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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
GREENVILLE COUNTY COURT OF COMMON PLEAS

The Honorable Letitia H. Verdin, Circuit Court Judge

Appeal No.: 2023-000440

Kevin Dwayne Chavis, ...Appellant,

v.

Vansy Saensane and Ra Cha, Inc. d/b/a Bangkok Tokyo Restaurant a/k/a Bangkok Thai Restaurant, ... Respondents.

INITIAL BRIEF OF RESPONDENT RA CHA, INC. D/B/A BANGKOK TOKYO RESTAURANT A/K/A BANGKOK THAI RESTAURANT

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STATEMENT OF THE CASE

Appellant Kevin Dwayne Chavis ("Appellant"), Plaintiff below, filed a Second Amended Complaint, naming Vansy Saensane ("Saensane") and Ra Cha, Inc. d/b/a Bangkok Tokyo Restaurant a/k/a Bangkok Thai Restaurant ("Bangkok" or "Respondent") as Defendants. (Second Amended Complaint, filed May 4, 2022). In his Second Amended Complaint, Appellant alleged five causes of action against Bangkok: Dram Shop Liability; Negligence, Gross Negligence, Carelessness, Recklessness *Per Se*; Negligent Hiring and Retention; Vicarious Liability; and Joint Enterprise. Bangkok filed a timely Answer, denying the substantive allegations and raising a number of affirmative defenses. (Answer, filed May 19, 2022).

Following discovery, Bangkok moved for summary judgment. (Motion for Summary Judgment, filed Oct. 18, 2022). Appellant filed an opposition, (Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed Jan. 13, 2023) ("Opposition"), to which Bangkok responded with a Memorandum of Law in Support. (Defendant Bangkok's Memorandum of Law in Support of Motion for Summary Judgment, filled Jan. 24, 2023, including Exhibit filed Jan. 25, 2023) ("Memo in Support"). In its Memo in Support, Bangkok argued, among other things: that it did not serve, or sell alcohol to Saensane on September 26, 2019, noting the absurdity of Appellant's argument that "Saensane, as an owner of Defendant Bangkok, failed to 'refuse herself service'"; that Appellant's negligence per se cause of action suffered from the same defects as did his dram shop cause of action; that Saensane was not hired or retained by Bangkok and, in addition, that "Bangkok had no reason to know that [Saensane] created an undue risk of harm to the public"; that, to the extent Saensane was an employee of Bangkok, she was not acting within the scope of her

employment at the time of the accident; and that Appellant failed to state a viable cause of action against Bangkok under his "joint enterprise liability" cause of action. (Memo in Support).

The Honorable Letitia H. Verdin heard argument on January 27, 2023, and issued first a Form 4 Order and then a detailed Order granting summary judgment to Bangkok as to all causes of action against it, and dismissing Bangkok as a Defendant. (Form 4 Order, filed Jan. 30, 2023; Order filed Feb. 16, 2023). Appellant moved for reconsideration, (Motion to Reconsider, Alter, or Amend Judgment, filed Feb. 20, 2023) ("Motion to Reconsider"), which Bangkok opposed. (Bangkok's Response to Plaintiff's Motion to Reconsider, filed Feb. 28, 2023). The Circuit Court denied the Motion to Reconsider in a Form 4 Order filed March 7, 2023.

Appellant timely appealed to this Court.

BACKGROUND FACTS

Appellant alleged that, in the early hours of September 27, 2019, he was driving south in the southbound lane of North Pleasantburg Drive in Greenville when Saensane was driving north in the same southbound lane. Saensane's actions caused a head-on collision with Appellant's car, resulting in injuries to Appellant. (2d Amd. Compl. ¶¶ 5-8).[1] Among other things, Appellant asserted that Saensane was "a co-owner, manager, and employee" of Bangkok, and that, "[w]hile working at Defendant Bangkok's place of business, Saensane served herself and/or was served alcoholic beverages by agents, servants or employees of Defendant Bangkok." Appellant alleged that Saensane became intoxicated but continued to

[1] On appeal, Appellant asserts he alleged he was injured "as a result of Respondents' and Saensane's actions" in ¶ 8 of the Second Amended Complaint, (App. Br. p. 3); however, that paragraph of the Complaint addresses only Saensane's negligence. (2d Amd Comp ¶ 8).

consume and/or that "the agents, servants and/or employees of Defendant Bangkok continued to serve her and to allow consumption of alcoholic beverages … when she and/or they knew or should have known that she had become intoxicated." (2d Amd. Compl. ¶¶ 14-16). Appellant asserted that Saensane failed to "refuse herself service" and "no co-owner, agent or employee of Defendant Bangkok prevented Saensane from drinking any additional alcohol." Appellant alleged that Saensane left Bangkok's premises and later caused the accident with Appellant. (2d Amd. Compl. ¶¶ 19-20). Appellant alleged Bangkok was negligent in, among other things, serving or allowing Saensane to serve herself alcoholic beverages and/or failing to offer her alternative means of transportation once she became intoxicated. (2d Amd. Compl. ¶¶ 27-30).

Saensane was deposed on February 10, 2022. She testified that she and her boyfriend/fiancé, Chaisana Thammavongsa ("Chai") became part owners of Bangkok in 2017. At the time she became part-owner, she began working in the restaurant. (Saensane Dep. p. 24, line 4 – p. 25, line 21). Allison, the majority owner,[2] works in the restaurant as well, but Chai does not. Together, Allison and Saensane "run the restaurant." They both interview and hire employees. (Saensane Dep. p. 27, line 22 – p. 28, line 20).

When asked whether she was "an employee" of the restaurant, Saensane responded, "Yes, sir," but then explained that she gets "paid by monthly and it's depend on how the restaurant make money, or some months I don't get paid." In other words, the amount she is paid depends on how well the restaurant is doing. (Saensane Dep. p. 31, line 24 – p. 34, line 15).

[2] In 2019, at the time of the alleged incident, Allison, also known as Pouna A. Wannarat, owned 50% of the shares in Bangkok, while Saensane and Chai each owned 25%. (Saensane Dep. p. 24, lines 9-18; p. 26, lines 8-14).

