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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas W. McGee, III, Circuit Court Judge

Appellate Case No. 2024-002074
Civil Action No. 2023-CP-40-03052

Portundo M. Kimble, as Personal Representative
of the Estate of Devon Enrique Kimble, Deceased,

Appellant/Respondent,

v.

Jays Bar and Grill, LLC,

Respondent/Appellant,

FINAL RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Was the circuit court correct in finding that South Carolina does not recognize a first party dram shop action for adult patrons?

- II. Was the circuit court correct in determining that a plaintiff cannot obtain damages from a defaulting party on a cause of action that South Carolina has refused to recognize?

COUNTER-STATEMENT OF THE CASE AND FACTS

In this action, the estate of Devon Kimble (“Plaintiff” or “Kimble”) brought claims against Jays Bar and Grill, LLC (“Jays”), alleging that Jays overserved alcohol to Plaintiff, thus allegedly causing Plaintiff’s subsequent single-car accident in which Plaintiff lost control of his vehicle and was killed. (Compl. at ¶¶ 7, 9–10 (R. p. 25)). Plaintiff was over 21 years old at the time of the accident. (*See* Transcript of Hearing on Relief from Default at 10 (R. p. 67, line 11); Transcript of Hearing on Default Damages at 14 (R. p. 91, lines 4–5)). Plaintiff’s estate has filed a Complaint against Jays asserting causes of action for negligence, negligence per se, and negligent hiring, training, supervision, and retention. (Compl. ¶¶ 23, 32, 41 (R. pp. 29, 31, 32)).

Plaintiff attempted to serve this Complaint on Jays’ registered agent, Jay Kalin, Jr., at his registered address for service of process in Myrtle Beach, South Carolina, but was unsuccessful. (Pl.’s Aff. of Non-Service (R. p. 37)). Plaintiff then began a series of attempts to serve Kalin at his place of business at Jays Bar and Grill in Columbia, South Carolina. (Pl.’s Aff. of Non-Service (R. pp. 35–36); *see also* Def.’s Mem. in Supp. of Mot. to Set Aside Default (R. pp. 146–147)). These attempts were also unsuccessful, which is not surprising given that all but one of these attempts were made before Jays’ business hours of 8 p.m. to 1 a.m. or 2 a.m. (Pl.’s Aff. of Non-Service (R. pp. 35–36); *see also* Def.’s Mem. in Supp. of Mot. to Set Aside Default (R. pp. 146–147); Aff. of Kalin (R. p. 198)). Another attempt at service was made at Jay’s Vape and Wellness, despite the process server’s acknowledgement within his Affidavit of Nonservice that he had been told that Kalin was not usually at that address. *See id.*

Plaintiff then petitioned the Court for service by publication. (Pet. For Service by Pub. (R. p. 38)). In response, the clerk of court entered an order granting Plaintiff service by publication based on “it appearing that the Registered Agent for Defendant Jays Bar and Grill,

LLC cannot, after due diligence, be located” and on “it further appearing that a cause of action exists against said defendant.” (Order for Pub. (R. p. 1)). Plaintiff then published the summons in Richland County’s *Free Times* newspaper on August 9, 2023, August 16, 2023, and August 23, 2023, but published nothing in Horry County, South Carolina, where the registered agent had his registered service address (Pl.’s Aff. of Publication (R. p. 57)).

When Jays did not answer or appear, Plaintiff moved for an entry of default (Not. of Mot. and Mot. for Default (R. p. 135)), and the clerk of court entered a default against Jays. (Entry of Default (R. p. 133)). Later, Jays filed a motion to set aside the default, followed by a memorandum in support which argued that the default should be set aside because there was good cause to do so and because service by publication should never have been granted in the first place. (*See* Mot. to Set Aside Def. (R. p. 142); Mem. in Supp. of Mot. to Set Aside Default (R. pp. 144–150)). Jays argued, among other things, that contrary to the clerk’s order, Plaintiff’s complaint did not state a recognized cause of action as required by the publication statute. *Id.*

At the hearing on Jays’ motion, Plaintiff argued among other things that the order granting service by publication was valid because the publication statute’s second prong, existence of a cause of action against the defendant, was met in this case. (Transcript of Hearing on Relief from Default (R. pp. 58–77)). In support of this position, Plaintiff’s counsel incorrectly posited that “[t]here’s nothing in Tobias or the cases that follow [stating] there’s no common law duty whatsoever by the owner of a bar establishment to a patron who visits that establishment[;] [s]o there is a cause of action.” (*Id.* at 15 (R. p. 72, lines 13–16)).

