

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-7239  
Summary Calendar

---

JAMES L. HAMMOND,

Plaintiff-Appellant,

versus

MISSISSIPPI STATE HIGHWAY DEPARTMENT,  
ET AL.,

Defendants,

SOUTHERN GUARD SERVICES, INC.,

Defendant-Appellee.

---

Appeal from the United States District Court for the  
Southern District of Mississippi  
(CA-S90-0239(R)(R))

---

(February 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

James Leon Hammond, the plaintiff below, appeals the district court's grant of judgment as a matter of law. We affirm the district court, holding that the evidence is legally insufficient

---

\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

to support a jury verdict in favor of the plaintiff on both his claim of breach of contract and his tort claims.

I

James Leon Hammond, the plaintiff-appellant before this court, spent the weekend of July 4, 1986, vacationing in Fort Walton Beach, Florida. On Sunday, July 6, after having had a dinner of raw oysters and steak the night before, Hammond began his return journey to his Memphis, Tennessee home.

Hammond left Fort Walton driving west on Interstate 10 through Pensacola, Florida, and then through Mobile, Alabama. After clearing the Mobile Bay tunnel, Hammond began to feel queasy, so he stopped at a truck stop to purchase a cold soft drink. Hammond resumed his journey on Interstate 10, but at some point west of the truck stop, Hammond suddenly became violently ill, accompanied by diarrhea and vomiting. According to Hammond's testimony, he then began to look for the first opportunity to exit from the interstate.

Hammond exited at the Mississippi Welcome Center in Jackson County, Mississippi. According to Hammond, he parked in front of the Welcome Center by the sidewalk leading to the rest rooms, got out of his minivan, and was sick again. Hammond then entered the rest room where he met a uniformed janitor, whom Hammond mistook for a "security guard," cleaning the rest room. Hammond apologized to the janitor for his appearance and odor, was sick again, and then changed at least some of his clothing. Hammond then returned

to his van. These final events supposedly occurred at dusky dark on Sunday evening, July 6.

On Monday evening, July 7, security guard Williamson first noticed Hammond's minivan parked in front of the Welcome Center. Williamson saw Hammond and believed him to be conversing with an unidentified man seated on the passenger side in the minivan. Later that evening--1½ to 2 hours later--Williamson observed Hammond alone in the minivan. Hammond appeared to need assistance. So, with the aid of two unidentified travelers, Williamson knocked on the window and inquired whether Hammond was ill. Hammond nodded affirmatively.

One of the three men opened the door of the minivan to find that Hammond was covered in vomit and diarrhea. Williamson instructed Hammond to lie down, and Williamson immediately dialed "911" to obtain an ambulance for Hammond. Williamson placed this call at 7:24 p.m. on Monday, July 7.

The ambulance arrived on the scene at 7:44 p.m. Dr. Millette, Hammond's treating neurologist, testified that Hammond was dehydrated and had lost blood circulation to the optic lobe of his brain. Hammond was treated at the Singing River Hospital for twelve days. After his discharge, Hammond flew to Memphis, Tennessee, and was examined at the Veterans Administration Hospital at Memphis. In January of 1987, Hammond was admitted to the Southeastern Blind Rehabilitation Center at Birmingham, Alabama,

where Hammond was granted a VA disability on the ground of his loss of vision. Hammond is legally blind.

## II

Hammond filed this suit on May 18, 1990, against the Mississippi State Highway Department and Southern Guard Services, Inc. ("Southern"), the security guard service on contract for the Mississippi Welcome Center. Hammond alleged that the Mississippi State Highway Commission negligently contracted for "inappropriate security guard services" and that Southern negligently failed to investigate and find Hammond's vehicle parked for nearly twenty-four hours in front of the Mississippi Welcome Center, delaying a call for critically needed medical attention for Hammond's Shigella dysentery.

Prior to discovery, Hammond dismissed all claims against the Mississippi State Highway Department, but continued the suit against Southern. At the close of discovery, Southern moved for summary judgment, and the district court denied the motion.

The trial began on November 16, 1992, and continued until November 23.<sup>1</sup> At the close of their evidence, Southern moved for judgment as a matter of law. The district court granted this motion, and on December 14, 1992 entered a final judgment in favor of Southern. Hammond filed a motion for a new trial on

---

<sup>1</sup>The trial was originally set for May 18, 1992, but due to defense counsel's illness, the court granted a continuance. The trial was ultimately rescheduled to be heard by a different district judge in November.

