00-CI-001972

JIM PORTER'S GOOD TIME  
EMPORIUM, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Ronald Baxter, appeals from an order of the Jefferson Circuit Court granting the appellee's motion for judgment notwithstanding the verdict. We reverse and remand.

Jim Porter's Good Time Emporium, ("Jim Porter's") is a Louisville nightclub, which consists of approximately 18,000 square feet of multiple rooms, dance floors, and bars. The nightclub employs a security staff ("bouncers"). On the evening

of March 20, 1999, the appellant, Ronald Baxter (Baxter), along with his brother Wayne Baxter (Wayne), and a friend, Tommy Hardy (Tommy), went to Jim Porter's. There was testimony that also present at the nightclub was a group of two or three other patrons (unnamed) who were acting belligerently. There was testimony that one of these unnamed patrons (whom we shall refer to as the "angry patron") had been pushing and shoving his way around the nightclub, yelling and cursing. At some point this "angry patron" was in the vicinity of where Baxter, Wayne, and Tommy were standing, and without warning, punched Baxter (referred to as "sucker punched"). Baxter retaliated by punching the "angry patron" and attempting to punch him again. Bouncers intervened, and Baxter ended up on the floor, under some number of bouncers,<sup>1</sup> and thereby suffered a broken leg.

Baxter filed a negligence action against Jim Porter's seeking damages resulting from the broken leg.<sup>2</sup> A jury trial commenced on October 22, 2002. There was conflicting testimony as to the details of the incident. The trial court denied Jim Porter's motion for a directed verdict. Both parties tendered instructions, which the court rejected in favor of its own. The court instructed the jury as follows:

Instruction No. 1

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<sup>1</sup> There was conflicting testimony as to how many bouncers "piled" onto Baxter, which ranged from one up to about six.

<sup>2</sup> Baxter did not seek damages for injuries from the "sucker punch" itself.

It was the duty of the Defendant, Jim Porter's Good Time Emporium, and its employees, to exercise ordinary care for the safety and protection of its patrons while using its premises, and this duty included the following, specific duty:

(a) That in the exercise of ordinary care, the Defendant's employees in charge of the tavern should have foreseen the danger that the Plaintiff would be abused or assaulted by another person or persons present in the tavern, and with the means at their command could have taken reasonable precautions to prevent such an occurrence but failed to do so, and that such failure was a substantial factor in causing the Plaintiff's injuries.

If you believe from the evidence that the Defendant failed to comply with the above duty, then you shall find for the Plaintiff and proceed to Instruction No. 2. Otherwise, you shall find for the Defendant,  
. . . .

The jury returned a verdict in favor of Baxter, and awarded damages totaling \$79,613.20. The jury apportioned fault 35% to Baxter and 65% to Jim Porter's, resulting in a total recovery to Baxter of \$51,748.58. Jim Porter's moved for a judgment notwithstanding the verdict, which the court granted in an opinion and order entered April 21, 2003.<sup>3</sup> In granting the motion, the trial court relied upon the case of Murphy v. Second

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<sup>3</sup> Baxter had also moved for a judgment notwithstanding the verdict on grounds that trial court erred in not permitting him to explain the effect of the apportionment instruction in his closing argument. The trial court denied Baxter's motion for JNOV. In his appeal brief, Baxter states that he merely seeks reinstatement of the jury's original verdict, and relinquishes the trial court's denial of his JNOV motion as grounds for appeal.

Street Corp., 48 S.W.3d 571 (Ky.App. 2001), which involved an incident at a nightclub wherein a patron was punched, without warning, by another patron, thereby suffering a broken jaw. The injured patron brought an action against the nightclub for damages suffered as a result of the punch. The Murphy court explained:

For Murphy to meet her burden of proof in this negligence action she must establish: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. The question of duty presents an issue of law; and when a court resolves a question of duty, it is essentially making a policy determination.

"What constitutes ordinary care varies with the nature of the business and the use to which the premises are put, but it is a care commensurate with the particular circumstances involved in the given case." A proprietor is not the insurer of the safety of its guests. A plaintiff must show either: (1) that the proprietor had knowledge that one of his patrons was about to injure the plaintiff and he failed to exercise ordinary care to prevent such injury; or, (2) that the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they might injure other guests.