After the hearing, Judge Coble issued an order denying Jays’ motion for relief from default. (Transcript of Hearing on Relief from Default (R. p. 58); Order Denying Relief from Entry of Default (R. pp. 3–7)). The order made no finding regarding whether a first party dram

shop action exists in South Carolina for adult patrons injured through their own intoxication. (*See id.*). Jays filed a Motion to Reconsider, in which it provided further factual information, submitting via affidavit that Jays' registered agent Kalin did not learn of the case until his attorney discovered it in the public index long after the default was entered; that Kalin's registered address in Myrtle Beach was in fact a residence he shares with his parents, rather than being a rental dwelling occupied by tenants as Plaintiff asserted; and that the *Columbia Free Times* was not a proper periodical for service by publication because it is based in and reports on news regarding Richland County, whereas Kalin's registered address for service is his permanent address in Myrtle Beach, which is located in Horry County. (Motion to Alter or Amend (R. pp. 173–174, 175–176); Aff. of Kalin (R. p. 198)).

Jays also provided case law to the court demonstrating that *Tobias* and its progeny explicitly hold that there exists no first party dram shop action in South Carolina for adult patrons who are injured as a result of their own intoxication, whether under common law or statutory negligence per se. (Motion to Alter or Amend (R. pp. 174)). For this reason, Jays argued, it was a manifest error for the clerk of court to conclude in its publication order that “there exists a cause of action against said defendant,” such that the statutory requirements for service by publication were not met. (R. pp. 174–175). Jays further argued that the factors for setting aside default under Rule 55(c), SCRCP, weigh in Jays' favor. (R. pp. 176–177). Jays' motion to reconsider, however, was denied by subsequent order of Judge Coble dated September 3, 2024. (Order Denying Def.'s Mot. for Recons. Pursuant to Rule 59(e), SCRCP (R. p. 8)). Like the order denying relief from entry of default, the order denying Jays' motion to reconsider made no mention of whether South Carolina recognizes a first party dram shop action for adult patrons who are injured as a result of their own intoxication, nor did it comment on this issue. (*See id.*).

On October 9, 2024, Plaintiff filed a motion for a default damages hearing. (Plaintiff's Motion for Default Damages Hearing (R. p. 135)). On September 17, 2024, a default damages hearing was conducted before the Honorable Thomas W. McGee, III. (Transcript of Hearing on Default Damages (R. pp. 78–128)). At the hearing, Jays argued, among other things, that no damages could be properly awarded on a cause of action that the South Carolina Supreme Court has refused to recognize, and Plaintiff argued, among other things, that South Carolina does recognize such a cause of action under common law and that Jays was improperly repeating arguments it had made in support of its prior motion for relief from default. (*See id.*).

On October 29, 2024, Judge McGee entered an Order Denying Plaintiff's Motion for Damages, finding that even if all the factual allegations of Plaintiff's Complaint were deemed admitted, Plaintiff was not entitled to an award of damages because Plaintiff's cause of action, an adult first-party dram shop claim, is not recognized under South Carolina law. (Order Denying Plaintiff's Motion for Damages) (R. p. 18)). The order also cited numerous persuasive authorities in support of this ruling. *See, e.g., id.* at 5 (R. p. 15)). The order made no mention of the propriety or impropriety of the court's prior refusal to grant Jays relief from default. *See id.*

On October 30, 2024, the Plaintiff filed a Motion to Reconsider Judge McGee's Order Denying Plaintiff's Motion for Damages, again arguing that (1) South Carolina does recognize an adult, first-party dram shop action under common law and (2) that it was improper for Jays to argue that no damages could be awarded in the absence of a recognized cause of action to support a damages award when it had previously argued it should be granted relief from default based on no recognized cause of action having been brought by Plaintiff. (Plaintiff's Motion to Reconsider (R. p. 199)). The Motion was denied by Order dated December 6, 2024. (Order Denying Motion to Reconsider (R. p. 20)). Kimble appealed.

