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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Honorable Larry R. Patterson, Circuit Court Judge

Case No. 2004-CP-24-38

Jon E. Hartfield, by and through his Conservator,
Haskell L. Hartfield and Haskell L. Hartfield, Individually ..... Respondent,

vs.

The Getaway Lounge & Grill, Inc., and Shou Mei Morris, individually and as President of
The Getaway Lounge & Grill, Inc, ... Appellants.

REPLY BRIEF OF APPELLANT

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Question 1

Did the trial court err in admitting the testimony of Dr. William Brewer as to the extrapolated level of blood alcohol in the system of Hoyt Helton when the plaintiff failed to establish that Hoyt Helton had not consumed any alcohol after he left the Getaway Lounge and as a result the extrapolated level of blood alcohol was mere speculation or conjecture?

The Getaway Lounge does not contend that the use of an expert to extrapolate a blood alcohol reading is never appropriate. The Getaway contends that under the facts of this case the use of expert testimony is not appropriate due to the assumptions the expert had to make concerning facts not proven.

The Respondent improperly states the proof as "There is no evidence Helton went anywhere else between leaving The Getaway and arriving at The Lounge." Br. of Resp. at 7. The correct statement of the proof should be there was no evidence as to where Mr. Helton went after he left The Getaway and his arrival at The Lounge and after he left The Lounge. Respondents contend that they presented some evidence that Mr. Helton did not consume any alcohol after he left The Getaway. Br. of Resp. at 7. The position of the Respondents at trial was in fact to the exact opposite. They sought to prove that Mr. Helton did consume alcohol at The Lounge after he left the Getaway. Rec. on App. at 171, ll 14-18. To make the testimony of their expert admissible, the Respondents, as plaintiffs, have the burden of proving that Mr. Helton did not consume any alcohol after he left the Getaway.

The Respondents admit that the missing time for Mr. Helton may have been as

much as fifty minutes. Br. of Resp. at 8. The lack of proof of exactly where Mr. Helton was after leaving The Getaway for at least fifty minutes and under the facts the time could be even more, is why the extrapolation of Dr. Brewer was not proper.

The cases cited by the respondents are not akin to the facts in this case. In all cases cited when the courts have permitted the use of extrapolation, the whereabouts of the intoxicated patron has been firmly established and the time was fully accounted for. *Bruce* v. *K.K.B., Inc.* 52 S.W.3d 250, 255-256 (Tex. App. 2001) ("The parties agree that Diosdado and Villarreal left the bar around 6:15 p.m. Diosdado was killed in an automobile collision some fifteen to twenty minutes after leaving Spaghetti Works."); *Douillard v. LMR, Inc.*, 433 Mass. 162, 740 N.E.2d 618 (2001) (evidence of whereabouts of intoxicated driver after leaving establishment were known as driver testified); *Morrision v. Fleck*, 120 Ohio App. 3d 307, 314, 697 N.E.2d 1064, 1069(Ct. App. 1997) ("Fleck testified that he went straight to the Simmerly residence from the LaPorte Inn. . . . Soon after leaving, just down the street from the Simmerly residence, Fleck struck Jay Scott Morrison with his motorcycle."); *Godfrey v. Boston Old Colony*, 763 So.2d 12 (La. App. 2000)(wreck occurred within thirty minutes of leaving bar while driving home.)

The danger of permitting extrapolation of blood alcohol without clear proof the intoxicated driver had nothing to drink after leaving the bar is evident from a very simple example. Assume that a plaintiff proves that an intoxicated driver leaves a bar at 8 p.m. with the testimony being he only consumed three beers and he had no visible sign of intoxication. He has a wreck at 10 p.m. at which time he has a blood alcohol content of .22. No testimony established what he did during the missing two hours. To permit an expert to extrapolate a blood alcohol

reading as to what the driver would have been would be improper and would mislead the jury. No expert should be permitted to tell a jury under those circumstances that the driver had a blood alcohol reading of .28 at the time he left the bar. Such a conclusion would be speculation because the expert has no information that the driver did or did not consume alcohol during the two hour missing period. Under those facts the expert testimony would actually mislead the jury into believing the plaintiff has proven a fact that it has not proven - that the driver was visibly intoxicated at the time he left the bar.

