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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-20-55

Court of Appeals Case No.: 2014-001567

Caitlin Elisabeth Braun, ... Appellant

v.

The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., Two Heels, Inc. d/b/a State Street Pub and Sunbelt Golf Development, Inc. d/b/a Indian River Golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P. is the Respondent, ... Respondent,

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AMENDED INITIAL BRIEF OF RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH CAROLINA, L.P.

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[1] For the Court's convenience, Respondent's Statement of Issues on Appeal restates the Appellant's original issues as II, III, and IV, and adds Respondent's issues as I.

STATEMENT OF THE CASE

On May 16, 2011, Appellant Caitlin Braun was involved in motor vehicle accident hours after ending her job as a beverage hostess at a charity golf tournament at the Indian River Golf Course, where she provided and poured small "tasting" portions of alcohol beverage products for tournament golfers to sample. The accident resulted in the death of a young child in the other vehicle and severe injuries to the child's father who was driving the vehicle. Appellant Braun pled guilty to one count of Felony Driving Under the Influence, and was sentenced to eighteen (18) months in prison and a fine of $10,100.00 (Ten Thousand One Hundred Dollars). In addition, Appellant and Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., (Ben Arnold) were among several named defendants in lawsuits filed by the victims, which ultimately were resolved by mediation.

Thereafter, Appellant Braun then filed this new lawsuit against several entities, including Respondent Ben Arnold, alleging that her intoxication was caused by the negligence of Respondent Ben Arnold and others, and claiming she sustained damages, including physical injury and "loss of liberty" due to the incarceration resulting from her guilty plea.

Respondent Ben Arnold filed a Motion for Summary Judgment on several grounds, which was granted by the Circuit Court on April 24, 2014. Appellant's Rule 59(e), SCRCP Motion for Reconsideration was thereafter denied on May 30, 2014. The Order denying Appellant's Motion for Reconsideration, which was entered/filed by the Fairfield County Clerk of Court on June 2, 2014, was mailed to all counsel by the Clerk

of Court on June 2, 2014 and was received by Respondent's counsel via U.S. Mail no later than June 9, 2014. Thereafter, Appellant Braun filed a Notice of Appeal on July 18, 2014. Respondent Ben Arnold filed a Motion to Dismiss the appeal as untimely on July 24, 2014. Appellant Braun filed no response whatsoever to Respondent's Motion to Dismiss. Justice Cureton, For the Court, denied Respondent's Motion to Dismiss by way of an Order dated September 11, 2014.

A. Background Facts

This case arises from an automobile accident which occurred in Lexington County on May 16, 2011. The material facts are undisputed. Appellant Caitlin Braun, then a 24-year-old, part-time bartender and college graduate with an earned Bachelor of Science degree in Hospitality Management, had been working as a beverage hostess at a charity golf tournament at the Indian River Golf Course in Lexington County. Respondent Ben Arnold was one of many beverage alcohol distributors who agreed to provide beverage products at the tournament site. During the tournament, Appellant Braun tended a vendor table on the golf course, from which she provided and poured small "tasting" amounts of various alcoholic beverage products for passing golfers to sample if they so chose. By her own admission in her Complaint and testimony, Appellant Braun also consumed alcoholic beverages during the day.

Well after the tournament concluded and Appellant Braun's work responsibilities had ended, Appellant Braun was driving her personal car on a roadway near the golf course where the tournament had been held. Appellant Braun, who has since pled guilty to operating her vehicle illegally while under the influence of alcohol and/or other drugs, crossed the center line of a two-lane road at a high rate of speed and struck an oncoming

vehicle head-on. The driver of that vehicle, Devin Shumate, was gravely injured in the collision and his four (4)-year-old daughter Gabriella Shumate was killed.

Appellant Braun was charged with violating South Carolina's felony driving under the influence ("DUI") statutes. She was also named as a defendant in civil lawsuits brought by the Shumates in the Fairfield County Court of Common Pleas (civil actions 2011-CP-20-301 and 2011-CP-20-302) for both Mr. Shumate's injuries and the death of his young daughter. The civil actions eventually settled at mediation and the settlements were approved per an Order of the Circuit Court.