Saensane testified that the restaurant usually closes at 9:00 p.m. for the evening. After the restaurant closes, she does "the closing, you know, like, do the paperwork, count the money and wait for the, um, staff to finish their cleanup and stuff, even though we close at 9:00. But they leave before me because I have to do things in there." Although Saensane could not remember exactly what time she left on September 26, 2019, she confirmed that she is the last to leave the restaurant, and usually leaves sometime between 10:00 p.m. and 11:00 p.m., but "not often" later than 11:00 p.m. (Saensane Dep. p. 42, line 20 – p. 44, line 6).

Sometimes, but not on a regular basis, Saensane would drink one or two half glasses of wine, but no more, while she did the paperwork. She agreed that on September 26, 2019, she did drink some red wine, which was the same wine served to customers. She drank no more than one or two glasses. Saensane testified that she did not specifically remember the evening before the wreck because "I do the same thing all the time, like, do the paperwork, get home. That's all I remember." (Saensane Dep. p. 44, line 18 – p. 46, line 7; p. 68, lines 10-16). Saensane was clear that she was alone at the restaurant when she drank the wine, although Allison had been there at times prior to September 26, 2019 when she had had a glass of wine while closing. (Saensane Dep. p. 47, line 22 – p. 48, line 25). Unlike Saensane, who is part owner, employees of the restaurant are not permitted to drink alcohol while they are at work. (Saensane Dep. p. 50, lines 1-16).

Saensane confirmed that she did not pay for the wine she drank while doing paperwork:

> Q: So, when you're—well, when you're drinking—if you're drinking, uh, some wine after close when you're doing paperwork, you're not selling yourself a glass of wine and putting it in the point-of-sale system and paying for it, right?

A: No, sir. (Saensane Dep. p. 49, lines 5-20).

Saensane cannot remember what she did or where she went after she left work on September 26, 2019:

Q: Okay. So, I—I'm trying to figure out the timeline and this is a little important to me, okay? So, the restaurant closes at 9:00 and then you have a period of time in which you're doing the closing procedures, paperwork, uh, that kind of thing, and the staff is cleaning up, right? You said that takes around an hour or so, usually. Is that correct?

A: Yes, sir.

Q: So, that takes me to about 10:00 or 10:30. Does that sound right?

A: I think so; yes.

Q: Okay. So, what I want to know is, is I want to know from 10:30-ish to 12:56 a.m., what you did.

A: I don't know. I don't remember, sir. I just know I get in the car and drive. That's it.

Q: Okay. So, when you left the restaurant that night, did you go somewhere else?

A: I don't remember, sir. I don't know. (Saensane Dep. p. 51, line 4 – p. 52, line 5; *see also* p. 54, line 12 – p. 55, line 5). Saensane did not know why she was driving on North Pleasantburg Drive at the time of the accident because it is not on the way back to her home, although she testified that sometimes after work she just drives around to clear her head. (Saensane Dep. p. 56, lines 1-25).

Attached to Appellant's Opposition was an Affidavit by David H. Eagerton, Ph.D., who stated that Saensane's serum alcohol level, taken at 1:34 a.m. on September 27, 2019 at Prisma Health, Greenville Hospital, was "equivalent to a whole blood-alcohol level of 0.263 g/100mL." Dr. Eagerton opined that, "Ms. Saensane's BAC level at 12:56 a.m., the time of the collision, would have been 0.273 g/100mL." Dr. Eagerton concluded that her "BAC level at 11:30 p.m. would have been 0.296 g/100mL which rises to the level of gross

intoxication," and then assumed, without any evidence in support, that Saensane's sole alcohol consumption on the evening of September 26, 2019 occurred while she was still at the Restaurant. (Eagerton Affid.).

STANDARD OF REVIEW

Appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP. *Baughman v. AT&T*, 306 S.C. 101, 114-115, 410 S.E.2d 537, 545 (1991). That is, summary judgment should be granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In making this determination, the Court must view "the evidence and all inferences which can be reasonably drawn therefrom … in the light most favorable to the nonmoving party." *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 735, 738 (Ct. App. 2001). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010); *see also Brooks v. Northwood Little League*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (summary judgment is proper "when the evidence is susceptible of only one *reasonable* interpretation") (emphasis added). Plainly, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014).

Once the moving party has carried "its initial burden, [the] opposing party must, under Rule 56(e), '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*, 306 S.C. at 115, 410 S.E.2d at 545. The party opposing

summary judgment must present evidence that "provide[s] a meaningful factual basis on which a factfinder could" find for the non-moving party. *Kitchen Planners, LLC v. Friedman*, 2023 S.C. LEXIS 164 *8, 2023 WL 5420401 (S.C. Aug. 23, 2023).[3] In other words, a "party opposing summary judgment 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019), citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *Baughman*, 306 S.C. at 117, 410 S.E.2d at 546 (speculative evidence insufficient to withstand summary judgment). Ultimately, "[t]he purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Singleton v. Sherer*, 311 S.C. 185, 197-198, 659 S.E.2d 196, 203 (Ct. App. 2008).

ARGUMENT

I. A majority of Appellant's arguments are not preserved for appellate review.

Appellant raises a number of arguments that were never presented to the circuit court and, therefore, are unpreserved for appellate review. For example, while Appellant relies on a host of statutory and regulatory provisions on appeal, he did not cite a single statute or regulation in his Second Amended Complaint, and the only statutory provisions Appellant

[3] Contrary to Appellant's assertion, *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991), does not stand for the proposition that summary judgment is inappropriate even if the evidence in opposition is "weak." Instead, the standard properly applied in *Vereen* was whether there is "evidence from which a jury could *reasonably* conclude" in the nonmoving party's favor. 306 S.C. at 432, 412 S.E.2d at 431 (emphasis added). The evidence this Court found sufficient in *Vereen* to withstand a motion for directed verdict consisted of testimony of a police officer who observed the crime scene, as well as photographic evidence of the crime scene. *Id.* This hardly is "weak" evidence. Appellant's misinterpretation of *Vereen* appears to be an attempt to circumvent or soften the South Carolina Supreme Court's recent decision rejecting the "mere scintilla" standard and affirming the "genuine issue of material fact" standard under Rule 56(c), SCRCP. *Kitchen Planners*, 2023 S.C. LEXIS 164 *8.

cited in either his Opposition or Motion for Reconsideration were S.C. Code Ann. § 61-4-580(A)(2) (formerly codified at S.C. Code Ann. § 61-9-410), and former S.C. Code Ann. § 61-5-30 (now codified at S.C. Code Ann. § 61-6-2220). Section 61-4-580(A)(2) provides, in pertinent part, that, "[n]o holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may *knowingly* … (2) *sell* beer or wine to an *intoxicated person*." S.C. Code Ann. § 61-4-580(A)(2) (emphasis added). Section 61-6-2220 provides that, "[a] person or establishment licensed to sell alcoholic liquors or liquor by the drink pursuant to this article may not *sell* these beverages to persons in an *intoxicated condition*; these sales are considered violations of the provisions thereof and subject to the penalties contained herein." S.C. Code Ann. § 61-6-2220 (emphasis added). As is discussed in more detail below, both provisions require a *sale* of beer, wine or liquor to an intoxicated person. There is no evidence of a "sale" of any alcoholic beverages here.

