

RECEIVED

Sep 07 2023

SC Court of Appeals

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,

Respondent.

of whom AYDEN PHILLIPS is the

FINAL BRIEF OF APPELLANT

Angeline M. Larrivee
Roy T. Willey, IV
Eric M. Poulin
32 Ann Street
Charleston, SC 29403
(803) 222-2222

Joseph E. Thoensen
2019 Park Street
Columbia SC 29201

Kenneth G. Goode, Jr. (S.C.
#100368) 4 Carriage Lane, Suite 204
Charleston, South Carolina 29407
(843) 754-5985
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 2

Argument

I. CONSIDERING THE EVIDENCE AND ALL REASONABLE INFERENCES IN APPELLANT’S FAVOR, THERE IS AT LEAST A SCINTILLA OF EVIDENCE THAT PHILLIPS KNOWINGLY SERVED OR PROVIDED ALCOHOL TO AN UNDERAGE DRIVER..... 10

 A. Standard of Review..... 10

 B. Breach..... 12

II. THIS COURT SHOULD RECOGNIZE A “SAFE HAVEN” APPROACH TO DETERMINING WHETHER A SOCIAL HOST CAUSED AN ALCOHOLIC BEVERAGE TO BE SERVED UNDER *MARCUM*..... 13

 A. Standard of Review..... 13

 B. A Modest Proposal..... 13

 a. The Origins of the Safe-Haven Approach..... 13

 b. Support for a Modified Safe-Haven Approach..... 15

 c. The Broader Import of *Juliano*..... 17

Conclusion 19

TABLE OF AUTHORITIES

CASES

Baker v. Croslin, 359 Or. 147, 376 P.3d 267 (2016) 15, 16

Bennett v. Carter, 421 S.C. 374, 807 S.E.2d 197 (2017)..... 13

Burke v. S.C. Dep’t of Transportation, 429 S.C. 319, 838 S.E.2d 534 (Ct. App. 2020) 13

Easterling v. Burger King Corp., 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016)..... 11

Hoskins v. Snipes-King, No. CV 3:08-2442-JFA, 2009 WL 10677296 (D.S.C. Apr. 27, 2009).. 12

Juliano v. Simpson, 461 Mass. 527, 962 N.E.2d 175 (2012)..... 15, 16, 17, 18

Lord v. D & J Enterprises, Inc., 407 S.C. 544, 757 S.E.2d 695 (2014) 11

Marcum v. Bowden, 372 S.C. 452, 643 S.E.2d 85 (2007) 12, 16, 18, 19

Nelson v. Charleston Cnty. Parks & Recreation Comm’n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004)..... 11

Pers. Care, Inc. v. Theos, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019)..... 13

Ray v. City of Rock Hill, 434 S.C. 39, 862 S.E.2d 259 (2021) 11

Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992)..... 18

Scott v. McAlister, 436 S.C. 324, 871 S.E.2d 620 (Ct. App. 2022) 11

Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) 11

State Farm Mut. Auto. Ins. Co. v. Windham, 438 S.C. 156, 882 S.E.2d 754 (2022), *reh’g denied* (Feb. 9, 2023) 10

STATUTES

S.C. Code Ann. § 56-5-6110..... 10

S.C. Code Ann. § 61-6-4070..... 10

S.C. Code Ann. §§ 61-4-90..... 10

OTHER AUTHORITIES

Scintilla-of-Evidence Rule, Black's Law Dictionary (11th ed. 2019)..... 11

Social Host Liability, 2A American Law of Torts § 9:87..... 18

What Are You Prepared to Lose, S.C. DAODAS..... 14, 19

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR AYDEN PHILLIPS, WHERE THERE WAS AT LEAST A SCINTILLA OF EVIDENCE THAT HE WAS LIABLE UNDER THE SOCIAL-HOST DOCTRINE.

STATEMENT OF THE CASE¹

On January 9, 2020, Appellant Constance Mayers (as Personal Representative for the Estate of Darrius “George” Dreher) brought negligence, wrongful death, and survival claims against several defendants, including Ayden Phillips, the Respondent on appeal. S&C pp. 1-29 (R. pp. 25-51).² As relevant to this appeal, Appellant alleged that Phillips, while on private property, “provided alcohol to” an underage driver, “encouraged” her to “knowingly consume alcohol, and facilitated her consumption of alcohol.” Amend. S&C pp. 3, 6-7 (R. p. 54; R. pp. 57-58); *see* Amend. S&C pp. 13-14 (R. pp. 64-65). Ultimately, the underage, intoxicated driver struck and killed a young man, George Dreher. Amend. S&C pp. 3-4 (R. pp. 54-55).

Phillips denied most of the allegations. Phillips’ Answer pp. 1-7 (R. pp. 81-87). He also raised multiple defenses to Appellant’s claims for punitive damages; raised the defenses of contributory and comparative negligence and of a superseding cause; and “claim[ed] [his] rights

¹ Dramatis Personae (in alphabetical order):

Logan Bird (“Bird”), the minor alleged to have killed George Dreher.

Haley Davis (“Davis”), a friend of Phillips who testified to Bird’s alcohol consumption.

George Dreher (“Dreher”), the decedent.

Kenneth Cole Godley (“Godley”), the young man whose home Bird visited between her visit to Phillips’ home and the fatal collision.

Ayden Phillips (“Phillips”), the Respondent, the adult alleged to have provided alcohol to Bird.

Kenneth Lee Prater (“Prater”), a friend of Phillips.