Murphy, at 573-574 (quoting Sidebottom v. Aubrey, 267 Ky. 45, 101 S.W.2d 212, 213 (1937)). The Murphy court concluded that, because the injured patron was punched without warning, the nightclub had no duty to protect Murphy from the assault, as it was not foreseeable.

The standard of review of a trial court's ruling on a motion for a judgment notwithstanding the verdict is the same standard as used for reviewing a directed verdict. Prichard v. Bank Josephine, 723 S.W.2d 883, 885 (Ky.App. 1987); Cassinelli v. Begley, 433 S.W.2d 651, 652 (Ky. 1968). "In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion." Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985). The trial court must give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. Id. The trial court may not enter a directed verdict or judgment n.o.v. "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Id.

At trial, Jim Porter's did move for a directed verdict. In denying the motion, the trial court found that there were issues of fact which required the matter to be submitted to the jury. Both parties tendered instructions, and, in discussing the instructions with counsel, the trial court recognized that Baxter presented two theories of negligence, that Jim Porter's breached its duty to provide a safe, non-hazardous premises in that (1) its employees did not react

quickly enough to prevent the fight, or, (2) that the bouncers used excessive force upon Baxter. The trial court's instruction, however, given over the objection of Baxter, appears to encompass only the first.<sup>4</sup> Under this instruction, however, the jury did find in favor of Baxter.

In granting the judgment n.o.v., the trial court found the facts of the present case analogous to the facts of Murphy, in that, as was the plaintiff in Murphy, Baxter, too, was punched without warning. Citing Murphy, 48 S.W.2d at 574, "[o]bviously, if Murphy was struck without warning, the Corporation had no duty to prevent the assault; the assault was not foreseeable," the trial court similarly found no duty on the part of Jim Porter's to prevent the "sucker punch", and concluded that it should have granted a directed verdict. We disagree, and believe the case was properly submitted to the jury. As distinguished from Murphy, in the present case there was testimony that the "angry patron" had been behaving in a belligerent manner for a time preceding the altercation with Baxter.<sup>5</sup> Although the testimony on this issue was conflicting,

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<sup>4</sup> This was error, because a court acknowledging multiple theories has a duty to submit all theories legally warranted by the pleadings and the proof. See West Kentucky Coal Co. v. Shoulders' Adm'r, 234 Ky. 427, 28 S.W.2d 479, 482 (1930). However, Baxter does not raise the trial court's failure to give his tendered instructions as an issue on appeal.

<sup>5</sup> The appellant in Murphy argued that the nightclub "knew or should have known of the assailant's propensity to be violent." However, as distinguished from the present case, the appellant in Murphy "fail[ed] to identify any evidence of record to support this statement." Murphy, 48 S.W.3d at 574. See also, Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971).

it created an issue of fact for the jury. It is possible that the jury reasonably believed that the "angry patron" had been steaming for a sufficient amount of time that Jim Porter's should have foreseen a growing danger. Sidebottom, 101 S.W.2d at 213; Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971). With the jury having found that Jim Porter's failed to exercise ordinary care in failing to foresee and prevent the assault by the "angry patron", it follows that Jim Porter's became liable for all damages proximately resulting from the negligence, which would include the "sucker punch" and the broken leg. Field Packing Company v. Denham, 342 S.W.2d 524, 526 (Ky. 1961).

We note that Baxter emphasizes in his appeal that he is seeking damages only for the broken leg, and not from the "sucker punch". As previously noted, Baxter advanced two theories at trial, one that Jim Porter's employees did not react quickly enough to prevent the fight, and the other, that the bouncers used excessive force upon Baxter (regardless of the foreseeability of the "sucker punch"). Baxter appears to primarily argue the second theory on appeal. However, this theory was not encompassed by the trial court's instruction. Having concluded, however, that the case was properly submitted to the jury under the first theory of recovery, and as the jury did find in Baxter's favor under this theory, the issues covering the second theory are moot.

For the foregoing reasons, the judgment notwithstanding the verdict of the Jefferson Circuit Court is reversed and remanded with directions to reinstate the jury verdict.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Brentley P. Smith  
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BRIEF AND ORAL ARGUMENT FOR  
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