Appellant asserts on appeal that he "brought private causes of action arising from the violation of state criminal alcohol control statutes under Titles 12 and 61 of the South Carolina Code of Laws." (App. Br. p. 11). However, there is not a single reference to Titles 12 and/or 61 of the South Carolina Code of Laws in Appellant's Second Amended Complaint and, as noted above, not single reference to any specific statute or regulation. Instead, as he did in his other pleadings filed below, Appellant only vaguely referenced "licenses issued by the State of South Carolina to serve alcohol to the general public," "state liquor law," "South Carolina law and regulations," that are intended to protect persons such as Appellant, and "the laws of the State of South Carolina." (2d Amd. Compl. ¶¶ 3, 22, 28, 29, 31). To the extent the substance of any of Appellant's allegations can be construed to assert a violation of any statute or regulation, the only one that reasonably could be identified is S.C. Code

Ann. § 61-4-580, formerly S.C. Code § 61-9-410, which is addressed herein. None of the other statutes or regulations cited and relied on in Appellant's Brief were raised to or ruled on by the court below. They are not preserved for appellate review and should be disregarded.

Appellant's myriad references to other statutory provisions addressing the regulation, taxation and sale of alcohol are, therefore, unpreserved for appellate review. An argument raised on appeal that is based on different grounds from the argument presented to the trial court is not preserved for appeal. *Creighton v. Coligny Plaza Ltd. P'ship*¸ 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998), citing *Schofield v. Richland County Sch. Dist.*, 316 S.C. 78, 82, 447 S.E.2d 189, 191 (1994). Although Appellant asserted generally in its Opposition that "the duties owed to the Plaintiff by the Defendant arise out of the S.C. Code of Laws, Ann., 1976, as amended, and as those statutes have been interpreted and applied by the Courts of this State," (Opposition p. 3), and in its Motion for Reconsideration that "[t]here are a number of SC Code sections that have been enacted by the South Carolina Legislature related to the sale, distribution, and consumption of alcohol that are penal in nature, but which have been interpreted to impose civil liability upon those that violate these statutes," (Motion for Reconsideration p. 9), such vague statements do not preserve any argument on appeal beyond the two statutes mentioned in those pleadings. Even if they did, which is denied, the only statutory provisions the circuit court ruled on were S.C. Code Ann. § 61-4-580(A)(2) and S.C. Code Ann. § 61-5-30 (now codified at S.C. Code Ann. § 61-6-2220). In order to be preserved for appellate review, the various statutory provisions would have to have been raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for

the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review").[4]

Appellant also suggests on appeal that summary judgment was premature because "the full scope of statutory and regulatory violations is premature due to the ongoing discovery and litigation." (App. Br. p. 15). In addition to being incorrect, this issue is unpreserved because Appellant did not argue below that summary judgment should be delayed and/or that he needed additional discovery. *E.g.*, *Schofield*, 316 S.C. at 82, 447 S.E.2d at, 191 (an issue "not raised to or ruled on by the trial judge … is not properly before this Court").

This Court should disregard Appellant's unpreserved issues and arguments.

II. The circuit court properly granted Bangkok summary judgment on Appellant's Negligence and Dram Shop causes of action.

The circuit court correctly held that Bangkok was entitled to summary judgment on both the negligence and dram shop causes of action because there is no evidence that it sold or served Saensane alcohol on September 26, 2019, rejecting Appellant's attempts to broaden the language of S.C. Code Ann. § 61-4-580 to reach the facts of this case. Because South Carolina does not have a so-called "dram shop act," Appellant's civil causes of action must be based on a "violation of a penal statute" such as S.C. Code § 61-4-580. *Tobias v. Sports Club*, 323 S.C. 345, 348-350, 474 S.E.2d 450, 452-453 (Ct. App. 1996). Appellant has not and cannot demonstrate that Bangkok violated any statute (or regulation) that would support his private causes of action. Consequently, summary judgment was proper and Appellant presents no facts or arguments on appeal that reasonably call that ruling into question.

[4] Nonetheless, and out of an abundance of caution, Bangkok addresses these provisions below, none of which justify overturning the circuit court.

In fact, much of Appellant's discussion on pages 12-19, 21-23 of his Brief not only is unpreserved for appellate review, but also is irrelevant and/or unpersuasive. As an initial matter, it is not disputed that the public policy underlying the extension of tort liability to a restaurant or bar that knowingly sells alcohol to an intoxicated person pursuant to S.C. Code Ann. § 61-4-580(A)(2), is to promote public safety. However, here, there is no evidence nor can there be a reasonable inference from the evidence that Bangkok sold any alcohol to Saensane on September 26, 2019, and Appellant's contorted attempts to equate Saensane's consumption with a sale by Bangkok are unavailing.[5] Even the almost two-centuries old case cited by Appellant, *Harrison v. Berkley*, 32 S.C.L. (1 Strob.) 525 (1847), involved the *sale* of alcohol to an enslaved person, pointing out "the financial advantage inuring to the merchant … through the *sale* of his goods to the slave." (App. Br. p. 16 (emphasis added). Here, there simply is no evidence that Bangkok "sold" any alcohol to Saensane on September 26, 2019, and certainly no evidence of a knowing sale of alcohol to an intoxicated person.

