THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-000143
Civil Action No. 2020-CP-32-00146

CONSTANCE MAYERS as Personal Representative for the Estate of Darrius "George" Dreher, Appellant,

v.

Logan Bird, Samuel Bird, James Coleman Hunter, Ayden Phillips, Kenneth Cole Godley, Dominion Energy South Carolina, Inc., Mark McMillan, and Kimberly McMillan, Defendants,

of whom AYDEN PHILLIPS is the Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant Constance Mayers respectfully submits this Reply to note that (1) Respondent Ayden Phillips mischaracterizes salient facts, and (2) Phillips' additional sustaining grounds lack merit. Apart from those issues, Appellant rests on her brief.

ARGUMENT

I. Respondent mischaracterizes relevant facts.

Phillips' brief tends to gloss over inconvenient facts. Chiefly, in his Statement of the Case, Phillips fails to present "uncontested ma[tt]ers in a non-argumentative way," *see* Respondent's Initial Brief p. 5. Rather, he presents a carefully curated subset of facts and encourages this Court to fill the voids with his desired conclusions.[1]

For one thing, Phillips overstates the trial court's holdings. According to Phillips, the trial court held that he "owed no duty to Bird or Plaintiff-Appellant's decedent to prevent Bird from driving her own vehicle when she left his home." Respondent's Initial Brief p. 2. But the court made no such sweeping holding. Rather, the court's holding—that Phillips "had no obligation to ensure that Bird did not drive her own vehicle nearly seven hours after leaving his home"—referred solely to Appellant's theory that Phillips was negligent *per se* for "aiding or abetting . . . Bird's driving while under the influence of alcohol." Dec. 28 Order p. 13. As to general negligence, however, the court held that if there had been evidence that Phillips served Bird alcohol (or caused her to be served), proximate cause would remain an issue of fact despite the alleged "seven-hour time gap." Dec. 28 Order p. 11.

[1] Phillips' approach is ironic, given his claim that Appellant's "'Facts' section does not comport with Rule 208(b)(1)(C)'s vision of a Statement of the Case, as it does not state uncontested manners [sic] in a non-argumentative way, but attempts to insert unsubstantiated allegations as fact." Respondent's Initial Brief p. 5. Of course, that claim is incorrect; Rule 208(b)(1)(E), SCACR, permits "a separate statement of facts relevant to the issues . . . with reference to the record on appeal, which may include contested matters and summarize the party's contentions."

Also, although the court did indeed "f[i]nd the comparative negligence issues . . . moot for the purposes of the decision, as the other issues were dispositive," Respondent's Initial Brief p. 2, the court's treatment of the issue went beyond such a simple rejection. Specifically, the court stated that "[i]f it were possible for this evidence to give rise to any claim of negligence on the part of [Phillips], . . . determinations" related to comparative negligence "would be matters for the jury."

Phillips not only overstretches the trial court's holdings, but he also presents certain contested or otherwise unsubstantiated matters as underlying facts—while claiming to "faithfully characterize[] non-contested matters and facts." Respondent's Initial Brief p. 2.

Appellant wishes to specify two examples of this problem. Firstly, Phillips states that he "did not offer any of his friends, including Bird, any alcohol to drink," and cites as a supporting premise the allegation that two witnesses, Jenna Sills and Haley Davis, both "recalled that Bird brought her own alcohol" to Phillips' home. Respondent's Initial Brief at 4.

But on closer examination, the girls' testimony is less clear-cut. The record does not reveal whether either girl saw Bird entering the Phillips' property, as opposed to the part of the property immediately adjacent to the Phillips' pool. *See* Sills Depo p. 12, lines 8-17; Respondent's Initial Brief p. 4 (Sills and Davis were at the pool or pool house when Bird arrived); Bird Depo p. 67, lines 11-13 (the "pool area" was "in the back"). Although Davis did claim to have seen Bird arriving "at the Phillips' house with [a] bag" of "Straw-Ber-Ritas," Davis Depo p. 41, lines 8-12, she undermined that testimony by confessing she did not know ***how*** Bird arrived, Davis Depo p. 19, line 14-p. 20, line 1, and by admitting that she did not remember whether or not Phillips had "hand[ed] any alcohol to Logan Bird, including the Straw-Ber-Ritas," Davis Depo p. 36, lines 22-25. In the light most favorable to Appellant, this conflict—subtle though it may seem—creates a question of fact ripe for jury determination.

