THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

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,.....Respondents,

v.

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

AMENDED FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On July 25, 2003, Hartfield brought this action against Hoyt G. Helton. That case was settled and, on January 8, 2004, the Pleadings were amended to add other parties. (R.pp. 1-12, 13). The procedural history was extensive.

On February 5, 2007, the Pleadings were amended before trial to correct minor errors in the caption and remove a settled party. (R.pp. 14-23). On the same day, the trial began before The Honorable Larry R. Patterson and lasted four days.

At the conclusion of Respondents' case, Appellant moved for a directed verdict which the Trial Court denied. (R.pp. 294, line 7-25; R.pp. 295-299; R.p. 300, lines 1-16).

At the conclusion of all evidence, the jury returned a verdict in favor of both Respondents for $10,000,000 in combined actual damages. (R.p. 40).

After trial, the Trial Court conducted a hearing as to whether the Respondents would be entitled to pierce The Getaway's corporate veil and orally ruled Respondents could pierce The Getaway's corporate veil. (R.pp. 458-501; R.p. 502, lines 1-19). By separate written Order, Respondents' request to pierce Appellant's corporate veil was granted. (R.pp. 41-45). Appellant submitted Rule 59 motions which were denied. (R.pp. 27-39, 46-47).

FACTS

According to his wife of eleven years, Helton did not have a speech impediment, drank Budweiser, sipped his beer, would start drinking around noon and would typically leave around 4:00 to 4:30 p.m. to go to his favorite bars. (R.pp. 63-75). She had no recollection of Helton drinking before he left home the day of the accident. (R.p. 68, lines 10-13). Helton weighed 130 to 150 pounds. He got in trouble for drinking and driving a

number of times. (R.p. 70, lines 17-25; R.p. 71, lines 1-2). He frequented the Pub and The Getaway. (R.p. 71, lines 3-8). He was an alcoholic and she repeatedly had to pick him up at the Pub and The Getaway because he was too drunk. (R.p. 73, lines 5-13).

On July 11, 2003, between 10:30 and 11:00 p.m., Laura Riddle was driving her car with Respondent John Erik Hartfield as her passenger. It was a dark and rainy night. She was taking him to his father's house. While heading south on S.C. Highway 254 in Greenwood, S.C., a car driven by Hoyt Helton crossed the centerline and hit Riddle's car where Hartfield was sitting. (R.pp. 54-55). Helton died at the scene. (R.p. 161, lines 21-24).

Riddle and Hartfield were seriously injured. Hartfield was flown to the Greenville Hospital where he laid comatose for months. With his father at his side, Hartfield eventually came out of his coma. However, he suffered serious brain trauma and physical injuries necessitating assisted living for the remainder of his life. (R.pp. 58-59; R.p. 185, lines 21-25; R.pp. 186-187; R.p. 188, lines 1-20).

At trial, the key testimony was as follows.

<u>First Stop, Williams Package and South Pointe Pub</u>

1. Cockrell operated the Pub and served beer at the Pub. (R.p. 84, lines 3-25; R. p. 85, lines 1-4).

2. Cockrell considered Helton a regular customer. (R.p. 85, lines 21-25). Cockrell stated Helton would go to the Pub three times a week. (R.p. 89, lines 3-7). Cockrell stated Helton would sip his beer, always a Budweiser. (R.p. 89, lines 13-20).

3. Cockrell had seen Helton where he was in such a condition that it required others to take him home, but he refused to admit seeing Helton intoxicated and

claimed he never had to refuse to serve him. (R.p. 86, lines 1-17).

4. Helton arrived at the Pub between 4:00 and 4:15 p.m. (R.p. 87, lines 22-24). Cockrell admitted Helton was in the Pub until 5:30 p.m. (R.p. 88, lines 1-2). Cockrell admitted seeing Helton in front of the Pub on a bench at 7:05 when he was closing up the Pub. (R.p. 92, lines 4-14). However, Cockrell denied Helton drank a Budweiser at the Pub and denied seeing Helton even drinking a Budweiser when outside and in front of the Pub on a bench. (R.p. 91, lines 1-18). Cockrell admitted Helton had previously disclosed that he would go to The Getaway after leaving the Pub. (R.p. 91, lines 1-23).

5. Brad Harrison was Helton's drinking buddy. They would drink together at the Pub and The Getaway. (R.p. 102, lines 13-20; R.p. 105, lines 13-20). Helton would drink when he went to these places. (R.p. 103, lines 7-9). Helton would drink Budweiser slow and sip it. (R.p. 104, lines 15-20; R.p. 106, lines 13-19). Harrison never saw Helton chug beer. (R.p. 104, lines 15-20). Harrison had seen Helton drunk. (R.p. 104, lines 21-24; R.p. 108, lines 6-10). Harrison believed Helton was an alcoholic. (R.p. 108, lines 3-5).

