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 McMillian, and Kimberly McMillian, Defendants,

of whom AYDEN PHILLIPS is the

Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY FIND THAT UNDER SOUTH CAROLINA'S SOCIAL HOST DOCTRINE A HOST DOES NOT INCUR LIABILITY WHEN AN UNDERAGE GUEST BRINGS AND CONSUMES THEIR OWN ALCOHOL OUTSIDE OF THE HOST'S PRESENCE?

II. DID THE TRIAL COURT PROPERLY FIND THE 'SAFE HAVEN' DOCTRINE DOES NOT APPLY TO INDIVIDUALS WHO ARE NOT SUBJECT TO THE ALCOHOL AND BEVERAGE CONTROL STATUTORY FRAMEWORK?

STATEMENT OF THE CASE

I. Procedural History

This case is before this Court on appeal from the grant of a motion for summary judgment by The Honorable William P. Keesley in the Court of Common Pleas in Lexington County. On January 9, 2020, Plaintiff-Appellant brought causes of action against various defendants, including Ayden Phillips, for negligence. On November 17, 2021, after undertaking extensive discovery, Phillips filed a Motion for Summary Judgment on the grounds that he owed no duty to Appellant's decedent because he was not a social host with respect to Logan Bird (the individual whose vehicle struck Plaintiff-Appellant's decedent); that he did not knowingly or intentionally serve or cause to be served any alcoholic beverage to Bird; and that the alcohol allegedly voluntarily purchased, controlled, and consumed by Bird was not the proximate cause of the later accident involving Plaintiff-Appellant's decedent. This same Motion was also brought on the grounds that even if there were a duty owed to Plaintiff-Appellant's decedent, the grossly intoxicated decedent would be, as a matter of law, more negligent than Phillips.

Phillips' initial motion was denied by Order on February 15, 2022, on the basis that Plaintiff-Appellant requested more time to undertake additional discovery, including taking the

deposition of Ayden Phillips as well as seven other depositions. Since the case had been pending two years, the trial court determined that the discovery should be completed so the motion could be decided and requested that a scheduling order be entered. The scheduling order, which was filed on March 15, 2022, required discovery be completed by May 15, 2022. In that time, Plaintiff-Appellant took only one additional deposition, that of Phillips.

After the discovery period closed, Phillips filed a Renewed Motion for Summary Judgment on the same grounds as his previous motion. This Renewed Motion was filed on May 23, 2022, and was heard for argument on June 14, 2022. The trial court granted the Renewed Motion by Order issued December 28, 2022, holding that there could be no liability on the part of Phillips for two reasons: 1) there was no evidence Phillips breached any duty to Plaintiff-Appellant's decedent as a social host; and 2) Phillips owed no duty to Bird or Plaintiff-Appellant's decedent to prevent Bird from driving her own vehicle when she left his home. The trial court found the comparative negligence issues raised by Defendant-Respondent moot for the purposes of the decision, as the other issues were dispositive.

Plaintiff-Appellant filed the Notice of Appeal on January 27, 2023. The Plaintiff-Appellant's Initial Brief was filed on April 27, 2023.

II. Summary of Non-Contested Matters

Phillips believes the following summary faithfully characterizes non-contested matters and facts before this Court. Defendant Logan Bird, who was nineteen years old at the time of the incident, participated in a Poker Run on Lake Murray organized by a group of her peers' parents on June 17, 2017. (R. p. 457). The McMillan, the Lucas, the Woodrow, the Williams, and the Motley families hosted the Poker Run during various assigned time slots on June 17, 2017. After participating in the Poker Run, Bird testified she went to Defendant Cole Godley's house.

In the light most favorable to Plaintiff-Appellant, Bird is alleged to have stopped at Ayden Phillips' parents' home, where he had returned home to live and work during the summer while he was on break from being a student at Clemson. (R. p. 404, line 21; R. p. 320). Ayden Phillips was twenty-two years old that summer. (R. pp. 852-53).

