STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
KEVIN DWAYNE CHAVIS, Plaintiff, v. VANSY SAENSANE AND RA CHA, INC. D/B/A BANGKOK TOKYO RESTAURANT A/K/A BANGKOK THAI RESTAURANT, Defendants.	)	Civil Action No. 2021-CP-23-01487 **ORDER**

This matter was before the Court on January 27, 2023 on a Motion for Summary Judgment by Defendant Ra Cha, Inc. d/b/a Bangkok Tokyo Restaurant a/k/a Bangkok Thai Restaurant (hereinafter "Defendant Bangkok"). After consideration of the arguments of counsel and evidence presented in this case, the Court grants summary judgment as to all claims against Defendant Bangkok.

FACTUAL BACKGROUND

Defendant Bangkok is a Thai cuisine restaurant located at 599 Haywood Road in Greenville, South Carolina. In September 2019, Defendant Vansy Saensane (hereinafter "Defendant Saensane" or "Saensane") held a 25% ownership interest in Defendant Bangkok. During operating hours, Defendant Saensane worked in the restaurant doing food prep, cooking, and occasional waitressing. On September 26, 2019, Defendant Bangkok's restaurant closed at 9:00 PM. After the restaurant closes, Defendant Saensane normally stays after hours to help clean up, do paperwork, and count money. After the restaurant closed on September 26, 2019, while doing paperwork/accounting, Defendant Saensane drank wine and served herself.

Defendant Saensane likely left the restaurant for the night around 10:00 PM on September 26, 2019. Defendant Saensane has no recollection of where she was between the hours of 10:00 PM and 12:46 AM the next morning. However, at 12:46 AM, on September 27, 2019, Saensane was traveling on North Pleasantburg Drive in Greenville, South Carolina when she was involved in an automobile accident with Plaintiff Kevin Chavis' ("Plaintiff") vehicle. As a result of this accident, Plaintiff brought this action against Defendant Bangkok for 1) Dram Shop Liability; 2) Negligence Per Se; 3) Negligent Hiring and Retention; and 4) Vicarious Liability.

STANDARD OF REVIEW

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate 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 judgment as a matter of law." Rule 56(c). SCRCP. "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.,* 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in the pleadings to withstand a summary judgment motion but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment

may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

DISCUSSION

I. Defendant Bangkok never served alcohol to Defendant Saensane; thus, Plaintiff's Dram Shop claim is improper

In South Carolina, a third party injured by the actions of an intoxicated person in violation of S.C. Code Ann. § 61-4-580 may pursue a civil action against the vendor. *Hartfield v. Getaway Lounge & Grill*, 388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010) (citing *Daley v. Ward*, 303 S.C. 81 (1990)). "Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes." *Hartfield v. Getaway Lounge & Grill*, 388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010) (citing *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 92, 504 S.E.2d 318, 319 (1998)). In *Tobias,* the South Carolina Supreme Court held that:

> "South Carolina Code Ann. § 61-4-580 (2) prohibits the knowing sale of beer or wine to an intoxicated person . . . In recognizing a private cause of action for a violation of [this] [statute], the Court of Appeals stated that their purpose is to promote public safety, and to prevent an already intoxicated person from becoming even more intoxicated, and thus a greater risk to the public at large, when he leaves the establishment. We agree." 332 S.C. 90, 92, 504 S.E.2d 318, 319 (1998) (citing *Tobias v. The Sports Club, Inc.*, 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996)).

Plaintiff's Second Amended Complaint does not contain specific reference to any South Carolina statutes but the language of the Second Amended Complaint implies that Defendant Bangkok violated S.C. Code Ann. § 61-4-580 (2). The Courts in South Carolina have established that Dram Shop liability requires the actual sale of alcohol to an intoxicated person under S.C. Code Ann. § 61-4-580 (2). *Hartfield v. McDonald*, 671 S.E.2d 380, 381 S.C. 1 (S.C. Ct. App. 2008). Defendant Bangkok argues that there is no evidence in this case that Defendant Saensane was sold any alcohol, nor is there any evidence or testimony that Defendant Saensane was served any alcohol by any employee or agent of Defendant Bangkok. The Court agrees. Plaintiff argues that