On February 8, 2012, Appellant Braun pled guilty to one charge of Felony DUI causing death. S.C. Code Ann. § **56-5-2945.** At the plea hearing, Appellant Braun acknowledged that she understood she would receive a mandatory sentence of at least one (1) year in jail when pleading guilty to the Felony DUI charge. (Plea Tr., p.4, ll. 16-20). She also expressly acknowledged she was freely and voluntarily pleading guilty to driving under the influence of alcohol and/or drugs which resulted in an accident which caused the death of Gabriella Shumate. (Plea Tr. p. 7, ll. 1-7; 23-25).

On August 7, 2012, Appellant Braun was sentenced to eighteen (18) months in prison and a fine of $10,100.00 (Ten Thousand One Hundred Dollars). During the sentencing hearing, Appellant Braun accepted her responsibility and stated she would "forever regret the decisions [she] made on May 16, 2011." (Sentencing Tr. p. 27, ll. 7; 17). She also stated that it is difficult "knowing everyday what [she] did and the pain [she] caused[.]" (Sentencing Tr. p. 27, l. 24).

B. Litigation and Procedural History

Devin Shumate and his wife filed civil lawsuits against various defendants, including Appellant Braun and Respondent Ben Arnold, on July 28, 2011. (*See* Civil Action Nos. 2011-CP-20-301 (Shumate Complaint 1) and 2011-CP-20-302 (Shumate Complaint 2)). Appellant Braun filed an Answer in both actions, denying the Shumates' allegations of liability as to both her and Respondent Ben Arnold. (*See* Shumate Complaint 1, ¶¶. 12-16; Shumate Complaint 2 13-17; Answer 1, ¶¶4-5; Answer 2, ¶¶3-4).

The *Shumate* matters were ultimately settled at mediation. The Circuit Court approved the settlement and issued an Order to that effect, which stated, in pertinent part:

> Upon execution of [the release], Defendants shall be fully released from and protected against any and all claims, demands, causes of action, judgments or liability of whatsoever nature and kind in law or in equity arising out of or in any way connected with the alleged injuries to and death of Gabriella Shumate.
>
> . . . .
>
> Finally, it is further ORDERED that the Complaint in this case be dismissed with prejudice, and that all matters and things contained therein are res judicata between the parties and their heirs, successors, and assigns.

(Order Approving Settlement).

On February 7, 2013, many months after the settlement of the Shumates' civil actions against her, Appellant Braun filed this civil action against Respondent Ben Arnold and the other defendants who had also been sued in the Shumate actions. (*See* Civil Action No. 2013-CP-20-55 (Braun Complaint)). Her Complaint asserted allegations of negligence and liability against Respondent Ben Arnold that were virtually identical, and often verbatim, to those originally asserted by the Shumates, and which were denied by Appellant Braun in both *Shumate* matters. (*See* Braun Complaint, ¶¶ 10-

15). In response to her Complaint, Respondent Ben Arnold filed its Answer denying any liability to Appellant Braun.

Respondent Ben Arnold thereafter filed a Motion for Summary Judgment and Memorandum in Support as to Appellant Braun's claims, asserting seven (7) grounds for summary judgment. (Motion and Memorandum in Support of MSJ). Specifically, Respondent Ben Arnold asserted the following grounds, each of which were argued to the Circuit Court on February 20, 2014:

1. In pleading guilty to one charge of Felony DUI, Appellant admitted her legal responsibility for the automobile accident on May 16, 2011 from which her alleged injuries and damages arise. Therefore, she is estopped judicially and collaterally from now denying her liability for this accident and the damages she alleges result therefrom.
2. Having admitted her fault and liability for the accident of May 16, 2011 which gives rise to her damage claims, Appellant is negligent as a matter of law and to such a degree that her claims are barred.
3. In her pleadings previously filed with this Court in "Shumate vs. Braun, et al.", Fairfield County Civil Action No. 2011-CP-20-301 and "Shumate vs. Braun, et al.", Fairfield Civil Action No. 2011-CP-20-302, Appellant denied that Ben Arnold was negligent as she now alleges. Therefore, she is estopped judicially and collaterally from pursuing the same negligence claims against Respondent, which she previously denied.