On June 16, 2017, Phillips and his friend, Lee Prater, were out late celebrating a friend's birthday, returning back to the Phillips' home in the early morning of June 17, 2017. (R. pp. 413-14). Lee Prater, Phillips' friend, stayed at Phillips' home on the night of June 16, 2021. (R. p. 854). That morning and early afternoon, after the two played Xbox and retrieved lunch, Prater asked if he could invite Haley Davis and Jenna Sills, two other friends, over to spend time in and near the Phillips' pool. (R. p. 856). Sills and Davis accepted the invitation to join them that afternoon to swim in the pool. Neither Phillips, Prater, Sills or Davis had anything to drink at the Phillips' home that afternoon. (R. p. 360; R. p. 833; R. p. 333; R. p. 879). The group went to dinner at El Paso, where again none of them ordered or consumed alcohol. (R. p. 334; R. p. 837; R. p. 861). They then went back to Phillips' home. When the group returned to the Phillips' home, Ayden Phillips and Prater went in to the house to play Xbox while Sills and Davis were sitting outside by the pool. (R. pp. 861-62).

In the light most favorable to Plaintiff-Appellant, someone from the group invited Bird to join them back at Phillips' home. Prater did not remember Bird coming over at all. (R. p. 835). Jenna Sills and Hayley Davis were sitting outside by the pool when Logan Bird arrived at the Phillips' home. (R. p. 364). Sills recalled that Bird brought her own alcohol to Phillips' home and drank one Straw-Ber-Rita. (R. p. 367). Davis also recalled that Bird brought her own alcohol—either a Tall Boy or a Straw-Ber-Rita. (R. p. 319). Phillips was not in the vicinity of the pool when Bird arrived; Bird was socializing with the other young women who were there. Phillips, Prater,

Davis, and Sills did not have anything to drink. (R. pp. 868-869; R. p. 835, 837; R. p. 328; R. p. 368). Phillips did not offer any of his friends, including Bird, any alcohol to drink in the thirty minutes they were at his home after leaving El Paso. (R. p. 866; R. p. 835, 837; R. p. 367; R. p. 341). Phillips did not serve any alcohol to any of the people who were at his parents' home on June 17, 2017. (R. p. 866; R. p. 835, R. 837; R. p. 367; R. p. 341). Phillips did not purchase any alcohol for Logan Bird on that day. (R. p. 365, 370). The group remained at Phillips' home for approximately thirty minutes until they departed in separate vehicles to go to Godley's home. (R. pp. 866-67; R. p. 311).

The following remaining facts are not personally known by Phillips, but are additionally believed to be uncontested. Separately from the Poker Run group and the group at Phillips' home, George Dreher became intoxicated at Defendant, The Frayed Knot Bar and Grill, where he was continued to be served alcohol after becoming visibly intoxicated. An employee of the Frayed Knot, Alex Downs, drove Dreher home and watched him walk up the stoop of his house. At some point, however, Dreher walked off of his property and ended up in the road. Medical examiner Timothy Paul Seybt, MD, testified that Dreher's blood alcohol content was as high as .326, and that at this concentration, it is possible Dreher was either passed out in the road, or already deceased from alcohol poisoning. (R. p. 784).

Logan Bird departed from Godley's home later that night and while driving back to her family's home ran over Dreher as he lay passed out in Bird's lane of travel.

Any additional facts contained within Plaintiff-Appellant's 'Facts' section between its Statement of the Case and Argument sections are not conceded to by Phillips. Phillips makes this distinction primarily to ensure it is not bound to the Statement of the Case put forth by Plaintiff-Appellant as dictated by Rule 208(b)(2) of the *South Carolina Rules of the Appellate Court*.