6. Harrison saw Helton at the Pub at 6:00 to 6: 15 p.m. (R.p. 103, lines 15-18).

7. Harrison drank two beers and left the Pub between 7:00 and 7:15 p.m. and Helton was still there. (R.p. 107, lines 12-15; R.p. 109, lines 1-6).

8. Harrison claimed Helton did not drink anything at the Pub and did not appear intoxicated. (R.p. 107, lines 14-21).

Second Stop, The Getaway

9. Harrison arrived at The Getaway at 8:00 p.m. and Helton was there sitting at the bar drinking a beer. (R.p. 109, lines 15-32). At trial, Harrison claimed Helton only drank two beers at The Getaway. (R.p. 110, lines 7-11). However, on redirect, Harrison admitted that he said in his earlier deposition that Helton had three beers at The Getaway. (R.p. 122, lines 1-16). Harrison stated he was with Helton the whole time and Helton was sipping his beer. (R.p. 115, lines 21-25).

10. Harrison admitted that Helton had been to The Getaway before, but denied Helton was a regular. (R.p. 112, lines 1-7). This was claimed despite the fact that Helton died in the accident and The Getaway placed a farewell note on its marquee saying, "Good-bye Punk we'll miss you." (R.p. 112, lines 16-20; R.p. 135, lines 23-25; R.p. 136, lines 1-5).

11. Diane Bice manages The Getaway, tends bar at The Getaway and was present when Helton was there. (R.p. 124, lines 11-16; R.p. 127, lines 24-25; R.p. 128, lines 1-6; R.p. 129, lines 22-25).

12. Bice had known Helton for ten years, had served him beer and seen him intoxicated. (R.pp. 127-128). Interestingly, Bice claimed she knew Helton drank during this time but did not know he was an alcoholic. (R.p. 128, lines 19-22). She admitted refusing to serve Helton in the past. (R.p. 129, lines 1-13).

13. Bice testified Helton consumed a beer in thirty minutes to an hour. (R.p. 128, lines 9-18).

14. Bice testified Helton showed up at The Getaway at between 7:15 and 7:30

p.m. (R.p. 98; R.p. 99, lines 1-3). Bice claimed Helton was not sitting at the bar despite Harrison's testimony to the contrary. (R.p. 133, lines 11-15; R.p. 141, lines 5-14). Bice claimed she did not see Helton drink a beer and he did not appear intoxicated. (R.p. 130, lines 3-15; R.p. 133, lines 20-15; R.p. 134, lines 1-14).

15. Harrison testified at trial he left The Getaway about 9:00 or 9:15 p.m., but also testified earlier in his deposition that he left The Getaway at 9:30 p.m. (R.p. 109, lines 24-25; R.p. 110, lines 1-3). Further, within days of the accident, he told Trooper Keller that he left The Getaway between 9:30 and 10:00 p.m. (R.p. 169, lines 19-25; R.p. 170, line 1).

16. Harrison claimed Helton did not appear intoxicated at any time in The Getaway and when Harrison left The Getaway. (R.p. 111, lines 2-16; R.p. 116, lines 1-19). He never saw Helton again. (R.p. 111, lines 2-5).

17. The bartender at The Getaway also told Trooper Keller that Helton was sober when he left. (R.p. 179, lines 12-14).

Third Stop, The Carolina Lounge

18. Billy McDonald was the bartender at The Carolina Lounge. (R.p. 142, lines 10-18). He had known Helton for twenty-five years. (R.p. 142, lines 19-20).

19. McDonald saw Helton enter the Carolina and sit at the bar. (R.p. 143, lines 8-17). McDonald claimed Helton did not drink a beer despite testimony by Trooper Keller that McDonald admitted serving Helton a beer. (R.p. 143, lines 23-24).

20. McDonald saw Helton leave about 10:00 to 10:15 p.m. (R.p. 149, lines 13-19) and told Trooper Keller that Helton was sober when he left. (R.p. 143).

Trooper Keller testified that Billy McDonald identified himself to Trooper Keller and further admitted serving Helton one beer on the night of the accident. (R.p. 170, lines 2-22; R.p. 171, lines 16-18). Trooper Keller also testified that he arrived at the scene shortly after the accident, secured the scene and inspected the scene and Helton's vehicle. More importantly, Trooper Keller testified that there were no open containers of any kind at the scene or in Helton's vehicle.(R.p. 162, lines 18-25; R.p. 163, lines 1-14). Trooper Keller also testified that he listened to a recorded phone message by Helton on his wife's phone and within minutes of the accident. (R.p. 171, lines 23-25; R.p. 172, lines 1-2). Trooper Keller heard the voice of a man who was highly intoxicated. (R.p. 172, lines 18-25; R.p. 173, lines 1-12). Trooper Keller testified the accident occurred at 10:51 p.m. (R.p. 158, lines 3-8).