4. The Releases and Stipulations of Dismissal executed by Appellant in "Shumate vs. Ben Arnold, et al.", Fairfield County Civil Action No. 2011-CP-20-301 and "Shumate vs. Ben Arnold, et al.", Fairfield Civil Action No. 2011-CP-20-302, bar the claims of Appellant against Respondent.
5. Appellant cannot recover as a matter of law, for her claim of "loss of liberty and freedom due to her incarceration for Felony DUI resulting from the death of an occupant in the vehicle that was struck by the Plaintiff", because the Appellant voluntarily pled guilty to Felony DUI, admittedly knowing that incarceration would be a mandatory element of her sentence.
6. South Carolina does not recognize the cause of action Appellant purports to assert against Respondent for injuries she sustained as a result of intoxication claimed to have been facilitated by Respondent and, therefore, Appellant's Complaint should be dismissed with prejudice.
7. In the alternative, and assuming as true the allegations of Appellant's Complaint which allege that her relationship with Respondent was that of employee-employer, Appellant's sole and exclusive remedy against Respondent is a Workers' Compensation claim and, therefore, the Complaint should be dismissed.

Respondent's Motion for Summary Judgment was granted on April 24, 2014. (*See* Order Granting MSJ). In the Order, the Circuit Court based its ruling on Grounds #6 and #7, but also noted that the other grounds argued by Respondent would likewise support summary judgment. (*See* Order Granting MSJ). Appellant's Motion for Reconsideration was denied on May 30, 2014. The Order denying Appellant's Motion

for Reconsideration, which was entered/filed by the Fairfield County Clerk of Court on June 2, 2014, was mailed to counsel on June 2, 2014 and was received by Respondent Ben Arnold's counsel in Columbia on June 9, 2014 via U.S. Mail.

However, Appellant Braun's Notice of Appeal was not filed until July 18, 2014, and stated that "Appellant received written notice of entry of the Order denying Appellant's Motion for Reconsideration on July 16, 2014", some forty-four (44) days after the June 2, 2014 Order was mailed to her counsel's undisputed correct business address in Columbia, South Carolina, and approximately six (6) weeks after it was received by all defense counsel. (*See* Cuttino Affidavit)

ARGUMENT

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), of the South Carolina Rules of Civil Procedure. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *see also Peterson v. West Am. Ins. Co.,* 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter,* 328 S.C. 36, 492 S.E.2d 55 (1997).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot

simply rest on mere allegations or denials contained in the pleadings[,] [but] must come forward with specific facts showing there is a genuine issue for trial." *Regions Bank v. Schmauch*, 354 S.C. 648, 650, 582 S.E.2d 432, 438 (Ct. App. 2003). "Finally, when reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008).

I. Appellant's Appeal Should be Dismissed as Untimely.

As a threshold jurisdictional matter, Respondent submits Appellant's Notice of Appeal was untimely. Accordingly, Respondent Ben Arnold filed its Motion to Dismiss the Appeal on July 24, 2014. Appellant Braun filed no response whatsoever to the Respondent's Motion to Dismiss Appeal, and Respondent's Motion to Dismiss Appeal should be granted.

Rule 203(b)(1), SCACR requires that a Notice of Appeal be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR. Furthermore, Rule 263(b) SCACR expressly states an appellate court cannot extend the time period for filing an appeal. *See* Rule 263(b), SCACR ("[T]he time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or

by any judge or justice thereof."). *See also* Rule 6(b), SCRCP ("The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.").

"[S]ervice of the Notice of Appeal is a jurisdictional requirement, and [appellate courts] ha[ve] no authority to extend or expand the time in which the Notice of Appeal must be served." *Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). Thus, a party's failure to comply with Rule 203(b), SCACR "divests this court of subject matter jurisdiction and results in dismissal of the appeal." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting *Canal Ins. Co. v. Caldwell,* 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct.App.1999)). "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); *See also Panhorst v. United States*, 241 F.3d 367, 369-70 (4th Cir. 2001) (noting that the United States Supreme Court has repeatedly emphasized that the requirement of a timely notice of appeal is "mandatory and jurisdictional.") (quoting *Browder v. Director, Dep't of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556 (1978)).

Importantly, "[e]vidence that a letter is properly addressed and mailed raises a presumption it was received by the addressee[.]" *Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990); *see also Williams v. Fulmer*, C/A 8:09-1044-PMD, 2009 WL 2421791 (D.S.C. July 31, 2009) ("The envelope in which the Order was mailed was not returned undelivered, thus it is presumed that Plaintiff received his copy

of the Order."). If the date of receipt is unknown or disputed, case law and Rule 6, SCRCP provides a presumption that service by regular mail is received within five (5) days. *See* Rule 6(e), SCRCP ("Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period."); s*ee also Nguyen v. Inova Alexandria Hosp.*, 187 F.3d 630 (4th Cir. 1999) (noting if the date is unknown, however, it is presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules); *see also Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 148, n. 1, 104 S.Ct. 1723, 1724 (1984) (suggesting that Rule 6(e) applies when parties dispute the date of receipt).