Austin Tyler Newman (“Newman”), the young man who accompanied Bird for part of the day.

Jenna Sills (“Sills”), a friend of Phillips who testified to Bird’s alcohol consumption.

² A week later, she filed an amended complaint. Amend. S&C pp. 1-29 (R. pp. 52-80). Any amendments are irrelevant to this appeal.

to credits, set offs, settlement of judgments, to the extent applicable and allowed pursuant to South Carolina law.” Phillips’ Answer pp. 7-9 (R. pp. 87-89).

On November 17 of that year, Phillips moved for summary judgment, alleging that “he was not a social host with respect to Logan Bird,” the underage driver; that “he did not knowingly or intentionally serve or cause to be served an alcoholic beverage to” her; “that the alcohol allegedly voluntarily purchased, controlled and consumed by [the underage driver] . . . was not the proximate cause of” the collision; and that the decedent’s negligence exceeded Phillips’ as a matter of law. MSJ pp. 1-2 (R. pp. 90-91). But because discovery was incomplete, the trial court denied the motion on February 15, 2022. Feb. 15 Order p. 1 (R. p. 3).

On May 23, 2022, Phillips filed his “renewed” motion for summary judgment, Renewed MSJ pp. 1-2 (R. pp. 648-49), and on June 14, the trial court heard the motion, Dec. 28 Order p. 1 (R. p. 9). In an order filed December 28, 2022, the court granted summary judgment for Phillips, holding that Appellant “failed to prove that Phillips knowingly and intentionally served or caused to be served alcohol to Bird.” Dec. 28 Order pp. 1, 10 (R. pp. 9, 18).

On January 27, 2023, Appellant timely filed and served her Notice of Appeal of the December 28, 2022 order, bringing the appeal properly before this Court. NoA p. 1 (R. p. 740).

FACTS

I. The Big Picture

On June 17, 2017, Logan Bird—a girl of nineteen years and a hundred and ten pounds, September 14, 2020 Deposition of Logan Bird, p. 18, lines 7-9, p. 146, lines 14-17 (R. p. 457, lines 7-9; R. p. 585, lines 14-17)—drank a substantial amount of alcohol as part of a “poker run.” Bird Depo, p. 40, line 18-p. 41, line 10; p. 48, line 22-p. 49, line 24 (R. p. 479, line 18-p. 480, line 10; R. p. 487, line 22-p. 488, line 24).

After Bird returned from the run, Phillips³ called Austin Newman, the young man accompanying Bird, Bird Depo p. 62, line 3-p. 63, line 3 (R. p. 501, line 3-p. 502, line 3), to invite the couple to his house,⁴ Bird Depo p. 66, line 3-p. 67, line 5 (R. p. 505, line 3-p. 506, line 5).

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 (R. p. 167, line 14-p. 169, line 7); February 18, 2021 Deposition of Haley Alexandra Davis, p. 28, lines 12-17, p. 29, lines 16-18 (R. p. 329, lines 12-17; R. p. 330, lines 16-18). This pattern continued on the evening of June 17. Bird did not bring any alcohol with her to Phillips' house, Bird Depo p. 67, lines 6-8 (R. p. 506, lines 6-8), but two witnesses spotted her drinking alcohol on the premises, Davis Depo p. 10 lines 6-17, p. 18 lines 10-13 (R. p. 311, lines 6-17; R. p. 319, lines 10-13); April 22, 2021 Deposition of Jenna Ann Sills, p. 12, line 12-p. 13, line 1, p. 22, line 24-p. 23, line 12 (R. p. 364, line 12-p. 365, line 1; R. p. 374, line 24-p. 375, line 12). This mysterious materialization is no mere coincidence—Phillips provided alcohol to Bird after she came to his house at his invitation.

After plying Bird with alcohol until she was visibly intoxicated, Sills Depo p. 28, lines 2-7; p. 37, lines 2-3 (R. p. 380, lines 2-7; R. p. 389, lines 2-3), Phillips allowed her to drive herself to Kenneth Cole Godley's house, Sills Depo p. 26, lines 10-12 (R. p. 378, lines 10-12). After some time at Godley's house, where Bird drank additional alcohol, she started driving toward her father's house. Bird Depo p. 81, line 24-p. 82, line 4; p. 89, lines 12-14; p. 98, lines 2-4 (R. p. 520, line 24-p. 521, line 4; R. p. 528, lines 12-14; R. p. 537, lines 2-4). On the way, she struck and killed

³ Who was twenty-one years old at the time. September 14, 2020 Deposition of Lisa Phillips, p. 12, lines 20-22 (R. p. 407, lines 20-22).

⁴ The house actually belonged to Phillips' parents. April 7, 2022 Deposition of Joseph Ayden Phillips, III ("Phillips Depo") (R. p. 701, line 14-p. 19, line 1).

Dreher, Appellant's decedent. *See* Bird Depo p. 103, line 16-p. 108, line 9; p. 126, lines 17-23 (R. p. 542, line 16-p. 547, line 9; R. p. 565, lines 17-23).