The SLED toxicologist, Alex Lewis, who handled and tested Helton's blood, urine and ocular samples, found Helton's blood alcohol content was .212, his urine alcohol content was .304 and his ocular sample was .249. (R.p. 206, lines 4-21; R.p. 224, lines 1-12).

William Brewer was qualified as an expert toxicologist. (R.p. 215, lines 4-7). He was extensively schooled in toxicology and the physical attributes associated with various levels of toxicity. (R.pp. 218-219). He was knowledgeable about how alcohol was metabolized in the body and how this affected levels of toxicity. (R.pp. 222-223).

He was aware of Helton's physical attributes at the time of his death. (R.p. 216, lines 24-25; R.p. 217, line 1). He was aware of Helton's drinking habits. (R.p. 216, lines 20-23). He was aware of the foregoing time line presented by trial testimony. (R.p. 217, lines 2-24). He testified to Helton's expected consumption during the day of the accident and various levels of intoxication. He was able to testify to Helton's physical signs of intoxication at

various times during the day and at The Getaway. (R.pp. 224-298). He explained "retrograde extrapolation." (R.pp. 196-197).

ARGUMENTS

I. BECAUSE THERE WAS SUFFICIENT EVIDENCE CREATING A JURY QUESTION AS TO THE AMOUNT OF ALCOHOL HELTON CONSUMED WHILE A PATRON AT THE GETAWAY AND SUFFICIENT EVIDENCE OF HELTON'S ACTIVITIES AFTER HE LEFT THE GETAWAY, THE TRIAL COURT DID NOT ERR IN ADMITTING DR. BREWER'S TESTIMONY AS TO HELTON'S EXTRAPOLATED BLOOD ALCOHOL CONTENT WHEN HE WAS SERVED AT THE GETAWAY LOUNGE.

A. LAW:

The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion, the trial court's ruling will not be disturbed on appeal. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence. Conner, 363 S.C. at 467, 611 S.E.2d at 908.

B. DISCUSSION:

Dr. Brewer's testimony was properly grounded on facts in evidence and was properly admitted over Appellant's objections. Helton's activities after leaving The Getaway were presented at trial although part of the evidence depended on which of the Defendants' witnesses the jury chose to believe. Trial testimony showed he left The Getaway between

9:30 and 10:00 p.m. (R.p. 169, lines 24-25; R.p. 170, line 1). Also at trial, Harrison testified that Helton left The Getaway about 9:00 or 9:15 p.m. despite earlier deposition testimony that Helton left The Getaway at 9:30 p.m. (R.p. 109, lines 24-25; R.p. 110, lines 1-3). Billy McDonald testified that Helton left The Lounge between 10:00 and 10:15 p.m. without consuming any alcohol.[1] Trooper Kelley testified that there was no evidence of consumption of any alcohol in Helton's vehicle at the scene of the accident. (R.p. 162, lines 18-25; R.p. 163, lines 1-14). There was no evidence Helton went anywhere else between leaving The Getaway and arriving at The Lounge.

According to the foregoing and while recognizing the difficulty in getting witnesses for The Lounge to admit serving any alcohol to Helton, Respondents were able to present some evidence Helton did not consume any more alcohol after leaving The Getaway. (R.p. 143, lines 23-24).

Therefore, armed with the timing of these events and the time of the accident in which Helton died and his blood alcohol content was accurately captured, Dr. Brewer was able to extrapolate Helton's blood alcohol content at the time he was present and left The Getaway. Dr. Brewer's opinion was based on all the foregoing circumstances and was conservative given those circumstances. (R.pp. 184, 203-204, 219-227).

Appellant argues Respondents' evidence does not account for Hoyt Helton's activities for one hour and fifty minutes after Hoyt Helton left The Getaway. This is an absolute misstatement of the trial testimony. If one assumes Brad Harrison's account of Helton's 9:15 departure from The Getaway is true and the officer's estimation of the time of the accident

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[1] Despite the fact that Trooper Kelley recounted Billy McDonald admitting to him that Helton had one beer at The Lounge. (R.p. 171, lines 16-18)

at 10:50 p.m., then the total possible gap in time is one hour and thirty-five minutes.

However, there is uncontroverted testimony Helton left The Lounge at 10:10 to 10:15 p.m. (R.p. 149, lines 13-19). Further, other testimony places Helton's departure from The Getaway between 9:30 to 10:00 p.m. (R.p. 169, lines 24-25; R.p. 170, line 1). If Helton left The Getaway between 9:30 to 10:00 p.m., drove about ten minutes in the rain to The Lounge, left the Lounge at 10:15 p.m., drove about another ten minutes to the scene of the accident and did not have any alcohol in or about his person at the accident scene at about 10:50 p.m., then Helton's whereabouts and activities are accounted for and the narrowest total gap in time would only be fifty minutes.