Finally, a party cannot deny receipt of mail due to the party's failure to open and/or retrieve the mail. *See, e.g.*, *Kramer v. Labor & Indus. Review Comm'n*, 605 N.W.2d 664 (Wisc. Ct. App. 2000) ("[Plaintiff's] lack of diligence in checking his post office box will not erase the fact that the notice of hearing was mailed, delivered and received at [Plaintiff's] last known address. He cannot base his claim for relief upon his neglect of a common responsibility."); *Hagin v. Fireman's Fund Ins. Co.*, 353 P.2d 1029, 1032 (Ariz. 1960) (noting that where plaintiffs let their mail accumulate, and all that plaintiffs had to do was to open their mail, they are charged with constructive notice of the knowledge which this letter attempted to convey). Rather, "a party has a duty to monitor the progress of his case." *Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Indeed, "it is the duty of litigants and

their counsel to keep themselves advised of the developments and status of their case or cases." *Poston v. State Highway Dep't*, 192 S.C. 137, 5 S.E.2d 729, 731 (1939).

In this case, all defendants, through their counsel, received notice of Circuit Judge McMahon's Order Denying Appellant Braun's Motion for Reconsideration on either June 4, June 5, or June 9, 2014, (See Cuttino Affidavit), while Appellant contends she did not receive notice of the entry of the Order until July 16, 2014, almost six (6) weeks after the last Defendant (Ben Arnold) received it, and a total of forty-four (44) days after it was mailed from the Fairfield County Clerk's office on June 2, 2014 (Clerk of Court Certificate of Mailing). There is no evidence the Clerk of Court's mailing to Appellant's counsel was returned as undelivered, either to the Clerk of Court or U.S. Postal Service. Thus, pursuant to Rule 6, SCRCP, Appellant should be presumed to have received the Order it seeks to appeal from as of Monday, June 9, 2014, at the latest. (Five days after the June 2 mailing of the Order would be Saturday, June 7, thus the next business day per Rule 6(a), SCRCP was Monday, June 9). Appellant's attempt to file and serve her Notice of Appeal was untimely and the appeal should have been dismissed.[2]

It is significant that, even when faced with a Motion to Dismiss the appeal, Appellant Braun made no effort to refute this presumption of having timely received the

[2] Moreover, if the Appellant contends it is significant or dispositive that she personally did not receive notice of entry of the Order, as can be inferred from a literal reading of the Noitce of Appeal, (as opposed to receipt by her counsel of record) such argument is irrelevant and unavailing. *See* Rule 5(b), SCRCP ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."); *see also Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client."). Because Appellant is represented and therefore acts through her counsel, any contention that she received notice of the Order on a later date than her counsel of record did, is of no significance and cannot operate to extend the time for filing the Notice of Appeal.

Order she attempts to appeal from. Respondent filed its Motion to Dismiss Appeal with this Court on July 28, 2014. Rule 240 of the South Carolina Appellate Court Rules states, in pertinent part:

> Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a copy of the return; provided, however, a return to a petition or motion for rehearing under Rule 221 need not be filed unless requested by the court. The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.

Rule 240, SCACR. Appellant Braun was required to file her return to the Respondent's Motion to Dismiss within ten (10) days from the date of service, but never filed anything. In *USAA Property*, the underlying plaintiff contended on appeal that the circuit court erred in finding USAA's motion for reconsideration timely because it was filed more than ten days after entry of the order. The court ultimately held that the circuit court had not erred and relied, in part, on counsel for USAA's reply letter to the court after the plaintiff asserted the motion was untimely:

> In response to Lambrecht's assertion that USAA's motion to reconsider was untimely, USAA's counsel submitted a letter to the circuit court in which she claimed she did not receive notice of entry of the final order until May 16, 2005, when Lambrecht's counsel contacted her. After receiving this notice, USAA's counsel claimed she filed the motion for reconsideration on May 26, 2005, within the requisite ten-day time period.
>
> . . . .
>
> Deferring to the circuit court, we find USAA's counsel was credible in *explaining* her delay in filing the motion for reconsideration.