II. A Detailed View

Before exploring the nuances of the relevant events, it is worth noting that all the witnesses struggled to recall significant details of the relevant period. For example, Godley originally testified that he spent nearly the whole day with Phillips on Sandy Beach; however, after further questioning, he realized that he was testifying to typical Saturday events, not to the events of the day. August 12, 2020 Deposition of Kenneth Cole Godley, p. 25, line 13-p. 26, line 17; p. 69, lines 9-19 (R. p. 209, lines 13-p. 210, line 17; R. p. 253, lines 9-19). Newman did not even remember whose house he had woken up at that morning. Newman Depo p. 9, lines 3-15 (R. p. 156, lines 3-15). Davis was unsure of her memories of that day, because it "was a long time ago." Davis Depo p. 9, lines 10-14 (R. p. 310, lines 10-14). And other witnesses testified to similar lapses. In short, the refrain "I don't remember" permeated the testimony, revealing a mosaic of fragmented memories and questionable credibility.

That said, a description of the testimony follows.

Logan Bird spent the afternoon of June 17, 2017 attending the poker run with several other young people, including Austin Newman. Bird Depo p. 28, line 8-p. 60, line 6 (R. p. 467, line 8-p. 499, line 6). She had at least one-and-a-half vodka mixed drinks during the run (and perhaps considerably more, *see* February 18, 2021 Deposition of Allison Rider, p. 22, lines 17-21 (R. p. 132, lines 17-21); April 22, 2021 Deposition of Graci Jane Conner, p. 16, line 25-p. 17, line 20) (R. p. 287, line 25-p. 288, line 20). Bird Depo p. 40, line 18-p. 41, line 10; p. 48, line 22-p. 50, line 25 (R. p. 479, line 18-p. 480, line 10; R. p. 487, line 22-p. 489, line 25). Meanwhile, another group of friends, including Kenneth Lee Prater, Haley Davis, and Jenna Sills, spent their afternoon at the

Phillips' house. April 22, 2021 Deposition of Kenneth Lee Prater, III, p. 8, lines 14-25 (R. p. 692, lines 14-25); Davis Depo p. 9, lines 15-17 (R. p. 310, lines 15-17); Sills Depo, p. 7, lines 17-20 (R. p. 359, lines 17-20). The two groups ran into each other at El Paso around dinnertime. *See* Davis Depo p. 9, lines 18-24 (R. p. 310, lines 18-24); Bird Depo p. 63, lines 10-13 (R. p. 502, lines 10-13).

From there, the testimony diverges. According to Bird, Phillips called Newman (who was driving her,) to invite the twosome over. Bird Depo pp. 66:3-67:5 (R. p. 505, line 3-p. 506, line 5). But according to Phillips, Bird drove by herself. Phillips Depo p. 18, lines 15-25 (R. p. 703, lines 15-25). Phillips even claimed that he did not even “know who [Bird] was at the time,” Phillips Depo p. 19, lines 1-25 (R. p. 704, lines 1-25), although Sills testified that Bird was “closer with the guys,” including Phillips, Sills Depo p. 11, lines 17-21 (R. p. 363, lines 17-21), and Bird testified that she drank with Phillips about five times before June 17, Bird Depo p. 21, lines 1-16 (R. p. 460, lines 1-16).

In any case, Bird ended up at Phillips' house. *See, e.g.*, Sills Depo p. 7, lines 23-24 (R. p. 359, lines 23-24). She claimed that she did not bring any alcohol to Phillips' house; that she did not drink at his house that evening; and that he did not provide her with alcohol, make alcohol available to her, or encourage her to drink alcohol. Bird Depo p. 67, lines 6-8; p. 68, lines 2-4; p. 147, line 19-p. 148, line 14 (R. p. 506, lines 6-8; R. p. 507, lines 2-4; R. p. 586, line 19-p. 587, line 14).

According to Davis and Sills, however, Bird did drink. Davis and Sills were near Phillips' pool house or pool when Bird arrived. Sills Depo p. 12, lines 8-11 (R. p. 364, lines 8-11); *see* Sills

Depo p. 7, lines 17-21 (R. p. 359, lines 17-21). Bird had a bag of alcoholic drinks.⁵ Davis Depo p. 10, lines 6-17 (R. p. 311, lines 6-17); Sills Depo p. 12, line 12-p. 13, line 1 (R. p. 364, line 12-p. 365, line 1). According to Davis,⁶ Bird was “chugging” a drink, either “a tall boy or a Straw-Ber-Rita.” Davis Depo p. 18, lines 10-13 (R. p. 319, lines 10-13). Sills, similarly, recalled Bird using a “Chambong” (a sophisticated beer bong) to drink from at least one Straw-Ber-Rita tallboy. Sills Depo pp. 22:24-23:12 (R. p. 374, line 24-p. 375, line 12). Davis did not remember whether Phillips handed Bird that drink or whether he was near Bird at the time, Davis Depo p. 36, lines 8-25; p. 40, lines 19-23 (R. p. 337, lines 8-25; R. p. 341, lines 19-23), but Bird testified that Phillips was in the pool area and spoke to her, Bird Depo p. 67, line 11-p. 68, line 1 (R. p. 506, line 11-p. 507, line 1).

In the light most favorable to the plaintiff, then, Bird did not bring alcohol onto Phillips’ property, but rather received alcohol (and a Chambong)—likely from Phillips, despite her self-serving testimony to the contrary—after she arrived.