Both below and on appeal, Appellant urges an incongruous broadening of the term "sell" in his attempt to cover the facts of this case. However, "[w]ords used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the operation of the statute." *Richland County Sch. Dist. Two v. S.C. Dep't of Educ.*, 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999). The circuit court correctly held as a matter of law that the words of S.C. Code Ann. § 61-4-580(A)(2) "are plain and unambiguous and clearly prohibit a permittee from selling alcohol to an intoxicated individual. If the legislature intended to use a word other than 'sell' to capture the activity of

[5] On appeal, Appellant engages in new attempts to equate Saensane pouring herself a glass or two of wine on occasion to Bangkok "selling" her alcohol. In particular, Appellant suggests that the wine Saensane drank already had been "sold to customers," in a nonsensical and unsuccessful attempt to bring this case within the ambit of S.C. Code Ann. § 61-4-580(A)(2).

restaurants giving away alcohol, it could have done so." (Order, p. 5). In other words, had the legislature intended to penalize or prohibit the mere consumption of wine, or of a co-owner serving herself a glass or two of wine, it easily could have done so. *E.g.*, *Seels v. Smalls*, 437 S.C. 167, 181, 877 S.E.2d 351, 348 (2022) (if the General Assembly intended a result, it could have included language effectuating that result and, where it has not done so, "principles of statutory interpretation do not favor implying such a result in the absence of any indicia that this was, in fact, the General Assembly's intent"); *Allied Corp. v. S.C. Tax Comm'n*, 288 S.C. 197, 204, 341 S.E.2d 139, 143 (1986) (noting that if the General Assembly had intended to create certain deductions for drilling costs, "it could easily have" included language to that effect). But it did not and Appellant's attempts to read into the statute language that is not there are futile, ineffective, and should be rejected.

Appellant argues on one hand, that a permit holder "may still violate the ABL Statutes without a sale in the traditional sense," and or without requiring "two distinct individuals," (App. Br. pp. 16, 18, 19, 21, 23 (asserting the jury should have been allowed to determine whether "Respondent [*i.e.*, Saensane] allowed Saensane to leave the premises in a severely intoxicated state"); p. 25 (asserting Respondent is liable because it allowed its agent, Saensane, "to violate the ABL licensing statutes through the overservice of Saensane")), while, on the other hand, he attempts to equate Saensane pouring herself a glass of wine to a "sale" (*Id.* pp. 17, p. 22 (by suggesting that, although "Saensane did not directly pay for the drinks," she may have paid indirectly somehow)). Both arguments fall short and reveal the contorted reasoning and absurd factual assumptions required to bring this case within S.C. Code Ann. § 61-4-580(A)(2) and South Carolina precedent.

Apparently recognizing the flaws in his argument, Appellant then embarks on a discussion of alcohol licensing and taxation in order to make the point that a holder of an ABL permit *can* "violate the ABL statutes without a sale in the traditional sense of the exchange of monies for drinks." (App. Br. pp. 16-17). As noted in Section I, none of these licensing and taxation statutes or regulations were raised below and, consequently, none are preserved for appellate review. *Creighton*, 334 S.C. at 108, 512 S.E.2d at 516; *Schofield*, 316 S.C. at 82, 447 S.E.2d at 191. Moreover, even if they were preserved, which they are not, Appellant is not in the class of persons whom any of these statutes or regulations was designed to protect. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2 251, 252 (1991) (as Appellant acknowledges, a plaintiff "must show 'that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and … that he is a member of the class of persons the statute is intended to protect").

As this Court pointed out in *Brooks*, "the primary rule of statutory construction is to give statutes their plan and ordinary meaning where the statute's language is unambiguous." 327 S.C. at 406, 489 S.E.2d at 650, citing *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993); *see also Seels*, 437 S.C. at 176, 877 S.E.2d at 356 ("The plain language of a statute is the best evidence of the legislature's intent"). Patently, "courts must not resort to forced construction to limit or expand a statute's operation," *Brooks*, 327 S.C. at 407, 489 S.E.2d at 650, which is precisely what Appellant asked the circuit court and is asking this Court to do.[6] However, the term "sell" in S.C. Code Ann. § 61-4-580(A)(2) is clear and unambiguous and should be interpreted and applied pursuant to its normal and customary meaning. "When the terms of [a] statute are clear and unambiguous, the court must apply

[6] *See* Order pp. 4-5; Motion to Reconsider p. 13; App. Br. p. 17.

them according to their literal meaning." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.C.2d 660, 663 (1991). This is particularly so when the statute is penal in nature. *Id.* Much of Appellant's Brief is a creative albeit unpersuasive attempt to convince this Court to expand not only the term "sell" in section 61-4-580(A)(2), but to impose liability on Bangkok based on a host of unrelated statutes that touch upon licensing and taxing the sale of alcohol by restaurants such as Bangkok.

Appellant then veers off into a discussion of S.C. Code Regs. §§ 7-701 and 7-702.1, which govern restrictions on the sale and delivery of beer and wine. Without explanation or context, Appellant suggests that, pursuant to S.C. Code Regs. 7-702.1, because Saensane poured herself a glass or two of wine on September 26, 2019 while she was performing closing and booking functions, the circuit court erred in finding there was no "no evidence of any transaction or sale of any alcohol by" Bangkok to Saensane. (App. Br. p. 17). However, that code provision, which has no bearing on this case whatsoever, provides in pertinent part, that "[a]ny beer or wine sold, offered for sale or delivered to anyone from any licensed place of business or the removal therefrom of any beer or wine *between the hours of twelve o'clock Saturday night and sunrise Monday morning* is a violation against the beer and wine permit …. Any delivery or removal of beer or wine between *these restrictive hours* shall be prima facie evidence that a sale was made." S.C. Code Regs. 7-702.1 (emphasis added). September 26, 2019 was a Thursday, not a Saturday or Sunday and, moreover, there is no evidence that Saensane consumed any wine while on Bangkok's premises after midnight that night. Consequently, as is the case with Appellant's unpreserved discussions of other statutory and regulatory provisions,[7] this argument is nothing more than a red

[7] These include:

herring, proffered as embellishment and/or as a diversion in a case where Appellant cannot present any material facts that are in dispute.