Defendant Saensane's version of events can result in a dram shop action in this state because Defendant Saensane, as a co-owner of Defendant Bangkok, served herself alcohol. The Court disagrees that South Carolina's dram shop framework operates in such a fashion. Dram shop liability in this state is wholly predicated on South Carolina's penal codes. Therefore, Plaintiff must cite a South Carolina penal statute which Defendant Bangkok violated in order to bring a dram shop action. The most commonly cited statute in South Carolina dram shop actions is S.C. Code Ann. § 61-4-580 (2), which states that "No holder of a permit authorizing the sale of beer or wine to a servant, agent, or employee of the permittee may knowingly . . . sell beer or wine to an intoxicated person." Plaintiff cites this statute in his Memorandum in Opposition to this Motion. The statute is clearly intended to prohibit an employee from selling alcohol to an intoxicated customer. The Court finds that Defendant Bangkok did not violate this statute. Defendant Saensane was not sold or served wine by any employee of Defendant Bangkok. Defendant Saensane was not a customer of Defendant Bangkok on September 26, 2019. There is no evidence of any transaction or sale of any alcohol by Defendant Bangkok to Defendant Saensane.

At oral arguments, Plaintiff's counsel argued that the Court should read S.C. Code Ann. § 61-4-580 (2) differently. Plaintiff's counsel argued that if the legislature intended to prohibit selling alcohol to an intoxicated customer, they would also want to prohibit giving alcohol away, which Plaintiff's counsel argued was similar to a co-owner taking it from the bar. Putting aside whether giving alcohol away is analogous to a co-owner taking it from a bar, the Court is bound by the statute's plain and unambiguous meaning. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look or impose another meaning." *Richland*

County Sch. Dist. Two v. South Carolina Dep't of Educ., 355 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App 1999) (citing *South Carolina Dep't of Revenue and Taxation v. Rosemary Coin Machines, Inc.*, 331 S.C. 234, 245, 500 S.E.2d 176, 182 (Ct. App. 1998)). "Words used in a statute must be given their plan and ordinary meaning without resort to subtle or forced construction to limit or expand the operation of the statute." *Id.* (quoting *Greenville Hospital System v. Provident Life & Accident Ins. Co.*, 330 S.C. 436, 442, 499 S.E.2d 232, 235 (Ct. App. 1998)).

The Court finds that the statute's words are plain and unambiguous and clearly prohibit a permittee from selling alcohol to an intoxicated individual. If the legislature intended to use a word other than "sell" to capture the activity of restaurants giving away alcohol, it could have done so. The Court cannot substitute words in the statute based on what it feels the law should be. Additionally, the statute is clearly intended to apply to a transaction between two people, a representative of the permittee and an "intoxicated person". Here, Defendant Saensane is the only person involved and took the alcohol herself. S.C. Code Ann. § 61-4-580 (2) does not apply to such a situation.

Plaintiff's interpretation of the statute is also at odds with the public policy goals espoused by the South Carolina Supreme Court in recognizing the dram shop cause of action. The Court's stated purpose was to promote public safety and hold restaurants responsible if they or their employees served intoxicated individuals. This cause of action encourages restaurants to instruct their employees to recognize when an individual is intoxicated and to stop serving them at that point. It is unclear from Plaintiff's dram shop theory what Defendant Bangkok could have done to prevent Defendant Saensane from allegedly continuing to serve herself at the restaurant.

In his brief and at oral arguments, Plaintiff also argued that Defendant Bangkok violated

S.C. Code § 61-5-30. The Court need not address this contention, as S.C. Code § 61-5-30 was repealed by the legislature by 1996 Act No. 415 effective January 1, 1997.

In conclusion, the Court finds that Plaintiff has failed to present any evidence that Defendant Bangkok violated any South Carolina penal statutes. Therefore, Plaintiff's dram shop cause of action is dismissed.