It was the jury's job to determine who to believe and use this information to achieve an inference on Helton's whereabouts after he left The Getaway. Likewise, is was proper for Dr. Brewer to take this evidence and provide an expert toxicological opinion as to Helton's extrapolated state of intoxication from the time of the accident backward to the time he was served at and later left The Getaway.

Appellant relies on Beaulieu v. The Aube Corp., a factual distinguishable case, to argue that a one hour and thirty minute gap in time from the subject's departure from the bar to the time of the accident leads to conjecture and speculation by an expert. In Beaulieu, the drunk driver's blood alcohol content was never determined. He left the accident scene and his whereabouts AFTER the accident could not be established. Further, there was no evidence of when the accident occurred. The Beaulieu Court was also concerned that the drunk driver's pre-accident activities were not known. 796 A.2d 683, 691-692 (Me. 2002).

In this case, Helton's blood alcohol was captured at his death. (R.p. 161, lines 21-14;

R.pp. 48-50). There was evidence presented of Helton's whereabouts and activities PRIOR to the accident. The time of the accident was known. (R.p. 158, lines 6-8). There was evidence of Helton's whereabouts and activities prior to his visit to The Getaway. There is no unexplainable gap in time in this case and Dr. Brewer's testimony was not based on speculation and conjecture.

II. BECAUSE THERE WAS SUFFICIENT EVIDENCE CREATING A JURY QUESTION AS TO WHETHER (A) HELTON WAS VISIBLY INTOXICATED WHILE AT THE GETAWAY AND (B) WHETHER THE GETAWAY'S EMPLOYEES KNOWINGLY SERVED HELTON WHEN HE WAS INTOXICATED, THE COURT DID NOT ERR BY REFUSING TO GRANT A DIRECTED VERDICT.

A. LAW:

In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005). The trial court must deny such a motion when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); see also Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003).

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998) (if the evidence taken as a whole is susceptible of more than one

reasonable inference, the case must be submitted to the jury).

"When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002).

B. DISCUSSION:

The Trial Court properly denied Appellant's motion for a directed verdict regarding Helton's state of intoxication at The Getaway Lounge and whether The Getaway's employees knowingly served Helton when he was intoxicated.

Due to the direct evidence and testimony establishing the aforementioned time line, to the direct scientific evidence of Helton's level of intoxication at the time death (.212), to the direct evidence of Helton's activities after leaving The Getaway until the time of the accident and to the absence of any alcohol consumption while Helton was driving down the road, Dr. Brewer could use retrograde extrapolation and determine Helton's blood alcohol level before he left The Getaway and Helton's physical signs of intoxication during the time he was present and served at The Getaway.

Appellant's argument requires this Court to find that a person who is seriously injured at the hands of a drunk driver must provide eyewitness testimony at the time the drunk was served in the bar to prove the drunk was visibly intoxicated when served. That is an unreasonable burden. Respondents' direct and circumstantial evidence as presented at trial should be sufficient to allow a toxicologist (familiar with the physical attributes of the drunk and trained in determining behavior at varying levels of toxicity) to use retrograde extrapolation and to testify to a particular individual's state at a given time. Dr. Brewer was

able to do just that in this case without eyewitness testimony.

In Northside Equities, Inc. v. Hulsey, 275 Ga. 364, 567 S.E.2d 4 (2002), the Court examined the positions of the various jurisdictions. Other states have reached varying results in deciding the role of expert testimony in dram shop cases. Several courts have rejected attempts to use expert testimony to link the tortfeasor's blood alcohol level later in the day to a point earlier in the day,[2] whereas other courts have permitted expert testimony provided it focused on the tortfeasor's reaction to alcohol,[3] as opposed to the average person's reaction.[4] Only a few courts have not required expert testimony to explain the significance of a person's blood alcohol level.[5] In reviewing these cases, it is clear that these courts are concerned with experts giving opinions based on guesswork. The Respondents, before the trial of this case, became familiar with the concerns of these various courts and addressed each concern during deposition testimony and trial testimony. Thus, Dr. Brewer, who was an expert toxicologist who had conducted numerous studies concerning the effects of alcohol

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[2] Beaulieu v. The Aube Corp., 796 A.2d 683 (Me. 2002); Hollermann v. River Roost, No. C7-99-414, 1999 WL 639278 (Minn. Ct. App. 1999); Romano v. Stanley, 684 N.E.2d 19, 23 (N.Y. 1997); Johnson v. Harris, 615 A.2d 771, 776 (Pa. Super. Ct. 1992); Purchase v. Meyer, 737 P.2d 661, 663-65 (Wash. 1987).

[3] Bruce v. K.K.B., Inc., 52 S.W.3d 250 (Tex. Ct. App. 2001); Godfrey v. Boston Old Colony, 763 So.2d 12 (La. Ct. App. 2000); Morrison v. Fleck, 697 N.E.2d 1064 (Ohio Ct. App. 1997); see also Douillard v. LMR, Inc., 740 N.E.2d 618 (Mass. 2001).