Appellant asserts that, because Saensane did not record the glasses of wine she drank, she deprived the State and county of tax revenues, which Appellant then attempts to weave back into his argument that dram shop liability in South Carolina should be expanded beyond knowing sales of alcoholic beverages to intoxicated adults. (App. Br. p. 17). Clearly, even assuming a violation of a taxation statute or regulation occurred here, which is denied, Appellant cannot show that he belongs to the class of persons whom any such statute or regulation was designed to protect. *Whitlaw*, 306 S.C. at 53, 410 S.E.2 at 252 (a plaintiff "must show 'that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and … that he is a member of the class of persons the statute is intended to protect").

Contrary to Appellant's assertion, the circuit court did not engage in speculation in holding that Saensane "likely left the restaurant for the night around 10:00 PM on September

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- S.C. Code Ann. § 61-4-80, which prohibits a person from purchasing beer or wine on a licensed premises and then giving it to someone who legally cannot buy alcohol;
- S.C. Code Ann. § 61-4-160, which addresses discount pricing for on-premises consumption, and prohibits the advertisement, sale or dispensing of beer or wine on the premises for free, with certain exceptions for individuals, fraternal organizations, and private functions;
- S.C. Code Ann. §§ 61-4-735 and 61-6-100, which delineate and regulate manufacturers, or vintners, of wine as tier one, wholesales of wine as tier two, and retail establishments that sell wine as tier three, and prohibit certain ownership and financial relationships among them, but has no substantive bearing on this case;
- S.C. Code Ann. § 61-8-10, which deems the "unlawful sale[s], barter[s], exchange[s], storage or keeping in possession" of alcoholic beverages a "nuisance";
- S.C. Code Ann. § 12-21-1010(2) and 27 C.F.R. 6.11, which define the term "retailer" with respect to alcoholic beverages;
- S.C. Code Regs. §§ 200.1 and 7-202, which address licensing; and,
- S.C. Code Regs. §§ 7-701 and 7-702.1, which govern restrictions on the sale and delivery of beer and wine.

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26, 2019." (Order, p. 2). While Saensane could not recall what time she left the restaurant on that night, she testified that normally she left sometime between 10:00 p.m. and 11:00 p.m., and rarely later than 11:00 p.m. (Saensane Dep. p. 42, line 20 – p. 44, line 6). Thus, the circuit court's statement that she "likely" did what she "normally" did is fully supported by the record. Interestingly, Appellant also relies on Saensane's testimony as to what she "normally" did in asserting that she "would not have eaten before drinking the wine as she either ate at home or did not eat dinner." (App. Br. p. 6; *see also* Saensane Dep. p. 73, lines 8-16).

And, while Appellant continues to rely on *Norton v. Opening Break*, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994), that case addresses underage drinking and regulations that specifically prohibit a licensee from knowingly allowing "a person under twenty-one year[s] of age to purchase or possess or consume alcoholic liquors, beer or wine in or on a licensed place of business …" S.C. Code Regs. § 7-200.4 (formerly codified at 23 S.C. Code Ann. Regs. § 7-31 (Supp. 1993). The rules that apply to providing minors with alcohol or allowing underage drinking are strikingly different from the rules that apply to providing or allowing adult consumption of alcohol. ***Compare*** *Norton*, 313 S.C. 508, 443 S.E.2d 406 (establishing liability for corporate entity who provided "a 'safe haven' for underage drinkers" even though the corporation did not supply the alcohol); and *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (imposing liability on social host who serves underage person for injuries caused by that person to himself or other third parties); ***with*** *Garren v. Cummings & McCrady, Inc.*, 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986) (no third party liability when corporate employer serves alcohol to adult guests at a social function); *Tobias v. Sports Club*, 332 S.C. 90, 504 S.E.2d 318 (1998) (holding South Carolina does not

recognize a first person cause of action for a tavern owner's knowingly serving an intoxicated patron in violation of S.C. Code Ann. § 61-4-580(2)). Thus, Appellant's reliance on case law addressing liability when alcohol is supplied to underage drinkers, or where their intoxication is facilitated by providing a "safe haven" is misplaced, as those cases do not control the outcome in this case, which does not involve minors or underage drinkers.

Even if Appellant could show that Saensane continued drinking wine at Bangkok's restaurant until she was severely intoxicated—which is denied—summary judgment still would be appropriate. That is because South Carolina does not impose civil liability on a tavern or restaurant for simply allowing its adult owner/agent/employee to drink on the premises, even when the corporate entity supplies the alcohol, who later injures a third party. *Garren*, 289 S.C. at 350, 345 S.E.2d at 509 (employer who is "a social host is not liable at common law for the service of alcohol to an intoxicated person who subsequently injures a third party"); *see also Hill v. Honey's, Inc.*, 786 F. Supp. 549, 551 (D.S.C. 1992) (same). Thus, the fact that it is undetermined what Saensane did or where she went after she finished closing for the night on September 26, 2019, does not create a jury issue because Bangkok still would not owe Appellant any duty even if Saensane continued to drink wine on her own at the restaurant after finishing her closing duties.

Appellant also relies on *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990), in his attempt to bring the facts of this case within the ambit of S.C. Code Ann. § 61-4-580. However, Appellant fails to note that, in *Daley*, this Court held "the purpose in prohibiting a vendor from *selling* beer to one who is already intoxicated is to prevent the person from becoming even more intoxicated so that he is not a greater risk when he leaves the bar." 303

S.C. at 84, 399 S.E.2d at 14 (emphasis added).[8] Clearly, the use of the terms "served," "service" and "serving" in *Daley* equates to sold, sale or selling, as stated in Section 61-4-580. Here, as was correctly noted by the circuit court, there was no sale of alcohol to Saensane and, therefore, neither Section 61-4-580 nor *Daley* provide Appellant with a viable civil cause of action.

The "prejudice" to the plaintiff in *Daley* centered on the circuit court's erroneous instruction in response to a jury question, which queried whether the Windjammer bartenders still could be found to have been negligent if the jury did not feel they "knowingly" sold beer to an intoxicated patron. In response to this question, the circuit court instructed the jury that if they did not find a knowing sale of beer to an intoxicated person, "you will have found that there was no legal duty that was breached. Therefore, there was no negligence." 303 S.C. at 86, 399 S.E.2d at 16. That was the error this Court found "took from the province of the jury the issue of whether the bartenders negligently served alcoholic beverages to a person who, by his appearance or otherwise, would lead a prudent man to believe that person was intoxicated." 303 S.C. at 87, 399 S.E.2d at 14.