II. Plaintiff's *Negligence per se* Claim is functionally identical to his dram shop claim and therefore must also be dismissed

Plaintiff has brought an additional cause of action against Defendant Bangkok for negligence per se. The court in *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) established the test for determining when a duty created by statute will support an action for negligence. In order to show that the defendant owes a duty of care arising from a statute, "the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." A statute can establish a duty to a Plaintiff, but the Plaintiff must show a violation of the statute to establish breach of the duty established by the statute. Plaintiff did not assert a specific statute in his Second Amended Complaint that he alleges Defendant Bangkok violated. However, in his Memorandum in Law in Opposition to this Motion, Plaintiff cited S.C. Code Ann. § 61-4-580, which is commonly known as the dram shop statute. As the Court has already discussed, Defendant Bangkok did not violate S.C. Code Ann. § 61-4-580. Therefore, Plaintiff's cause of action for Negligence per se is dismissed.

III. Defendant Saensane was not hired or retained by Defendant Bangkok and Defendant Bangkok had no reason to know that she created an undue risk of harm to the public.

Plaintiff's next cause of action against Defendant Bangkok is for negligent hiring and

retention. Defendant Bangkok argues that Defendant Saensane was not its employee. Rather, Defendant Bangkok argues Defendant Saensane was a 25% owner of the restaurant along with her fiancé Chai, who owned 25%, and the original owner of the restaurant, Allison, who owned 50%.

"Our review of negligent hiring and retention cases from other jurisdictions leads us to conclude that such cases generally turn on two elements – knowledge of the employer and foreseeability of harm to third parties." *Doe v. ATC, Inc.*, 367 S.C. 199, 205, 624 S.E.2d 447, 450 (Ct. App. 2005) (citing *Di Cosala v. Kay*, 91 N.J. 159, 450 A.2d 508, 516 (N.J. 1982)). "From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused." *Id.* "A Plaintiff must demonstrate some propensity, proclivity, or course of conduct sufficient to put the employer on notice of the possible danger to third parties." *Id.* at 205, 624 S.E.2d at 451.

Plaintiff argues that although Defendant Saensane was a co-owner of the restaurant, she was also an employee. The Court disagrees. Defendant Saensane bought a stake in the restaurant in 2017 and began doing work at the restaurant because her personal income was determined by how well the restaurant performed. Defendant Saensane was involved in hiring the employees that staffed the restaurant. Defendant Saensane had no boss, could not be fired, and, most importantly, was not hired by anyone. Essentially, Plaintiff's negligent hiring claim is based on the theory that Defendant Saensane negligently hired and retained herself by taking on responsibilities at the restaurant. The Court finds that this is not a proper Negligent Hiring and Retention action.

Even if Defendant Saensane was an employee, Plaintiff has not identified any prior

incident or conduct which would put Defendant Bangkok on notice that she should not be retained or hired. One of the fundamental elements of this claim is the "number and nature of prior acts of wrongdoing by the employee" *Doe,* at 205, 624 S.E.2d at 450. Plaintiff's Second Amended Complaint does not identify a single act of wrongdoing committed by Defendant Saensane prior to this incident.

In summary, Defendant Bangkok did not hire Defendant Saensane and there is no evidence of prior misconduct committed by her sufficient to put Defendant Bangkok on notice of her alleged conduct in this case. Therefore, Plaintiff's cause of action for Negligent Hiring and Retention is dismissed.

IV. Defendant Saensane was not an employee, and even if she was, she was not acting within the scope of her employment at the time of the accident.

Lastly, Plaintiff has brought a cause of action for Vicarious Liability against Defendant Bangkok. "The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *Froneberger v. Smith*, 406 S.C. 37, 52, 748 S.E.2d 625, 633 (Ct. App. 2013) (quoting *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986)). "An act falls within the scope of the servant's employment if it was reasonably necessary to accomplish the purpose of the servant's employment, and it was done in furtherance of the master's business." *Id.* (quoting *Wade v. Berkeley Cnty,* 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998)). "As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, any injury sustained by accident at such time does not arise out of and in the course of his employment." *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998) (citing *McDaniel v. Bus Terminal Restaurant Management*

Corp., 271 S.C. 299, 247 S.E.2d 321 (1978)).