STANDARD OF REVIEW

In the default damages context, “[T]he trial judge has considerable discretion regarding the amount of damages, both actual or punitive.” *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 348, 907 S.E.2d 129, 140 (Ct. App. 2024), *reh’g denied* (Oct. 24, 2024) (citing *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004)). “Because of this discretion, [the appellate court’s] review on appeal is limited to the correction of errors of law.” *Id.* “[The appellate court’s] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.” *Id.*

ARGUMENT

I. South Carolina Does Not Recognize a First Party Dram Shop Action for Adult Patrons.

In South Carolina, an adult patron cannot maintain an action against a dram shop for injuries sustained as a result of his own intoxication. Yet every purported cause of action in Appellant/Respondent Kimble's complaint attempts to do this very thing, whether Kimble characterizes his claims as sounding in common law negligence or in negligence per se based on criminal statutes. Kimble's complaint alleges Kimble was killed in a car accident because Kimble was overserved alcohol by Jays Bar and Grill and seeks recovery for Kimble from Jays. The Complaint is thus a first party dram shop action, and as described below, South Carolina's jurisprudence on this issue explicitly rejects such a cause of action.

a. *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003)

A helpful summary of the history of first party dram shop claims in South Carolina is provided by the Supreme Court of South Carolina in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003). While *Lydia* was a negligent entrustment case rather than a dram shop case, the Court engaged in an analysis of dram shop claims because "[t]he public policy considerations which govern our decision as to whether to allow civil suits based on negligent entrustment grow out of South Carolina's regulation of the sale of alcohol." *Id.* at 41. As the Court in *Lydia* explains:

At common law in American courts, a tavern owner could not be held civilly liable for injuries caused by an over served, intoxicated patron. With the repeal of dram shop laws in all but 18 states, the majority of states did not impose liability upon tavern owners. In the 1950s, several state supreme courts began to develop a theory of tavern owner civil liability based on violations of state criminal statutes forbidding the serving of alcohol to intoxicated patrons.

By 1987, 41 states had some form of tavern liability. South Carolina's General Assembly did not enact a dram shop law, but in 1985, the South Carolina Court of

Appeals held that a bar owner's violation of the criminal statute forbidding service to intoxicated persons could support a civil suit against the bar for injuries caused by the intoxicated patron. *Christiansen v. Campbell*, 285 S.C. 164, 328 S.E.2d 351 (Ct.App.1985). In *Christiansen*, the plaintiff was struck by an automobile as he stepped off the curb in front of a bar where he had consumed a number of beers. The bar owner had continued to serve Christiansen after he became intoxicated. Christiansen sued the automobile driver and the bar owner. The Court of Appeals held that Christiansen had a private right of action against the bar owner based on the violation of a penal statute. The Court of Appeals found that the statute existed both to protect the public and to protect intoxicated persons. *Id.*

In *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), this Court expressly overruled *Christiansen* holding that we would not permit an intoxicated adult to bring a first party cause of action against a tavern proprietor predicated on a violation of the dram shop statutes. This Court stated, "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 90, 504 S.E.2d at 320. Our Court noted that its decision did not preclude a third party from bringing a cause of action under the statutes. *Id.* at 90, 504 S.E.2d at 319.

....

The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

Lydia, 355 S.C. at 41–42 (footnotes omitted) (emphasis added). While the Supreme Court's explanation in *Lydia* thus settles the issue, a direct analysis of the landmark *Tobias* case that *Lydia* was interpreting is also appropriate.

b. *Tobias v. Sports Club, Inc.* 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996)

In *Tobias v. Sports Club, Inc.*, 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998), the South Carolina Court of Appeals reviewed a case involving claims brought against a hotel by a patron alleging he was injured in a car accident caused by his own intoxication after allegedly being overserved liquor at the hotel's bar. *See id.* at 347. The Court began its analysis by noting that while "[a]t common law, a tavern

owner had no liability for serving alcohol to an intoxicated person who later injured himself or others,” “[m]any jurisdictions, departing from this common law view,” “have enacted ‘dram shop acts’.... [which] impose civil liability on tavern owners under various circumstances.” *Id.* at 348. “In states where dram shop legislation has not been enacted,” the Court explained, “some courts have imposed liability on vendors of alcoholic beverages using principles of negligence, often basing a private cause of action on the violation of beverage control statutes.” *Id.* at 349. Under the Court of Appeals’ prior *Christiansen* decision, “South Carolina is among those jurisdictions that have recognized a civil cause of action based upon the violation of a penal statute.” *Id.* at 350.