661 S.E.2d 791, 795-96; *see also Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995) (finding no error in trial court's decision to entertain husband's motion for

reconsideration despite wife's assertion it was untimely, where husband explained that motion was not untimely and provided explanations regarding disparity in pertinent dates).

Here, counsel for Appellant Braun was required, pursuant to Rule 240 SCACR, to respond to Respondent's assertions of untimeliness—otherwise, the court has no basis to determine whether the delay in filing to the Notice of Appeal was justified.[3] *Cf. USAA*, *supra*. In light of Appellant's counsel failure to file a return to Respondent's Motion to Dismiss, this court can and should consider Appellant to have consented to the Motion to Dismiss on the grounds the appeal was untimely. *See Williams v. Condon*, 347 S.C. 227, 252, 553 S.E.2d 496, 510 (Ct. App. 2001) (Shuler, J. dissenting) (stating "it is the duty of this Court to ascertain that an appeal is timely regardless of the parties' assertions"). Furthermore, because of Appellant's counsel's failure to respond, thereby conceding that the Notice of Appeal was untimely, this Court is without jurisdiction to hear Appellant's appeal. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

Appellant Braun's Notice of Appeal dated July 18, 2014 states simply that "Appellant received written notice of entry of the Order denying Appellant's Motion for

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[3] In *USAA Property*, the court presumed USAA's counsel was being truthful in her explanation of receipt of the order. Furthermore, Respondent is loath to suggest that Appellant's counsel has made a misrepresentation to the Court. However, in light of Appellant's counsel's complete failure to respond to Respondent's motion and/or explain the delayed filling of the Notice of Appeal, Respondent maintains that the extreme differences in the dates of receipt of the order suggest the Notice of Appeal was untimely.

Reconsideration on July 16, 2014." Respondent Ben Arnold's subsequent Motion to Dismiss the appeal directly challenged the plausibility of that claim, called it into question, and provided an opportunity for Appellant Braun to fully explain the issue and refute the presumption of service. However, Appellant Braun never responded to the Motion to Dismiss to offer any plausible explanation for why she and/or her counsel did not receive the Fairfield County Clerk of Court's mailing of the Order Denying her Motion for Reconsideration until almost six (6) weeks after all other counsel had received it. By failing to file a return to Respondent's Motion to Dismiss, Appellant has conceded the untimeliness of the appeal. This Court should grant the Motion to Dismiss the Appeal, as a jurisdictional matter.

In the event this Court permits the Appeal to go forward and considers the merits of this appeal, Respondent asserts the trial court properly granted summary judgment to Respondent and the ruling of the trial court should not be reversed.

II. The Trial Court did not Err in Granting Summary Judgment to Respondent Based Upon South Carolina's Prohibition Against First Party Claims By Intoxicated Adults Against Commercial Hosts and Social Hosts.

Respondent Ben Arnold submits summary judgment was proper on this ground, as South Carolina does not recognize the right of an intoxicated adult to maintain a first-party cause of action for injuries which result from her own conduct. Appellant seeks to characterize herself as an employee and agent of Respondent Ben Arnold. Appellant Braun has acknowledged that her claim against Respondent Ben Arnold rests on the premise that Respondent Ben Arnold had a legal duty to monitor her alcohol consumption during the tournament and/or to prevent her from becoming intoxicated, and

breached that duty. Appellant Braun essentially asks this Court to create such a heretofore unrecognized duty on employers.

Appellant Braun's contention that *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998)[4], and *Garren v. Cummings & McCrady, Inc.*, 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986), are inapplicable to the circumstances at bar is perplexing. The *Garren* decision held that under South Carolina common law, a third-party plaintiff had no cause of action in negligence against social host who served alcohol to an intoxicated adult guest who subsequently caused automobile collision, even if the host knew or ought to have known the guest intended to drive the motor vehicle. The *Tobias* decision, building upon the *Garren* decision some ten-years prior, specifically held that South Carolina does not recognize a "first party" cause of action against a tavern owner by an intoxicated adult predicated on an alleged violation of the alcohol control statutes. Read together, *Tobias* and *Garren* reflect South Carolina's stance on adult intoxication, establishing that "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which resulted from his own conduct." *Tobias*, 332 S.C. at 92, 504 S.E.2d at 320 (1998). This well-established public policy is extremely relevant to the case at bar.

