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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Circuit Court

Letitia H. Verdin, Circuit Court Judge

Appellate Case 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.

(FINAL) REPLY BRIEF OF APPELLANT

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INTRODUCTION

In arguing dram shop liability, Appellant was required to identify either a violation of common-law duty of care or an implied private right of action. Proceeding, *inter alia*, on an implied private right of action theory, Appellant sought to evidence Respondent's violation of the special obligations and duties imposed on a holder of a permit for on-premises consumption of beer and wine. Appellant articulated this to the trial court through his identification and production of the precedential case law of our courts when interpreting Title 61 of the South Carolina Code. Application of these principles to the facts of the case illustrates the error committed by the trial court in removing from the province of the jury determination of facts.

ARGUMENT

I. Appellant Properly Preserved the Issue on Appeal of Dram Shop Liability as the Trial Court Considered and Ruled Upon These Issues.

The trial court considered application of multiple provisions of Title 61 of the South Carolina Code of Laws when it determined no violation of the penal statutes had occurred as a matter of law. (Order, R. p. 6). Of primary import, Appellant raised the applicability of S.C. Code Ann. § 61-4-580(A)(2) multiple times during this litigation from which the trial court ruled no evidence existed allowing Appellant to recover under a dram shop cause of action. (Order, R. p. 7). The trial court also considered and ruled upon the applicability of S.C. Code Ann. § 61-6-2220, construing Appellant's argument at trial as referencing only S.C. Code Ann. § 61-5-30, which was repealed in 1997. (Order, R. p. 9).

In considering the applicability of these statutes to the facts raised at trial, it is axiomatic that the court consider the scope of Title 61 in order to effectuate the legislative intent. Title 61 is a total and exhaustive occupation of "the entire field of beer, wine, and liquor regulation." S.C. Code Ann. § 61-2-80. "The State, through the department, is the sole and exclusive authority

empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, is authorized to establish conditions or restrictions which the department considers necessary." *Id*. The trial court ruled a monetary transaction was required to proceed on an implied private cause of action for the overprovision of alcohol to a customer. (Order, R. p. 8). Interpretation of legislative intent as to the meaning of the word "sell" must be understood within the broader context of Title 61 else the statute falls prey to mischaracterization.

The word "sell" is not defined within Title 61, but there is ample evidence the legislature did not intend to allow beer and wine permit holders to bypass the "privileges and responsibilities associated with that license." S.C. Code Regs. 7-202. "'The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose.'" *Richland Cty. Sch. Dist. Two v. S.C. Dep't of Educ.*, 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999) (quoting *Stephen v. Avins Construction Co.*, 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996)). "'The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers.'" *Richland*, 335 S.C. at 496, 517 S.E.2d at 447 (quoting *Rosenbaum v. S-M-S 32*, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993)).

The legislature placed specific safeguards on the provision of discounted and free beer and wine for on-premises consumption, the sum of which constitutes the exhaustive and complete regulation of this field. For example, when a business such as that of Respondent changes ownership with the transfer of "twenty-five percent or more of corporate stock," the permit must be immediately surrendered and reapplied for by the changed corporation. *Id*. Sale by any individual not holding this license is in violation of the statute. S.C. Code Ann. § 61-4-150. Once licensed, the permit holder is only allowed to engage in the provision of beer and wine to the extent

authorized by Title 61. Logically, a permit holder operating under the law can only rely upon statutes authorizing that specific activity or else it is not authorized under the three-tier system of regulation. Provision of discounted beer and wine for on-premises consumption provide the regulatory framework for interpreting "sale" in light of the legislature's purposes in enacting Title 61 by envisioning an exhaustive statutory schema even when a permit holder dispenses beer for free.

"No person who holds a biennial permit to sell beer or wine for on-premises consumption may advertise, sell, or dispense these beverages for free, at a price less than one-half of the price regularly charged, or on a two or more for the price of one basis." S.C. Code Ann. § 61-4-160. This prohibition contains only one exception applicable to Respondent: "The prohibition against dispensing the beverages for free does not apply to dispensing to a customer on an individual basis . . . ." *Id*. The legislature describes the individual receiving the free beer as a "customer" even though no sale has occurred, nor consideration of any type offered. This is the natural outcome of the type of regulation contained in Title 61 whereby the State of South Carolina licenses a qualified applicant with the personal privilege of a permit. S.C. Code Regs. § 7-200.1(H); S.C. Code § 61-2-140(B) ("Licenses and permits are the property of the department and are not transferable.").