The specific question before the Court of Appeals in *Tobias* was whether to allow a defendant in a dram shop action to assert the defenses of contributory negligence and assumption of the risk. *Id.* at 346. In evaluating this issue, the Court reviewed the public policy considerations at play because “[s]ince this cause of action was judicially created in South Carolina, we have no statutory guidance on the class of persons who may recover or on the availability of defenses.” *Id.* at 351. Because this was a *first party* dram shop action brought under *Christiansen*, the Court began its public policy analysis by noting that “[i]n many states where such a cause of action is statutorily authorized, the dram shop act or cases interpreting it have specifically precluded the intoxicated person from that class of plaintiffs who may bring suit,” and that “[i]n addition, many courts in jurisdictions with penal statutes, including most of those relied upon by the Court in *Christiansen*, have precluded first party recovery.” *Id.* (footnotes omitted).

Describing other jurisdictions allowing dram shop defendants to raise the defenses of contributory or comparative negligence and assumption of the risk, the Court noted that “[t]hese

courts have held that voluntary intoxication is a self-indulgent act and a person who voluntarily consumes alcohol to the point of intoxication is at the very least partially responsible for his injuries.” *Id.* at 354 (citation omitted). Addressing concerns by its concurrence that permitting a dram shop such defenses would abrogate the legislative purpose of deterring drunk driving and punishing tavern owners who serve obviously intoxicated persons, the Court responded that “[t]he tavern owner is still subject to fines and license revocation for his actions under the statute regardless of whether the inebriant assumed the risk of becoming intoxicated,” and that “[t]hus, the legislative purpose of deterring drunk driving and punishing tavern owners who serve obviously intoxicated persons is served without absolving the inebriant of responsibility for his actions.” *Id.* at 355.

Continuing this reasoning, the Court of Appeals found that holding voluntarily intoxicated adult patrons responsible for their actions would actually help deter drunk driving, quoting approvingly from a New Jersey Supreme Court case as follows:

In reassessing the principles that should govern liability in dram-shop litigation, we are strongly influenced not only by the principles of comparative negligence but also by the public interest in deterring those who would create risk to others by voluntarily drinking to the point of intoxication. Our statutory and case law reflect the compelling public policy that those who voluntarily become intoxicated must be held responsible for the consequences of their behavior.

Id. at 355 (citation omitted). On the basis of all these public policy considerations, and mindful that “the majority of states that have considered this issue limit the inebriated patron’s ability to sue the tavern owner for the consequences of the patron’s voluntary intoxication,” the Court of Appeals held that both contributory negligence and assumption of the risk were properly submitted to the jury in that case. *Id.* at 356.

So holding, the South Carolina Court of Appeals concluded its analysis by stating that “a rule which allows an intoxicated individual to hold a tavern owner liable without regard to his

own actions in continuing to consume alcohol promotes irresponsibility and rewards drunk driving,” and that “[g]iven a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism.” *Id.* at 356 (citation and quotation omitted).

c. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998)

The plaintiff in *Tobias* appealed the Court of Appeals’ decision to the Supreme Court of South Carolina, which granted certiorari “to consider the Court of Appeals’ decision holding that the defenses of contributory negligence and assumption of the risk were available in a negligence suit brought by the intoxicated adult patron against the tavern owner who served him.” *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1998). Reviewing the analysis of the Court of Appeals, the Supreme Court agreed with its opinion but went a step farther, holding that “[w]e now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a ‘first party’ cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of S.C. Code Ann. §§ 61–5–30 and/or 61–9–410 (1990).” *Id.* at 91. The Supreme Court thus “overrule[d] *Christiansen v. Campbell*... and its progeny to the extent they recognize a first party action, but explicitly retain the right of injured third parties to maintain a negligence suit against the tavern owner based on a violation of these statutes.” *Id.* at 92. It accordingly affirmed the opinion of the Court of Appeals in *Tobias* as modified. *Id.*

In overruling *Christiansen*’s creation of a first party cause of action against a dram shop, the Supreme Court reviewed the *Christiansen* opinion and agreed with *Christiansen*’s finding that the “purpose [of statutes preventing the knowing sale of alcohol to an intoxicated person] is to promote public safety, and to prevent an already intoxicated person from becoming even more

intoxicated, and thus an even greater risk to the public at large, when he leaves the establishment,” but it disagreed with *Christiansen*’s finding that “another of the statutory purposes was to protect the intoxicated person from their own incompetence and helplessness.” *Id.* at 92 (citation omitted). Disagreeing with this second conclusion of *Christiansen*, the Supreme Court thus found intoxicated adult patrons to be outside the class of persons the statutes were designed to protect, and “h[e]ld that public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.” *Id.* at 92.