Appellant Braun, 24-year-old adult at the time of the accident, attempts to distinguish *Tobias* and *Garren* and situations of first-party adult intoxication. However, she fails to do so in any meaningful way. Moreover, in light of *Tobias* and *Garren*, Appellant has failed to establish what, if any, duty Respondent Ben Arnold owed Appellant Braun necessary to sustain Braun's negligence cause of action. *See Edwards v.*

[4] The Court also relied upon the Court of Appeals' *Tobias v. Sports Club, Inc.*, opinion, found at 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996).

Lexington Cnty. Sheriff's Dep't, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010) ("Without a duty, there is no actionable negligence."); *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) ("First, the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law."). Appellant now asks this Court to carve out a new common law duty of employers, one that has never previously been recognized by our appellate courts or the General Assembly.

It is instructive that other jurisdictions have rejected imposing a duty on an employer in similar circumstances and have rejected first-party recovery for an employee's voluntary intoxication. *See, e.g.*, *Edwards v. Silva*, 32 S.W.3d 713 (Tex. Ct. App. 2000) (holding that the employer did not affirmatively control employee's behavior such that the employer owed employee duty to prevent him from injuring himself due to intoxication); *Theis v. Cooper*, 753 P.2d 1280 (Kan. 1988) (holding employer owed no duty to third party for tortious acts of employee who, after consuming alcohol on employer's premises, left employer's premises and injured a third party). *Howard v. Delco Div. of Gen. Motors Corp.*, 41 Ohio App.3d 145, 534 N.E.2d 936, 938 (Ohio Ct. App. 1987) ("We are not satisfied that the employment relationship in Ohio is so paternalistic as to impose a duty upon an employer to protect its obviously intoxicated employee from the risk that the employee will have an automobile accident after leaving work when the employee brought that risk upon himself through his own conduct, with no help or encouragement from his employer.").

These representative cases, in conjunction with South Carolina's clear public policy, only further establish that Respondent owed no duty to Appellant in this

circumstance. The trial court did not err in granting summary judgment to Respondent on this ground.

III. The Trial Court Did not Err in Holding that the Appellant's Sole Remedy Against the Respondent was an Action Brought Pursuant to the South Carolina Worker's Compensation Act.

In her second issue on appeal, Appellant contends the "coming and going" rule operates to exclude her claim from the South Carolina Workers' Compensation Act. Respondent respectfully submits that the trial court properly granted summary judgment upon this ground.

The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over employees' work-related injuries. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 402 (Ct. App. 2008). The Workers' Compensation Act contains an "exclusivity provision," which provides the exclusive remedy against an employer for an employee's work-related accident or injury.[5] *Edens v. Bellini,* 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004); *Fuller v. Blanchard,* 358 S.C. 536, 541, 595 S.E.2d 831, 833 (2004). The

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[5] Specifically, the Act states

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept *compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.*

S.C. Code Ann. § 42-1-540 (1985) (emphasis added).

exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. *Edens,* 359 S.C. at 442, 597 S.E.2d at 868; *Tatum v. Med. Univ. of S.C.,* 346 S.C. 194, 552 S.E.2d 18 (2001).

South Carolina employs a two-pronged test in determining whether an injury is compensable under the Act. The injury must both "arise out of" the employment while at the same time be in "the course of" the employment. *Kinsey v. Champion Am. Serv. Center*, 268 S.C. 177, 182, 232 S.E.2d 720, 722 (1977). Therefore, it must first be established there was an employer-employee relationship and that the incident happens because of the employment. *See Edens*, 359 S.C. at 442, 597 S.E.2d at 868 (noting coverage under the Act is dependent on the existence of an employer-employee relationship); *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (noting an accident arises out of employment when the employment is a contributing proximate cause of the accident). Once the "arising out of" prong is established, the Commission is then charged with determining whether the injury sustained was in the course of the employment. *See Whitworth v. Window World, Inc.*, 377 S.C. 637, 661 S.E.2d 333 (2008) (addressing whether the employee's injuries were compensable under scope and course of employment). Appellant misconstrues the nature of the "course and scope of employment" analysis—such analysis is performed by the Commission to determine whether an injury is compensable, not whether the Act itself applies.