Moreover, *Daley* is readily and meaningfully distinguishable from the case at hand because there, it was uncontested that the corporate defendant, the Windjammer, sold the at-fault driver nine 12-ounce beers over a period of four to five hours and, critically, that the intoxicated driver left the bar only 15 to 20 minutes prior to causing an accident. 303 S.C. at

[8] Appellant's assertion that "Allison left the restaurant before Saensane on September 26, 2019, leaving Respondent unable to satisfy the duties and responsibilities owed to the general public pursuant to the Alcohol and Alcoholic Beverages Licensing statutes," (App. Br. pp. 6-7), is somewhat perplexing. Saensane testified Allison left before her because "she don't do the paperwork," (Saensane Dep. p. 48), clearly indicating Allison left after the restaurant closed but before the paperwork was completed. There are no "duties and responsibilities" that Bangkok owed to the general public after it closed for the night and it was no longer selling wine or beer to customers.

83, 399 S.E.2d at 14. Here, in stark contrast, there is a gap of approximately three hours for which Saensane cannot account between her consuming one or two glasses of wine, and the time of the accident. Equally important, there is no evidence, nor any evidence from which a reasonable inference could be made that Bangkok sold any wine to Saensane on September 26, 2019, or on any other date.[9]

Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010), does not advance Appellant's case either.[10] There, evidence revealed that the intoxicated driver usually started drinking at home around noon and would start visiting his "favorite bars" around 4:00 or 4:30 p.m. 388 S.C. at 411, 697 S.E.2d at 560. The Getaway Lounge was the second of three bars he visited the night of the fatal accident. There, he drank at least four beers, although there was some dispute as to whether or not he appeared intoxicated. He only stayed at the third bar 10-15 minutes and, within an hour was involved in an automobile accident in which he died and a third party was injured. Again, as was the case in *Daley* and every other South Carolina case that has held an establishment with a license to sell alcohol liable for injuries to third parties caused by an intoxicated patron, the case hinged on whether or not the bar knowingly *sold* alcohol to an intoxicated person. *Hartfield*, 388 S.C. at 415, 697 S.E.2d at 562. Because Bangkok did not sell any alcohol to Saensane, S.C. Code Ann. § 61-4-580 does not support any of Appellant's causes of action and *Hartfield* is inapposite.

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[9] The sentence asserting that "Appellant has offered uncontroverted evidence that Respondent sold wine to customers and that the leftover wine Saensane consumed at the restaurant before she left in her car," (App. Br. p. 13), makes no sense. While it is acknowledged that Bangkok did sell wine to its customers, that fact alone does nothing to advance Appellant's case. There is no evidence that Bangkok "served" or "sold" Saensane any wine or other alcoholic beverages on September 26, 2019.

[10] *Daley* and *Hartfield*, along with a large number of the other cases cited and discussed substantively in Appellant's Brief, are not listed in his Table of Authorities.

Appellant clearly is asking this Court to create a new cause of action based on his assertion that Bangkok knowingly allowed Saensane to drink wine while performing closing and doing paperwork (even though the testimony establishes that this was not her common practice and that, when she did drink wine, she only poured herself one or two "half" glasses of wine (Saensane Dep. p. 44, line 18 – p. 46, line 7; p. 68, lines 10-16); and on his absurd and illogical contention that, presumably because Saensane was a part-owner/agent/employee of Bangkok and, because she was the only person present at the time she left the restaurant on September 26, 2019, that Bangkok both served Saensane wine, and "was aware Saensane left in an intoxicated state." (App. Br. pp. 6, 7, 10, 11, 15, 20, 23, 25, 26, 27). Such a ruling would open corporate liability to any bar or restaurant whose owner or officer has a drink from the restaurant stock and later causes an accident—as opposed to holding that owner or officer personally liability.[11] It also controverts the plain meaning of S.C. Code Ann. § 61-4-580, which specifically addresses only a knowing sale of alcohol to an intoxicated person. Finally, even if this Court were to accept Appellant's invitation to devise such a cause of action, which it should not, it would create new "tort liability where formerly there was none," such that any relief would be forward looking only, and would not provide any relief for Appellant. *See Marcum*, 372 S.C. at 455, 643 S.E.2d 86; *see also Tobias*, 323 S.C. at 351, 474 S.E.2d at 454 (Justice Hearn noting that "dram shop" liability was "judicially created in South Carolina").

Appellant's reliance on S.C. Code Ann. § 61-4-160 is misplaced. The fact that Section 61-4-160 proscribes certain licensees from advertising, selling or dispensing

[11] Appellant's suggestion that failing to impose liability here "would provide a blue print for future licensees to escape liability," (App. Br. p. 19), is nothing more than hollow fear mongering. Bar owners and restaurants who knowingly serve intoxicated patrons will continue to be held liable to injured third parties who can meet their burden of proof.

alcoholic beverages "for free," with exceptions for "happy hour" and for "dispensing to a customer on an individual basis," does not create a viable dram shop cause of action. In fact, this Court has held that a "lack of evidence as to [the licensee's] sale of alcohol," was "fatal to his argument." *Hartfield v. McDonald*, 381 S.C. 1, 6, 671 S.E.2d 380, 383 (Ct. App. 2008). The same is true here. The lack of evidence that Bangkok sold any alcohol to Saensane on September 26, 2019 is fatal to Appellant's claims against it.

Nor do any of the taxation provisions cited by Appellant, including S.C. Code Ann. §§ 61-4-20, 12-21-1230, and 12-21-170, support his cause of action against Bangkok. The harm caused to Appellant was not due to insufficient taxes being paid on the wine Saensane drank. In addition, Appellant clearly is not in the class of persons these statutes are intended to protect. *E.g.*, *Whitlaw*, 306 S.C. at 53, 410 S.E.2 at 252 (a plaintiff "must show 'that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and … that he is a member of the class of persons the statute is intended to protect").

Finally, Appellant's discussion of proximate cause is both unpreserved and irrelevant. Because he has not shown that Bangkok, as opposed to Saensane individually, owed him any duty and/or that that duty was breached, the issue of proximate cause does not arise in this case. As was stated in *Rayfield v. S.C. Dept. of Corrections*, in order to recover from an alleged violation of a statute, a plaintiff must first demonstrate that "the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered," and that "he is a member of the class of persons the statute is intended to protect," he has established that the defendant owes him a duty of care. The plaintiff must then show "that the defendant violated the statute" in order to prove negligence *per se*. 297 S.C. 95, 103, 374 S.E.2d 910, 914-915

(Ct. App. 1988). Where the plaintiff cannot show a violation of the statute, as is the case here, he does not reach the issue of proximate cause.

Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985),[12] does not provide differently. Only after determining that the bar had violated what is now S.C. Code Ann. § 61-4-580(A)(2) did this Court reach the issue of proximate cause. For these reasons, the other cases cited by Appellant in his discussion of proximate cause simply are irrelevant.

This Court should affirm the grant of summary judgment on Appellant's negligence and dram shop causes of action.

III. The circuit court properly granted Bangkok summary judgment on Appellant's Vicarious Liability cause of action.

It is unclear whether Appellant is challenging the circuit court's grant of summary judgment on his vicarious liability claim on appeal but, out of an abundance of caution, Respondent addresses it herein. What makes it unclear whether Appellant is challenging this finding is that, in his discussion of S.C. Code Ann. § 61-4-580(A)(2) on page 19 of his Brief, Appellant abruptly devolves into a discussion of agency, which discussion later mentions vicarious liability. Respondent does not contest that Saensane, as co-owner, was its agent. What Respondent does contest is that, regardless of whether she was an agent or an employee or a principal of Bangkok, Appellant has failed to make out a viable claim under S.C. Code Ann. § 61-4-580(A)(2) or any other applicable statutory or regulatory provision. And, for the reasons set forth in the Order, his Vicarious Liability cause of action also was properly dismissed.

[12] *Christianson* was overruled by *Tobias*, 332 S.C. at 92, 504 S.E.2d at 319-320, with respect to whether S.C. Code Ann. § 61-4-580(A)(2) provides a cause of action for a first-party, as opposed to a third-party, claim against a seller of alcohol.

As the circuit court held, even if, solely for the sake of argument, Saensane could be construed to be Bangkok's employee or agent, she was not acting within the scope of her employment or agency at the time of the accident. Thus, the one issue on which Appellant might have produced a shred of evidence that arguably is in dispute, *i.e.*, whether Saensane is Bangkok's employee, which is not conceded, is not material to the grant of summary judgment. As this Court aptly stated in *McCall v. Finley*, "whatever doesn't make any difference, doesn't matter." 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

Here, as was the case in *McAllister v. Graham*, 287 S.C. 455, 339 S.E.2d 154 (Ct. App. 1986), relied on by Appellant, although the tortfeasor was an employee of the corporate employer, he was not performing any task or activity related to his employment at the time of the accident. Instead, at the time of the accident, the employee was involved in a "purely personal" activity, which this Court deemed "a lark." 287 S.C. at 457-458, 339 S.E.2d at 155-156. Consequently, there, as is the case here, where Saensane was not doing anything remotely related to her employment or status as agent for Bangkok at the time of the accident, Bangkok cannot be held liable for her actions in causing the accident with Appellant. "An employer is not liable for its employee's negligent acts where the employee is not performing the employer's business, but rather engaged in the employee's private, personal business." 287 S.C. at 458, 339 S.E.2d at 156; *see also Lane v. Modern Music, Inc.*, 244 S.C. 299, 304-305, 136 S.E.2d 713, 716 (1964) ("A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his

employment").[13] Thus, regardless of any dispute as to whether Saensane may have been an employee or an agent, summary judgment was proper, as her actions were entirely outside any scope of employment or agency at the time of the accident.

Even if it were accepted as true that Saensane continued to drink while on Bangkok's premises until she was severely intoxicated—which is not conceded other than for the sake of argument—summary judgment still would be proper. That is because, although Saensane cannot recall what she did or where she went after she finished doing the paperwork on September 26, 2019, to the extent she stayed at the restaurant drinking—which again is not conceded—that would not have been in furtherance of Bangkok's business. Moreover, Appellant can point to no South Carolina authority holding that an employer or corporate entity that simply allows an employee or agent to drink on an employer's premises owes any duty of care to third parties, as there is none. Instead, the opposite is the law in South Carolina. *Garren*, 289 S.C. at 350, 345 S.E.2d at 509 (employer who is "a social host is not liable at common law for the service of alcohol to an intoxicated person who subsequently injures a third party"); *see also Hill*, 786 F. Supp. at 551 (same).

This Court should affirm the grant of summary judgment on Appellant's Vicarious Liability claim.

IV. The circuit court's grant of summary judgment on Appellant's Negligent Hiring and Retention and Joint Enterprise causes of action is both unchallenged and correct.

In his opening Brief, Appellant did not address or dispute the circuit court's ruling that summary judgment was properly granted to Bangkok on his Negligent Hiring and

[13] The limited exception to this rule does not apply either, as Saensane was not on Bangkok's premises nor was she using "a chattel of" Bangkok at the time of the accident. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992).

Retention cause of action and/or his related and defective Joint Enterprise cause of action. As a result, Appellant cannot raise them in a reply brief, as issues that are not addressed in his opening brief are deemed abandoned and should not be considered by this Court. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 270, 818 S.E.2d 447, 455 (2018) (explaining that South Carolina "appellate jurisprudence has clearly established that '[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court'"); *Emerson Elec. Co. v. South Carolina Dept. of Rev.*, 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief).

To the extent this Court considers the Negligent Hiring and Retention cause of action, which it should not, the circuit court properly granted summary judgment. While the circuit court determined that Saensane was not Bangkok's employee, that determination is not essential to the grant of summary judgment in Bangkok's favor. That is because, after finding Saensane was not an employee, the circuit court correctly held that, "[e]ven if Defendant Saensane was an employee, [Appellant] has not identified any prior incident or conduct which would put Defendant Bangkok on notice that she should not be retained or hired." (Order, pp. 7-8). *See Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005) (negligent retention cause of action requires facts demonstrating "knowledge of the employer" of wrongdoing, and "foreseeability of harm to third parties"). Here, there is no evidence of prior incidents of wrongdoing on the part of Saensane, which precludes any suggestion that Bangkok knew or could have known of any prior wrongdoing.