[4] Beaulieu, 796 A.2d at 693; Hollermann, 1999 WL 639278; Johnson, 615 A.2d at 776.

[5] Stewart v. Ryan, 520 N.W.2d 39 (N.D. 1994) (commonly understood appearance of person who consumed fifteen to twenty drinks creates jury question); Crocker v. Larson, 1990 WL 130087, at *2 (Tenn. Ct. App. Sept. 11, 1990) (blood alcohol .23% an hour after accident, which occurred ten minutes after leaving bar created jury question); see also Vanderhoek v. Willy, 728 N.E.2d 213, 217 (Ind. Ct. App. 2001) (blood alcohol level coupled with appearance at scene of accident short time after being served).

at various levels of toxicity, was equipped with all the essential information to form a founded opinion in this case.

In this case and in the absence of an eyewitness who would admit to an accurate account of Helton's beer consumption and signs of intoxication, the direct evidence is otherwise substantial and supports Dr. Brewer's testimony. Helton's whereabouts and activities before entering The Getaway were presented by direct testimony. Helton's time at The Getaway, activities in The Getaway and alleged nominal beer consumption at The Getaway was presented by direct testimony. Helton's time of departure from The Getaway was presented by direct testimony. Helton's time of departure and activities were presented by direct testimony. The time of the accident was reported and recorded by law enforcement. Helton's blood alcohol content[6] was captured at his death at the scene of the accident.

Dr. Brewer's testimony focused on the individual Helton and not people in general. Dr. Brewer was provided, by way of medical records and direct testimony, Heltons' physical attributes, drinking habits and physical reactions to alcohol. (R.p. 216, lines 20-25; R.p. 217; R.pp. 256-258).

Dr. Brewer testified Helton was intoxicated during his stay at The Getaway and, therefore was visibly intoxicated when served three to four beers. (R.p. 259, lines 1-3). Dr. Brewer used Helton's physical attributes and habits to determine if Helton would have shown signs of being intoxicated during that time. Dr. Brewer testified there was no doubt. (R.p. 259, lines 4-12).

All of the cases presented by Appellant were read by Respondents' attorney before

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[6] As well as ocular and urine levels.

the trial of this case. Appellant's attorney framed his deposition questioning and trial testimony in order to cover those problems presented in these cases. Therefore, these cases are factually distinguishable from this case.

III. BECAUSE THE STATUTORY INFERENCE OF INTOXICATION WAS CHARGED IN CONJUNCTION WITH THE CRIMINAL STATUTES USED FOR DRAM SHOP CASES IN SOUTH CAROLINA, THE TRIAL COURT DID NOT ERR BY CHARGING THE STATUTORY INFERENCE OF INTOXICATION.

A. LAW:

Jury instructions should be considered as whole, and if as whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).

"The substance of the law is what must be instructed to the jury, not any particular verbiage. . . . A jury charge which is substantially correct and covers the law does not require reversal." Burroughs v. Worsham, 352 S.C. 382, 391, 574 S.E.2d 215, 220 (Ct. App. 2002).

B. DISCUSSION:

Because South Carolina does not have a Dram Shop Act and relies on criminal statutes to create a civil remedy, the Trial Court's charge of S.C. Code Ann. § 61-9-410 (1976) coupled with S.C. Code Ann. § 56-5-2950 (as amended, 2006) was not error.

The charge as a whole was a proper. Smith; Burkhart. The requirements to prove intoxication at the time of service and to prove that the bar's employees knowingly served the intoxicated patron were properly charged. Whether or not a given level of blood alcohol provides an inference of intoxication, the burden to prove that Helton was at or above that

level was not lessened. In fact, the evidence presented at trial showed Helton would have had a blood alcohol content of .18 to .20 given the testimony at trial and Helton's physical attributes. (R.p. 216, lines 20-15; R.p. 217, lines 2-24; R.p. 227, lines 19-25; R.p. 228; R.p. 229, lines 1-10; R.p. 255, lines 8-25; R.pp. 256-258; R.p. 259, lines 1-12).

At best, the charge on the presumption of intoxication as it applies to The Getaway was harmless error. See State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (the commission of legal error is harmless if it does not result in prejudice to the defendant). Dr. Brewer opined Helton's level of intoxication when served at The Getaway was substantially higher than the statutory inference of intoxication. At worst, the charge was substantially correct and reversal is not required. Burroughs.

Appellant argues because Respondents did not prove the blood was taken pursuant to the requirements of S.C. Code Ann. § 56-5-2950, the Appellant was not entitled to the inference. This argument misapplies the language of the statute. The requirements set forth in this statute are designed to ensure procedural due process in a criminal conviction. Even if the blood alcohol level was obtained in violation of this statute, it only effects the admissibility of this blood alcohol evidence in a criminal proceeding. However, with a proper chain of custody in a civil case, the same inference can be drawn.