Phillips believes Plaintiff-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 in a non-argumentative way, but attempts to insert unsubstantiated allegations as fact, despite these contentions being rejected by the trial court below.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 614, 753 S.E.2d 515, 517 (2013). Summary judgment should be granted when there are no *genuine* issues of *material* fact and the moving party is entitled to a judgment as a matter of law. *Id*., emphasis added. In order to resist a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts, but must come forward with specific facts showing that there is a genuine issue for trial." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (internal quotations deleted) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986)). Finally, "Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

Further, "the court must determine that a genuine issue of material fact exists for *each element* of the plaintiff's claim," and "must determine whether the plaintiff has established a prima facie case as to each element of a claim" when ruling on a summary judgment motion. *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (emphasis added). In order to prove negligence, the plaintiff must show: (1) defendant owed a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach

was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Andrade v. Johnson*, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003); *Regions Bank v. Schmauch*, 354 S.C. 648, 668, 582 S.E.2d 432, 443 (Ct.App. 2003). "The absence of any one of these elements renders the cause of action insufficient." *Washington v. Lexington Cty. Jail,* 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE SOCIAL HOST DOCTRINE DOES NOT HOLD HOSTS LIABLE UNLESS THEY PROVIDE, SERVE, OR CAUSE TO BE SERVED ALCOHOL TO AN UNDERAGE INDIVIDUAL.

The trial court properly granted summary judgment to Phillips in this case because the Plaintiff-Appellant failed to show that Phillips breached any duty owed as a social host. The common law in South Carolina provides that "an adult social host who knowingly and intentionally serves, or causes to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages proximately resulting from the host's service of alcohol." *Marcum v. Bowden*, 372 S.C. 452, 455, 643 S.E.2d 85, 86 (2007). To recover under this doctrine, a party must prove 1) alcohol was served, or was caused to be served, by the host to someone the host knew or should have known was between the ages of 18 and 20; 2) this service was knowing and intentional, and; 3) the damages complained of proximately resulted from such service. Additionally, the South Carolina District Court has noted that a finding of liability under this "very narrowly limited" duty requires "*affirmative, intentional action* by the owner of the duty to create or exacerbate the

diminished abilities of the party who actually inflicts harm on the third party." *Hoskins v. Snipes-King*, 2009 U.S. Dist. LEXIS 135624 at *5 (D.S.C. Apr. 27, 2009) (emphasis added).

There was no evidence presented to the trial court that Ayden Phillips knowingly and intentionally served alcohol to Logan Bird—or anyone present at his parents' home on June 17, 2017. The evidence is wholly to the contrary: all the witnesses who were present at the Phillips' home testified that Phillips did not serve alcohol to Bird. They also testified that Phillips did not purchase alcohol for Bird. (R. p. 907; R. p. 835, 837; R. p. 365, 370; R. p. 341; R. pp. 506-07, 586-87). The Plaintiff-Appellant attempts to obfuscate the issue regarding the lack of evidence for their position on the central question on duty by focusing on immaterial and irrelevant facts, including the number of times Bird and Phillips met prior to June 17, 2017; the number of times underage drinking had occurred at his home; whether he invited her with her boyfriend Austin Newman or someone else did; or whether Bird actually had anything to drink at Phillips' home. The operative question regarding the breach of duty is whether Ayden Phillips provided alcohol, served alcohol, or caused alcohol to be served to Logan Bird on June 17, 2017? The trial court found he did not because there is no competent evidence to support any other conclusion.

Moreover, there is no evidence that Phillips "caused to be served alcohol" to Bird while she was at his house. The narrow exception carved out to the common law of South Carolina allowing for social host liability for serving underage individuals requires intentionality in service or providing the alcohol. In other circumstances where South Carolina courts recognize the phrase, "cause to be served," the language almost exclusively refers to an action taken by one party upon another. For example, an attorney may "cause to be served" upon an individual an affidavit. A county office may "cause to be served" on a landowner a notice of condemnation. *Emerson v. Kaminski*, 143 S.C. 36, 141 S.E. 108 (1928). Banks may be required to certify that they "caused

to be served" a copy of application for default. *Bank of Am., N.A. v. Ousley*, 2017 S.C. C.P. LEXIS 646. The use of this phrase is active, requiring some initiation on the part of the one causing the service. In this matter, Phillips took no such steps, initiated no such action, nor is there evidence which suggests he did. Even if Logan Bird came to his house with her own alcohol and proceeded to drink it in front of him, this would not be enough to suggest that he "served or caused her to be served" as that verb is used by the courts and legislature of this State.