As the Supreme Court further expounded the public policy basis for its decision,

Imposing liability on a tavern owner for continuing to serve an intoxicated person who later injures others serves public policy by imposing upon the tavern owner a duty to use judgment and discretion. We do not believe that the owner will exercise this judgment and discretion less prudently if he risks a law suit only when the intoxicated person injures others. The decision to refuse to serve alcoholic beverages, beer or wine to an intoxicated patron will be unaffected by our decision today. In overruling *Christiansen*, we join other jurisdictions that have refused to allow intoxicated persons to maintain a first party action against a tavern owner based on alleged violations of statutes imposing criminal penalties for the sale of alcoholic beverages to an intoxicated adult.

Id. at 92–93 (collecting cases). The Supreme Court concluded by reiterating that “our alcohol control statutes do not create a first party cause of action for an intoxicated adult patron, but that they do permit a third party action.” *Id.* at 93. It left “for another day the issue whether [South Carolina] will recognize a first party action brought by a minor.” *Id.*

In the present case, in total disregard of *Tobias* and *Lydia*, Kimble has sought to bring a first party cause of action by an intoxicated adult patron. Kimble has attempted to dodge these authorities by arguing that they leave open the possibility of common law first party actions, but that argument completely ignores the above-quoted language of these cases explaining that there is no common law right of recovery against a tavern owner for overserving a patron, whether brought by a first party or even a third party. *See also Hartfield v. Getaway Lounge & Grill, Inc.*,

388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010) (“Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes.... The civil remedy is predicated on criminal statutes.” (citing *Tobias*, 332 S.C. at 92)). Thus, despite Kimble’s arguments to the contrary, there is no cause of action against Jays in this case, under common law or otherwise.

d. The Arguments of Appellant/Respondent’s Brief

Although the above-described authorities on this issue are abundantly clear, Appellant/Respondent’s Brief ignores them. As is explained in the two *Tobias* opinions (the Court of Appeals’ opinion and the Supreme Court opinion affirming it as modified), there is no common law adult first party dram shop action in South Carolina, and although the Court of Appeals in *Tobias* intended to allow for such an action grounded in negligence per se based on the alcohol control statutes, the Supreme Court in *Tobias* disagreed with that part of its holding and ruled that an adult could not maintain any suit against a tavern for injuries resulting from his own intoxication, even under negligence per se. Appellant/Respondent’s Brief includes this conclusion in a block quote, but perhaps lacks sufficient context to understand its import.

Indicative of this lack of review of relevant authorities and the context of *Tobias*, Appellant/Respondent’s Brief does not mention, quote from, cite to, or in any way seem to apprehend the existence of the Court of Appeals’ opinion in *Tobias*, which was *affirmed* as modified by the Supreme Court’s subsequent opinion, making it precedential. Similarly, Appellant/Respondent’s Brief does not mention or cite to any of the subsequent cases summarizing the state of our law under *Tobias*, such as *Lydia*. While Appellant/Respondent’s Brief asserts that in this case “*Tobias* has been lazily and incorrectly cited as standing for the

proposition that there can be no first party liability on any theory which is simply incorrect,”¹ it is not Jays’ argument that should be so characterized.

Furthermore, Appellant/Respondent’s Brief’s separation of powers and statutory construction arguments, which follow hard on the heels of its misapprehension of *Tobias*, are misguided and puzzling. On the one hand, Kimble engages in a short statutory construction argument that agrees with *Tobias*’ holding that the South Carolina dram shop statutes are not intended to protect the adult patrons themselves and thus do not create a private cause of action for an adult patron who suffers injuries resulting from his own intoxication. (*Id.* at 13–14). On the other hand, Kimble also asserts that “[i]f it is to be the policy of the State of South Carolina that no intoxicated patron of a tavern can ever bring a common law negligence claim against a tavern operator for injuries he or she sustained after being over served alcohol, then any such edict should issue from the South Carolina legislature—not from the trial court bench.” (*Id.* at 13). This argument is puzzling because common law is realm of the courts rather than the legislature. It is misguided because our courts have repeatedly made clear that common law has never countenanced such a negligence claim, and indeed, Appellant/Respondent Brief does not cite to any common law precedent for one.