The facts in the above paragraph are not legally different from the facts of this case. Here the whereabouts of Mr. Helton from the time he left The Getaway are not known for a considerable period of time. Whether he stopped at another bar, drank in the truck and threw the bottle away or had nothing to drink is simply not known. The jury is left to speculate as to what Mr. Helton did after leaving The Getaway. Such speculation is not proof. The lack of proof that he did consume alcohol cannot be held to be proof by the respondents that he did not consume alcohol. The respondents had the burden of proving facts to make their expert testimony admissible. In this case they failed to prove sufficient facts.

QUESTION II

Did the trial judge err in failing to direct a verdict in favor of the defendant The Getaway Lounge, Inc. when the plaintiff failed to prove that Hoyt Helton was visibly intoxicated or that the employees of the Getaway Lounge, Inc knew that Mr Helton was intoxicated when he was consuming alcohol in the lounge?

Contrary to the argument of the respondents, The Getaway does not argue that a plaintiff in a case such as this must establish eye witness testimony before a plaintiff can prevail.

But that certainly is an important factor. The respondents in this case produced no eye witness testimony that Mr. Helton was visibly intoxicated when he was in The Getaway. Even the Respondents own witnesses so testified. Rec. on App. at 77, ll 6-20. The position of The Getaway is that the Respondents did not establish sufficient circumstantial evidence to refute the direct testimony of the witnesses at trial. As a Pennsylvania court has said "We are accordingly wary of an attempt to create a genuine issue of fact as to 'visible intoxication' based on medical testimony of what the *average person's* reaction might have been *assuming Harris' 'probable' blood alcohol concentration.*" *Johnson v. Harris*, 419 Pa. Super. 541, 542, 615 A.2d 771, 776 (1992)(emphasis in the original). And this wariness should be even greater under the facts of this case where the record does not prove Mr. Helton had nothing to drink after he left The Getaway.

The Respondents contend there is direct evidence of Mr. Helton's visible intoxication. Br. of Resp. at 12. The record is in fact devoid of any direct evidence of Mr. Helton's visible intoxication. The direct testimony as to his beer consumption is not sufficient to establish visible intoxication. That direct testimony establishes only that Mr. Helton had three beers at The Getaway. Rec. on App. at 110, ll 7-11; 122, ll 9-16.

The Respondents also argue that Mr. Helton, according to their expert, would have been visibly intoxicated when he consumed the beers at The Getaway. Br. at 13.[1] But this assumption by the expert is based upon a fact not proven - that Mr. Helton had consumed alcohol before he arrived at The Getaway. An expert simply cannot be permitted to give an opinion based upon facts that have not been established. Under the facts of this case, Mr. Helton could

[1] The Respondents also seem to argue here that being intoxicated and being visibly intoxicated are the same thing. No court has so held and the standard of proof under our statute is visibly intoxicated, not simply intoxicated.

just as easily have consumed alcohol after leaving The Getaway as before arriving at The Getaway. With no facts to say one version is more probable than the other, the respondents have simply failed in their proof.

The Respondents contend that The Getaway argues for a rule that requires an injured plaintiff to have direct testimony from patrons that a driver was visibly intoxicated before they can recover. The Getaway has not so contended. All The Getaway has argued is that if the injured party is going to use extrapolation to prove the case, the injured party must prove the driver could not have consumed any alcohol after he left the establishment To hold otherwise would permit an expert to base their opinion on speculation, conjecture or surmise. Such an opinion is not a valid basis for establishing liability.

QUESTION III

Did the trial court err in charging the jury the statutory inferences from the criminal statute concerning driving under the influence?

