

Neither may Baldwin's knowledge be imputed to American under an apparent authority theory, as the record shows that American never had direct contact with Vector, never held out Baldwin as its agent, and never led Vector to believe Baldwin had authority to act on its behalf. See *Howard v. St. Paul, etc., Ins. Co.*, 180 Ga.App. 802, 804(1), 350 S.E.2d 776 (1986).

[3] 2. The essence of the rationale given by the ALJ for his conclusion that coverage existed is that American should have known that the endorsements to the Vector policy were actually intended to cover Omega employees, and is therefore estopped to deny coverage. The law is otherwise. Although the doctrine of estoppel has been applied in certain situations to find coverage where the insurer knew certain facts concerning the insured or the claim and was deemed to have accepted the risk, estoppel "has [not] been found concerning such basic elements of the policy as who is insured." *Sandner, Inc. v. Centennial Ins. Co.*, 189 Ga.App. 277, 280(1), 375 S.E.2d 611 (1988), modified on other grounds 259 Ga. 317, 380 S.E.2d 704 (1989).

Although the facts as found by the Board are conclusive and binding on this court if supported by any evidence, *Little v. Cox Enterprises*, 195 Ga.App. 211, 212, 393 S.E.2d 57 (1990), and the ALJ found that the language of the Vector policy does not *exclude* leased employees from coverage, he also found that the employee leasing agreement was "a subterfuge, if not an outright fraud."

The evidence shows that the subterfuge was Vector's intention to cover Omega employees under the endorsements to its policy, through the employee leasing agreement, while withholding knowledge of this arrangement from American. Given that American had previously refused under any circumstances to agree to cover Omega employees, even at the risk of losing the Vector account, it is clear that had American known the employee leasing agreements were intended to cover Omega employees, it would not have issued the endorsements. Coverage of Omega employees was material to the risk assumed by

American. Under those circumstances, the evidence demands a finding that no coverage existed, *Smith v. Integon Life Ins. Corp.*, 195 Ga.App. 481-482, 393 S.E.2d 741 (1990), and American is not estopped to deny that coverage exists for Omega employees. OCGA § 33-24-7(b).

[4] 3. We reject Vector's argument that the judgment below must be affirmed because American waived its right to avoid coverage when, instead of rescinding the Vector policy and tendering back the premium upon learning of the purported subterfuge, it canceled the Vector policy prospectively. See *Loeb v. Nationwide Mut. Fire Ins. Co.*, 162 Ga.App. 561, 562-563, 292 S.E.2d 409 (1982). Because only the endorsements, and not the entire Vector policy, were involved in the subterfuge, and no additional premium had been paid for the endorsements, the principle involved in *Loeb* is inapplicable here. No basis existed for rescinding the entire policy. American has not sought to avoid paying claims made by legitimate Vector employees during the period the Vector policy was in effect.

Since our review of the record has revealed no basis for coverage of Conner's claim under the policy issued by American to Vector, the judgment against American must be reversed.

*Judgment reversed.*

JOHNSON and BLACKBURN, JJ.,  
concur.



209 Ga.App. 696

**GOOD OL' DAYS DOWNTOWN,  
INC. et al.**

v.

**YANCEY.**

**No. A93A0593.**

Court of Appeals of Georgia.

July 13, 1993.

Reconsideration Denied July 28, 1993.

Certiorari Denied Nov. 5, 1993.

In personal injury action arising out of assault against plaintiff in restaurant by

another patron, the State Court, Fulton County, Thompson, J., denied motion for summary judgment contending that lawsuit should be dismissed against newly added defendants due to plaintiff's failure to seek leave of court to add defendants. Defendants appealed. The Court of Appeals, Cooper, J., held that: (1) although proper procedure would have been for plaintiff to seek leave to add parties, denying motion for summary judgment on ground of failure to seek leave was not abuse of discretion absent any prejudice to defendants, and (2) genuine issue of material fact as to whether defendants had notice in sufficient time to react to patron's loud and abusive behavior precluded summary judgment in favor of defendants on negligence and inadequate security theories.

Affirmed.