Such a conclusion is unsurprising. 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 (R. p. 714, line 13-p. 715, 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

⁵ Sills was under the impression that Bird “brought alcohol over to Phillips’ house,” that “the only alcohol [Bird] had at Phillips’ house was alcohol she brought herself,” and that Phillips did not provide alcohol for Bird. Sills Depo p. 12, lines 16-17; p. 13, lines 20-25; p. 14, lines 1-3 (R. p. 364, lines 16-17; R. p. 365, lines 20-25; R. p. 366, lines 1-3). However, because Sills was already at the pool or pool house (which, according to Bird, was “in the back,” Bird Depo p. 67, lines 11-13 (R. p. 506, lines 11-13)), she did not necessarily see Bird arrive on the property. Furthermore, she evidently did not remember whether “there was any alcohol” at Phillips’ house “available for Bird . . . to drink.” Sills Depo p. 18, lines 7-11; p. 23, lines 20-23 (R. p. 370, lines 7-11; R. p. 375, lines 20-23).

⁶ Based on her earlier police statement, which she believed to be accurate. Davis Depo p. 14, line 24-p. 17, line 22 (R. p. 315, line 24-p. 318, line 22).

others—including Bird—doing so in the mere “handful of times” he visited. Newman Depo p. 20, line 14-p. 22, line 7 (R. p. 167, line 14-p. 169, 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 (R. p. 319, lines 12-17; R. p. 330, lines 16-18). In general, Phillips, who claimed that he never provided alcohol to a minor, Phillips Depo p. 62, lines 16-18 (R. p. 717, lines 16-18), failed to keep track of his friends’ ages, thus rendering underage drinking more likely, Phillips Depo p. 29, lines 1-8 (R. p. 709, lines 1-8).⁷

In fact, Davis and Sills were both underage on June 17, 2017. Davis Depo p. 12, line 5 (R. p. 313, line 5); Dec. 28 Order p. 5 (R. p. 13, line 10). 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 (R. p. 338, lines 8-14);⁸ Sills Depo p. 9, line 17-p. 10, line 2 (R. p. 361, line 17-p. 362, line 2).

In any case, Bird was obviously intoxicated at some point after dark. Sills Depo p. 28, lines 2-7; p. 37, lines 2-3 (R. p. 380, lines 2-7; R. p. 389, lines 2-3). This may well have been at Phillips’ house. *See* Newman Depo p. 22, lines 15-20 (R. p. 169, lines 15-20) (the get-together at Godley’s house occurred after dark); Phillips Depo p. 21, line 23-p. 22, line 10 (R. p. 705, line 23-p. 706, line 10) (he and his guests may have left for Godley’s house around 9 p.m.).⁹ Nonetheless, at least

⁷ “2011” should be “2017.”

⁸ Earlier in her deposition, Davis testified that Phillips “never provided [her] alcohol,” Davis Depo p. 29, lines 1-6 (R. p. 330, lines 1-6), but her later uncertainty about June 17 contradicts that assertion.

⁹ *See also June 2017 - Lexington, South Carolina - Sunrise and Sunset Calendar, Sunrise-Sunset*, <https://sunrise-sunset.org/us/lexington-sc/2017/6> (last visited April 11, 2023) (In Lexington, SC on June 17, 2017, twilight ended at 9:07:34 p.m.).

according to Sills, Phillips let Bird drive herself to Godley's house. Sills Depo p. 26, lines 10-12 (R. p. 378, lines 10-12).¹⁰

After a few hours¹¹ at Godley's house, during which Bird consumed at least one more beer, Bird Depo p. 81, line 24-p. 82, line 4 (R. p. 520, line 24-p. 521, line 4), she left for her father's house, Bird Depo p. 89, lines 12-14 (R. p. 528, lines 12-14). While on her way, she "felt [a] huge thud." Bird Depo p. 103, lines 20-23 (R. p. 542, lines 20-23). She later realized that the "thud" was Dreher. Bird Depo p. 126, lines 17-23 (R. p. 565, lines 17-23).¹²

III. The Trial Court's Ruling

In Phillips' renewed motion for summary judgment, he argued that he had no duty to Dreher because (1) "he was not a social host" to Bird; (2) "he did not knowingly or intentionally serve" alcohol to Bird, or cause alcohol to be served to her; and (3) "the alcohol allegedly

¹⁰ *But see* Bird Depo p. 75, lines 8-10; p. 76, lines 10-21 (R. p. 514, lines 8-10; R. p. 515, lines 10-21) (alleging that Newman drove her to Godley's house). Newman, in contrast, did not even recall going to Phillips' house. Newman Depo p. 19, lines 13-15 (R. p. 166, lines 13-15).

¹¹ As noted, Bird may well have arrived at Godley's house at around 9:00 p.m. But if Godley's testimony (though singularly confused on that point) can be believed, she may have arrived later than 10:30 p.m. Godley Depo p. 35, lines 9-12 (R. p. 219, lines 9-12).

On the other end, Bird thought that she likely left Godley's house at 2:15 a.m., Bird Depo p. 98, lines 2-4 (R. p. 537, lines 2-4), but evidence suggests she may have left much earlier. According to Bird, Godley was awake when she left, Bird Depo p. 86, line 23-p. 87, line 1 (R. p. 525, line 23-p. 526, line 1); Godley testified that he went to bed at about 1:00 a.m. Godley Depo p. 43, lines 1-14 (R. p. 227, lines 1-14). Thus, the gap between her visit to Phillips' house and her fateful drive home might have been as little as two-and-a-half hours, but was likely closer to four or five.