Assuming that Bird brought her own alcohol and drank it on the premises, outside of Phillips' presence, the Plaintiff-Appellant still does not have any evidence to satisfy the narrow standard under *Marcum v. Bowden.* Although there is no case addressing this issue directly in South Carolina, the Oregon Supreme Court has found that the phrase "served or provided" relies heavily upon "whether the social host has control over the alcohol that was supplied." *Baker v. Croslin*, 376 P.3d 267, 271 (2016). The Court reinforced its holding that "where a defendant has no control over the supply of alcohol, the defendant cannot be liable for permitting a person" to consume that alcohol. *Id*. Additionally, the Supreme Judicial Court of Massachusetts applied its common law social host liability "only in cases where the host had actually served alcohol or made it available." *Juliano v. Simpson*, 962 N.E.2d 175, 181 (2012). The court distinguished the host who "lacked the obligation, or the means, effectively to control the supply" of alcohol from the host who "furnishes liquor to guests," finding that the latter host is more "like a bartender in a licensed establishment who is well situated to shut off guests who should not be drinking because of age or intoxication." *Id.*, at 182. In the present case, there is no evidence Ayden Phillips exercised control over any alcohol consumed by Defendant Bird or even that he knew that she was drinking on his premises.

The trial court properly applied the social host doctrine in finding that even if Bird consumed alcohol on the premises, liability does not attach to Phillips absent a showing that he in some way served or provided alcohol to her.

Plaintiff-Appellant cites to the principle that this Court should not "make factual determinations" or "consider the merits of competing testimony." Initial Brief of Appellant, p. 10. However, it goes on to ask this Court to do just that, going so far as to provide the specific inferences it wishes the Court to draw which is an inappropriate application of the law. While courts must draw inferences in a light most favorable to the non-moving party, what Plaintiff-Appellant asks this Court to do is to look at facts which are properly in evidence and decide they do not exist. Rather than relying upon the enumerated allegations and possibilities which arise from the negative space, this Court has authority to rely upon the clear testimony before it: that Phillips did not provide, serve, or cause to be served alcohol to anyone, including Logan Bird, on June 17, 2017. (R. p. 907; R. p. 835, 837; R. p. 365, 370; R. p. 341; R. p. 506-07, 586-87). In the absence of evidence that Phillips effectuated alcohol into the hands or mouth of Bird, Plaintiff-Appellant can show no breach of duty. In the absence of a breach of duty, Plaintiff-Appellant's claims fail as a matter of law, and, therefore, summary judgment was properly granted by the trial court.

II. THE 'SAFE HAVEN' DOCTRINE DOES NOT APPLY TO INDIVIDUALS WHO ARE NOT SUBJECT TO THE ALCOHOL AND BEVERAGE CONTROL STATUTES.

Plaintiff-Appellant next asserts that Phillips' home was a "known haven" for underage drinkers, and that as such, social host liability exists. Initial Brief of Appellant, p. 3. However, the courts of this State have made clear that the safe haven doctrine applies only to licensees under the

Alcohol and Beverage Control statutes. Plaintiff-Appellant concedes this point. The primary case on point for this issue is *Norton v. Opening Break*, in which a bar created an atmosphere where minors could possess and consume alcohol with near impunity, and where they were provided that alcohol by the bar. *Norton v. Opening Break*, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994). When an underage drinker left this bar and caused harm to a third party, the Court found the bar liable for the third party's damages by importing the statute which prohibits liquor licensees from allowing underage drinkers to possess or consume alcohol on their premises. This ruling explicitly excluded non-licensees and made the civil cause of action – and liability – inherent to the liquor licensure itself, as the regulations governing licensees do not broadly apply to members of the general public. Therefore, the trial court correctly ruled that the safe haven doctrine did not extend to social hosts.

