THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No.: 2022-000754

Case No. 2020-CP-2481

Stefani Eddins, Appellant,

vs.

Tall Sam I Am, LLC d/b/a Tabbuli, Respondent.

INITIAL BRIEF OF APPELLANT

GARY C. JOHNSON, P.S.C.
Michael E. Liska
SC Bar No. 102542
2265 Executive Drive
P.O. Box 55106
Lexington, KY 40505
Tel: 859-268-4300
Fax: 859-268-7318
Email: mliska@garycjohnson.com

THE NYE LAW GROUP P.C.
Justin D. Maines
SC Bar No. 76668
2008 Whitaker Street
Savannah, Georgia 31401
Tel: (912) 200-5230
Fax: (912) 335-6553
Email: jd@thenyelawgroup.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN DETERMINING THE EVIDENCE GENERATED ONLY A SINGLE INFERENCE CONCERNING RESPONDENT'S NEGLIGENCE

STATEMENT OF THE CASE

Appellant Stefani Eddins filed the Complaint in this action on June 5, 2020. Respondent Tall Sam I Am, LLC d/b/a Tabbuli was served with the Complaint on June 9, 2020. Stefani Eddins brought this action for negligence seeking damages for injuries sustained in a July 20, 2017 incident at Tall Sam I Am, LLC d/b/a Tabbuli's restaurant. Tall Sam I Am, LLC d/b/a Tabbuli served an Answer on June 26, 2020.

Tall Sam I Am, LLC d/b/a Tabbuli filed a Motion for Summary Judgment on March 21, 2022. Stefani Eddins served her Response to Defendant's Motion for Summary Judgment on April 20, 2022. Tall Sam I Am, LLC d/b/a Tabbuli also filed its Memorandum in Support of Motion for Summary Judgment on April 20, 2022.

On April 21, 2022, the Honorable Bentley D. Price heard the parties' arguments on Tall Sam I Am, LLC d/b/a Tabbuli's Motion for Summary Judgment. The trial court's Order granting Tall Sam I Am, LLC d/b/a Tabbuli's Motion for Summary Judgment was filed May 24, 2022. Stefani Eddins filed and served her Notice of Appeal on June 1, 2022.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

Rule 56(c), SCRCP provides that a trial court may grant a motion for summary judgment only "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." 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 that light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[T]he court's duty at this state is to presume the credibility of the evidence." Abdelgheny v. Moody, 432 S.C. 346, 852 S.E.2d 225 (Ct. App. 2020). If a reasonable juror looking at the evidence in the light most favorable to the non-movant could draw more than one inference about a material fact from it, summary judgement must be denied. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). This includes causation. Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997)."[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, 381 S.C at 330, 673 S.E.2d at 803. "Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 337 (1990).

FACTS

This is a negligence action concerning: Respondent's own duties to keep its premises safe for patrons, discover and eliminate risks, and not put patrons in harm's way; Respondent's breach of those duties on July 20, 2017; and the injuries and damages caused by Respondent's breach. [Complaint, R.p.]

Respondent, via its Rule 30(b)(6) designee and Operations Manager, Jeff Deihl, testified that it had a duty to keep its premises safe [Deihl Depo., p. 66, lines 18-21, R. p.], discover and

eliminate risks [Deihl Depo. pp. 58, lines 18-25, p.59, lines 1-10, R.p.], and not put patrons in harms' way [Deihl Depo., p. 128, lines 23-25, p. 129, lines 1-2, R. p.].

On the night of July 20, 2017, at 10:20 p.m., a temporary portable stage light fell on Appellant's head while a patron at Respondent's restaurant. [Complaint, R.p.; Incident Report, R.p.] According to Respondent' manager, Cait Chapin, after investigating the incident that night, it was determined that the light fell because "[i]t was not secured properly." [Chapin Depo., p. 92, line 4, R.p.] Plaintiff's expert, Mark E. Williams, AIA, NCARB, agrees, testifying "[i]t fell because it wasn't properly attached" [Williams Depo., p. 44, line 12, R.p.], and "[i]t fell because it was unstable." [Williams Depo., p. 79, lines 3-4, R.p.]

Respondent was holding its outdoor Thursday night fashion show, White Haute Nights, at the time. [Chapin Depo., pp. 11, line 3, 20, lines 12-14, R.p.] The temporary portable stage light was to be used for lighting. [Chapin Depo., p. 23, lines 3-11, R.p.] The light was set on top of a speaker that was attached to a support column. [Williams Depo., pp. 35, lines 11-12, R.p.]

Respondent had a duty to supervise the installation of the temporary portable stage light to make sure it was secure, which included the use of a bracket, bolt and an additional safety chain, regardless of who owned or installed the light. [Plaintiff's Expert Disclosures, p. , R.p., Williams Depo., p. 15, lines 18-22, p. 27, lines 18-25, p. 28, lines 1-12, p. 35, lines 16-21, p. 43, lines 6-10, p. 44, lines 16-18, p. 84, lines 12-18, p. 86, lines 10-25, p. 89, lines 21-25, p. 90, lines 1-8, p. 111, lines 20-25, p. 112, lines 1-13, p. 115, lines 19-25, p. 116, lines 1-25, R.p., Rivenbark Depo., p. 125, lines 7-12, R.p..] Respondent did not supervise the installation of the light. [Chapin Depo., pp. 60, lines 15-25, R.p.]

Respondent had a duty to keep the temporary portable stage light barriered from patrons after it was installed so it would not strike anyone on the head in case it did fall. [Plaintiff's Expert

Disclosures, p. , R.p., Williams Depo., p. 15, lines 18-22, p. 27, lines 18-25, p. 28, lines 1-12, p. 35, lines 16-21, p. 43, lines 6-10, p. 44, lines 16-18, p. 84, lines 12-18, p. 86, lines 10-25, p. 89, lines 21-25, p. 90, lines 1-8, p. 111, lines 20-25, p. 112, lines 1-13, p. 115, lines 19-25, p. 116, lines 1-25, R.p., Rivenbark Depo., p. 125, lines 7-12, R.p..] "[T]hings that might impact that light such as noise, gravity, air, somebody contacting it, the music, the pivoting" are all "reasons why the light needs to be supervised when it's installed and properly barriered from patrons, properly chained and properly secured." [Williams Depo., p. 116, lines 12-25, R.p.]

In this case, Respondent arranged its floor and seating plan accordingly for the fashion show. [Chapin Depo., pp. 19, lines 3-10, p. 23, lines 3-15, R.p.] Instead of keeping the light barriered from patrons, Respondent placed one of its seats under the temporary portable stage light. [Chapin Depo., pp. 19, lines 3-10, p. 23, lines 3-15, R.p.] Respondent told Appellant to sit below the light in the seat it had placed under the light. [Eddins Depo., pp. 20, lines 7-24, R.p.]

Respondent testified that when Respondent tells a patron where to sit, Respondent has a duty to make sure it is safe for that patron to sit there. [Deihl Depo., p. 128, lines 23-25, p. 129, lines 1-2, R. p.] Respondent did not inspect the light to make sure it was safe for patrons to sit below it before it sat Appellant under the light. [Chapin Depo., p. 62, lines 2-7, R.p.]

Thereafter, the show, with its noise and activity, started and the light fell on Appellant's head causing serious injuries. [Complaint, R.p.; Eddins Depo., p. 21, lines 1-25, p. 33, lines 1-18, R.p., Haynes Depo., p. 14, lines 1-25, p. 19, lines 1-24, p. 20, lines 9-17, R.p.]