### 1. Judgment ⇐181(5.1)

Although proper procedure would have been for personal injury plaintiff to seek leave to add parties in action alleging assault by patron after discovering proper corporate name of owner of restaurant in which assault occurred, trial court's denial of motion for summary judgment based on ground that no motion for leave to amend was filed amounted to implicit approval of plaintiff's amendment and was not abuse of discretion, where defendants were served without any inexcusable delay and were not prejudiced in maintaining defense on merits and should have known that they were proper defendants in case. O.C.G.A. §§ 9-11-15(a), 9-11-21.

### 2. Judgment ⇐181(33)

Genuine issue of material fact as to whether employees of restaurant in which plaintiff was assaulted by another patron had reason to anticipate criminal action due to patron's loud and abusive behavior precluded summary judgment in favor of restaurant in personal injury action alleging negligence and inadequate security.

### 3. Judgment ⇐186

In ruling on motion for summary judgment, trial court is obliged to consider entire setting of case.

Bentley, Karesh & Seacrest, Gary L. Seacrest, Stephen D. Apolinsky, Atlanta, for appellants.

Lance A. Cooper, Marietta, for appellee.

COOPER, Judge.

This interlocutory appeal arises out of an action filed by appellee against appellants to recover for personal injuries appellee received when he was struck in the face by a patron at appellants' restaurant/bar. We granted appellants' application to consider whether the trial court properly denied their motion for summary judgment.

Viewed in favor of appellee's opposition to the summary judgment, *Eiberger v. West*, 247 Ga. 767(1), 281 S.E.2d 148 (1981), the evidence shows that appellee was sitting with a female friend at a table at the Good Ol' Days restaurant in Sandy Springs. Another customer in the restaurant, James Haynes, walked over to appellee's table, accused appellee of taking his beer and demanded that appellee buy him a beer. For approximately the next five minutes, Haynes continued to stand over appellee's table insisting that appellee buy him a beer. Haynes' voice became gradually louder, and his tone grew impatient. As a result of Haynes' behavior, appellee attempted to get the attention of a waitress to ask that she bring a beer for Haynes. After waiting a few minutes for the waitress to bring a beer, appellee decided to go to the bar to get the beer for Haynes. When he stood up, Haynes struck appellee in the face with his fist and then hit him in the face with a pool cue. Appellee suffered severe injuries to his face and mouth as a result of the incident.

[1] 1. Appellants' first three enumerations of errors concern whether appellee properly amended his complaint to add party-defendants. The record reflects that on January 7, 1991, appellee filed his original complaint against Good Ol' Days Downtown, Inc. d/b/a Good Ol' Days. Discovery revealed that at the time of the inci-

dent, the Sandy Springs Good Ol' Days was not owned by Good Ol' Days Downtown, Inc., but was owned by Flower Pot Food Factory, Inc., a subsidiary of Good Ol' Days, Inc. Therefore, on March 22, 1991, prior to the expiration of the statute of limitation, appellee filed an amended complaint against Good Ol' Days, Inc. and Flower Pot Food Factory, Inc. d/b/a Good Ol' Days. On March 30, 1992, appellants filed a motion for summary judgment, contending in part that the lawsuit should be dismissed against the newly-added defendants because appellee did not seek leave of court to add the defendants pursuant to OCGA § 9-11-21. OCGA § 9-11-15(a) provides that "[a] party may amend his pleading as a matter of course without leave of court at any time before the entry of a pretrial order." OCGA § 9-11-21 provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." It is undisputed that appellee never sought leave of court to add the defendants. However, the trial court's denial of appellants' motion for summary judgment, made on the ground that no motion for leave to amend was filed, amounts to an implicit approval of appellee's amendment. While the proper procedure would have been for appellee to seek leave to add the parties, it appears that appellants were served without inexcusable delay, that they have not been prejudiced in maintaining a defense on the merits and that they should have known that they were the proper defendants in the case. Moreover, it is undisputed that the newly-added defendants were properly served within the statute of limitation. Accordingly, we conclude that the trial court's denial of summary judgment on the ground that appellee did not seek leave to add the parties-defendant was a proper exercise of the trial court's discretion to allow the amendment. See, e.g., *Bil-Jax, Inc. v. Scott*, 183 Ga.App. 516(1), 359 S.E.2d 362 (1987).