Furthermore, Phillips denies Plaintiff-Appellant's unsubstantiated allegation that his residence was a safe haven for underage drinkers. Plaintiff-Appellant mischaracterizes two points of testimony in asserting the Phillips' residence was a safe haven. Initial Brief of the Appellant, p. 3. Haley Davis' testimony was not that the Phillips' home was a safe haven, but that she could not remember if she had ever had a drink at the home while she was underage. (R. p. 329, lines 12-17; R. p. 330, lines 16-18). Austin Newman's testimony was that he had consumed alcohol at the Phillips' home prior to the date *of his deposition* (which occurred four years post-incident), and that he believes he had seen Bird drink at the Phillips' home at some time *after* the night of June 17, 2017. (R. p. 167, line 14-p. 169, line 7). Therefore, even if you assume the 'safe haven' doctrine would be extended to social hosts, there is no evidence that Phillips provided a safe haven for underage drinkers.

Additionally, while Plaintiff-Appellant purports to submit "a modest proposal" to extend the safe haven concept to social hosts, the deeper implication suggests a broader concept: the imposition of statutory frameworks to private citizens to whom they were not legislated to apply. While this Court has authority to find that legislation has gone beyond its bounds, it is not the aim of this Court to stretch the bounds of regulations drafted by the General Assembly to effectuate a prohibition designed for voluntarily licensed entities upon the general population at large. Further, even if there were substantiated evidence that Phillips' home was such a safe haven, and this Court were willing to bind private individuals to regulatory schemes, the only pertinent factual question at issue is the same as above: did Ayden Phillips provide, serve, or cause to be served alcohol to Logan Bird on June 17, 2017? The facts in evidence do not support a finding that he did, nor provide a mere scintilla for Plaintiff-Appellant to rely upon in their assertion that he did. (R. p. 907; R. p. 835, 837; R. p. 365, 370; R. p. 341; R. p. 506-07, 586-87). Therefore, this court should reject the Plaintiff-Appellant's proposal to extend the safe haven doctrine to social hosts.

III. ADDITIONAL GROUNDS SUPPORTING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

A. Plaintiff-Appellant failed to show any actual or proximate causation between its damages and Defendant-Respondent.

Summary judgment was also properly granted in this case as Plaintiff-Appellant failed to meet another essential element of its claim for negligence – actual or proximate causation. To be subject to liability under the social host doctrine, the damages complained of must have been proximately caused by the defendant's actions, specifically, the service of alcohol to an underage adult. *Marcum*, 372 S.C. 452, at 455, 643 S.E.2d at 86. "Proximate cause requires proof of (1) causation in fact and (2) legal cause." *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251,

253 (1991). The Supreme Court of South Carolina has held that "causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence," and that "legal cause is proved by establishing foreseeability." *Id.*, citing *Bramlette v. Charter-Medical Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 916 (1989). Further, a plaintiff only proves legal cause by "establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.*

In the present matter, Plaintiff-Appellant has presented no evidence that any act or omission by Phillips is the cause of the decedent's death. The pathologist, Dr. Timothy Seybt, testified the decedent had a blood alcohol level of .326 at the time samples were collected. (R. p. 784, lines 15-17). He additionally testified that this level may have been higher at the time of the accident, and that this amount of blood intoxication can be enough to cause an individual to stop breathing, though he did not say conclusively if this was the case for the decedent. (R. p. 783, line 9-p. 785, line 1). He further testified that the decedent was laying prone in the road at the time he was struck by Defendant Bird's vehicle, indicating he may have already been deceased when Defendant Bird was driving home. (R. p. 787, line 14-p. 789, line 23). Plaintiff-Appellant has additionally not provided evidence that Defendant Bird was intoxicated when she left Defendant Godley's home. There is a distinct possibility that Defendant Bird was not intoxicated at the time of the incident, but simply that the decedent was either passed out or otherwise unconscious in the middle of a dark road and was, unfortunately, struck.

There are several intervening factors between the time Bird spent at the Phillips' home and the time of the accident. Primarily, there is an approximately seven hour time gap between when Bird was alleged to have consumed one drink at Phillips' home which she brought with her and when she struck the decedent on the way to her own home. Additionally, Bird spent those seven

hours at another residence where she and others have testified that she did consume alcohol. Phillips cannot be held liable for the superseding acts of other defendants, including anyone who may have provided Defendant Bird alcohol after she left Phillips' home.