In response to a Rule 34 request for photographs of the light, Respondent produced only one photograph, which showed the light unsecured, upside down, without any safety chain, sitting on top of the speaker. [Photograph of Light, R.p.] This photo must have been taken earlier on the day of the incident because Respondent claims a DJ brought the light onto the premises about 3:00

or 4:00 p.m., Respondent took the light out of service after it fell on Appellant's head, and the DJ took the light after the incident. [Chapin Depo., p. 73, lines 24-5, p. 74, lines 1-9, Deihl Depo., p. 77, lines 12-14, R.p.; Williams Depo., pp. 114, lines 15-24, p. 115, lines 7-18, R.p.] A photo taken that night of the seating area below the light where Respondent seated Appellant was also produced in discovery. [Photograph of Scene, R.p.]

As further background, Respondent's manager, Cait Chapin, testified "Thursday nights were, our fashion show, White Haute Nights." [Chapin Depo., p. 20, lines 12-14, R. p.] Respondent would "arrange chairs and couches" "according to whatever event is taking place." [Chapin Depo., p. 19, lines 3-10, R. p.] If Respondent had a DJ, the DJ would set up "according to our floor plan" over which Respondent had control. [Chapin Depo., pp. 23, lines 3-15, p. 24, lines 4-7, R. p.] The DJs "would arrive probably 4:00 p.m., maybe 3:00 p.m." "and they would set up whatever they need set up." [Chapin Depo., p. 37, lines 8-11, R. p.] "If Tabulli saw something with the setup that they did not like and told the DJ to not do that, the DJ would have to comply." [Chapin Depo., p. 26, lines 12-16, R. p.] However, on July 20, 2017, nobody from Tabbuli was monitoring the DJs and the light set up. [Chapin Depo., p. 60, lines 15-25, R. p.]. "[O]ne of the duties [Respondent] had was making sure that anything that was a danger be taken care of." [Chapin Depo., p. 30, lines 1-4, R. p.]

"Lighting [has] to be safe." [Chapin Depo., p. 33, lines 11-13, R. p.] However, on July 20, 2017, "no one from Tabulli was monitoring the light setup." [Chapin Depo., p. 60, lines 15-25, R. p.] "No one was standing there watching it being installed." [Chapin Depo. p. 60, lines 15-25, R. p.] "No one from Tabbuli checked for any safety hazards that might be presented by the hanging light setup." [Chapin Depo., p. 61, lines 17-21, R. p.] "Nobody from Tabbuli told the DJ not to put the light where it was" placed. [Chapin Depo., p. 61, lines 22-25, p. 62, line 1, R. p.] More

importantly, “nobody from Tabbuli did a safety inspection with respect to the lighting to make sure lights were safe for the patrons before it fell on Ms. Eddin’s head.” [Chapin Depo., p. 62, lines 2-7, R. p.]

When Appellant got to the restaurant that night, she sat at a table to eat. [Eddins Depo., p. 20, lines 7-24, R. p.] Respondent’s server told Appellant she should stay for the White Haute Nights event. [Eddins Depo., p. 20, lines 7-24, R. p.] The server told Appellant to move closer to the stage, and then seated her under the light. [Eddins Depo., pp. 20, lines 7-24, R. p.] After the show started, at 10:20 p.m., with the crowd and music, the light fell and struck Appellant on the head causing serious injuries. [Incident Report, R.p., Complaint, R.p.; Eddins Depo., p. 21, lines 1-25, p. 33, lines 1-18, R.p., Haynes Depo., p. 14, lines 1-25, p. 19, lines 1-24, p. 20, lines 9-17, R.p.]

Respondent testified that it investigates incidents and keeps Incident Reports in case “we ever needed to go back and find out what happened on a particular day or a particular event” and “to help determine a root cause of what caused that incident.” [Deihl Depo., p. 94, lines 14-21, R.p.] Respondent investigates incidents because it wants “to see if it is something that [it] could have prevented and how do[es it] prevent it in the future.” [Deihl Depo., p. 120, lines 7-22, R. p.]

Respondent’s manager, Cait Chapin, testified that she investigated the incident and is the one who completed the Incident Report. [Incident Report, R.p.; Chapin Depo., p. 58, lines 5-14, R. p.] Ms. Chapin “went over to talk to whoever was setting up lighting where this happened,” “looked at what happened, how it had fallen [and] what we could have done to prevent it, why it happened.” [Chapin Depo., p. 58, lines 5-14, R. p.] Ms. Chapin stated “we all spoke about it together upon [Appellant’s] exiting” and then Ms. Chapin spoke to “corporate,” which had the video from that day, about what happened. [Chapin Depo., pp. 68, lines 23-4, p. 69, lines 1-5, R.

p.]. After speaking with those involved and completing her official investigation of the incident, Ms. Chapin concluded that the light fell because "[i]t was not secured properly." [Chapin Depo., p. 92, line 4, R. p.]

After the incident, the manager told the "DJs to make sure that they are setting things up properly and things are secured and not setting things up over people and things like that." [Chapin Depo., p. 71, lines 1-4, R.p.] She looked at the light after it fell on Appellant and "[she] told everyone to make sure that things like this are secured, especially that are hanging overhead." [Chapin Depo., p. 73, lines 13-17, R.p.] The manager testified that they took down the light after it was put back from where it fell because "they didn't want that to happen again." [Chapin Depo., p. 74, lines 1-7, R.p.]

The manager testified that Respondent and its employees have a duty to "obey safety rules and exercise caution and common sense," and "report any potential accidents." [Chapin Depo., pp. 81-2, lines 1-16, R. p.] "You better be making sure that your t's are crossed and your i's are dotted in the restaurant because you want to make sure everyone is safe all around." [Chapin Depo., p. 83, lines 17-21, R. p.] "Negligence that could lead to a safety violation or cause injuries to guests or employees [is] prohibited." [Chapin Depo., p. 83, lines 22-25, p. 84, lines 1-4, R. p.] "Violation of any federal, state or local law or failure to follow prescribed rules or regulations, which could result in potential legal action" is also prohibited. [Chapin Depo., p. 84, lines 9-14, R. p.]

The manager testified that if staff told her there was a problem with one of the lights the DJs were using, "[she] would have gone out there and [she] would have investigated the entire situation. If [she] had known about this prior to this happening, [she] would have asked them to take it down or secure it somewhere that it couldn't potentially hurt somebody." [Chapin Depo., pp. 90, lines 19-25, 91, lines 1-3, R. p.] Ms. Chapin testified that the "staff is kind of constantly

looking for safety issues" "just by being observant, by being observant of the surroundings, the situations, the people." [Chapin Depo., pp. 97, lines 14-25, p.98, line 1, R. p.]

Respondent testified that Respondent had a general manager "who directed or supervised discovering [and inspecting] hazardous, dangerous and defective conditions on the premises on July 20, 2017." [Deihl Depo., p. 37, lines 4-15, R. p.] The general manager would have directed "premises safety, inspecting for hazards, discovering hazards, preventing hazards, correcting hazards, [and] warning about hazards." [Deihl Depo., pp. 37, lines 20-25, p.38, lines 1-3, R. p.] Respondent had a "duty" to "keep the premises in first class condition in accordance with the highest standards of operation of similar businesses." [Deihl, Depo., pp. 45, lines 19-25, p. 46, lines 1-6, R. p.] Mr. Deihl explained "at Tabbuli our employees go through training at orientation where we describe and show them how to watch out for things that would potentially be dangerous as far as their safety is concerned as an employee or as a guest." [Deihl Depo., pp. 50, lines 17-25, p. 51. Line 1, R.p.] Mr. Deihl testified:

> Q. What does Tall Sam I Am, LLC do to inspect, discover, correct, remedy, remove, and warn about any hazardous, dangerous or defective conditions at its premises in general, and on the date of the incident that we are here about today?
>
> A. Sure. So our general manager, all of our employees have a responsibility to look out for hazards. Our general manager would be tasked with probably more responsibility than a server or a dishwasher. But they do constant circles through the restaurant. They open up the restaurant. They get it ready for service. They close the restaurant throughout the day if they observe something that they would deem potentially hazardous, then they would address it and call for help to remedy or address it.