In sum, Appellant/Respondent’s Brief’s arguments on this issue ignore the controlling case precedents and offer no meaningful challenge to those precedents. The trial court was correct in finding that “the Supreme Court in *Tobias v. The Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), makes it clear that there is no recognized common law or statutory ‘first party’ dram shop cause of action in South Carolina, which are the only claims raised in Plaintiff’s Complaint.” (Order Denying Plaintiff’s Motion for Damages at 6 (R. p. 16)).

¹ (Appellant’s Brief of Appellant/Respondent at 13) (emphasis omitted).

II. The Trial Court Correctly Awarded No Damages at the Default Damages Hearing Due to the Plaintiff's Lack of a Recognized Cause of Action.

a. Unavailability of Damages in the Absence of a Legitimate Cause of Action

The trial court's analysis of the question of the availability of default damages in the absence of a recognized cause of action was both thorough and accurate. As the trial court's Order Denying Plaintiff's Motion for Damages explained, there are numerous decisions from the District of South Carolina persuasively supporting the common-sense conclusion that no damages are available to a plaintiff in the absence of a recognized cause of action, even where the plaintiff has successfully obtained a default against the defendant:

The Court has spent a generous amount of time researching this issue, and while it appears there is no state court case on point, there are many decisions that provide guidance and support for this ruling. For example, in *State Farm v. Stephens*, 2020 WL 8643790, Judge Norton noted that when a party is in default,

the court accepts a plaintiff's well-pleaded **factual** allegations as true. However, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover. As such, **the court need not accept the plaintiff's legal conclusions and must determine whether the plaintiff's allegations support the relief sought. The party moving for default judgment must still show that the defaulted party was properly served and that the unchallenged factual allegations constitute a legitimate cause of action.** If the court determines that service was proper and that the allegations entitle the plaintiff to relief, then it must then determine the appropriate amount of damages. (Emphasis added and internal citations omitted).

(Order Denying Plaintiff's Motion for Damages at 5 (R. p. 15) (emphasis in original)). "This holding has been echoed in many other DSC decisions." *See id.* (citing *Certain Underwriters at Lloyd's, London v. Water Mgmt. Consultants & Testing, Inc.*, 2022 WL 16541132 (same holding); *Velarde v. Covercraft Industries, LLC*, 2024 WL 2942914 (same holding); *Atrium Corporate Capital Limited v. Williams*, 2023 WL 8282769 (same holding); *Auto-Owners Insurance Company v. Leysath*, 2023 WL 11886065 (same holding); *Progressive Northern*

Insurance Company v. Geoffroy, 2023 WL 6462851 (same holding); *Peppers-Jeridore v. T. Bayou, LLC*, 2020 WL 85223 (“[T]he defendant is not held to have admitted conclusions of law, or allegations that concern only damages ... Thus, a court considering default judgment must still determine **if the established factual allegations constitute a legitimate cause of action and provide a sufficient basis the relief sought.**”) (internal citations omitted) (emphasis added)). A defendant’s forfeiture of the right to contest the allegations of a plaintiff’s complaint via default, therefore, does not simultaneously create new and unique rights for the plaintiff such that the plaintiff can recover damages on claims not countenanced under the law by sole virtue of the defendant’s default.

As the trial court noted, the above cases are from the District Court of South Carolina, and thus persuasive rather than precedential, but as the trial court went on to correctly point out:

[w]hile these decisions involve the application of FRCP 55 and not SCRCF 55, a review of the Official Reporter’s Notes of SCRCF 55 reveals that much of the state Rule 55 is “drawn from” (Rule 55(a) and (b)(1)) or “identical to” (Rule 55(c) and (d)) its federal counterpart. Also, in regard to Rule 55(b)(2) – which is not in the federal rule – the Official Reporter notes that this subsection was “added to preserve Circuit Court Rule 38, requiring attachment of property against which the money judgment may be collected, when the defendant has not been personally served and does not appear in the action.” In sum, there appears to be no difference between the federal and state Rule 55 that impacts the question at issue here, and the Court finds the above cases persuasive and applicable to the case at hand.

(Order Denying Plaintiff’s Motion for Damages at 5–6 (R. pp. 15–16)).

As the trial court also correctly explained, the availability of damages under a given claim or injury is determined by law. *See id.* at 7–8 (R. pp. 17–18) (citing *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) (“Workers’ compensation benefits do not include all the various types of damages that may be recovered in a personal injury suit against a third party tortfeasor. For example, in a personal injury suit, the ‘loss

compensable in a personal injury action includes such elements as pain and suffering, disfigurement, medical expenses, and lost earning capacity.’’) (internal citations omitted); and *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 316, 737 S.E.2d 601, 620 (2013) (“Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.’’) (internal citations omitted)). It would not be proper for a trial court to award damages to a plaintiff where the South Carolina Supreme Court has explicitly held that recovery is against the public policy of the state.