Even accepting Saensane's testimony that Allison was aware that she drank one or two glasses of wine after closing from time to time, that does not constitute the kind of

wrongdoing that is sufficient to establish a negligent hiring and retention claim. In *Doe*, this Court held that a prior incident that involved some sexual interaction with a co-worker "lack[ed] a sufficient nexus to the sexual assault" on the plaintiff. 367 S.C. at 207, 624 S.E.2d at 451. This Court held that, "the totality of the prior incident, is a far cry from the reprehensible, persistent pattern of abuse against" the disabled adult in *Doe*. 367 S.C. at 207-208, 624 S.E.2d at 451. Similarly, here, Saensane's occasional consumption of one or two half glasses of wine while she did paperwork, which Allison knew about, "is a far cry from" the level of excessive drinking required to produce a BAC of 0.273 g/100 mL at the time of the accident, which Appellant's expert estimated would be "the equivalent of the level of intoxication a person such as Ms. Saensane would obtain after consuming seven (7) standard drinks." (Eagerton Affid. p. 2).[14]

The circuit court correctly held that Appellant failed to present any South Carolina authority for his improper Joint Enterprise cause of action. (Order, pp. 9-10). To date, that theory of liability has only been applied where two or more individuals were in a vehicle involved in a motor vehicle accident. *E.g.*, *Pruitt v. Bowers*, 330 S.C. 483, 487, 499 S.E.2d 250, 252 (Ct. App. 1998) ("To establish joint venture of enterprise liability between a driver and passenger, there must be a common purpose or community of interest, and the passenger must have an equal right to control the direction and management of the vehicle"). Appellant

[14] Appellant's expert presumes, without any evidence in support, that Saensane did not go anywhere else and did not drink any additional alcohol after she "left work at 10:30 p.m." (Eagerton Affid. p. 2), which presumption Appellant adopts on appeal (App. Br. pp. 2, 15, 23, 25, 26). However, that is pure speculation, which is insufficient to defeat summary judgment. *Gibson*, 426 S.C. at 353, 827 S.E.2d at 182; *Baughman*, 306 S.C. at 117, 410 S.E.2d at 546 (speculative evidence insufficient to withstand summary judgment). In any event, as noted above, it does not matter for purposes of summary judgment in this case whether Saensane continued drinking at the restaurant or went to another restaurant or bar and continued drinking there.

has not alleged, much less raised any material issue in dispute, in support of his Joint Enterprise claim, which was properly dismissed.

Thus, this Court should affirm the grant of summary judgment on Appellant's Negligent Hiring and Retention cause of action.

V. Appellant's attempts to distort the record should be rejected.

Appellant makes a number of factual assertions, in addition to ones noted above, for which there is absolutely no evidence in the Record to support. These include:

- That Saensane and Chai held a minority interest in Bangkok "as Joint Tenants with Rights of Survivorship" (App. Br. p. 4);
- That, while her boyfriend, Chai, "paid to buy" into ownership of Bangkok, somehow her ownership share in the restaurant was "in exchange for Respondent Saensane's labor and sweat equity in the restaurant" (App. Br. pp. 4);[15]
- That "numerous bottles of wine were purchased by the glass by customers of Respondent," on September 26, 2019, "such that open bottles would have been readily available to Saensane unless Respondent took care" (App. Br. p. 7);
- That Saensane testified she drank wine while performing closing tasks, as though that was a regular occurrence, ominously warning multiple times that her access to Respondent's stock of alcohol was "unfettered" and/or that she had a "pattern and practice of consuming alcohol on the premises" and asserting she had a "long-standing proclivity to consume wine after-hours" (App. Br. pp. 5, 10, 18, 20, 26);[16]
- That Saensane testified "she was served glasses of wine by [Bangkok] who had purchased those pursuant to its PBW permit" (App. Br. p. 6, 10, 11, 13, 15, 18, 24

[15] In fact, Saensane was asked, "when Chai paid the money that he paid, was he paying to buy his twenty-five percent (25%) and your twenty-five percent (25%)" to which Saensane responded, "Yes, sir." (Saensane Dep. p. 27, lines 1-4). Thus, although Saensane worked alongside Allison in the restaurant, it is clear that her share in the restaurant had been paid for by Chai.

[16] In fact, as is noted above, Saensane testified that drinking wine while she did the paperwork was not an "everyday thing," and that, when she did drink wine, it was only one or two half glasses. (Saensane Dep. p. 44, line 18 – p. 46, line 7; p. 68, lines 10-16).

(suggesting, erroneously, that "Respondent *gave* these drinks to Saensane for free or as a form of employment compensation") (emphasis added);[17]

- That "Respondent was aware Saensane left in an intoxicated state" and/or Saensane "served herself substantial amounts of alcohol" while at the restaurant to the point of "severe intoxication" (App. Br. pp. 15, 21, 23);
- That Saensane testified "she did not go anywhere between leaving Respondent's premises and the motor vehicle collision site just down the road from Bangkok Tokyo" or near Respondent's restaurant (App. Br. pp. 7, 24);[18] and,
- That the accident occurred "near the restaurant when she turned right onto North Pleasantburg Drive" (App. Br. p. 24).

As these assertions are not supported by the Record in this appeal, they should be rejected and cannot serve as a basis for overturning the circuit court. *See* Rule 210(h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal").

[17] The testimony cited in Appellant's Brief for this point includes Saensane stating Bangkok purchased its wine from a supplier called "Southern something," and that she could not pronounce the second part of the name. (Saensane Dep. p. 46, lines 12-23). She also testified that, because she did not pay for the wine that she occasionally drank after closing, the account would "be short, but it's not everyday thing. So, you know? That don't – it don't count that much." (*Id.* p. 49, line 21 – p. 50, line 2). There is no reference to a "PBW permit," and certainly the testimony does not even lend itself to the suggestion that Bangkok served Saensane glasses of wine. This phrasing clearly is intended to further Appellant's absurd theory that, in pouring herself a glass of wine, Saensane and Respondent were, in the same instant, both the same entity and two different entities (one serving, one being served), and that she was both the corporation and the "customer."

[18] In fact, Saensane testified that she did not know where she went or what she did after leaving the restaurant on September 26, 2019. (Saensane Dep. p. 54, line 12 – p. 56, line 8).

CONCLUSION

For the reasons stated herein, this Court should affirm the circuit court's grant of summary judgment to Defendant Bangkok on all of Appellant's claims, and dismiss this appeal with prejudice.

Respectfully submitted,

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