Simply because S.C. Code § 61-9-410 is a criminal statute the law does not permit the use of criminal inferences under S.C. Code § 56-5-2950. The Respondents have not addressed the argument of The Getaway that an inference of being under the influence under S.C. Code § 56-5-2950 is not proof of visible intoxication under S.C. Code § 61-9-410. Being under the influence for purposes of driving an automobile is not the standard by which liability is imposed under S.C. Code § 61-9-410.

When the trial judge in this case told the jury that they may infer Mr. Helton was under the influence if his blood alcohol was above .10, that charge lessened the burden on the respondents to prove Mr. Helton was visibly intoxicated. The charge was not harmless as

contended by the respondents. To tell a jury they may infer intoxication at a lower level simply tells the jury that a higher level would mean Mr. Helton was intoxicated. The charge injected an inference into the case that simply was not helpful to the jury in making the determination as to whether Mr. Helton was visibly intoxicated.

The purpose of the procedural requirements under S. C. Code § 56-5-2950 is required to ensure the inference created by the code section is a proper inference. If the blood is not drawn correctly then the reading may not be correct. As the statute created a legal inference, the legislature by the statute wanted to ensure that the blood was properly handled before a statutory inference is made applicable to the case. This is not a simple procedural safe guard, but a safe guard that ensures the reliability of the reading itself. Without the reliability built in by the statute no charge concerning an inference should be given.

The Respondents reliance upon *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999) is misplaced. To hold that a person seeking to introduce a urinalysis must establish a proper chain of custody is not authority for the proposition that all a claimant has to prove to use a statutory inference is a chain of custody. The question of a statutory inference was not addressed in *Stevens*.

QUESTION IV

Did the trial court err in failing to instruct the jury that the plaintiff was required to prove that Hoyt Helton was visibly intoxicated and that it was not sufficient to prove that he was intoxicated or he had a high blood alcohol reading as set forth in Defendant's Request to Charges Nº 4 and Nº 6 ?

The Respondents have mis-characterized the Getaway's request to charge Nº 4

and Nº 6. At no time did The Getaway request that the judge charge that direct testimony of visible intoxication be required. In the Request to Charge Nº 4 The Getaway simply requested a charge that said "To find that Hoyt Helton was intoxicated at the time he was served an alcoholic beverage and that the defendant knew he was intoxicated, the plaintiff must prove more than the fact that Hoyt Helton had a high blood alcohol level." In the Request to Charge Nº 6 the requested charge stated "Before you can find a defendant liable, the plaintiff must prove that Hoyt Helton was visibly intoxicated at the time he was served an alcoholic beverage. It is not enough to prove that Mr. Helton was intoxicated or he had a high blood alcohol level." In neither request to charge was there a requirement that direct testimony must be presented. The emphasis of both charges was a correct statement of the law that a high blood alcohol level alone is not sufficient to convict. As noted in the opening brief, in *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 12 (Ct. App. 1990) this Court recognized that visible intoxication is required before liability can be imposed.

The Pennsylvania court has said "The law does hold a licensee or its agents responsible on any basis such as the blood alcohol of a patron, which would not be externally apparent; instead, the law decrees that the alcoholic beverage dispenser shall not provide more alcohol when the signs of intoxication are visible. The practical effect of the law is to insist that the licensee be governed by appearances, rather than by medical diagnoses." *Laukemann v. Com. Pennsylvania Liquor Control Bd.*, 82 Pa.Cmwlth. 502, 506, 475 A.2d 955, 956-957 (1984); *See, also, Kish v. Farley*, 24 A.D.3d 1198, 1200, 807 N.Y.S.2d 235, 236 (2005)("[P]roof of high blood alcohol count alone generally does not establish visible intoxication.")

The fact that the Respondents may not have relied upon a high alcohol reading

alone to prove its case, does not lessen the burden upon the trial court to inform the jury that they could not rely solely upon a high blood alcohol content alone to establish liability. Br. of Resp. at 16. The fact that other evidence was presented to not mean the jury did not reject that testimony and rely solely upon the high blood alcohol reading. The charge was a proper statement of the law and should have been given.