¹² According to Dr. Timothy Seybt, the pathologist who examined Dreher's body, Dreher had also been drinking: his blood-alcohol content was .326 when he was killed. December 2, 2020 Deposition of Timothy Paul Seybt, MD, p. 9, lines 5-8; p. 12, lines 3-10; p. 15, lines 4-13 (R. p. 678, lines 5-8; R. p. 679, lines 3-10; R. p. 680, lines 4-13). However, this does not mean Dreher was at fault. His blood-alcohol level did not permit Dr. Seybt to conclude that he was unconscious when Bird struck him. Seybt Depo p. 22, line 18-p. 23, line 3 (R. p. 684, line 18-p. 685, line 3). Furthermore, although Dr. Seybt opined that Dreher was lying in the road when Bird struck him, he couched his opinion carefully, stating that it was based on "the evidence that [he] had at the time." Seybt Depo p. 33, lines 9-17 (R. p. 687, lines 9-17).

voluntarily purchased, controlled and consumed by [Bird] . . . was not the proximate cause of an accident” where Bird “ran over the plaintiff’s decedent, passed out in the public road, some eight hours after she left Ayden Phillips’ home.” Renewed MSJ pp. 1-2 (R. pp. 648-49). Phillips argued that even if he had a duty to Dreher, Dreher was “more negligent than Phillips as a matter of law” because he “was grossly intoxicated,¹³ passed out in the middle of the dark public road in the lane of travel of Bird’s car.” Renewed MSJ p. 2 (R. p. 649, lines 2-5).

The trial court granted Phillips’ motion. Dec. 28 Order p. 1 (R. p. 9). “[R]ecogniz[ing] some disparity between the depositions,” it claimed to view the facts “in the light most favorable to” Appellant. Dec. 28 Order pp. 2-3 (R. pp. 10-11). However, rather than truly viewing the facts and related inferences in this light—which would have produced a narrative much like the one above—the court understandably, but erroneously, sought to reconcile the disparate accounts.¹⁴

In light of its own reading of events, the court decided that “there is no evidence that Phillips served, or caused to be served, alcohol to Ms. Bird,” and that “[a]ssuming that Ms. Bird consumed alcohol at the home, there is no genuine issue of material fact . . . showing that Phillips knowingly and intentionally caused Bird to be served.” Dec. 28 Order pp. 8-9 (R. pp. 16-17). Similarly, it held that Phillips did not “provide[] a ‘safe haven’ for Ms. Bird as an underage

¹³ A slight clarification: according to both the original and the renewed motion, Dreher’s “undisputed blood-alcohol level” was .334. MSJ p. 2, Renewed MSJ p. 2 (R. p. 91, lines 5-6; R. p. 649, lines 5-6). But according to Dr. Seybt’s testimony—which Phillips included as an exhibit to both of his memoranda in support—Dreher’s ultimate blood-alcohol level was .326. Seybt Depo p. 9, lines 5-8; p. 12, lines 3-10; p. 15, lines 4-13 (R. p. 678, lines 5-8; p. 679, lines 3-10; p. 680, lines 4-13).

¹⁴ For example, it concluded that “[t]he only evidence is that Logan Bird brought her own alcohol to the home and drank it herself.” Dec. 28 Order p. 8 (R. p. 16, lines 20-21); *see* Dec. 28 Order p. 9 (R. p. 17, lines 6-7). However, as noted above, it is unclear whether either of the girls who witnessed Bird drinking saw her enter Phillips’ property, as opposed to the part of the property immediately adjacent to the pool or pool house. It is also unclear whether Phillips’ house was a place where drinking (including underage drinking) regularly occurred, a pattern which would tip the scales in Appellant’s favor on this issue.

drinker,” and that even if he did, the safe-haven theory applies only to ABC licensees. Dec. 28 Order pp. 9-10 (R. pp. 17-18).

It also held held that Appellant’s claims of negligence *per se* failed because S.C. Code Ann. §§ 61-4-90 and 61-6-4070 create no civil cause of action or duty and because, even if S.C. Code Ann. § 56-5-6110 applied to the facts, it creates no civil duty. Dec. 28 Order pp. 11-13 (R. pp. 19-21).

However, the court correctly held that comparative negligence was a jury issue. Dec. 28 Order p. 13 (R. p. 21, lines 9-11). Similarly, it held that proximate cause was a jury issue, even after finding that there was “an approximately seven-hour time gap between when Ms. Bird was alleged to have consumed alcohol at the home and when the decedent was allegedly struck.”¹⁵ Dec. 28 Order p. 11 (R. p. 19, lines 6-14).

ARGUMENT

I. Considering the evidence and all reasonable inferences in Appellant’s favor, there is at least a scintilla of evidence that Phillips knowingly served or provided alcohol to an underage driver.

A. Standard of Review

This Court “reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC.” *State Farm Mut. Auto. Ins. Co. v. Windham*, 438 S.C. 156, 159, 882 S.E.2d 754, 755 (2022), *reh’g denied* (Feb. 9, 2023) (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). It recognizes that “because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues.” *Lord v. D & J Enterprises, Inc.*, 407

¹⁵ As noted above, the period was likely much shorter. *See* n.11, *supra*.

S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citing *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006)).