Secondly (and more importantly), Phillips takes undue liberties in describing the events that led to George Dreher's death. Consider first this statement: "An employee of" the bar which allegedly overserved Dreher "drove Dreher home and watched him walk up to the stoop of his house," but "[a]t some point . . . , Dreher walked off of his property and ended up in the road." Respondent's Initial Brief pp. 4-5. Assuming *arguendo* that this information is correct, it does not appear in the summary-judgment record. The only possible purpose for including such an unsupported statement is to color this Court's impression of Dreher, suggesting from the very beginning that Dreher's negligence exceeded Phillips' as a matter of law.

Then consider how Phillips ends his description: by stating as indisputable fact that "Bird . . . ran over Dreher as he lay passed out in Bird's lane of travel." Respondent's Initial Brief p. 5. True, Phillips' expert testified that "based on the evidence that [he] had at the time . . . , the only conclusion" he could "draw from the pattern of injuries and . . . the lack of damage to the vehicle [was] that [Dreher] was lying in the road supine when he was struck." Seybt Depo p. 33, lines 9-17.[2] But Logan Bird, an actual eyewitness, testified that although she was watching the road and her headlights were on at the time of the collision, she had seen nothing in the roadway. Bird Depo p. 105, lines 10-25. Bird's testimony creates a reasonable inference that Dreher was not lying in the roadway. The trial court itself noted that "[t]here is an issue of fact as to whether Mr. Dreher was lying in the roadway and run over, or whether he was struck while upright, either in or alongside the road." Dec. 28 Order p. 7.

[2] No description of the expert's methodology appears in the summary-judgment record, rendering his determination conclusory and unreliable. *Cf. State v. Council*, 335 S.C. 1, 19–21, 515 S.E.2d 508, 518 (1999) (describing four factors for a court to use in determining reliability under Rule 702, SCRE: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures").

Phillips' tendency to obscure the facts takes a more troubling turn when he later accuses Appellant of "mischaracterizing" testimony regarding whether Phillips' home was a safe haven for underage drinking. Respondent's Initial Brief p. 11. By pointing the Court solely to page 3 of Appellant's Initial Brief, which contains only the slenderest summary of the relevant testimony,[3] Phillips hints that Appellant is attempting to befog the issues with misleading citations.

Appellant would instead point the Court to page 6 of her brief,[4] in which she explains her references to the challenged citations and clarifies how (in the light most favorable to Appellant as the non-movant) the evidence suggests that Phillips' home was a safe haven.

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[3] For ease of reference: "Phillips' house was a known haven for drinking, underage drinking included. See April 2, 2021 Deposition of Austin Tyler Newman, p. 20, line 14-p. 22, line 7; February 18, 2021 Deposition of Haley Alexandra Davis, p. 28, lines 12-17, p. 29, lines 16-18." Appellant's Initial Brief p. 3.

[4] For ease of reference:

> Despite Phillips' protestation that he and his friends only drank at the house one time in his life, Phillips Depo p. 38, line 13-p. 39, line 16, evidence suggests that youngsters regularly drank there. For example, although Newman "hardly ever" "h[u]ng out at" Phillips' house, he drank there and witnessed others—including Bird—doing so in the mere "handful of times" he visited. Newman Depo p. 20, line 14-p. 22, line 7. Davis, too, testified that she drank alcohol at Phillips' house while he was present, possibly while she was underage. Davis Depo p. 28, lines 12-17; p. 29, lines 16-18. In general, Phillips, who claimed that he never provided alcohol to a minor, Phillips Depo p. 62, lines 16-18, failed to keep track of his friends' ages, thus rendering underage drinking more likely, Phillips Depo p. 29, lines 1-8.7
>
> In fact, Davis and Sills were both underage on June 17, 2017. Davis Depo p. 12, line 5; Dec. 28 Order p. 5. Nevertheless, Davis could not recall whether Phillips "handed" her any alcohol that day, and Sills was unsure whether she drank at Phillips' house just before going to Godley's. Davis Depo p. 37, lines 8-14; 8 Sills Depo p. 9, line 17-p. 10, line 2.

Appellant's Initial Brief p. 6.

As the above examples demonstrate, Phillips attempts to smear Appellant's credibility while himself neglecting to "state uncontested ma[tt]ers in a non-argumentative way." *See* Respondent's Initial Brief p. 5. Therefore, this Court should carefully scrutinize Phillips' allegedly "faithful[]" description of "non-contested matters and facts." *See* Respondent's Initial Brief p. 2.