Appellant cites State v. Carrigan and claims this case supports its argument that Helton's blood alcohol content should not have even been introduced. This argument has no merit. Carrigan involves the admissibility of blood alcohol information in a criminal case. The same standards for admissibility of blood alcohol used for criminal cases do not exist for civil cases. See e.g., Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999)

(court requiring a sufficient chain of custody in civil cases).

IV. BECAUSE RESPONDENTS PRESENTED EVIDENCE HELTON WAS INTOXICATED AND EXHIBITING VISIBLE SIGNS OF INTOXICATION AT THE TIME HE WAS SERVED, THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY THE RESPONDENTS HAD TO PROVE BY DIRECT OBSERVATION OF AN EYEWITNESS THAT HELTON WAS VISIBLY INTOXICATED WHEN SERVED.

A. LAW:

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). The trial court's refusal to give a requested jury instruction must be both erroneous and prejudicial to warrant reversal. State v. Light, 363 S.C. 325, 330, 610 S.E.2d 504, 506 (Ct. App. 2005).

B. DISCUSSION:

The Trial Court's refusal to instruct the jury that the Respondents must prove by direct testimony that Helton was visibly intoxicated at the time he was served was not an abuse of discretion, was not erroneous and was not prejudicial.

First, the Trial Court's charge included the explanation that the Respondents must prove not only was Helton intoxicated at the time he was served, but also that the Appellant's employees knowingly served Helton when he was intoxicated. (R.p. 433, lines 11-25; R.p. 434, lines 1-20). To this extent, the Trial Court's refusal to present Appellant's Charge Numbers 4 and 6 was not only not erroneous, but certainly not prejudicial. Light.

Second, there is no legal requirement to prove by direct testimony that Helton was visibly intoxicated when The Getaway's employees served Helton. To require the court to

charge that Helton would have to have been visibly intoxicated implies that the bartender would have to be faced with the obvious and not required to exercise due care when serving a patron that might be intoxicated (either by visible signs or sheer number of drinks served). The charge was neither erroneous nor prejudicial.

Third, the Respondents did not rely solely on a blood alcohol content to create a jury question as to whether Helton was intoxicated when he was served beer at The Getaway. Respondents also used the plethora of other evidence about Helton, Helton's activities before arriving at and after leaving The Getaway, Helton's captured blood alcohol content at death and at the time of the accident, Dr. Brewer's expertise in toxicology and Dr. Brewer's practical training, studies and experience with physical attributes of individuals at various levels of toxicity.

Last, Appellant cites Sorenson v. Denny Nash, Inc. in support of its argument that blood alcohol alone is not sufficient to establish Helton was visibly intoxicated at the time The Getaway's employees admittedly served him. This case is clearly distinguishable.

In Sorenson, the defendant's motion for summary judgment was being reviewed. The plaintiff relied on the affidavit of a forensic pathologist who (1) had no expertise or familiarity with the study of the visible signs of intoxication, (2) did not identify scientific rates, studies and data used to establish visible signs of intoxication based established levels of toxicity, and (3) was an expert in forensic pathology and did not offer any qualifications that would enable him to render an opinion correlating the defendant's blood alcohol content to visible signs of intoxication. 249 A.D.2d 745, 747-748 (Sup. Ct. App. Div. 1998).

In this case, Dr. Brewer was a toxicologist who had practical experience in studying

and reporting visible signs of intoxication. He identified these studies during Voir Dire and upon examination. Morever, he was not just a forensic pathologist. He was a forensic toxicologist with qualifications to render an opinion correlating Helton's blood alcohol content, given the time line of events established at trial, with visible signs of intoxication at specified times prior to Helton's death. Dr. Brewer, at trial, was competent to testify about Helton's signs of intoxication given his level of toxicity established through retrograde extrapolation. (R.pp. 211-229; R.p. 230, lines 1-5).

Appellant, in essence, wants this Court to hold that the Respondents and other persons similarly situated will have to present the testimony of an eyewitness (probably a biased patron) who can testify that the drunk patron was visibly intoxicated when the bartender served the patron. Better yet, Appellant wants this Court to hold that the bartender might have to admit to the same in order for a plaintiff to prevail. This is absurd. If Respondents are not allowed to use evidence of the Helton's location during certain times of the day, Helton's consumption of alcohol during certain times of the day, Helton's physical attributes, Helton's drinking habits, Helton's known response to alcohol and Helton's captured blood alcohol content at the time he died and the expertise of a toxicologist, then the remedy provided by the common law in this State is meaningless.

In other jurisdictions, circumstantial evidence by way of expert testimony and the use of retrograde extrapolation may be used to establish service of alcohol as well as the level of toxicity of a patron when served. People v. Ladd, 88 N.Y.2d 849 (1996). Facts from which an inference may properly be drawn must be established by direct evidence and not by other inference. Alaniz v. Rebello Food & Beverage, L.L.C., 165 S.W.3d 7 (Tex. App.