Indeed, in analogous default damages contexts, South Carolina precedent has already held that a default damages award must be supportable under a cause of action within the plaintiff’s complaint. For example, in *Blakely v. Wright*, 269 S.C. 6, 235 S.E.2d 803 (1977), the Supreme Court of South Carolina held that:

A defendant who is in default for failure to answer has the right to assume that the judgment will be limited to the cause of action stated in the complaint. If the complaint states facts which entitled the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained.

Blakely, 269 S.C. at 12 (reversing lower court’s award of punitive damages at default judgment where “[t]here was no pleading of facts to the effect that Defendant [acted] willfully, maliciously, or by collusion’’) (citing *Hopkins v. Hopkins*, 266 S.C. 23, 221 S.E.2d 113 (1975)). See also *Gadsden v. Home Fertilizer & Chem. Co.*, 89 S.C. 483, 72 S.E. 15, 17 (1911) (“The complaint in this case fails to state the facts necessary to entitle plaintiff to recover the special damages which were awarded by the verdict.’’); *Williams v. Am. Ry. Express Co.*, 118 S.C. 121, 110 S.E. 125, 126 (1921) (“[I]f the complaint states facts which entitle plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default, giving a different kind of relief or relief as to greater extent, is without authority of law, and cannot be sustained’’).

The trial court below also correctly identified negative downstream effects if Plaintiff were to be awarded damages on a cause of action the Supreme Court has abolished:²

No authority was presented—nor could this court find any—that would support the position that a plaintiff who sues a party that happens to fail to timely answer is entitled to more legal rights and remedies than a similar plaintiff who sues a party that files a timely responsive pleading[;] . . . such scenario might lead to complaints being filed (in hopes of a default situation) alleging causes of action that parties and their attorneys know do not have “good ground to support” them at the time of filing.

Id. at 6–7 (R. pp. 16–17). This is a prescient observation. Allowing plaintiffs to recover on an abolished cause of action by virtue of the defendant’s default would incentivize the filing of complaints that include claims that South Carolina law rejects, burdening the courts with complaints reliant on defaults to validate their unrecognized causes of action. It would also incentivize, in cases where no legally cognizable path to recovery exists, the filing of unsupportable claims followed by attempts to intentionally procure default as the only possible means of the plaintiff’s recovery. Such a framework would be both burdensome and unjust.

b. Distinction between Judge Coble’s Denial of Relief from Default and Judge McGee’s Subsequent Award of No Damages

Kimble has argued both in the trial court and on appeal that in awarding no damages at the default damages hearing, “Judge McGee was being recruited improperly to ‘re-reconsider’ a matter that had already been consider [sic] and reconsidered by a prior circuit court judge.”

² *See id.* at 6, fn.1 (R. p. 16) (noting that the Supreme Court in *Tobias* found that public policy was not served by allowing an adult patron to recover damages for injuries resulting from his own conduct, and providing examples where the Supreme Court has either declined to recognize an extension of the kinds of injury for which a party can recover damages (*see* discussion of ‘wrongful life’ claims in *Willis v. Wu*, 362 S.C. 146, 154, 607 S.E.2d 63, 67 (2004)); declined to recognize an extension of which parties can recover damages for a given injury (*see* discussion of third-party spoliation claims in *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 714 S.E.2d 537 (2011)); or abolished a previously recognized cause of action such that damages are no longer available to plaintiffs (*see* discussion of criminal conversation and alienation of affections in *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992))).

(Appellant’s Brief of Appellant/Respondent at 8). Kimble appears to draw this conclusion based on a belief that “two prior circuit court Orders foreclos[ed] the issue of whether South Carolina recognizes a first party dram shop action.” *See id.* This argument is entirely without basis, as explained below.