II. Respondent's additional sustaining grounds lack merit; based on the evidence, comparative negligence and causation remain issues for the jury.

In suggesting additional sustaining grounds, Phillips argues that Appellant failed to show that Phillips' actions caused Dreher's death. Respondent's Initial Brief pp. 12-13. He also argues that even if Phillips was negligent, Dreher's alleged comparative negligence exceeded Phillips' negligence as a matter of law. Respondent's Initial Brief pp. 14-17.

The facts related to Phillips' comparative-negligence defense bear on Phillips' causation argument; therefore, this reply will address comparative negligence first.

A. Comparative Negligence

Phillips claims that "the sole reasonable inference from the evidence is that [Dreher] was more than 50% negligent as a matter of law" because, allegedly, "Dreher was lying down in the road and grossly intoxicated at the time of his death." Respondent's Initial Brief pp. 14-17. But his contention rests on one of two faulty premises: either that (1) the sole reasonable inference from the evidence is that Dreher was lying down in the road, or (2) if a person becomes "grossly" intoxicated, that person is necessarily responsible for any injuries he or she sustains.

As noted above and as the trial court acknowledged, Logan Bird's testimony—that she was watching the road and had her lights on, yet did not see Dreher—creates an issue of fact as to whether Dreher was in the road or walking on the edge. That suffices to answer the first premise.

The second premise also founders, even assuming *arguendo* that intoxication is sufficient to render a person negligent. It fails to acknowledge that for a plaintiff's negligence to fit within a

comparative framework, that negligence must have contributed to the undesired result. In other words, the plaintiff's negligence must have been a proximate cause of the event. *See Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 421–22, 472 S.E.2d 253, 255 (1996) (emphasis added) (citation omitted) ("If the inferences . . . tend to show both parties guilty of negligence, and there may be a fair difference of opinion as to whose act ***proximately caused*** the injury complained of, then the question must be submitted to a jury.")

Proximate cause contains two subsidiary concepts: "causation-in-fact" and "legal cause." *Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 5 (Ct. App. 2021), *reh'g denied* (Dec. 2, 2021) (quoting *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 368–69, 635 S.E.2d 97, 101 (2006)). "Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the [party's] negligence, and legal cause is proved by establishing foreseeability." *Id.* at 581, 865 S.E.2d at 5–6 (quoting *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101). "Foreseeability 'is determined by looking to the natural and probable consequences of the [party's] conduct.'" *Ibid.* (quoting *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E2d 644, 649 (2013)).

Here, there remains a question of fact as to whether Dreher's intoxication was the cause-in-fact of his death. Yes, Dreher was almost certainly "significantly intoxicated." Seybt Depo p. 19, line 25-p. 20, line 2; p. 22, line 18-p. 23, line 3. Yes, his blood-alcohol level was far too high for him to drive a motor vehicle. *See* S.C. Code Ann. § 56-5-2950(G)(3). But Dreher was not driving a motor vehicle. In fact, if this Court believes Bird's testimony that there was nothing in the road—as it must, under the summary-judgment standard of review—Dreher was not even in the middle of the road, but rather on the edge, where a sober driver taking reasonable care would not have struck him.

Our Supreme Court has held that "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001)). For example, in *Bloom v. Ravoira*,[5] the Court held that the pedestrian was more negligent than the driver as a matter of law where the pedestrian ignored the "crosswalks and traffic signals at both corners" and instead "chose to cross in the middle of the block"; where "it was dark and rainy out"; and where the pedestrian, "who was dressed in dark clothing . . . quickly entered the street from between two parked vehicles." 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000).

This is not such a "rare or exceptional case[]." Even if Dreher's overindulgence constituted negligence, the evidence creates a dispute as to whether his intoxication was the cause-in-fact of his death. And if an issue regarding proximate cause exists, though it "may hang by a slender thread, . . . the question should be resolved by a jury." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 222, 826 S.E.2d 285, 295–96 (2019). Therefore, this Court should disregard the suggested sustaining ground of comparative negligence.

B. Proximate Cause

Phillips also argues that there is no evidence that his negligence proximately caused Dreher's death. He alleges that "[t]here is no conclusive evidence as to the cause of Mr. Dreher's death; there is no evidence that Defendant Bird was intoxicated at the time of the incident," but rather, "[t]here is a distinct possibility . . . that the decedent was either passed out or otherwise unconscious in the middle of a dark road and was, unfortunately, struck;" "and there is no evidence that Phillips contributed in any way to either Mr. Dreher's death or Defendant Bird's alleged intoxication." (Respondent's Initial Brief p. 13).