Appellant has repeatedly asserted on court filings and otherwise, that she was an employee of Respondent Ben Arnold and that any alleged injury she sustained was a result of that employment relationship. Accepting her argument as true only for the

purpose of ruling on Respondent Ben Arnold's Motion for Summary Judgment, she is subject to the Worker's Compensation Act, thus requiring her to bring her claim before the Workers' Compensation Commission. Ironically, by pursuing this matter in the Court of Common Pleas, Appellant asked the Circuit Court to make a factual finding that her injury occurred during the course of her employment when it lacks jurisdiction to do so. *See Posey, supra.*

In *Whitworth*, the case which Appellant relies upon, the Supreme Court was addressing the "coming and going", rule in an appeal from the decision of the Workers' Compensation Commission, not an appeal of a civil lawsuit from Circuit Court. 377 S.C. 637, 661 S.E.2d 333. Moreover, Appellant Braun here attempts to use the "coming and going" rule as a defense to being subject to the Workers' Compensation Act, while in fact the "coming and going" rule is intended to be an employer's defense to the compensability of an employee's claim. Indeed, the "coming and going" rule is a Workers' Compensation legal doctrine intended to bar compensation to claimants whose injuries arise outside of the course and scope of their employment. *See* 32 Am. Jur. Proof of Facts 2d 199 (Originally published in 1982) (noting it is a generally recognized rule in workers' compensation cases that injuries incurred by an employee while going to or returning from his regular place of work are not compensable).

Thus, because Appellant has repeatedly alleged her injury arose out of her "employment" with Respondent Ben Arnold, she is required to pursue her claim for personal injury under the South Carolina Workers' Compensation Act. Respondent submits that the trial court properly granted summary judgment on this basis, and this Court should affirm.

IV. The Trial Court Did Not Err in Holding that the Additional Grounds Raised by Respondent in its Motion for Summary Judgment Supported the Granting of Summary Judgment.

In her final issue on appeal, Appellant contends the lower court erred in holding that the additional grounds by Respondent Ben Arnold in its Motion for Summary Judgment supported the granting of summary judgment. However, this argument and the remaining grounds are not properly before this Court.

"An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." *Doe v. Roe,* 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct.App.2006), *cert. denied* Oct. 18, 2006. "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103 594 S.E.2d 485, 498 (Ct. App. 2004). "Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006)

Here, in its Order Granting Summary Judgment to Respondent Ben Arnold, the Circuit Court stated:

> Further, because this Court's ruling is based upon the threshold grounds of #6 and #7 set forth previously herein, *the remaining grounds are moot and are not addressed by this Order at this time. An analysis of Defendant Ben Arnold's additional grounds in support of its Motion was not necessary for this Order but the other grounds appearing in the Record as argued by Defendant Ben Arnold support summary judgment.*

(Order Granting MSJ) (emphasis added). The Circuit Court's statement noting the "remaining grounds" support summary judgment appears to be dicta, and cannot be considered a ruling on these grounds. The Circuit Court expressly stated those "remaining grounds" were not analyzed and Appellant did not include those grounds in her Rule 59(e), SCRCP, Motion for Reconsideration in order to obtain a ruling on these issues. Therefore, the remaining grounds were not preserved for appellate review.

Furthermore, because the Circuit Court has not addressed and ruled upon the remaining grounds, the grounds are not ripe for appellate review.

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan v. Greenville Cnty.,* 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). In general, this court may only consider cases when a justiciable controversy exists. *See Lennon v. S.C. Coastal Council,* 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) (holding "a threshold inquiry for any court is a determination of justiciability"). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co.,* 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); *see also Kiawah Property Owners Group v. The Public Serv. Comm'n of S.C.,* 357 S.C. 232, 593 S.E.2d 148 (2004); *Byrd v. Irmo High School,* 321 S.C. 426, 468 S.E.2d 861 (1996). "Accordingly, issues that are not ripe are not proper subjects of review." *Spivey ex rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 160, 624 S.E.2d 435, 438 (Ct. App. 2005).

Here, any appellate ruling on the remaining grounds is inappropriate, as the controversy over these grounds is "contingent" and "hypothetical," in light of the Circuit Court's failure to specifically rule upon each of them. [6] These grounds, therefore, are not ripe for appellate review.[7]

In sum, Respondent submits that because the Circuit Court explicitly did not rule on these issues, and Appellant failed to raise the issues in her Rule 59(e) motion, the remaining grounds are not preserved and are not ripe for appellate review.[8]

---

[6] Respondent submits that in the event this Court reverses the trial court's grant of summary judgment under Grounds 6 and 7, the case will necessarily be remanded to the Circuit Court, which will have an opportunity to rule upon the remaining grounds argued in Respondent's Motion for Summary Judgment and Memorandum in Support thereof.