[Deihl Depo. pp. 58, lines 18-25, p.59, lines 1-10, R.p.] "Of course it is our job to make sure our premises is safe for our guests coming into our restaurants, of course it is" added Mr. Deihl. [Deihl Depo., p. 66, lines 18-21, R. p.]

Defendant has "just to be always on the lookout for general potentially hazardous conditions to be familiar with." [Deihl Depo., p. 107, lines 7-9, R. p.] "If one of [Respondent's] employees [including managers, general managers, and operations managers] encountered a hazardous condition or something that had the potential to become a hazardous issue [emphasis added]" "they would take what immediate action they could to either fix it or prevent . . . it from causing a problem." [Deihl Depo., p. 107, lines 10-25, p. 108, lines 1-2, R. p.]

If one of the employees viewed equipment of an independent contractor that was hazardous "they would – if they could do anything about it, they would. If they could not do anything about it, then they would report it to their manager." [Deihl Depo., p. 109, lines 15-22, R. p.]. "If someone had informed him that there was any other hazardous condition whatsoever with this particular light" he [and all employees and managers] would have "taken whatever steps necessary to fix it." [Deihl Depo., p. 123, lines 4-12, R. p.]

Respondent controls what DJs come onto the premises and where they put any of their equipment and what they do with it. [Deihl Depo., p. 126, lines 21-25, p. 127, lines 1-19, R. p.] "If they didn't want the DJ to put a piece of equipment in any particular spot, they could tell that DJ not to do it." [Deihl Depo., p. 127, lines 1-19, R. p.]

Respondent also "controls where tables and chairs where patrons sit are located in proximity to the DJ's equipment." [Deihl Depo., p. 127, lines 20-25, p. 128, line 1, R. p.] According to Respondent "we would control tables and chairs as located to any equipment in the building." [Deihl Depo., pp. 127, lines 20-25, p. 128, line 1, R. p.] Most importantly, "when [Respondent] tells a patron where to sit, [Respondent has] a duty to make sure it is safe for that patron to sit there." [Deihl Depo., p. 128, lines 23-25, p. 129, lines 1-2, R. p.]

Pertinent videotape evidence has been spoiled. Respondent's manager, Cait Chapin, testified that Appellant told her Appellant was going to sue Respondent immediately after the light struck Appellant on the head. [Chapin Depo., p. 50, lines 1-2, R. p.] In addition to the camera pointing at the light and the area where Respondent told Appellant to sit underneath the light, there is also a camera pointing at the front door that recorded the people and anything that came into the restaurant that day. [Deihl Depo., p. 82, lines 1-11, R. p.] "The camera system is always on. It is always recording, and then anything that it captures it saves for about 14 days." [Deihl Depo., pp. 80, lines 24-25, p. 81, lines 1-2, R. p.] Security camera footage is kept at the corporate office. [Chapin Depo., p. 49, lines 10-19, R. p.] When asked why "only about 20 seconds" of the video from that day was provided to Appellant pursuant to Appellant's discovery request for video of the premises and location where the incident occurred that day, all Respondent could say is "I don't know." [Deihl Depo., p. 81, lines 3-6, R. p.] This is particularly important in this case because Respondent, while trying to cast blame onto an unknown and unidentified DJ, cannot [or will not] say who the alleged DJ was, what was the DJ's name, where the DJ lives, what was the DJ's telephone number, or even whether the alleged DJ was a man or a woman. [Deihl Depo., p. 146, lines 1-12, p. 147, lines 8-10, R. p.]

Plaintiff's Expert Disclosures [R.p.] were filed of record and attached to the depositions of Appellant's experts. [Plaintiff's Expert Disclosures, R.p., Williams Depo., p. 15, lines 18-22, p. 43, lines 6-10, Rivenbark Depo., p. 109, line 25, p. 110, lines 1-25, p. 111, lines 1-3, R.p.] Appellant's experts, architect and safety expert Mark E. Williams, AIA, NCARB, and operations, restaurant owner, and safety expert James Rivenbark, confirmed under oath in their depositions that the opinions contained in Plaintiff's Expert Disclosures are still their opinions to a reasonable degree of architectural and professional certainty and are those to which they will testify at the

trial herein. [Williams Depo., p. 111, lines 20-25, p. 112, lines 1-13, R. p., Rivenbark Depo., p. 110, lines 23-25, p. 111, lines 1-3, R.p.]

Mr. Williams' disclosures, including his CV, state that he is a registered architect in 12 states, including South Carolina, and is certified by the National Council of Architectural Registration Boards [NCARB]. He is charged by the licensing bureau in those states as well as building codes to protect the health, safety and welfare of the general public. He has experience designing lighting systems, mechanical systems, and hiring people as consulting engineers. The architectural curriculum includes lighting and mechanical systems in buildings. Mr. Williams is employed as a forensic architect by Robson Forensic, Inc. and provides investigations, analysis, reports, and testimony concerning the standard of care for the operation and maintenance of commercial buildings, including restaurant facilities, and premises safety. Mr. Williams has been qualified as an expert to provide opinion testimony in a number of cases throughout the United States, including South Carolina. [Plaintiff's Expert Disclosures, R.p.,]

Mr. Williams' opinions to a reasonable degree of architectural and technical certainty, as set forth in Plaintiff's Expert Disclosures and confirmed by Mr. Williams during and attached to his deposition, include the following. It is Respondent's responsibility to maintain a safe premises for its patrons at all times. Industry, manufacturer and code safety standards require a restaurant owner to supervise the installation of a temporary portable stage light to make sure it is secure, which includes the use of a bracket, bolt and an additional safety chain, regardless of who owns or installs the light. Industry, manufacturer and code safety standards require a restaurant owner to then keep the temporary portable stage light barriered from patrons so it will not strike anyone on the head if it happens to fall, regardless of who owns or installs the light. A restaurant has a duty

to never put a patron in harm's way. Respondent breached these duties. Respondent's breaches caused Appellant's injuries and damages. [Plaintiff's Expert Disclosures, R.p.]

Mr. Williams' opinions explain further. The subject light was a temporary portable stage light, consistent with a multi-purpose PAR 64 constructed of sheet steel, similar to that manufactured by Altman Lighting, with a 10-inch diameter, about 16-inches long, weighing approximately 10 pounds, widely used in commercial and residential illumination including theatrical lighting. The photograph of the light produced by Respondent shows the light improperly situated upside-down with the power cord extending out of the top and its mounting yoke resting on an elevated audio speaker. The light was dangerous because the mass of its weight and height above the outside patio posed a foreseeable risk of harm to restaurant patrons. PAR light fixtures are not manufactured or intended to be placed unsecured on a ledge or shelf above where spectators are seated during performances. The 10 pound light was traveling 12 mph when it struck Appellant. A properly secured light fixture would not have fallen. Allowing a 10 lb. light fixture to sit unsecured on top of an audio speaker 8 ft. above patrons, made it foreseeable that patrons seated below the speaker would be struck and injured if it fell. The light should have been inspected, discovered, secured and barriered by the restaurant thereby eliminating the risk before inviting patrons onto the premises and seating them below the light. A restaurant exercising reasonable or ordinary care for its patrons' safety would have done so. Had Respondent done so, the light would not have fallen on Appellant and Appellant would not have been injured. The failure of Respondent to take reasonable safety precautions to properly identify and eliminate temporary hazards was a departure from standard practice and exposed patrons on the outdoor patio to a risk of harm. The failure of Respondent to provide a safe premises, regardless of who owned or installed the light, violated the standard of care for property maintenance, and created

the dangerous condition that caused Appellant to be struck and injured. [Plaintiff's Expert Disclosures, R.p.]