Plaintiff-Appellant attempts to impose the compounding indemnification of *dram shop liability* to hold each *social host* Bird encountered on June 17, 2017 liable for the death of its decedent. Public policy permits this kind of imposition upon entities and individuals subject to the regulatory standards required to maintain an ABC licensure; however, the courts of this State have not imposed such standards upon social hosts. To do so would be to state that social hosts have a duty to third parties to monitor the actions of not only their guests, but also subsequent hosts, long after their event has concluded. In the present case, Plaintiff-Appellant has failed to show any breach of duty by Phillips which in any way caused the death of Mr. Dreher. There 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; and there is no evidence that Phillips contributed in any way to either Mr. Dreher's death or Defendant Bird's alleged intoxication.

B. Plaintiff-Appellant is barred from recovery by Dreher's comparative negligence.

It is not disputed by the Plaintiff-Appellant that George Dreher was grossly intoxicated on the night he died. In the Amended Complaint, the Plaintiff-Appellant alleges that the restaurant, the Frayed Knot Bar & Grill, LLC, overserved him alcohol. (R. pp. 54-55). Plaintiff-Appellant alleges that George Dreher went to the Frayed Knot in "a state of intoxication." (R. p. 65). They also allege that despite George Dreher being intoxicated, the Frayed Knot agents and employees allowed George to continue to drink until approximately 1:00 a.m., serving him when he was visibly intoxicated. (R. p. 65). The Amended Complaint further alleges that the Frayed Knot

continued to sell alcoholic beverages to George Dreher despite his obvious intoxication. (R. p. 65). Plaintiff-Appellant further alleged that someone from the Frayed Knot gave George Dreher a ride home and left him walking to his home "in his intoxicated state." (R. p. 66).

The allegations of the Amended Complaint which admit that Dreher was grossly intoxicated are corroborated by the pathologist who performed the autopsy on Dreher. Dr. Seybt, employed by Pathology Associates of Lexington and contracted by Lexington Medical Center to conduct autopsies, performed the autopsy on George Dreher. (R. pp. 773-74). He testified that the hospital initially did a screening test on Dreher's body and found that his blood alcohol level at the time of his death was .334. (R. p. 822). After the initial screening test, Dr. Seybt testified that he drew blood from Dreher during the autopsy and sent it to NMS Laboratory's mass spectrometer to analyze the level of alcohol contained in Dreher's blood. (R. p. 776). Dr. Seybt stated that he regularly used NMS Laboratories to test blood and that it was scientifically acceptable for him to rely on the NMS Laboratory report in forming his opinion as to the blood alcohol level of George Dreher. (R. p. 785). Dr. Seybt testified that the blood alcohol level of George Dreher *at the time of the drawing of the blood* was .326 mg/DL. Dr. Seybt also testified that Dreher's blood alcohol level could have been higher at the time he was in the accident as some of the alcohol may have metabolized after the accident. (R. p. 779). He further testified that someone who has a blood alcohol level of a .326 would certainly be affected by the alcohol:

> Q: "Do you have any opinion to a reasonable degree of medical certainty as to how a person would be affected by having a blood alcohol level of .326?"
>
> A: "Again, part of that depends on the person. If they are a seasoned drinker that drinks all the time, in my opinion there's no way they're not significantly intoxicated. Now, how that affects them depends on how much they drank. For instance, if I were to have a .326,

I wouldn't be sitting here talking to you. The majority of people I would say at .326 would not be conscious."

(R. pp. 786-87). Dr. Seybt confirmed that it was his opinion to a reasonable degree of medical certainty that Dreher had a .326 blood alcohol level at the time of his death. (R. p. 823). This is over four times the legal limit in South Carolina for operating an automobile. See, S.C. Code Ann. § 56-5-2933 (2009).