As previously discussed, Defendant Saensane was a co-owner, not an employee, of Defendant Bangkok. Therefore, Plaintiff's claim for vicarious liability is not proper. Additionally, even if Defendant Saensane was an employee, she was not acting in the scope of her employment with Defendant Bangkok when the accident occurred on September 27, 2019. The accident occurred at 12:56 AM, nearly four hours after the restaurant had closed for the day. Defendant Saensane left the restaurant two to three hours prior to the accident. South Carolina law is clear that even if Defendant Saensane had been driving straight home after leaving the restaurant, the commute would still not take place within the scope of her employment.

Plaintiff has also alleged vicarious liability against Defendant Bangkok under a theory of joint enterprise. South Carolina case law regarding this cause of action is extremely limited. However, the 2nd Restatement of Torts defines a Joint Enterprise as: (1) an agreement, express or implied, among the members of a group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. Restat 2d of Torts § 491, cmt. c.

Our case law is unclear regarding whether our state has adopted the Restatement definition of a joint enterprise and the Court sees no reason to address that issue here. However, after review of the relevant case law in this state, it appears South Carolina courts have only discussed joint enterprise liability in the context of automobile accidents in which two or more people were in the subject vehicle. In *Pruitt v. Bowers*, the South Carolina Court of Appeals affirmed the circuit court's grant of summary judgment in favor of the passenger of a vehicle where he had become intoxicated with the driver before the subject incident. 330 S.C. 483, 499

S.E.2d 250 (Ct. App. 1998). The court held that "to establish joint venture or enterprise liability between a driver and passenger, there must be a common purpose or community of interest, and the passenger must have an equal right to control the direction and management of the vehicle." *Id.* at 487, 499 S.E.2d at 252 (citing *Lollar v. DeWitt*, 255 S.C. 452, 179 S.E.2d 607 (1971)). "[Plaintiff] failed to present any evidence to support a finding that [the driver] was [the passenger's] agent or that [the passenger] had a voice in the management or direction of movements of the vehicle . . . [the driver] owned the vehicle, drove the vehicle, and ultimately controlled the vehicle." *Id.* at 487, 499 S.E.2d at 253.

Plaintiff has not cited any South Carolina case which has extended joint enterprise liability in a motor vehicle accident to any defendant other than the passenger of the vehicle. Plaintiff's theory appears to be that Defendant Bangkok, a business entity, is engaged in a joint enterprise with Defendant Saensane, the entity's co-owner, such that any of her actions in a motor vehicle can be imparted onto Defendant Bangkok. The Court finds that this is not a proper cause of action. Defendant Bangkok had no common purpose or pecuniary interest in wherever Defendant Saensane was headed when the accident occurred and had no control of Defendant Saensane's management or direction of movements of the vehicle. Further, South Carolina's case law regarding joint enterprise is clearly limited to situations involving two individuals. Here, Defendant Saensane was the only person in the vehicle and there has been no allegation that any other agent of Defendant Bangkok was even aware of Defendant Saensane's movements on the date of this incident. For these reasons, Plaintiff's causes of action for and related to Vicarious Liability are dismissed.

CONCLUSION

In conclusion, the Court finds that there exist no genuine issues of material fact and that Defendant Ra Cha, Inc. d/b/a Bangkok Tokyo Restaurant a/k/a Bangkok Thai Restaurant is entitled to judgment as a matter of law regarding all four of Plaintiff's causes of action against it. Therefore, Defendant Bangkok's Motion for Summary Judgment is GRANTED and Defendant Bangkok DISMISSED as a Defendant in this action with prejudice.

IT IS SO ORDERED

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Letitia H. Verdin
Thirteenth Circuit Court Judge

February ___, 2022
Greenville, South Carolina

Greenville Common Pleas

Case Caption: Kevin Dwayne Chavis vs. Vansy Saensane , defendant, et al

Case Number: 2021CP2301487

Type: Order/Summary Judgment

So Ordered

s/Letitia H. Verdin, SC Judge 2162