During his deposition, Mr. Williams testified:

> It's a case about putting a 10-pound object over somebody that's seated on a couch and not being involved during the setup to where you could ensure that it's safe.

[Williams Depo., p. 34, lines 6-10, R. p.]

> The point here that we're missing is that it's a 10-pound object purposely positioned eight feet above the floor. It's not properly secure, and then the business purposely seated people underneath it in the dark.

[Williams Depo., p. 39, line 25, p. 40, lines 1-4, R. p.]

> [A] business owner with this occupancy should have a heightened sense of concern and awareness about placing people in the dark that they're serving food and beverages, and sometimes alcoholic beverages, and that they're putting on a presentation that has noise and activity. So, it's a visually rich environment in the dark, and it's intended to capture your attention. So, having understood all those things, surely you wouldn't purposely sit somebody underneath a 10-pound object that you haven't been involved with and expect this not to happen. . . . Even though in spite of the fact that they didn't own it, they still had to make sure it was safe.

[Williams Depo., pp. 66, lines 22-25, p. 67, lines 1-9, 13-14, R.p.]

> I'm saying that it's the business owner's responsibility . . . to be involved in what goes on in the building. To be involved in the set up and involved in the supervision and the knowledge. They had plenty of time to find it, and to say that we're not responsible because we don't own it is preposterous. So -- and Chapin testified after the fact that if she'd have known that, she would have made them take it off.

[Williams Depo., p. 81, lines 8-20, R. p.]

> The hazard is the mass and weight when you evaluate in the context of the height. [. . .] Setting a 10-pound object eight foot off the floor creates a hazard because of its mass and weight. If you had barricaded it and you hadn't invited people to sit right underneath it, then it would have just fallen on the cushions [. . .] If it was

> adequately secure, then the hazard of it falling is not present. You can't take away gravity. If you take a 10-pound object and place it eight foot over someone's head and you ensure that it's adequately secure and you have a redundant chain or cable in case it fails, then that's called hazard mitigation.

[Williams Depo., pp. 82, lines 5-25, p. 83, lines 1-2, R. p.]

> [Section 520.10 requires the light installation to be] supervised while energized and barriered from the general public. Haven't seen any evidence that there was any supervision. In fact, the testimony is actually that they just show up, and we let them do whatever they want. I think that was a direct quote. So, there wasn't any level of supervision and then in terms of barrier . . . you could mitigate the hazard by simply barricading the area. If a 10-pound light is sitting eight feet off the floor and it's not attached in any manner and you barricade it, the hazard is still there because it -- there's still something likely to promote harm, but it's not dangerous because you can't encounter it. That's the whole point of design, guard, warn. If you guard people, you barricade them away from something and if it were to fall then it's not going to strike them. [. . .] What I'm saying is, if you take a portable light and you put it – temporarily place it like they did without any supervision and you let people sit underneath it, then the outcome shouldn't come as a surprise to anyone.

[Williams Depo., pp. 86, lines 10-18, 21-25, p. 87, lines 1-6, 22-25, p. 88, line 1, R. p.]

> You can ask me how do I know it wasn't properly secured, and I said I'm familiar with the technical data sheets and I'm familiar with what it takes to anchor it and make it safe and the redundant system with the cable [chain]. So, if you take all that action and you do all of that, then this wouldn't have happened. So, if you allow someone to come into your business and you know they're bringing things in and you take a position that they can do – and I quote, do pretty much whatever they want, then you're discharging or you're not looking at your responsibility as a business owner to observe and be involved in what they're doing. And now that we have someone who's been knocked on the head with a 10-poiund object, we have the general manager of the business saying in hindsight if I'd have known it was like that, I would have told them to take it down.

[Williams Depo., p. 95. Lines 13-25, p. 96, lines 1-6, R.p.]

> The intent [of Section 520.63] is that fixtures shall be securely fastened in place. It's one short sentence. It seems self-evident to me

> what that means. If it had been secured in place, then it wouldn't have fallen and struck her in the head.

[Williams Depo., p. 97, lines 8-14, R.p.]

> Keep people from sitting underneath it. Don't put a couch underneath the 10-pound object. It doesn't matter if it's a light or a bowling ball. Don't put somebody under something that could fall and hit their head.

[Williams Depo., p. 122, lines 14-18, R.p.]

> I know what it takes to install these. I know – I'm familiar with what proper procedure is with the yoke and the safety chain. And if you do those, if you take those actions and you follow manufacturer's recommendations, it won't fall off.

[Williams, Depo., p. 35, lines 16-21, R.p.]

> If the manufacturer published technical data sheets that instructs you to do certain things, take certain actions, and you don't do it, then you're not installing in an approved manner.

[Williams, Depo., p. 80, lines 8-11, R.p.]

> I'm not sure that it's necessarily a conclusion as it is a fact that the light is manufactured with a metal bar called a yoke. The yoke is visible in the photograph. It's sitting upside down. It comes with a way to attach it to a physical object so it will be secure, and it comes with a redundant safety chain so that if that attachment fails, you have something else to keep it from falling.

[Williams Depo., p. 38, lines 3-12, R.p.]

James Rivenbark

Mr. Rivenbarks' disclosures, including his CV, confirmed by him during his deposition, state that he is experienced in commercial hospitality operations, including restaurant enterprises. His employment requires expertise in maintaining commercial premises in in a safe condition in order to protect patrons from harm and a restaurant's duties with respect to same. He is experienced in hospitality and restaurant operations, designing restaurant layouts, architectural design, premises safety, premises maintenance, project management, creation of systems, interviewing, hiring, training and managing personnel, creating, implementing, and training on operational

policies, procedures, and employee handbooks, including those concerning premises and patron safety, vendor relationships, insurance coverages, licensing, and working with contractors. [Plaintiff's Expert Disclosures, R.p.] Mr. Rivenbark's opinions in Plaintiff's Expert Disclosures are similar to those of Mr. Williams but through the view of an expert restaurant operations manager and owner. Those can be seen in Plaintiff's Expert Disclosures filed of record and attached to Mr. Rivenbark's deposition rather than repeating them here.

Like Mr. Williams, Mr. Rivenbark was also asked about some of his disclosures and opinions during his deposition. Mr. Rivenbark testified to a reasonable degree of professional certainty as follows.

> Q. Is it your opinion that that temporary light should not have been placed above a patron's head where they were going to seat a patron?
> A. Yes.
>
> Q. Was it the restaurant's duty to make sure that that light was not put there?
> A. Yes.
>
> Q. Was it the restaurant's duty to go through and inspect the premises to discover that that light had been put above the seating area?
> A. Yes.
>
> Q. And had they inspected that area and seen that light, should they have taken that light down so it would not be above a patron's head?
> A. Yes.
>
> Q. And had they done that, would you agree that that light would not have fallen on Stefani's head?
> A. Yes.
>
> Q. Should that light have been discovered and taken down before it fell on Stefani's head by the restaurant?
> A. Yes.
>
> Q. Does a restaurant have control over everything in the restaurant, regardless of who brings it in?
> A. Yeah.

Q. Does a restaurant have a duty to make sure that whatever is brought into its restaurant is safe and not injurious to patrons?
A. Yes.