[2, 3] 2. Appellants also contend that the trial court erred in denying their motion for summary judgment on appellee's theory of negligence and inadequate securi-

ty. "A proprietor's duty to invitees is to 'exercise ordinary care in keeping the premises and approaches safe.' OCGA § 51-3-1. The proprietor is not the insurer of the invitee's safety, [cit.], but is bound to exercise ordinary care to protect the invitee from unreasonable risks of which he or she has superior knowledge. [Cit.] If the proprietor has reason to anticipate a criminal act, he or she then has a 'duty to exercise ordinary care to guard against injury from dangerous characters.' [Cit.]" *Lau's Corp. v. Haskins*, 261 Ga. 491, 492(1), 405 S.E.2d 474 (1991). Appellants argue that the attack against appellee was sudden and unprovoked and that the incident was not foreseeable since there was no evidence of any substantially similar incidents which occurred at the restaurant. However, appellee asserts that the employees of the restaurant had sufficient time to react to his attacker's loud and abusive behavior which continued for over five minutes within hearing distance of the waitresses and bartenders. Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ." (Punctuation omitted.) *Minor v. E.F. Hutton & Co.*, 200 Ga.App. 645, 646(2), 409 S.E.2d 262 (1991). In ruling on a motion for summary judgment, the trial court is obliged to consider the entire setting of the case. Appellee and his female companion testified in their respective depositions that Haynes' abusive behavior consisted of loud cursing and repeated demands that appellee buy him a beer. Appellee's companion testified that a waitress and bartender had to have been aware of Haynes' behavior. Although appellants' employees denied hearing anything more than a "discussion" between Haynes and appellee, the evidence at least raises a question of fact as to whether appellants could have foreseen the potentially dangerous situation and intervened prior to the violent attack on appellee. "There is no evidence as to what could

have been done to protect appellee from injury. . . . However, it cannot be inferred, from the failure of appellants' [employees] to act, that nothing could have been done. On motion for summary judgment, all inferences are to be resolved against appellants and in favor of appellee. [Cit.]" *Shell Oil Co. v. Diehl*, 205 Ga.App. 367, 368-369, 422 S.E.2d 63 (1992). Accordingly, construing the evidence most favorably to appellee, we conclude that factual questions exist for a jury to resolve on the issue of negligence and diligence, and the trial court correctly denied appellants' motion for summary judgment. See *Shell Oil Co.*, supra.

*Judgment affirmed.*

McMURRAY and BEASLEY, P.JJ.,  
concur.



209 Ga.App. 789

KELLY

v.

The STATE.

No. A93A0066.

Court of Appeals of Georgia.

July 14, 1993.

Reconsideration Denied July 30, 1993.

Defendant was convicted of two counts of armed robbery and aggravated assault with intent to rob, by the Superior Court, Fulton County, Langham, J. After his motion for new trial was denied, defendant appealed. The Court of Appeals, Beasley, P.J., held that: (1) the state had exercised its peremptory challenges in a neutral manner; (2) the indictments were properly joined for trial; and (3) testimony of half brother that he, rather than defendant, committed crimes was properly stricken af-

ter he asserted his Fifth Amendment privilege.

Affirmed.

Pope, C.J., filed a specially concurring opinion in which Andrews, J., joined.

Cooper, J., filed a dissenting opinion in which Blackburn, J., joined.

1. Jury ⇄33(5.15)

There is three-step process for evaluating claims of racial discrimination in state's use of peremptory jury strikes: defendant must first make prima facie showing that prosecution exercised its peremptory challenges based on race; burden then shifts to prosecution to articulate race-neutral explanation for striking jurors; and finally trial court must determine whether defendant carried burden of proving purposeful discrimination.

2. Jury ⇄33(5.15)

Defendant made prima facie showing of racial discrimination in state's use of peremptory jury strikes, where 46 percent of venire was African-American, 36 percent of jury empaneled was African-American, and prosecution exercised nine peremptory challenges, all against African-American venirepersons.

3. Jury ⇄33(5.15)

State exercised peremptory challenges in race-neutral manner; three peremptory strikes of African-American prospective jurors were not challenged by defendant, four African-American prospective jurors were struck for reasonable suspicions regarding their impartiality, one prospective juror was struck because he was disabled and prosecutor doubted he could sit through lengthy trial, and one prospective juror was struck because he had worked at his present job for only four months, leading prosecutor to be concerned that he was not a "stable member of the community."

4. Jury ⇄33(5.15)

Propriety of a peremptory strike must be evaluated in light of both strength of defendant's prima facie case of discrimina-