Further, the legislature anticipated the need for retail establishments to bypass the strict limitations on consumption of alcohol on-premises when assessing procurement of new brands. Samples of wine, for example, can be provided to the retail establishment free of charge but must follow strict labeling requirements, cannot be a brand purchased within the last year, and it cannot be sold or provided to any employees under 21 or to a retailer's customers. S.C. Code § 61-4-360. The provision of alcohol to Saensane was not a sampling but a provision to a customer of discounted wine.

a. The Trial Court Considered and Ruled as to Application of S.C. Code Ann. § 61-4-580(A)(2).

The trial court specifically considered and ruled upon the applicability of S.C. Code § 61-4-580 as evidenced by the specific findings of fact concerning this statute. (Order, R. pp. 6-8). These issues were explicitly addressed by both parties at the summary judgment hearing, were contained in the filings presented to the trial court by Appellant, and served as a basis for the motion for reconsideration filed by Appellant.

b. The Trial Court Considered and Ruled as to Application of S.C. Code Ann. § 61-6-2220.

The trial court clearly ruled as to S.C. Code § 61-5-30 when finding the statute was repealed in 1997. That statute is now found in S.C. Code § 61-6-2220. Appellant raised this argument to the trial court in the motion to reconsider. (Mtn to Reconsider, R. p. 90). Appellants set forth the full scope of case law in South Carolina concerning dram shop liability as the judicial construct of these causes of action necessarily require reliance upon these precedents to articulate a viable cause of action implied by the legislature. (Mtn. to Reconsider, R. pp. 89-95). Appellants set forth much of the text from *Tobias*, illustrating the applicability of the same statutory mandates from 1996 as found in Eberle's article and as are in full force and effect now. (Mtn. to Reconsider, R. pp. 95-97).

c. The Trial Court Necessarily Considered and Ruled as to Interpretation of S.C. Code §§ 61-4-580 and 61-6-2220 by Evaluating the Statutory Scheme of Title 61.

The Appellant raised the issue of statutory construction to the trial court as grounds for the appropriate interpretation of the penal statutes underpinning dram shop liability in South Carolina. (Memo in Opp. to MSJ, R. p. 49). The trial court considered, albeit in error, the legislative intent

behind S.C. Code § 61-4-580 by failing to consider the broad scope and exhaustive regulations of Title 61. The lens of case law establishing the narrow contours of dram shop liability are necessarily predicated upon the appropriate interpretation of Title 61; it is no surprise numerous cases use serve and sell interchangeably. It is a surprise that Respondent and the trial court both used these terms interchangeably when describing Saensane's consumption of alcohol on the licensed premises: "Defendant Saensane drank wine and served herself." (Order, R. p. 4). "Defendant Saensane testified that she drank wine from the restaurant after close on September 26, 2019 and served herself." (Memo in Suppt. Summ. Judgment, R. p. 56). "Defendant Saensane was not sold or served wine by any employee of Defendant Bangkok." (Memo in Suppt. Summ. Judgment, R. p. 58).

II. On Presentation of the Record

Issues before the Court of Appeals are rarely simple. They represent thorny questions of fact and law; they arise from cases with irreconcilable differences and from litigants with life-altering damages. This case, from the facts giving rise to it to the record before this Court, presents its own thorny questions. To that end, sophistry is not needed to further complicate the measured assessment of the facts that are in the record.

a. The Trial Court Record is Absent a Transcript

Respondent identifies numerous "attempts to distort the record" in their brief. To the extent that the record does not speak for itself, Appellant notes the following:

Saensane and Chai each held a minority interest in the business. Saensane's interest was a 25% share. Chai had a 25% share. Saensane considered herself a shareholder and an employee of Respondent Ra Cha. (R. p. 145, line 4- p. 148, line 16).

Respondent is correct that the record does not contain evidence Saensane's ownership in Respondent's business was as a joint tenant with rights of survivorship.

Saensane testified that Chai paid to buy in to Respondent Ra Cha. (R. p. 147, lines 15-19). Saensane testified that she worked there as an employee. (R. p. 147, lines 15-19). Saensane testified that she did not know how much Chai paid to buy his share and Saensane's share. (R. p. 148, lines 1-6). Saensane testified that Chai paid a certain amount of money but that Saensane "didn't pay." (R. p. 146, lines 19-24).