Q. Does a restaurant have a duty to make sure they don't seat patrons in an area of danger?
A. Yes.

Q. Would an area of danger be seating a patron below a light that's been set there temporarily?
A. Yes.

Q. Ms. Chapin testified in her Depo. that a DJ came in around 3 or 4 in the afternoon, and the incident report indicates that the incident where the light fell on Stefani's head occurred about 10:20 p.m. that evening. Would that have been plenty of time for Ms. Chapin or any other manager or any other staff member to notice that the light was sitting above a patron seating area where it should not have been?
A. Yes.

Q. Would that have been plenty of time for them to take that light down?
A. Yes.

Q. Should the restaurant have had a plan in place to go around and inspect for hazards like a temporary light being placed above a patron's head?
A. Yes. When they have an independent contractor in bringing in stuff that's not normally there, yes, they should have been checking.

Q. And all of these duties we've mentioned, is it your opinion that the defendant breached these duties?
A. Yes.

Q. And is it your opinion that those breaches caused Stefani to have this light fall on her head?
A. Yes.

[Rivenbark Depo., p. 119, line 22, though p. 122, line 17, R. p.]

Q. Would you expect a restaurant to tell the DJ, if in fact the DJ in this case put the light where it was, to not put a light above where a patron is going to be seated?
A. Yes. If they walked in with lights, I would expect that.

Q. Would putting a light above someone's head be outside the bounds of what a restaurant should allow a DJ to do?
A. Yes.

Q. If you were going to put a light above a patron's head and where you were going to seat patrons, would you need to have that inspected to make sure it was safe?
A. Yeah, yeah.

Q. And that's what a restaurant should do?
A. Yeah.

Q. Would you expect a restaurant's manager to inspect the lighting being placed by someone else that comes into the restaurant?
A. Yes. That's a big red flag, yes.

Q. Would you expect the manager to not let a temporary light be placed above a patron's head?
A. Yes.

Q. Would you expect a manager to remove a light or have a person remove the light if they did place it above a patron's head?
A. Yes.

Q. Would you expect a manager not to allow patrons to be seated below a temporary light?
A. Yes.

Q. And if managers are not doing that, can you infer that managers are not being properly trained?
A. Yes.

Q. And if the staff is not doing that, can you infer that the staff is not being properly trained?
A. Yes.

[Rivenbark Depo., p. 123, line 3, though p. 124, line 17, R. p.]

Q. Mark Williams is an expert architect who is going to be testifying in this case, as well. Mr. Williams' disclosures are in there, as well, in Plaintiff's Exhibit A. In paragraphs 29 and 30, he says, "Temporary lights, like stage lights, need to be properly supervised by qualified personnel and barriered from patrons." Do you agree with that as a restaurant operator?
A. Yes.

[Rivenbark Depo., p. 125, lines 1-12, R. p.]

> Q. [In your disclosures you state] "The light that fell in this case would not have passed even a brief inspection that should have been conducted by Tabbuli before then seating patrons underneath same."
> A. Uh-huh.
>
> Q. [In your disclosures you state] "Tabbuli even states in its applicable handbook under 3.9, "Safety," that, "Each employee is expected to obey safety rules and exercise caution and use common sense."
> A. Uh-huh.
>
> Q. "This would include staff and management using 'common sense' and objecting to dangerous lights, permanent, temporary, or otherwise, being installed or placed directly above tables where they are going to seat patrons." Do you see all of that?
> A. Yes, sir.
>
> Q. And is that still your opinion today?
> A. Yes.

[Rivenbark Depo., p. 135, line 10, through p. 136, line 4, R. p.]

ARGUMENTS

I. BECAUSE THERE WAS AT LEAST A SCINTILLA OF EVIDENCE TO ALLOW A JURY LOOKING AT THE EVIDENCE IN A LIGHT MOST FAVORABLE TO APPELLANT TO DRAW MORE THAN ONE INFERENCE ABOUT RESPONDENT'S NEGLIGENCE, THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT

The lower court erred in determining the evidence of record led only to a single inference — that Respondent was not negligent. When presented with a choice of conflicting inferences, a jury must determine the negligence. The lower court chose between multiple inferences emerging from the evidence in reaching its conclusion, a task which should be reserved exclusively for a jury. In turn, Respondent's motion for summary judgement should have been denied.

Respondent's negligence

To establish a cause of action for negligence, a plaintiff must show three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damages proximately resulting from the breach of duty. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1886).

Respondent duties were to keep its premises safe for patrons, discover and eliminate risks, and not put patrons in harm's way

Concerning the first element of negligence [duty], Respondent's duties included keeping its premises safe for patrons, discovering and eliminating risks, and not putting patrons in harm's way. In South Carolina, "[t]he owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." Sims v. Giles, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001) (citing Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). Like a landowner, a merchant also owes its customers "the duty to exercise ordinary care to keep his premises in a reasonably safe condition." Young v. Meeting St. Piggly Wiggly, 288 S.C. 508, 510, 343 S.E.2d 636, 637 (Ct. App. 1986). "A business owner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks." Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 452 S.E.2d 619, 620-1 (S.C.App. 1994). "[A]n invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there." Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159, 161 (S.C.App. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 341A cmt. a (1965)).

When it comes to duty, "[t]he general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case." Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002). "This kind of evidence is admitted

not because it has 'the force of law,' but rather as 'illustrative evidence of safety practices or rules generally prevailing in the industry.'" Id.

Even if these duties were not mandated in South Carolina, if an act is voluntarily undertaken, the actor assumes the duty to use due care. Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) (where evidence indicated a dam builder may have voluntarily undertook to monitor the lake for the benefit of others, it may have owed a duty to those injured when the dam broke). *See also* Wright v. PRG Real Estate Mgmt., 426 S.C. 202, 826 S.E.2d 285 (2019) (although a landlord generally has no duty to provide security to protect tenants from criminal acts of third parties, a landlord who undertakes to provide security measures may be liable if the undertaking is performed negligently). Hill v. York Cty. Sheriff's Dep't, 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993) (where sheriff refused to give intoxicated appellant a ride after charging him with disorderly conduct, and where appellant was shot trying to reach his hotel, trial court erred in granting summary judgment to sheriff in appellant's negligence suit).

Whether out of compliance with South Carolina law or voluntarily undertaking same, or both, according to the testimony of Respondent's Rule 30(b)(6) designee, Jeff Deihl, and Respondent's manager, Cait Chapin, set forth above, Respondent acknowledges owing the duties to keep its premises safe for patrons, discover and eliminate risks, and not put patrons in harm's way.

Respondent breached its duties to keep it premises safe for patrons, discover and eliminate risks, and not put patrons in harm's way

Concerning the second element of negligence [breach], this case is about Respondent's own breach of duties which created the dangerous condition in this case. This is not a notice case. Respondent wants this to be a notice case so the Court will ignore Respondent's negligence that created the danger which caused Appellant's injuries. The specific acts that created the dangerous

condition and caused the injuries in this case were Respondent failing to supervise the installation of the temporary portable stage light, failing to make sure it was properly secured with a bolt and bracket, failing to make sure a backup safety chain was utilized, failing to barrier the light from patrons in case it did fall, putting a couch under the light, and seating Appellant on the couch under the light, all in violation of industry, manufacturer and code safety standards. This is true regardless of who owned the light or what caused the light to fall. Respectfully, even if Respondent and Mr. Williams had not determined that the light fell because it was not properly secured, the lower court's focus on what caused the light to fall and who placed the light was misplaced.