December 21, 1992, and the district court issued a memorandum opinion denying the motion on March 10, 1993. On April 8, 1993, this appeal was noticed by the plaintiff, James Hammond, and on May 25, 1993, an order allowing Mr. Hammond to proceed in forma pauperis was granted.

### III

The central issue on appeal is whether the district court erred in granting defendant Southern's motion for directed verdict. We review the district court's grant of judgment as a matter of law de novo, applying the same standards applied in the district court. United States Indus. v. Aetna Casualty & Sur. Co., 690 F.2d 459, 463 (5th Cir. 1982) In ruling on a motion for directed verdict, the trial court must determine whether the evidence, viewed in the light most favorable to the non-moving party, is sufficient to allow a reasonable juror to arrive at a verdict in the non-movant's favor. Sumitomo Bank v. Product Promotions, Inc., 717 F.2d 215, 219 (5th Cir. 1983).

In the present case, the district court granted judgment as a matter of law holding that Southern owed no legal duty to Hammond. The question before us, de novo, is whether the evidence presented to the jury was sufficient to support a reasonable jury in finding that Southern breached any legal duty that it owed to Hammond. Hammond alleged two legal theories for recovery: one sounding in contract, and one sounding in tort. We will discuss each, in turn.

A

Southern Security Guard Services, Inc., entered into a contract with the Mississippi Highway Commission, agreeing "to provide security guard service for the Mississippi Welcome Center facilities . . . in accordance with the stipulations listed on Pages 1 and 2 of 2." The "Work Stipulations and Security Guard Duties to be performed" deal with insurance, supervision, hours of work, recommendation for more or less service, changes in work hours, uniforms, appearance, physical condition, and co-operation with local law enforcement agencies. These two pages do not detail the duties of security service.

It is Hammond's position, therefore, that the scope of the duties under the contract that Southern owed in providing "security guard service" is ambiguous. He states that when there is an ambiguity, what the duties and responsibilities were under the contract is a question of fact for the jury. It is true that when an ambiguity exists, the parties' intent can be proven by the admission of parole evidence. Kight v. Sheppard Building Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989). Furthermore, what parties to a contract actually do thereunder is often the best evidence of what the contract requires of them. Id. Finally, it is generally within the province of a jury to determine the intent of the parties and to interpret the extrinsic evidence. Id. But, as in any case, when the evidence submitted would support only one reasonable jury finding, the issue is appropriate for entry of

judgment as a matter of law by the court. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 269 (5th Cir. 1980).

Assuming that the definition of "security guard service" is indeed ambiguous in the contract, the evidence offered by Hammond is nonetheless legally insufficient to support his claim that Southern owed Hammond some sort of contractual duty.<sup>2</sup> Clearly, Hammond is not a party to the contract between Southern and the Mississippi Highway Commission. At best, therefore, Hammond could argue that he is an intended third party beneficiary under the contract. "A third person may enforce a promise made for his benefit even though he is a stranger to the contract or to the consideration." Mississippi High Sch. Activities Ass'n v. Farris, 501 So. 2d 393, 395-96 (Miss. 1987) (emphasis added).

---

<sup>2</sup>It is clear from the testimony at trial and Mississippi's "Request for Contract Personnel Services Approval" that the primary purpose and duty of the security service was to control vandalism. But Hammond presented testimony of several credible witnesses to show that the Welcome Center also had an unwritten policy that the security guards were to assist any visitor who asked for assistance, and if any Welcome Center visitor parked in front of the building for an extended period, the guards would request that visitor to move their vehicle to the Center's rear parking area. It is Hammond's contention that the guard service breached its contractual duty and caused his injury because no guard came to his car until after it had been parked in front of the Welcome Center for over twenty-four hours.

In addition to the evidence noted above, Hammond proffered the testimony of one Truett Ricks, an expert in the field of security guard services, and claims now that the district court erred in not allowing his testimony. Decisions as to the admissibility of evidence are within the discretion of the trial court. United States v. Blankenship, 746 F.2d 233, 238 n.1 (5th Cir. 1984). We cannot say that the district court abused its discretion in this matter.