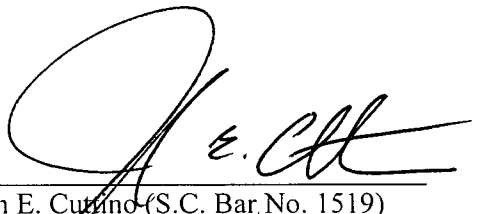
[7] In the event this Court finds the grounds are properly before this Court, which Respondent denies, Respondent submits that Appellant has abandoned these issues on appeal. South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *see also Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting mere allegations of error are not sufficient to demonstrate an abuse of discretion, and on appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling).

In light of Appellant's woeful failure to cite sufficient legal authority, these arguments have not been properly presented to this Court and are abandoned. *See Glassock, Inc.*, *supra.*

[8] For brevity and in an abundance of caution, Respondent directs this Court to its Memorandum in Support of its Motion for Summary Judgment and arguments contained therein in support of the remaining grounds should the Court desire to address the merits of the remaining grounds for summary judgment. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

CONCLUSION

As a threshold issue, Appellant's appeal should be dismissed as untimely. Furthermore, the trial court properly granted Respondent's Motion for Summary Judgment and properly denied Appellant's Motion for Reconsideration because Appellant's claims are barred as a matter of law. At the time of the accident, Appellant Braun was either an employee of Respondent Ben Arnold acting within the course and scope of her employment and thus subject to the Worker's Compensation Act or she was not, and is simply asking the Court to depart from the well established law of South Carolina and create a cause of action which permits her, as an adult, to hold others responsible for her actions. Indeed, Appellant Braun seeks to create a new common law duty owed by an employer to actively prohibit and monitor a legal adult from voluntarily consuming alcohol. Additionally, the trial court properly rejected Appellant's attempt to bypass the jurisdiction and laws of the Workers' Compensation Commission. Finally, the remaining grounds raised in Respondent Ben Arnold's Motion for Summary Judgment are not before this Court. Based upon the foregoing, Respondent respectfully requests this Court to affirm.



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ATTORNEYS FOR RESPONDENT
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

January 6, 2015

RECEIVED

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-20-55

Court of Appeals Case No.: 2014-001567

Caitlin Elisabeth Braun, ... Appellant

v.

The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., Two Heels, Inc. d/b/a State Street Pub and Sunbelt Golf Development, Inc. d/b/a Indian River golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P. is the Respondent, ... Respondent,

---

PROOF OF SERVICE

I certify that I have served AMENDED INITIAL BRIEF OF RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH CAROLINA, L.P. by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following:

H. Ronald Stanley
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Columbia, South Carolina 29202

Jerry Leo Finney
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Of whom The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P. is the Respondent, ... Respondent,

---

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the AMENDED INITIAL BRIEF OF RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH CAROLINA, L.P. complies with Rule 208(a)(2), SCACR and the August 13,. 2007, Order from the South Carolina Supreme Court titled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

(SIGNATURE ON FOLLOWING PAGE)

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January 6, 2015

VIA Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Caitlin Elizabeth Braun, Appellant vs. The Ben Arnold Company, L.P. Respondent*
Case No.: 2013-CP-20-55
Court of Appeals Case No.: 2014-001567
GWB File No.: 1948-147

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of AMENDED INITIAL BRIEF OF RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH CAROLINA, L.P. For the Court's reference, the only change made was deletion of footnote 4 in Respondent's original Initial Brief addressing Appellant's Designation of Matter to be Included in the Record on Appeal. The footnote, which referenced Appellant's deposition in the Shumate matter and Appellant's failure to order the transcript of the summary judgment proceeding in the trial court, was deleted in compliance with the Court's December 18, 2014 Order. Please file these documents and return clocked copies to this office via our courier.

By copy of this letter, and as evidenced on the attached Proof of Service, I am serving Counsel of Record with the same.

With kind regards, I remain

Very truly yours,

John E. Cuttino
Direct Dial: 803-724-1714
E-Mail: jcuttino@gwblawfirm.com

JEC/kle
Enclosures
cc: H. Ronald Stanley, Esq.
Jerry Leo Finney, Esq.

RECEIVED
JAN 06 2015
SC Court of Appeals