Although Kimble states that Judge Coble’s Order Denying Relief from Entry of Default and Order Denying Defendant’s Motion for Reconsideration “foreclos[ed] the issue of whether South Carolina recognizes a first party dram shop action,” neither of those orders makes any mention of whether South Carolina recognizes a first party dram shop action. (*See generally* Order Denying Relief from Entry of Default (R. pp. 3–7); Order Denying Defendant’s Motion for Reconsideration (R. pp. 8–10)). While Jays did argue that Plaintiff’s lack of a cause of action recognized by South Carolina law is one of the reasons why Jays should have been granted relief from default in this case at the outset, the record demonstrates that Judge Coble never made or even hinted at a ruling on this issue in his orders or at the hearing. (*See id.*; *see also* Transcript of Hearing on Relief from Default (R. pp. 58–77)).

Instead, Judge Coble responded only to Jays’ arguments regarding “alleged procedural defects in process,” “how and why [it] ultimately filed [its] Motion to Set Aside Default [at the time that it did],” and Plaintiff’s alleged “continuing prejudice” due to default. (*See* Order Denying Relief from Entry of Default at 3–4 (R. pp. 5–6)). Judge Coble’s Orders avoided any mention of—much less any ruling upon—Jays’ argument that Plaintiff had not brought a recognized cause of action, even after Jays requested such a ruling in its motion to reconsider. *See id.*; *see also* Motion to Alter or Amend at 5–6 (R. pp. 174–175) (“The Court’s Order denying relief from default failed to consider at all Defendant’s primary argument—no cause of action exists.... The Court did not consider this argument, and did not rule upon it.”).

According to Kimble, the “pertinent part” of Judge Coble’s Order Denying Relief from Entry of Default found “that ‘[Jays] has not articulated any cause, much less good cause, for having failed to answer the Summons and Complaint in a timely manner.’” (Appellant’s Brief of Appellant/Respondent at 7 (quoting Order Denying Relief from Entry of Default at 3 (R. p. 5))). This ruling regarding the timing of Jays’ response to the summons and complaint is plainly not a ruling (in the face of South Carolina Supreme Court precedent) that Kimble’s adult first party dram shop claim is a recognized cause of action under South Carolina law.

Similarly, Kimble’s broad quotation from Judge Coble’s Order Denying Defendant’s Motion for Reconsideration—“After reviewing the applicable law and considering the arguments raised in the Motion, the Court is unable to discover any material fact or principle of law that has been overlooked or disregarded and further finds no error of law or fact not appropriately considered” (Appellant’s Brief of Appellant/Respondent at 7 (quoting Order Denying Defendant’s Motion for Reconsideration at 1 (R. p. 8))—did not “foreclos[e] the issue of whether South Carolina recognizes a first party dram shop action.” (Appellant’s Brief of Appellant/Respondent at 8).

Thus, none of the findings or rulings of Judge Coble’s orders were in any way reviewed by Judge McGee’s subsequent finding that Kimble lacked a recognized cause of action to support an award of damages. Indeed, Judge McGee never engaged, at the default damages hearing or in his subsequent orders, in any substantive discussion or criticism of Judge Coble’s prior rulings regarding relief from entry of default. (*See generally* Order Denying Plaintiff’s Motion for Damages (R. p. 11); Order Denying Plaintiff’s Motion to Alter or Amend (R. p. 20); and Transcript of Hearing on Default Damages at 5–6 (R. pp. 82–83) (“THE COURT: Okay. And it’s my understanding that—since the default has been entered and upheld, that—that you

certainly—you and your clients are—certainly can participate to the extent that it goes toward the damages issue, but not anything for a liability issue. Is that—is that accurate? [Jay’s Counsel:] That’s our understanding, as well, Your Honor.”)).

In sum, the issue of relief from default is clearly distinct from the issue of awarding default damages, which is why the two matters are governed by different standards and determined at separate hearings. Thus, Kimble’s argument that when Judge McGee found no damages could be awarded on Kimble’s claim he improperly “assume[d] the role of a court of appeals to Judge Coble” (Appellant’s Brief of Appellant/Respondent at 9) is completely unfounded. Similarly, Kimble’s implication that Jays exceeded “the limitations placed upon a defaulted party at a default damages hearing” (Appellant’s Brief of Appellant/Respondent at 8) is unfounded, as Jays limited its arguments before Judge McGee at all times to the availability of damages in the absence of a recognized cause of action, even assuming as true all the factual allegations of Plaintiff’s complaint. *See id.*

CONCLUSION

Therefore, for the reasons stated above, Respondent/Appellant Jays respectfully requests that this Court affirm the circuit court’s award of no damages to Appellant/Respondent Kimble given the lack of any recognized cause of action in Kimble’s complaint.

Signature Page Follows

Respectfully submitted,

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