Dr. Seybt further stated based upon his evaluation of Dreher's body, the photographs at the scene, and the photographs of the vehicle that it was his opinion to a reasonable degree of medical certainty that Dreher was lying down in the road and grossly intoxicated at the time of his death. He stated:

> Based on the evidence that I had at the time and the photographs that I observed and presuming that nothing had been done to tamper with the vehicle, which I don't have any reason to believe that it was, the only conclusion that I can draw from the pattern of injuries and the pattern of damage to the, the lack of damage to the vehicle, is that he was lying in the road supine when he was struck by the vehicle.

(R. p. 797).

Under the current rule of comparative negligence, "[A] plaintiff may only recover damages if his own negligence is not greater than that of the defendant." *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 394, 665 S.E.2d 222, 226 (Ct. App. 2008) (quoting *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000)). Generally, the issue of comparative negligence is for the jury, but the court will "determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is the plaintiff's negligence exceeded fifty percent." *Id*. "Under South Carolina jurisprudence, where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." *Singleton v. Sherer*, 377 S.C. 185, 207, 659 S.E.2d 196, 208 (Ct. App.

2008). Several South Carolina courts have upheld a trial court's determination that a plaintiff was more than 50% at fault in a tort action or overturned a trial court's decision to submit the case to the jury based on the plaintiff's fault percentage.[1]

Plaintiff-Appellant's decedent had a duty to use reasonable care for his own safety on the night of the incident underlying this lawsuit. *Rikard v. J.C. Penny Co., Columbia Div.*, 233 F. Supp. 133 (E.D.S.C. 1964). Comment e to the Restatement (Second) of Torts § 343A adopted by the South Carolina in *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123. 406 S.E.2d 361 (1991), states that a landowner "may reasonably assume that [an invitee] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so." The evidence shows that at the time of Dreher's death, his blood alcohol level was a minimum of .326 and could have been higher before he died. This level is over four times the legal limit of .08 for the operation of motor vehicles and "well beyond the concentration necessary for an inference that [Decedent] was under the influence of alcohol at the time of the accident." *Estate of Adair v. L-J, Inc.*, 372 S.C. 154, 157, 641 S.E.2d 63, 65 (Ct. App. 2007) (referring to blood alcohol content of .252%) and S.C. Code Ann. § 56-5-2933 (2009). Even assuming Phillips was negligent in some manner – and Phillips contends no such evidence has been presented – the sole reasonable inference from the evidence is that Decedent was more than 50% negligent as a matter of law. Decedent's own negligence in failing to exercise ordinary care for his own safety and assuming the risk of injury by becoming grossly intoxicated far outweighs any negligence by Phillips. Through his own actions, Decedent put himself in a dangerous situation which Phillips could not anticipate. Furthermore, allowing a voluntarily intoxicated adult to sue for injuries

[1] See, e.g., *Lydia v. Horton*, 355 S.C. 36, 37, 583 S.E.2d 750, 751 (2003); *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000); *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 634 S.E.2d 62 (Ct. App. 2006); *Moore v. Barony House Restaurant*, 382 S.C. 35, 674 S.E.2d 500 (Ct. App. 2009); *Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996).

resulting from his own conduct violates public policy. *See Tobias v. Sports Club*, 332 S.C. 90, 504 S.E. 2d. 318 (1998) (finding no first party liability exists for a commercial establishment who serves alcohol to a visibly intoxicated patron who later injures himself). Because the negligence of Dreher far exceeds 50%, Phillips was entitled to summary judgment as a matter of law under Rule 56(c), SCRCP.

CONCLUSION

For the above reasons, this court should affirm the trial court's grant of summary judgment to Phillips on the grounds that South Carolina's social host doctrine does not impose liability upon a host who not only does not actively serve or cause to be served alcohol to an underage individual and that the 'safe haven' doctrine does not apply to individuals who are not liquor licensees subject to the Alcohol and Beverage Control statutes.

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September 7, 2023

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 McMillian, and Kimberly McMillian, Defendants,

of whom AYDEN PHILLIPS is the

Respondent.

CERTIFICATION

Pursuant to Rule 211(a), SCACR, I certify that the Respondent's Final Brief complies with Rule 211(b), SCACR.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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