Therefore, in reviewing summary judgment, this Court does not “make[] factual determinations” or “consider[] the merits of competing testimony.” *Scott v. McAlister*, 436 S.C. 324, 331–32, 871 S.E.2d 620, 624 (Ct. App. 2022) (quoting *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)). Rather, “[i]n determining whether any triable issues of fact exist,” this Court views “the evidence and all inferences which can be reasonably drawn therefrom . . . in the light most favorable to the nonmoving party.” *Ray v. City of Rock Hill*, 434 S.C. 39, 44–45, 862 S.E.2d 259, 262 (2021) (quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361–62, 563 S.E.2d 331, 333 (2002)). In a negligence action, this Court must deny summary judgment where the non-moving party presents “a mere scintilla of evidence” showing a dispute as to either a material fact or “the conclusions to be drawn from” undisputed facts. *Nelson v. Charleston Cnty. Parks & Recreation Comm’n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004); *Easterling v. Burger King Corp.*, 416 S.C. 437, 445, 786 S.E.2d 443, 447 (Ct. App. 2016) (quoting *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011)). See *Scintilla-of-Evidence Rule*, *Black’s Law Dictionary* (11th ed. 2019) (“[I]f even the slightest amount of relevant evidence exists on an issue, then a motion for summary judgment . . . should not be granted and the issue must go to the jury.”). This Court must also deny summary judgment if “further inquiry into the facts of the case is desirable to clarify the application of the law.” *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008) (citing *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)).

B. Breach

“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” for the resulting damages. *Marcum v. Bowden*, 372 S.C. 452, 455, 643 S.E.2d 85, 86 (2007).¹⁶

The Supreme Court’s ruling in *Marcum* establishes a clear duty. In the present case, damages are a given, and proximate causation (as the trial court correctly held) is a matter for the jury. Therefore, only one question remains: did Appellant provide a scintilla of evidence that Ayden Phillips breached the duty to avoid serving Bird alcohol or causing her to be served alcohol?

If this Court refrains from making factual determinations and from weighing competing testimony, it will find at least a scintilla of evidence (as described in detail above) that:

- Bird was underage;
- Phillips was an adult;
- Phillips knew Bird, and either knew or willfully ignored the fact that she was underage;
- Bird did not bring alcohol to Phillips’ property on June 17, 2017;
- Shortly after Bird reached Phillips’ property—according to two other underage participants in the gathering—she had several alcoholic drinks and paraphernalia to enhance the experience; and
- Bird drank in Phillips’ presence.

¹⁶ The trial court’s quotation from an unreported district-court decision seems to suggest that the *Marcum* duty is so narrow that a social host is only liable if he or she intends that the minor become intoxicated. Dec. 28 Order p. 8 (quoting *Hoskins v. Snipes-King*, No. CV 3:08-2442-JFA, 2009 WL 10677296, at *2 (D.S.C. Apr. 27, 2009)). This is not *Marcum*’s holding.

The evidence in Appellant’s favor gains special significance in view of witnesses’ struggles to recall the events of June 17, 2017. Muddling through the conflicting and confused testimony of multiple witnesses is not a task for a court, but for the collective wisdom of a jury. Therefore, the trial court—which must view the evidence and all reasonable inferences in the light most favorable to Appellant—should have allowed the matter to reach the jury. But it did not. Rather, it decided to invoke the drastic remedy of summary judgment, a decision that this Court must reverse.

II. This Court should recognize a “safe haven” approach to determining whether a social host caused an alcoholic beverage to be served under *Marcum*.

A. Standard of Review

“When the trial court grants summary judgment on a question of law,” an appellate court “review[s] the ruling de novo.” *Bennett v. Carter*, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017). “In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court.” *Pers. Care, Inc. v. Theos*, 426 S.C. 78, 85, 825 S.E.2d 281, 284 (Ct. App. 2019) (citing *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)). This is especially true when an “appeal presents a novel issue of law.” *Burke v. S.C. Dep’t of Transportation*, 429 S.C. 319, 321, 838 S.E.2d 534, 535 (Ct. App. 2020).

B. A Modest Proposal

a. The Origins of the Safe-Haven Approach

The trial court stated that “[t]here is no case law in South Carolina supporting the plaintiff’s theory that there is liability for a social host who provides a ‘safe haven’ to an adult underaged drinker.” Dec. 28 Order p. 9. Going further, it stated that our courts “have rejected” the “safe haven doctrine” as applied to social hosts. Dec. 28 Order p. 9.

The latter statement is debatable; courts cannot reject the safe-haven theory as to social hosts without attempting to apply it. So far, safe-haven theory has been restricted to liquor

licensees. At the beginning of the opinion that established safe-haven theory, this Court clarified that the matter “present[ed] no question of *common law* liability of a social or business host who furnishes alcohol to his guests,” because the defendants held “a license . . . for the on premises sale and consumption of alcohol” and “their premises [were thus] subject to regulation by the State.” *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 510, 443 S.E.2d 406, 407 (Ct. App. 1994), *aff’d*, 319 S.C. 469, 462 S.E.2d 861 (1995). The Court then established safe-haven theory, holding that the regulation that prohibited ABC licensees from allowing minors “to possess or consume alcoholic liquors in or on the licensed premises” also created a duty of care toward third parties injured by underaged drinkers, even where the licensees merely “provided a ‘safe haven’ for underaged drinkers to engage in illegal drinking, but . . . did not themselves furnish the alcohol.” *Id.* at 510–513, 443 S.E.2d at 408–09.