Respondent's policy was to investigate an incident to determine the root cause and correct the danger so the injury did not happen again. Respondent's manager investigated the incident in accordance with Respondent's policy. Ms. Chapin "went over to talk to whoever was setting up lighting where this happened," "looked at what happened, how it had fallen [and] what we could have done to prevent it, why it happened." [Chapin Depo., p. 58, lines 5-14, R. p.] Ms. Chapin stated "we all spoke about it together upon [Appellant's] exiting" and then Ms. Chapin spoke to "corporate," which had the video from that day, about what happened. [Chapin Depo., pp. 68, lines 23-4, p. 69, lines 1-5, R. p.]. Ms. Chapin told the "DJs to make sure that they are setting things up properly and things are secured and not setting things up over people and things like that." [Chapin Depo., p. 71, lines 1-4, R.p.] She looked at the light after it fell on Appellant and "[she] told everyone to make sure that things like this are secured, especially that are hanging overhead." [Chapin Depo., p. 73, lines 13-17, R.p.] Ms. Chapin testified that they took down the light after it was put back from where it fell because "they didn't want that to happen again." [Chapin Depo., p. 74, lines 1-7, R.p.]

After speaking with those involved and completing her official investigation of the incident, Ms. Chapin concluded that the light fell because "[i]t was not secured properly." [Chapin Depo., p. 92, line 4, R. p.] Plaintiff's expert, after reviewing the evidence and manufacturer safety standards, technical data sheets, and specifications for installation of a temporary portable stage light, what it takes to anchor the light with the yolk, bolt, and the redundant system with the safety chain, with which he was already familiar, and based on his education, training and experience, agreed. [Williams Depo., pp. 44, line 12, 79, lines 3-4, R.p.]

However, what caused the light to fall is not determinative of Respondent's negligence. Even if the light had been secured in accordance with industry, manufacturer and code safety standards, which is denied, Respondent still created the danger by failing to barrier the light from patrons as is required with temporary portable stage lights due to their intrinsic nature of not being permanent fixtures and subject to falling when exposed to noise, vibrations, people and the environment. Respondent instead arranged its seating under the light, and then seated Appellant under the light in harm's way.

The lower court concluded its opinion with a statement that "assuming that the light was installed in a dangerous or defective condition, Defendant would still be entitled to judgment as a matter of law because the only reasonable inference from the record is that any such installation would have been performed by an independent contractor." [Order, R.p.] However, the South Carolina Supreme Court has long recognized that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 390-391, 611 S.E.2d 235, 238 (2005) (citing Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct.App.1993) (citing

57 C.J.S. Master and Servant, § 591 (1948)). The Supreme Court has explained:

> The term "nondelegable duty" is somewhat misleading. A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor. Simmons, 330 S.C. 115 at 123, 498 S.E.2d 408 at 412 (Ct. App. 1998); see also F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 654 (1997).

Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

Respondent is asserting the negligence of an alleged unknown third-party DJ "over which Defendant had no control" as an affirmative defense. [Answer, p. 3, R.p.] "The defendant asserting an affirmative defense bears the burden of its proof." Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008). Even if one were to ignore the law set forth above, the problem with Respondent trying to assert such a defense in this case is that Respondent had absolute "control" over the alleged third-party DJ and what the DJ did with the DJ's equipment in Respondent's restaurant.

Respondent's Rule 30(b)(6) corporate representative and Respondent's manager both testified Respondent DID have control over any alleged DJ and what the DJ did with, and where he or she otherwise put, his or her equipment, including the light. Manager Chapin testified that if they had a DJ come in, the DJ would set up "according to our floor plan" over which Respondent had control. [Chapin Depo., pp. 23, lines 3-15, p. 24, lines 4-7, R. p.] "If Tabulli saw something with the setup that they did not like and told the DJ to not do that, the DJ would have to comply." [Chapin Depo., p. 26, lines 12-16, R. p.] Ms. Chapin told the "DJs to make sure that they are setting things up properly and things are secured and not setting things up over people and things like that." [Chapin Depo., p. 71, lines 1-4, R.p.]

Rule 30(b)(6) Corporate Representative Deihl testified that "if someone had informed him

that there was any other hazardous condition whatsoever with this particular light" they would have "taken whatever steps necessary to fix it." [Deihl Depo., p. 123, lines 4-12, R. p.] Like Manager Chapin, Mr. Deihl confirmed that Respondent controls what DJs come onto the premises and where they put any of their equipment and what they do with it. [Deihl Depo., p. 126, lines 21-25, p. 127, lines 1-19, R. p.] "If they didn't want the DJ to put a piece of equipment in any particular spot, they could tell that DJ not to do it." [Deihl Depo., p. 127, lines 1-19, R. p.] This is control over the alleged third-party DJ and the light.

Respectfully, Respondent is liable for any alleged negligence on the part of the alleged unknown DJ. In South Carolina, a business owner can be held liable for the negligence of a third person. In Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001), citing RESTATEMENT (SECOND) OF TORTS § 344 (1965), the Court held:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to [a] discover that such acts are being done or are likely to be done . . . . Restatement (Second) of Torts § 344 (1965).

In this case, Respondent is subject to liability to Appellant for physical harm caused by both the harmful acts of the alleged third-party DJ, and by the failure of Respondent itself to exercise reasonable care to discover that such acts were being done or were likely to be done.

In the lower court, Respondent cited Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978) in its Motion for Summary Judgment in support of its claim that it cannot be held liable for the torts of the unknown alleged DJ unless an inherently dangerous act was involved. *Duane* actually supports Appellant's case and arguments herein because seating a patron under a speaker with an unsecured 10 pound temporary portable stage light sitting on top and then starting the show is inherently dangerous.

Duane overruled the motion for summary judgment in that case and, more importantly, specifically held that defendant "is responsible if the injury is caused by his own negligence in failing to take preventive measures." Id. at 683. That is exactly what happened in this case. Respondent is responsible because Appellant's injury was caused by Respondent's own negligence in failing to take preventive measures. Respondent cannot evade liability because failing to supervise the installation of the temporary portable stage light, failing to make sure it was properly secured with a bolt and bracket, failing to make sure a backup safety chain was utilized, failing to barrier the light from patrons, putting a couch underneath the light, and seating a patron on the couch under the light, all in violation of industry, manufacturer and code safety standards, was inherently or intrinsically dangerous to others with foreseeable injuries. At the very least, this should have been determined by a jury.

Respondent's spoliation of evidence

Appellant raised this point in the lower court because it would not be fair to allow Respondent to spoil the evidence and then argue Appellant lacks the evidence necessary to go forward with her case. When evidence is lost or destroyed by a party, regardless of the motivation or intent of the party for losing or destroying the evidence, an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990) (allowing adverse instruction even though "there was no evidence of any intentional misconduct on the part of Defendant or its counsel"); Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). The jury is entitled to consider whether Respondent has adequately preserved evidence. "When a party fails to preserve material evidence for trial, it is for [the jury] to determine whether the party has offered a satisfactory explanation for that failure. If

[the jury] find[s] the explanation unsatisfactory, [it is] permitted – but not required – to draw the inference that the evidence would have been unfavorable to the party's claim." Stokes v Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E. 2nd 675 (Ct. App. 2006) (holding spoliation instruction was warranted in medical malpractice action where two pieces of evidence initially collected by hospital were missing).