Saensane testified that she drank from open bottles of wine at Respondent Ra Cha. (R. p. 166, line 1 – p. 167, line 7). Saensane testified that she drank on the night of September 26, 2019, while working at Respondent Ra Cha. (R. p. 165, line 18- p, 166, line 20). Saensane did not recall exactly how many glasses she drank that night; however, the glasses of wine she served herself must have logically come from the Respondent's stock of wine as Saensane would "just drink whatever we have in there that open." (R. p. 166, line 14).

Saensane testified that she had a habit and pattern of practice concerning the consumption of Respondent's stock of wine. (R. p. 165, line 23- p. 166, line 5). Saensane testified she served herself from the open stock of wine "[n]ot every day," it was "not my everyday thing." *Id*. Saensane further testified that she "just drink by myself and do the paperwork. That's – I remember." (R. p. 169, lines 1-2). Saensane's own testimony establishes the history of her consumption of Respondent's alcohol.

Any establishment selling alcohol, beer, or wine in the State of South Carolina must obtain a permit from the state, so it is the natural conclusion that the license Saensane testified to be a permit for beer and wine for on-premises consumption. (R. p. 150, lines 10-13). Further, under the

three-tier system of distribution in the state, a wholesaler is not legally able to sell to a retail establishment unless the retail has a permit. S.C. Code § 61-4-940.

Respondent is a corporation organized under the laws of this state and containing, at the time of the accident giving rise to this action, at least three shareholders between the principal, Saensane, and Chai. This is uncontested. Respondent argues that Saensane is not an employee because she is a shareholder while also arguing that Respondent cannot be aware Saensane left in an intoxicated state. (Resp. Br. p. 28). Saensane herself testified that she considered herself an employee and a manager of Respondent Ra Cha; therefore, Respondent Ra Cha is either on notice of the acts and knowledge of its managers and shareholder or disclaim the acts and knowledge of its employee. Instead, Respondent seems to argue that Saensane was not an employee and that Saensane was not a shareholder of the corporation so as to escape liability for its agents and liability for the knowledge of its management and shareholders. Saensane, as a permit holder due to her minority ownership of the business, is bound by the same obligations as Respondent under Section 61-4-580, which "prohibits the holder of a permit authorizing the sale of beer or wine from knowingly selling beer or wine to an intoxicated person." *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 418, 697 S.E.2d 558, 564 (2010). Liability as to overserving an individual is not just predicated upon visible symptoms but "other cases under section 61-4-580 might concern knowledge acquired through a different medium." *Id*. at 418, 697 S.E.2d at 564.

Respondent urges this court to assume there exists evidence Saensane went somewhere prior to the collision because Saensane could not recall where she went on September 27, 2019, thereby placing some unknown third-party as the putative vendor liable for overservice. Saensane testified as to her general habit, as to her lack of knowledge of the night in question, and as to her habit to not go anywhere else after leaving Respondent Ra Cha. (App. Br. pp. 7, 24). Appellant

illustrated to the trial court a question of fact as to whether or not Saensane went to another bar following her consumption of alcohol at the restaurant; but there is no evidence controverting Appellant's recitation of Saensane's deposition to support Respondent's assertion this is a misconstruction of the facts. This is just the type of evidence anticipated by *Daley v. Ward* and progeny concerning the sufficient evidence, circumstantial or otherwise, that creates a jury question. 303 S.C. 81, 87, 399 S.E.2d 13, 16 (Ct. App. 1990).

Finally, there was evidence presented to the trial court concerning the location and site of the accident. (Aff. Eagerton, R. p. 53). Presented to the trial court was the affidavit of David H. Eagerton, Ph.D., F-ABFT, which set forth a retrograde analysis of the Blood Alcohol Content of Saensane based upon her testimony and the facts relied upon by Dr. Eagerton. (Aff. Eagerton, R. p. 52). Dr. Eagerton's affidavit contains testimony the accident occurred "at approximately 12:56 a.m., Kevin Chavis was operating his . . . automobile in a southerly direction on N. Pleasantburg Drive." (Aff. Eagerton, R. p. 53). "At the same time and place, Vansy Saensane was operating a 2019 Lexus automobile in a northerly direction in the south bound lane of traffic on N. Pleasantburg Drive in Greenville, South Carolina while under the influence of alcohol and/or other intoxicating substances." *Id*. Saensane testified that she did not recall why she had not taken the normal route home from the business on Haywood Road, instead being on North Pleasantburg Drive, the location of the accident site. (R. p. 176, line 2- p. 177, line 25).