Of course, any rationales unique to liquor licensees are inapplicable in the social-host realm. But safe-haven theory still offers a helpful framework for clarifying the scope of social-host liability under *Marcum*. Under a modified safe-haven approach, an adult social host who has at least a modicum of control over an alcoholic beverage, but nonetheless provides a safe haven for persons he knows (or reasonably should know) are underage adults to partake, should be liable for any resulting damages. Appellant also asks this Court to go further by clarifying that under *Marcum*, a broad safe-haven approach applies. That is, an adult who does not control the alcohol supply, but provides a safe haven for underage adults to drink, should be liable for any resulting damages.¹⁷

¹⁷ The South Carolina Department of Alcohol and Other Drug Abuse Services believes that *Marcum* already establishes this more stringent duty. See South Carolina Department of Alcohol and Other Drug Abuse Services, *What Are You Prepared to Lose*, S.C. DAODAS (September 2017), <https://www.daodas.sc.gov/wp-content/uploads/2017/12/What-Are-You-Prepared-to-Lose-9-17.pdf> (“The South Carolina Supreme Court has clearly ruled that if an adult allows underage drinking on his/her property

In presenting the safe-haven approach, Appellant will focus on the two out-of-state cases that the trial court used to justify narrowing a social host's duty. A proper analysis shows that both cases support a modified safe-haven approach, and one of them supports a broad safe-haven approach.

b. Support for a Modified Safe-Haven Approach

In its attempt to determine the parameters of social-host liability, the trial court drew on Phillips' memorandum in support of his motion for summary judgment, *see* Memo in Supp. p. 15, citing two out-of-state cases for the proposition that "service" requires "control" over the supply of alcohol, Dec. 28 Order p. 9 (citing *Baker v. Croslin*, 359 Or. 147, 376 P.3d 267 (2016) and *Juliano v. Simpson*, 461 Mass. 527, 962 N.E.2d 175 (2012)).

The court is correct: these cases rely on control. However, contrary to the trial court's suggestion, contextual analysis reveals that the concept of "control" in *Baker* and *Juliano* may broaden a social host's duty. Thus, *Baker* and *Juliano* support Appellant's position.

In *Baker*, one guest at a gathering killed another in alcohol-fueled horseplay; the decedent's personal representative sued the social host; and the trial court granted summary judgment in the social host's favor. 359 Or. at 149, 376 P.3d at 269. The applicable statute provided for liability if the host "served or provided" alcohol to an intoxicated person. *Ibid.* In that case, "[t]here [was] no evidence that defendant personally served any of the guests any alcohol." *Id.* at 150, 376 P.3d at 269. Rather, the host already had some of the alcohol and obtained some more, and the guests obtained the rest. *Id.* at 149, 376 P.3d at 269. At the gathering, "the guests understood that they were expected to help themselves." *Ibid.*

and one of the young people ends up causing damage, injury, or death to himself or others, then the adult can be held civilly liable.") Clearly, then, Appellant's proposed interpretation of *Marcum* is reasonable.

The Oregon Supreme Court decided that “liability turns not just on whether the host personally pours drinks but also on the extent to which the social host . . . directly exercises, or fails to exercise, control over the supply of alcohol to guests.” *Id.* at 158, 376 P.3d at 273. Ultimately, it held that “there [was] a genuine issue of material fact about the extent to which defendant controlled the supply of alcohol to his party, including the hard liquor that was the last shot that he and his friends consumed before the accident.” *Id.* at 165, 376 P.3d at 278. This was so even though the guests brought a substantial proportion of the alcohol. *See id.* at 149, 376 P.3d at 269.

Meanwhile, in *Juliano*, the Supreme Judicial Court of Massachusetts stated that a common-law duty to third parties exists “where a host either serves alcohol to guests or effectively controls the supply of alcohol”—but as in *Baker*, this “service” or “effective control” includes simply making alcohol “available” to guests. *Juliano*, 461 Mass. 527, 532–33, 962 N.E.2d 175, 180–81 (2012) (cleaned up) (citing *Langemann v. Davis*, 398 Mass. 166, 495 N.E.2d 847 (1986) and *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass. 152, 496 N.E.2d 141 (1986)).

The authorities the trial court cited, each of which interpret the scope of a duty similar to that established in *Marcum*, suggest that Phillips did not have to buy Bird a drink, pour her a drink, or hand her a drink. For Phillips to have “cause[d]” Bird “to be served” alcohol under the modified safe-haven approach, he only needed (1) to have access to and a modicum of control over an alcoholic beverage, and (2) to allow Bird access. As described above, there is at least a scintilla of evidence establishing these facts. Therefore, Phillips owed a duty to Dreher.

c. The Broader Import of *Juliano*

Juliano does more than highlight the inclusive nature of “control.” It signals a state’s willingness to consider holding a social host accountable when that host provides a venue for underage drinking (that is, a safe haven), even if the host does not control the liquor supply.

The *Juliano* Court confronted the issue of whether Massachusetts common law establishes a duty to third parties where a social host “knowingly allow[s] underage guests to possess alcohol in [his or] her home.” *Id.* at 532, 962 N.E.2d at 184. Ultimately, guided by “existing social values and customs and appropriate social policy,” the Court concluded that there was no duty. *Id.* at 532, 538–39, 962 N.E.2d at 180, 184. In analyzing social policy, the Court focused chiefly on the “‘practical difficulties’ inherent in imposing on social hosts a duty ‘to police the conduct of guests who drink their own liquor.’” *Id.* at 535–37, 962 N.E.2d at 182–83 (quoting *Ulwick v. DeChristopher*, 411 Mass. 401, 406–07, 582 N.E.2d 954 (1991)). In terms of “social values and customs,” the Court noted that there was no current consensus where, in Massachusetts, the Legislature had imposed criminal liability under the relevant statute but neglected to later “add a civil liability component”¹⁸ and where, on a national scale, only nine states “impose[d] social host liability for injury to third parties where a host merely provides a location for underage drinking.” *Id.* at 537–38, 962 N.E.2d at 183–84. However, the Court drew its conclusion reluctantly, stating that “[t]he plaintiffs make a compelling argument that underage drinking and driving is a persistent and widespread societal problem,” an argument supported by the Legislature’s decision to impose criminal liability. *Id.* at 538–39, 962 N.E.2d at 184.