The destruction of the video evidence from the day the incident occurred is particularly important in this case because Respondent is arguing that this is a notice case. The video of the premises, the front door, who came in the restaurant, what they brought with them into the restaurant, the light being set upside down on the speaker, the light not being properly installed with a bracket, bolt and safety chain, Respondent setting up the seating under the light, Respondent seating Appellant under the unsecured light, would have shown what Respondent saw and knew or should have seen and known. Respondent's manager testified that Appellant threatened to sue Respondent immediately after the incident on the night that it happened even before the manager called "corporate" which had the video of the entire day. Because Respondent lost or destroyed this evidence, or failed to preserve this evidence, regardless of the motivation or intent of Respondent for losing or destroying the evidence, an inference may be drawn that the evidence which was lost or destroyed by Respondent would have been adverse to Respondent.

Even if this were a notice case, Respondent at least had constructive notice

As noted above, Respondent created the dangerous condition and this is not a notice case. However, it is anticipated that Respondent will ask the Court to ignore Respondent's failing to supervise the installation of the temporary portable stage light, failing to make sure it was properly secured with a bolt and bracket, failing to make sure a backup safety chain was utilized, failing to barrier the light from patrons, putting a couch underneath the light, and seating a patron on the

couch under the light, all in violation of industry, manufacturer and code safety standards, which created the danger, and argue that this is a notice case requiring Appellant to show Respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it. See e.g. O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006).

Even if one were to argue Respondent did not create the dangerous condition, Respondent at least had constructive notice. "Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." O'Leary-Payne.

O'Leary-Payne is right on point with the facts and Respondent's anticipated arguments in this case. In O'Leary-Payne, the Court held that Defendant had constructive notice of the dangerous condition because:

1. Defendant's employees were required to conduct regular inspections of the area where the dangerous condition was found; and
2. Employees should have observed the dangerous condition during an inspection.

O'Leary-Payne at 101.

In this case, Respondent's own policies required it to conduct regular inspections of the area where the dangerous condition was found. Respondent's manager testified Respondent's protocol is to have its staff "constantly looking for safety issues" "just by being observant, by being observant of the surroundings, the situations, the people" [Chapin Depo., pp. 97, lines 14-25, p.98, line 1, R. p.] and "making sure that t's are crossed and i's are dotted in the restaurant because you want to make sure everyone is safe all around." [Chapin Depo., p. 83, lines 17-21, R. p.] Respondent's Rule 30(b)(6) corporate representative added that in order to do this, "they do constant circles through the restaurant" and "close the restaurant throughout the day if they observe

something that they would deem potentially hazardous." [Deihl Depo. pp. 58, lines 18-25, p.59, lines 1-10, R.p.] Respondent trains its employees "how to watch out for things that would potentially be dangerous as far as their safety is concerned as an employee or as a guest." [Deihl Depo., pp. 50, lines 17-25, p. 51. Line 1, R.p.] "When [Respondent] tells a patron where to sit, [Respondent has] a duty to make sure it is safe for that patron to sit there." [Deihl Depo., p. 128, lines 23-25, p. 129, lines 1-2, R. p.] Respondent should have observed the dangerous condition and that Respondent was violating the industry, manufacturer and code safety standards. In turn, Respondent had constructive notice of the dangerous condition.

Also, the light was there starting as early as 3:00 p.m. for seven (7) hours before it fell on Appellant at 10:20 p.m. At the very least, it was there long enough before Respondent placed a seat underneath it, seated Appellant underneath it, while Appellant sat there waiting for the show to start, for the first half of the show, for the intermission, and when the second half of the show started. Thus, Respondent had plenty of time for constructive notice.

The principle of "proof by circumstantial evidence"

A brief discussion of South Carolina's principle of "proof by circumstantial evidence" is also warranted here. A Plaintiff's case can be based on circumstantial evidence. Leek v. New S. Express Lines, 192 S.C. 527, 7 S.E.2d 459 (1940). This is especially true in this case where Respondent did not take measures to secure the light or the video of what transpired throughout that day in the restaurant despite Appellant allegedly threatening to sue Respondent that night immediately after she was struck on the head.

Appellant's case is not based on res ipsa loquitor

Like the defendant tried to do in O'Leary-Payne, it is anticipated that Respondent in this case will try to argue that Appellant relies solely upon the doctrine of *res ipsa loquitor* to prove

negligence. In O'Leary-Payne, the Court discussed *res ipsa loquitor* and overruled the defendant's motion for summary judgment which had tried to argue that plaintiff in that case relied solely on *res ipsa loquitor*. O'Leary-Payne held:

> Charter argues the trial court erred in failing to grant its directed verdict motion because O'Leary-Payne relied on the doctrine of *res ipsa loquitur*. We disagree.
>
> *Res ipsa loquitur* means "the thing speaks for itself." W. Page Keeton et al., *Prosser and Keeton on Torts* § 39, at 243 [5th ed. 1984]. According to the doctrine of *res ipsa loquitur*:
>
> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from lack of care. Id. at 244.
>
> Charter mischaracterizes O'Leary-Payne's argument as being "the rod speaks for itself." O'Leary-Payne did not attempt to prove Charter's negligence by asserting that simply because she was injured at Charter's Shopping Center, Charter was therefore negligent. Instead, she attempted to prove negligence by introducing details about the rod, such as its height and location, from pictures and testimony. Accordingly, we find the trial court did not err in failing to grant Charter a directed verdict on the grounds that O'Leary-Payne relied on *res ipsa loquitur* to prove negligence.

O'Leary-Payne at 100.

In this case, any attempt by Respondent to claim Appellant is relying solely on *res ipsa loquitur* to prove negligence mischaracterizes Appellant's argument as being "the [light] speaks for itself." Appellant is not attempting to prove Respondent's negligence by asserting that simply because she was injured at Respondent's restaurant, Respondent was therefore negligent. Instead, Appellant is attempting to prove negligence by introducing details about Respondent's duties, Respondent's violations of industry, manufacturing and code safety standards, Respondent failing to supervise the installation of the temporary portable light, Respondent's failure to properly secure

the light with a bracket, bolt and safety chain, the light, such as its height and location, Respondent failing to barrier the light from patrons, Respondent seating Appellant beneath the light, and Respondent's own policies of "constantly circling through the restaurant" "looking for safety issues," with the use of the evidence and testimony in this case. Also, Respondent's manager concluded in her investigation that the light fell because it was not properly secured. Mr. Williams agreed. Accordingly, Appellant is not relying on *res ipsa loquitur* to prove negligence.

Appellant's damages proximately resulted from Respondent's breach of duty

Concerning the third element of negligence (proximate cause), as a proximate result of Respondent's breach, Appellant suffered serious bodily injuries. Appellant was questioned about some of her injuries in her deposition which include but are not limited to the injuries to her head, neck, shoulder and other parts of her body, a traumatic brain injury, neurocognitive disorder, persistent post-concussion syndrome, concussion, chronic post-traumatic headache, memory problems, cervicalgia, muscle spasms, muscle strain, tendon strain, cervical, thoracic and lumbar spine problems, vision changes, diminished acuity, cognitive changes, speech difficulties, cognitive-linguistic problems, dizziness, physiologic cupping of optic disc of both eyes, myopia of both eyes, light sensitivity, noise sensitivity, and right shoulder pain. [Complaint, R.p.; Eddins Depo., p. 21, lines 1-25, p. 33, lines 1-18, R.p., Haynes Depo., p. 14, lines 1-25, p. 19, lines 1-24, p. 20, lines 9-17, R.p., Plaintiff's Expert Disclosures, R.p.,]

In South Carolina, there can be more than one proximate cause of an incident. Gibson v. Gross, 280 S.C. 194, 311 S.E.2d 736 (Ct. App. 1983). The general rule is that negligence, to render a person liable, need not be the sole cause of an injury. Id. at 738. It is sufficient that his negligence, concurring with one or more efficient causes, is the proximate cause of an injury. Id. Where several causes combine to produce injuries, a person is not relieved from liability because he is responsible

for only one of them; it is sufficient that his negligence is an efficient cause without which the injury would not have resulted. Id. Thus, in this case, it does not matter who owned or installed the light. What matters for Appellant's claim against Respondent are Respondent's violations of industry, manufacturing and code safety standards, Respondent failing to supervise the installation of the temporary portable light, Respondent's failure to properly secure the light with a bracket, bolt and safety chain, Respondent failing to barrier the light from patrons, Respondent seating Appellant beneath the light, and Respondent's violation of it's self-proclaimed duty of "constantly circling through the restaurant" "looking for safety issues."