2005) (court applying standard to dram shop case). An established time line of events and temporal proximate of the consumption of alcohol to the accident can be direct evidence to support an inference. Id. at 15. An expert's opinion as to consumption and level of toxicity can have probative value if the assumed facts do not vary materially from the undisputed facts. Id. at 16. Eyewitness proof that a patron was intoxicated at the time served is not required in a dram shop case. Romano v. Stanley, 684 N.E.2d 19 (N.Y. 1997).

In South Carolina, circumstantial evidence may be used in a dram shop case to prove that a patron was visibly intoxicated at the time he was served. See e.g., Daley v. Ward, 303 S.C. 81, 87, 399 S.E.2d 13, ___ (Ct. App. 1990) (Although Ward himself testified he had a high tolerance for alcohol and he did not believe he was intoxicated at the time he left the Windjammer, the jury could have easily determined from the circumstantial evidence that Ward was visibly intoxicated at the Windjammer such that a prudent man would have known of his condition.).

Therefore, Dr. Brewer, under the facts of this case, was well qualified to testify to Helton's visible signs of intoxication at the time Helton was served at The Getaway.

V. BECAUSE THE APPLICABLE STANDARD OF PROOF IS BASED ON A "REASONABLE PERSON" STANDARD, THE TRIAL COURT DID NOT ERR BY CHARGING THE GETAWAY EMPLOYEES KNEW OR SHOULD HAVE KNOWN HELTON WAS INTOXICATED.

A. LAW:

An appellate court will not reverse the trial court's decision regarding jury instructions unless it abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). The trial court's refusal to give a requested jury instruction must be both erroneous and prejudicial

to warrant reversal. State v. Light, 363 S.C. 325, 330, 610 S.E.2d 504, 506 (Ct. App. 2005).

B. DISCUSSION:

The Trial Court correctly charged the penal statute's exact language and then explained that the standard for The Getaway's employees was whether they knew or should have known Hoyt Helton was intoxicated when they served him. This was done in the absence of a general negligence charge explaining the reasonable person standard. As a general and practical matter, a bartender should know a person is intoxicated when they serve him twenty beers. To remove "should have known" as a version of the reasonable person standard from the analysis eviscerates this possible cause of action against the bar.

In Daley v. Ward, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990), the trial court planned and did instruct the jury by reading S.C. Code Ann. § 61-9-410(b) verbatim. The plaintiff objected and asked the trial court to read a charge framed after a North Carolina case and supported by the S.C. Supreme Court's decision in Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). The Daley Court held that the trial court's charge was correct. However, the analysis did not end there.

The Daley Court acknowledged the trial court also charged elements of negligence which included an explanation of the reasonable person standard. The Daley Court noted that this allowed the jury to determine whether the bartender acted reasonably in determining whether the patron was intoxicated when served. Id. at 85-86.

In addition, the S.C. Court of Appeals in Tobias v. The Sports Club, Inc., stated:

> "Thus, Christiansen and the decisions which followed it clearly indicate liability should be predicated upon a negligence standard, i.e., "whether the bartenders negligently served alcoholic beverages to a person who, by his appearance or otherwise, would lead a prudent man to believe that person was

intoxicated." Daley, 303 S.C. at 87, 399 S.E.2d at 16.

323 S.C. 345, 353, 474 S.E.2d 450, ___ (Ct. App. 1996).

In this case, the Trial Court did not charge the reasonable person standard in order to allow the jury to consider whether the bartender acted reasonably when determining if Helton was "knowingly" intoxicated when served. Instead, the Trial Court charged S.C. Code Ann. § 61-9-410(b) verbatim in the initial part of the charges (R.p. 431) and then further infused the reasonable person standard when explaining that the Respondents, in order to prove a cause of action under this statute, had to prove that the bartender knew or should have known Helton was intoxicated at the time he was served. (R.p. 432). Without this further explanation of how Respondents could prove Appellant knowingly served Helton, the charge would have been inadequate. However, the charge, read as a whole, was proper and did not prejudice Appellant's case. Light.

Clearly, the intent of the common law interpretation and application of the penal statutes is to allow for a reasonable man standard in these cases. In this case, the Trial Court communicated the reasonable man standard instructing the jury that Respondents had to show the bartender knowingly served Helton by proving The Getaway's bartenders knew or had reason to know Helton was intoxicated when served. By charging the "should have known" or reasonable man standard, the Trial Court permitted the jury to determine if The Getaway's bartenders were negligent by serving an intoxicated patron or even negligent in failing to take reasonable steps to ascertain whether Helton was intoxicated.[7]

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[7] It would be ludicrous to think that a bar cannot be responsible for negligently failing to ascertain a patron's state while serving alcohol. For example, patron orders a shot. Bartender hands him a bottle and tells patron to keep track of shots. Patron empties bottle and leaves. The bartender, as a matter of public policy, should have exercised

VI. BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S EQUITABLE DECREE ALLOWING RESPONDENTS TO PIERCE THE CORPORATE VEIL, THE TRIAL COURT DID NOT ERR BY ALLOWING RESPONDENTS TO DO THE SAME.