"[T]he right of a third party beneficiary to maintain an action on the contract must `spring' from the terms of the contract itself. In addition, a third party beneficiary may sue for a breach of the contract `only when the condition which is alleged to have been broken was placed in the contract for his direct benefit.'" Id. at 396 (citations omitted). Thus, even if a jury found that Southern's duty to provide "security guard services" was intended to include a duty to approach cars that were parked in front of the building for an extended period, there is absolutely no evidence to support the contention that the policy was intended to benefit the persons inside the parked vehicle. Whatever duties Southern owed under the contract were intended only to benefit the Mississippi Highway Commission and not Hammond.<sup>3</sup>

It might be argued, however, that regardless of the contracting parties' actual intent, a third-party could bring a contract claim if he relied on the contract to his detriment. See Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355 (Miss 1989) (allowing suit by Sheppard stating that although Sheppard was not a party to the agreement, Sheppard relied on the agreement as it was entitled to do.) Again, however, there is no evidence that

---

<sup>3</sup>Hammond further complains that the district court erred in refusing to admit evidence that the contract specifically contemplated the "public" by requiring Southern to maintain sufficient public liability insurance. Decisions as to the admissibility of evidence are within the discretion of the trial court. United States v. Blankenship, 746 F.2d 233, 238 n.1 (5th Cir. 1984). We cannot say that the district court abused its discretion in this matter.



supports a judgment in favor of Hammond. Hammond did not enter the Mississippi Welcome Center relying on the fact that it was a rest area, much less relying on the security service contract. According to his own testimony, he only looked for the first place to exit the highway--he testified that when he pulled off of the highway, he was unaware that he was entering a Welcome Center. Hammond was not intended to benefit under the contract between Southern and the Mississippi Highway Commission, nor did Hammond rely on that contract to his detriment. Accordingly, we find that Hammond has no viable third party beneficiary claim.<sup>4</sup> "A mere incidental beneficiary acquires by virtue of the contractual obligation no right against the promisor or promisee." Mississippi High School, 501 So. 2d at 396.

B

We next turn to address Hammond's tort claim against Southern. Hammond argues that from the time he entered the Welcome Center to the time that he left, he was a business invitee. Because of this status, Hammond argues that Southern, as custodian of the property, owed him a duty to exercise reasonable care for his safety. May v. VFW Post No. 2539, 577 So. 2d 372 (Miss. 1991); Grisham v. John O. Long VFW Post No. 4057, 519 So. 2d 413 (Miss. 1988); Kelly v.

---

<sup>4</sup>Similarly, Hammond can assert no viable tort claim based on the premise that Southern negligently performed its contractual duties--such a duty of care is owed only to those who reasonably rely on the contractual duty. Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 318-23 (Miss. 1987); Stacy v. Aetna Casualty & Sur. Co., 484 F.2d 289 (5th Cir. 1973).

Retzer & Retzer, Inc., 417 So. 2d 556 (Miss. 1982). Hammond's argument fails, however, because he was not a business invitee.

In order to obtain the status of business invitee, one must "go[] upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage." Lucas v. Mississippi Housing Authority No. 8, 441 So. 2d 101, 103 (Miss. 1983). "[O]ne who enters upon the property of another for his own convenience, pleasure or benefit, pursuant to the license or implied permission of the owner," however, is a mere licensee. Id. In the present case, Mr. Hammond entered the Welcome Center solely for his own convenience. He had no intention of entering into any kind of business transaction with the center, nor did he intend to benefit the Welcome Center in any other manner. Hammond stopped at the Welcome Center solely for the purpose of getting off of the highway and using the public rest room. Hammond, therefore, held the status of licensee. See Mayer v. Cities Serv. Oil Co., 258 F. Supp. 230 (N.D. Miss. 1966).

Because Hammond was a mere licensee and not a business invitee, "the only duty owing from [Southern] was not to willfully or wantonly injure him." Lucas, 441 So. 2d at 103. Clearly, there is no evidence of willful or wanton harm in the present case. Therefore, there is no evidence to support a jury finding that Southern breached any duty it owed as the occupier of land based on Hammond's status as a licensee on the property.

IV

Because we find that the evidence in this case was legally insufficient to support a jury in finding that Southern breached any duty that it owed to Hammond under contract or tort law, we affirm the district court's grant of judgment as a matter of law. The district court is hereby,

A F F I R M E D.