QUESTION V

Did the trial court err in charging the jury that The Getaway Lounge would be liable if the employees of The Getaway Lounge "should have known" that Hoyt Helton was intoxicated when such a charge was rejected by this Court in *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 12 (Ct. App. 1990)?

The standard in South Carolina under *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 12 (Ct. App. 1990) is not that a server should have known that a patron was intoxicated, but that the server knew the patron was visibly intoxicated or there were such circumstances that a reasonable person would have known the patron was visibly intoxicated. The respondent seems to argue that simple negligence in failing to determine if a patron was simply intoxicated is sufficient to impose liability. No South Carolina Court nor any other court has so held.

In *Daley* the plaintiff had requested a charge that said:

> To prove a violation of the statute I previously read to you, the Plaintiff must prove that the Defendants' patron was intoxicated and that the Defendants knew or should have known that the patron was in an intoxicated condition at the time he or she was served. *Id.* at 85, 399 S.E.2d at 15.

In rejecting the charge this Court said "The verbatim charge of the statute in question is proper. At no time did Daley point to any South Carolina authority which would

require the judge to instruct the jury that a violation of the statute would occur if the respondents knew or should have known that Ward was intoxicated at the time he was served." *Id.* As the specific charge given by the court below was rejected in *Daley*, this Court should reverse the judgment of the court below.

QUESTION VI

Did the trial judge err in piercing the corporate veil as to Shou Mei Morris when the testimony showed that The Getaway Lounge and Grill, Inc. had a valid charter, filed income taxes and no proceeds flowed from the corporation to Shou Mei Morris individually?

The Respondents have the burden of proving the corporate structure should be ignored to permit the Respondents to pierce the corporate veil. The Respondents have not established that any funds were "siphoned off." The income tax returns for the years in question were presented to the court. They showed the gross income and the net profit from The Getaway. The respondents did not produce any expert testimony that established that the gross income was inaccurate or that substantial sums could be "siphoned off" based upon the reported income.

Respondents complain that The Getaway failed to provide income tax returns during discovery. If Respondents had felt they were aggrieved by the failure to submit the income tax returns before the hearing on piercing the corporate veil, they could have filed motions to compel the production of the documents or could have requested the trial judge to postpone the hearing on piercing the corporate veil until they had the opportunity to further study the income tax returns. They did neither. As the Respondents have not established that it was inequitable to fail to pierce the corporate veil, this Court should reverse the decision of the lower court piercing

the corporate veil.

CONCLUSION

For the foregoing reasons and for the reasons stated in the opening brief, this Court should reverse the judgment of the court below and enter a judgment in favor of the Appellants as the Respondents have failed to prove Hoyt Helton was visibly intoxicated at the time he was served any alcohol in The Getaway. In the alternative, this Court should reverse this matter and remand for a new trial on the grounds that the expert testimony was improperly admitted, the trial judge improperly charged the jury concerning a criminal inference, and the trial judge failed to properly charge the jury as to the standard by which they were to determine the sufficiency of the evidence. The decision of the lower court in piercing the corporate veil should also be reversed on the ground that the Respondents failed to prove the required elements.

February 8, 2008

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

2/13, 2008

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on February 13, 2008, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the ~~Final Reply Brief of Appellant~~, Final Brief of Appellant and the Record on Appeal in the above case addressed to Jon Newlon, McCravy & Newlon Law Firm, 1629 ByPass 72 NE, Greenwood, South Carolina, 29649.

Sandy Traynham

SWORN to and Subscribed
before me this 13 day
of February, 2008
Mary Jane Harter
(Notary Public for South Carolina)
My Commission expires: 1/24/13

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Sandy Traynham

SWORN to and Subscribed
before me this 13 day
of February, 2008

Mary Jane Harter
(Notary Public for South Carolina)
My Commission expires: 2/13/08