A. LAW:

An action to pierce the corporate veil is one in equity. Thus this court may take its own view of the preponderance of the evidence. Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995); see Sturkie v. Sifly, 280 S.C. 453, 456-57, 313 S.E.2d 316, 318 (Ct. App. 1984) (finding that an action to pierce the corporate veil is one in equity and the appellate court takes its own view of the preponderance of the evidence).

The broad scope of review applicable to appeals in equity actions does not, however, require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. Hunting v. Elders, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004), cert. dismissed (Oct. 5, 2005). The trial court may disregard the corporate form when equity requires that the corporate form be disregarded. Id.

Courts generally disregard the corporate entity only where equity requires piercing the corporate veil to assist a third party. Woodside v. Woodside, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986) ("The corporate form may be disregarded only where equity requires the action to assist a third party."). The burden of proof is on the party asserting that

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reasonable judgment to ascertain the patron's state while he was being served. In this case, the negligence is not looking at a patron and serving him or her with knowledge the patron is intoxicated. Instead, the negligence is from the bartender's failure to take reasonable steps to avoid serving an intoxicated person and putting him or her on the road. A bartender should know that simply handing someone a drink would not only cause the person to become intoxicated but also amount to service while intoxicated.

the corporate veil should be pierced. Id.

Our courts have outlined a two-prong test to determine whether a corporate veil should be pierced. The first part of the test requires an eight-factor analysis and looks to observance of the corporate formalities by the dominant shareholders. Sturkie, 280 S.C. at 457-58, 313 S.E.2d at 318.

The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals. Id. Under the second prong of the Sturkie test, the party seeking to pierce the corporate veil must prove injustice or fundamental unfairness if the corporate veil is not pierced. Multimedia Publ'g of S.C., Inc. v. Mullins, 314 S.C. 551, 553, 431 S.E.2d 569, 571 (1993). The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell. Id. at 556, 431 S.E.2d at 573.

B. DISCUSSION:

The testimony and exhibits presented during this hearing clearly provided sufficient evidence for the Trial Court to permit the Respondents to pierce the corporate veil.

First, it is a question whether The Getaway was undercapitalized. While The Getaway submitted tax returns at trial showing reported income for several years, The Getaway failed to provide those same records during discovery and prior to a reasonable time before trial. (R.p. 468, lines 9-25; R.p. 469, lines 1-15). Further, this reporting was called into question when The Getaway, for the same tax years, reported $20,000 to $40,000 in revenue to the City of Greenwood. (R.p. 480, lines 3-25; R.p. 481, lines 1-3). The Getaway's

aforementioned revenue reportings covered periods of time before and after the filing of the lawsuit.

Second, the reporting discrepancy led to evidence and an inference that the difference in funds (about $150,000 per year) reported was being siphoned off by the officers of the corporation. When discovery requests were made for records that could explain the discrepancy, The Getaway did not provide any, even at trial. When asked about the "difference in funds discrepancy", Appellant's vice-president testified, "I don't' have an answer for that." (R.p. 492, lines 1-3). Instead, Appellant's president testified that those records were in a filing cabinet that was kept in a garage, but the records were stolen and/or lost during the course of litigation. (R.p. 466, lines 4-12). So, Appellant created a situation where Respondents could not fairly ascertain the validity of any testimony by its witnesses at trial.

Third, because no records were available due to the lost filing cabinet, Respondents could not validate claims that corporate formalities were observed. However, when Appellant's manager/vice-president was questioned about records of payments by checks or the like, she was not able to provide the same. (R.p. 485; R.p. 486, lines 1-21). It is interesting to note that this bar, The Getaway, claimed to be a non-profit organization which had made a number of donations to local organizations. At trial, Appellant's manager/vice-president under a subpoena duces tecum, did not and could not produce any documents to support this. (R.p. 485; R.p. 486, lines 1-21). She could not produce any meeting minutes whether monthly, quarterly or annually. In fact, she could not produce any. She simply said she held the meetings but did not take any notes. (R.p. 486, lines 22-25; R.p. 487- 488; R.p.

For the reasons stated, this Court should reverse the judgment of the Court.

Respectfully submitted,

April 16, 2008

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

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,.....Respondents,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Amended Final Brief of Respondent complies with Rule 211(b) SCACR.

April 16, 2008

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PROOF OF SERVICE

I certify that I have served a copy of the *Amended Final Brief of Respondents* to all counsel of record by depositing a copy of the same in the United State Mail, postage prepaid, on April 21, 2008, at the address indicated below:

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