III. The Law Does Not Require a Sale

The careful balancing required in recognizing liability predicated upon a statutory violation mandates equally careful recitation of the facts of this case as well as representation of the case law setting forth these private causes of action.

In *Hartfield v. McDonald*, the court determined that Hartfield could not prevail because there was neither evidence of selling the patron alcohol nor of serving the patron alcohol. *Hartfield v. McDonald*, 381 S.C. 1, 5, 671 S.E.2d 380, 383 (Ct. App. 2008). *Hartfield* also anticipates the difficulty in delineating sale and service when distinguishing from *Daley v. Ward*: "However, in each of the cases cited by Hartfield, the *sale or consumption* of alcohol at the establishments in question was either admitted to, or proven by other evidence. We find Hartfield's lack of evidence as to the Pub's sale of alcohol fatal to his argument." *Id*. at 5-6, 697 S.E.2d at 383 (emphasis added). "The court further allowed that an injured third party may show that the alleged violators knowingly *served alcohol* to an intoxicated person . . . ." *Id*. at 415, 697 S.E.2d at 562 (citing *Daley v. Ward*, 303 S.C. 81, 84, 399 S.E.2d 13, 14 (Ct. App. 1990)) (emphasis added).

The *Hartfield* court further illuminated this difficult issue by highlighting the critical elements of *Daley* supporting dram shop liability because in *Daley* the "intoxicated patron admitted that he drank nine beers in the five hours he was present in the establishment." *Id*. at 6, 671 S.E.2d at 383. Further, "the accident occurred only fifteen to twenty minutes after the patron left, and the establishment was the only one which the patron frequented that evening." *Id*.

In *Jenkins v. CEC Entm't Inc.*, the District Court recited the same construction of the private cause of action for sufficiency of the evidence to survive a motion for summary judgment. 421 F. Supp. 3d 257 (D.S.C. 2019). The court noted that there was no evidence "that the restaurant's staff served [the patron] alcohol or that [the patron] was intoxicated." Saensane's own admission provides the Appellant sufficient evidence to demonstrate she was intoxicated on the night in question.

Further, Appellant identified evidence material to the recognition of dram shop liability such as the location of the crash being near to the restaurant. This is circumstantial evidence a jury

could determine indicated Saensane had left the restaurant that evening at a later time than she usually did but that does not extinguish the question of fact as to whether Saensane had just left the restaurant on *the night in question just prior to the collision*. *Hartfield*, at 7, 671 S.E.2d at 383 ("the record is simply devoid of any evidence that the Pub actually sold Helton alcohol while he was there, or that Helton was drinking while present."). The record here is not devoid of any evidence as Saensane herself testified she consumed alcohol on the premises of a licensed business on the night in question, left the business, and collided with Appellant's vehicle.

Appellant does not rely solely upon the expert affidavit of Dr. Eagerton to demonstrate the intoxication of Saensane at the time she was at the restaurant. "Blood alcohol level may be sufficient proof of intoxication." *Jamison v. The Pantry, Inc.*, 301 S.C. 443, 392 S.E.2d 474, 476 (Ct. App. 1990). The case law provides liability may attach when a person is intoxicated but is not visibly so when there is some evidence of sale or consumption as here by Saensane's testimony.

CONCLUSION

For the reasons set forth above, as well as those discussed in his primary brief, Appellant respectfully requests that this Court reverse the Circuit Court's order granting summary judgment to Respondents and should remand the matter for further proceedings.

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APPEAL FROM GREENVILLE COUNTY
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Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-00044
C/A No. 2021-CP-23-01487

Kevin Dwayne Chavis……..……Appellant,

v.

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

of whom

Ra Cha, Inc. d/b/a Bangkok Tokyo Restaurant
a/k/a Bangkok Thai Restaurant is ……..…..……Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the (Final) Reply Brief of Appellant, Kevin Dwayne Chavis, complies with Rule 211(b), SCACR. The undersigned also certifies that this Appellant's Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

January 4, 2024

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PROOF OF SERVICE

I certify that on January 4, 2023 I served copies of the **(Final) Reply Brief of Appellant** by e-mail and by United States Mail, postage paid, addressed to:

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