[5] Which Respondent cites on page 16 of his Initial Brief.

But the claim that "[t]here is no conclusive evidence as to the cause of Mr. Dreher's death" lacks merit. Phillips' own expert stated that although it is possible for a person to die of alcohol poisoning with a blood-alcohol level of .326, "that's supposition . . . and speculation." Seybt Depo p. 20, lines 9-18. An admitted instance of mere "speculation" cannot begin to provide a sustaining ground for a decision granting summary judgment.

Furthermore, regarding the "distinct possibility" that Dreher was lying on the road, Bird's testimony creates a jury issue. *See supra* p. 3, pp. 5–6.

There is also a jury issue as to whether or not Bird was intoxicated at the time of the incident. As described in detail in Appellant's brief, there is at least a scintilla of evidence that Phillips provided Bird with alcohol—an intoxicating substance—at his parents' home. Taking the inferences in the light most favorable to Appellant, Bird may still have been intoxicated from that alcohol at the time she struck Dreher, even if she struck Dreher approximately seven hours after leaving the Phillips residence.[6]

Phillips suggests in the alternative that even if Bird was intoxicated, her intoxication was due to the "superseding acts of other defendants," because she spent the time between leaving the Phillips residence and her drive home "at another residence where she and others have testified that she did consume alcohol." Respondent's Initial Brief p. 13. However, "[f]or an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated." *Dawkins*, 434 S.C. at 581, 865 S.E.2d at 6 (quoting *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 205, 781 S.E.2d 534, 546

[6] As noted in Appellant's brief, the time may have been shorter, even significantly so. *See* Appellant's Initial Brief pp. 6–7, p. 7. n.11. Even an hour can make a substantial difference in the amount of alcohol metabolized. *See, e.g.*, *How Long Does Alcohol Stay in Your Body?*, Healthline (last updated July 12, 2022), https://www.healthline.com/health/how-long-does-alcohol-stay-in-your-system ("[T]he average metabolic rate to remove alcohol is about one drink per hour.").

(2015)). The question of foreseeability is almost always a jury issue. *Id.* at 582, 865 S.E.2d at 6 (citing *Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 489, 491, 450 S.E.2d 609, 615, 616 (Ct. App. 1994)). It is quite foreseeable that an intoxicated young person may proceed to make further impulsive, detrimental decisions, such as continuing to drink. *See Binge Drinking*, Centers for Disease Control and Prevention (last updated November 14, 2022, https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm ("Most people younger than 21 who drink alcohol report binge drinking, often consuming large amounts."); *cf. Steele v. Rogers*, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992) ("We are not prepared to say that a shooting, cutting, or other wounding related to the consumption of alcohol is so uncommon an event as to be unforeseeable as a matter of law . . . .").[7]

In short, there is at least a scintilla of evidence that (1) Phillips contributed to Bird's intoxication and (2) Bird's intoxication led to George Dreher's death. Therefore, this Court should disregard this second suggested sustaining ground.

CONCLUSION

Phillips attempts to turn debated, debatable facts into clear-cut issues of law. But as this Court will discover, numerous issues of fact bar summary judgment here. Therefore, this Court must reverse the trial court's decision granting summary judgment to Phillips, and must remand the case for trial.

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[7] In fact, around the time of the incident, Bird regularly drank up to eight drinks at a time—which she considered "[n]ot a lot." Bird Depo p. 146, line 18-p. 147, line 1.

July 25, 2023

Respectfully submitted,

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of whom AYDEN PHILLIPS is the Respondent.

PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Initial Reply Brief on Respondent by Electronic Mail on July 25, 2023, addressed to Respondent's attorney of record, Catharine Garbee Griffin of Baker Ravenel & Bender, LLP.

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Respectfully submitted,

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Appellant's Reply Brief - Constance Mayers v. Logan Bird // 2023-000143

1 message

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Dear Ms. Griffin:

We hope this letter finds you well. Enclosed for service upon you is Appellant's Initial Reply Brief.

Please let us know if you have any questions.

Sincerely,
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RE: *Constance Mayers v. Logan Bird*
Appellate Case No.: 2023-000143

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Initial Reply Brief with its associated proof of service. Please let us know if you need any additional information.

Sincerely,

s/Angeline Larrivee

Cc: Catharine Garbee Griffin