¹⁸ The Court stated that the Legislature “refus[ed]” to add a civil liability component.” *Id.* at 537, 962 N.E.2d at 183–84. However, Justice Gants later clarified that those “refusals” were simply “bills failing to emerge from the committee where they were filed.” *Id.* at 545, 962 N.E.2d at 189 (Gants, J., concurring in the judgment).

The majority's reasoning prompted two spirited rebuttals from three (of seven) justices. Justice Botsford argued that the policy rationale was irrelevant in situations involving adult hosts and minor guests, and that as to social values and customs, "there clearly exist[ed] . . . a widespread social consensus that (1) underage drinking, especially when combined with driving, is a social problem of enormous significance; and (2) we as a society are committed to preventing or limiting its occurrence in whatever ways we can." *Id.* at 539–40, 962 N.E.2d at 185–86 (Botsford, J., concurring in the judgment). She concurred in the judgment, but only because she believed it "prudent to give the Legislature," which "comprehensive[ly] regulat[es]" "[a]lcohol consumption and the alcohol industry," "time to address the issue raised in this case." *Id.* at 541–42, 962 N.E.2d at 186 (Botsford, J., concurring in the judgment). Justice Gants (with whom Chief Justice Ireland joined) similarly agreed that the holding was appropriate where the host herself was underage, but argued against extending the holding to an adult host. *Id.* at 542–43, 962 N.E.2d at 187–88 (Gants, J., concurring in the judgment).

As the tortured cluster of opinions in *Juliano* aptly demonstrates, issues relating to social-host liability have produced "a bewildering array of decisions." *Social Host Liability*, 2A American Law of Torts § 9:87. However, one thing is clear: in South Carolina, public policy now "treats [persons aged 18 to 20] as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages." *Marcum*, 372 S.C. at 460, 643 S.E.2d at 89. Adult underaged drinkers are a unique category: they "may need less protection from harming themselves than younger drinkers," but "their drinking still poses a high risk of harm to others besides themselves." *Norton*, 313 S.C. at 513, 443 S.E.2d at 409.

Our common law is created to serve the needs of the people (*see Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (citing *Dupuis v. Hand*, 814 S.W.2d 340, 346 (Tenn. 1991)

(“The common law changes when necessary to serve the needs of the people”). It is time to clarify *Marcum*’s holding, recognizing that it captures cases in which adult social hosts invite minors to gather while turning a blind eye to those minors’ drinking habits.

If this Court concludes that there is no scintilla of evidence that Phillips served Bird alcohol or caused her to be served alcohol, it must at least conclude that there is a scintilla of evidence that he invited her to his property and allowed her to drink there. Under a broad safe-haven approach (which is, as noted above, the South Carolina Department of Alcohol and Other Drug Abuse Services’ interpretation of *Marcum*), this participation establishes a duty of care to the decedent.

CONCLUSION

For the foregoing reasons, and for any other reason that may be evident from the record, the trial court’s decision granting summary judgment to Ayden Phillips should be reversed, and the case should be remanded for trial.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

**POULIN | WILLEY | ANASTOPOULO,
LLC**

s/ Angeline M. Larrivee

Angeline M. Larrivee (S.C. #105466)

Roy T. Willey, IV (S.C. #101010)

Eric M. Poulin (S.C. #100209)

32 Ann Street

Charleston, SC 29403

(803) 222-2222

E: angeline.larrivee@poulinwilley.com

roy@poulinwilley.com

eric@poulinwilley.com

&

**LAW OFFICE OF KENNETH G.
GOODE, JR., LLC**

s/ Kenneth G. Goode, Jr., Esq.

Kenneth G. Goode, Jr., Esq.

S.C. Bar No.: 100368

4 Carriage Lane, Suite 204

Charleston, South Carolina 29407

(p) 843.754.5985

ATTORNEYS FOR APPELLANT

RECEIVED

Sep 07 2023

SC Court of Appeals

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,

Respondent.

of whom AYDEN PHILLIPS is the

CERTIFICATION

Pursuant to Rule 211(a), SCACR, I certify that Appellant’s Final Brief and Appellant’s
Final Reply Brief comply with Rule 211(b), SCACR.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

POULIN | WILLEY | ANASTOPOULO, LLC

s/ Angeline M. Larrivee

Angeline M. Larrivee (S.C. #105466)

Roy T. Willey, IV (S.C. #101010)

Eric M. Poulin (S.C. #100209)

32 Ann Street

Charleston, SC 29403

(803) 222-2222

E: angeline.larrivee@akimlawfirm.com

roy@poulinwilley.com

eric@poulinwilley.com

&

**LAW OFFICE OF KENNETH G. GOODE,
JR., LLC**

Kenneth G. Goode, Jr., Esq.

S.C. Bar No.: 100368

4 Carriage Lane, Suite 204

Charleston, South Carolina 29407

(p) 843.754.5985

Attorneys for Appellant

September 7, 2023
Williamston, SC