Actual causation is proved by establishing the injury would not have occurred but for the defendant's negligence while legal causation is proved by establishing foreseeability. Hill v. York Cty. Sheriff's Dep't, 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993). Here, the injury would not have occurred but for Respondent's violations of industry, manufacturing and code safety standards by failing to barrier the light from patrons and instead seating Appellant beneath the light in harms way. That is true even without Respondent failing to supervise the installation of the temporary portable stage light and Respondent's failure to properly secure the light with a bracket, bolt and safety chain. As explained by Mr. Williams:

> [Y[ou could mitigate the hazard by simply barricading the area. If a 10-pound light is sitting eight feet off the floor and it's not attached in any manner and you barricade it, the hazard is still there because it -- there's still something likely to promote harm, but it's not dangerous because you can't encounter it. That's the whole point of design, guard, warn. If you guard people, you barricade them away from something and if it were to fall then it's not going to strike them.

[Williams Depo., pp. 86, lines 21-25, p. 87, lines 1-6, R. p.] Here also, the injury was foreseeable. As explained by Mr. Williams, the light was dangerous because the mass of its weight and height above the outside patio posed a foreseeable risk of harm to restaurant patrons. PAR light fixtures

are not manufactured or intended to be placed unsecured on a ledge or shelf above where spectators are seated during performances. Allowing a 10 lb. light fixture to sit unsecured on top of an audio speaker 8 ft. above patrons, made it foreseeable that patrons seated below the speaker would be struck and injured if it fell. The 10 pound light was traveling 12 mph when it struck Appellant. The light should have been inspected, discovered, secured and barriered by the restaurant thereby eliminating the risk before inviting patrons onto the premises and seating them below the light. A restaurant exercising reasonable or ordinary care for its patrons' safety would have done so. Had Respondent done so, the light would not have fallen on Appellant and Appellant would not have been injured.

CONCLUSION

The trial court erred in granting Respondent's Motion for Summary Judgement. Viewing the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to Appellant, Appellant has presented at least a mere scintilla of evidence in order to withstand a motion for summary judgment. The lower court's determination that Respondent was not negligent required choosing between multiple inferences from the presented evidence. The decision to choose between multiple inferences is one that must be left to a jury. Thus, the trial court's granting of Respondent's Motion for Summary Judgment was improper.

For the reasons set forth above, Appellant respectfully requests that this Court REVERSE the trial court's decision to grant Respondent's Motion for Summary Judgment.

GARY C. JOHNSON, P.S.C.

/s/ Michael E. Liska
Michael E. Liska
SC Bar No. 102542
2265 Executive Drive
P.O. Box 55106
Lexington, KY 40505
Tel: 859-268-4300
Fax: 859-268-7318
Email: mliska@garycjohnson.com
Attorneys for Appellant

Dated: September 9, 2022
Hilton Head Island, South Carolina

RECEIVED
Sep 09 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No.: 2022-000754

Case No. 2020-CP-2481

Stefani Eddins, Appellant,

vs.

Tall Sam I Am, LLC d/b/a Tabbuli, Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Tall Sam I Am, LLC d/b/a Tabbuli by depositing a copy of it in the United States mail, postage prepaid, and via email, on September 9, 2022 addressed to its attorney(s) of record as follows:

Mark S. Barrow, Esq.
William A. Neinast. Esq.
Brandon R. Gottschall, Esq.
SWEENY, WINGATE & BARROW, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina, 29211
msb@swblaw.com
wneinast@foxrothschild.com
brg@swblaw.com
Attorneys for Respondent

Dated: September 9, 2022
Hilton Head Island, South Carolina

GARY C. JOHNSON, P.S.C.

/s/ Michael E. Liska

Michael E. Liska
SC Bar No. 102542
2265 Executive Drive
P.O. Box 55106
Lexington, KY 40505
Tel: 859-268-4300
Fax: 859-268-7318
Email: mliska@garycjohnson.com
Attorneys for Appellant

From:	Nicole Gates
To:	wneinast@foxrothschild.com; msb@swblaw.com; brg@swblaw.com
Cc:	Liska, Mike; JD Maines
Subject:	Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date:	Friday, September 9, 2022 10:41:00 AM
Attachments:	2022.09.09 Designation of Matter to be Included in the Record on Appeal Proof of Service.pdf 2022.09.09 Designation of Matter to be Included in the Record on Appeal.pdf 2022.09.09 Initial Brief of Appellant (Proof of Service).pdf 2022.09.09 Initial Brief of Appellant.pdf

---

Please see the attached which was filed today in the above-referenced matter. Please contact me with any difficulties regarding the same.

Nicole Gates
Paralegal
GARY C. JOHNSON, P.S.C.
P.O. Box 55106
2265 Executive Drive
Lexington, KY 40505
Telephone: (859) 268-4300
Mobile or Text: (859) 693-5332
Facsimile: (859) 268-7318

From:	postmaster@swblaw.com
To:	msb@swblaw.com
Subject:	Delivered: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date:	Friday, September 9, 2022 10:40:31 AM
Attachments:	Eddins v. Tall Sam I Am LLC dba Tabbuli Appellate Case No. 2022-000754.msg

Your message has been delivered to the following recipients:
msb@swblaw.com (msb@swblaw.com) <mailto:msb@swblaw.com>
Subject: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754

From: postmaster@swblaw.com
To: brg@swblaw.com
Subject: Delivered: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date: Friday, September 9, 2022 10:40:28 AM
Attachments: Eddins v. Tall Sam I Am LLC dba Tabbuli Appellate Case No. 2022-000754.msg

---

Your message has been delivered to the following recipients:
brg@swblaw.com (brg@swblaw.com) <mailto:brg@swblaw.com>
Subject: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754

From:	Microsoft Outlook
To:	JD Maines
Subject:	Relayed: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date:	Friday, September 9, 2022 10:40:12 AM
Attachments:	Eddins v. Tall Sam I Am LLC dba Tabbuli Appellate Case No. 2022-000754.msg

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:
JD Maines (jd@thenyelawgroup.com) <mailto:jd@thenyelawgroup.com>
Subject: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754

From:	Microsoft Outlook
To:	Liska, Mike
Subject:	Delivered: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date:	Friday, September 9, 2022 10:40:09 AM
Attachments:	Eddins v. Tall Sam I Am LLC dba Tabbuli Appellate Case No. 2022-000754.msg

Your message has been delivered to the following recipients:
Liska, Mike (mliska@garycjohnson.com) <mailto:mliska@garycjohnson.com>
Subject: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754

From:	Microsoft Outlook
To:	wneinast@foxrothschild.com
Subject:	Relayed: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754
Date:	Friday, September 9, 2022 10:40:11 AM
Attachments:	Eddins v. Tall Sam I Am LLC dba Tabbuli Appellate Case No. 2022-000754.msg

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:
wneinast@foxrothschild.com (wneinast@foxrothschild.com) <mailto:wneinast@foxrothschild.com>
Subject: Eddins v. Tall Sam I Am, LLC d/b/a Tabbuli Appellate Case No. 2022-000754