ORIGINAL

THE STATE OF SOUTH CAROLINA

In the 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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On January 9, 2004 Haskell L. Hartfield, on behalf of his son Jon E. Hartfield, filed this action against Glenn McDonald d/b/a The Carolina Eight Ball Lounge & Grill, Inc., Shou Mei Morris, individually and as President of the Getaway Lounge & Grill, Inc. and the South Carolina Department of Transportation. Subsequently, the pleadings were amended to add Robert Cockrell, individually and d/b/a Williams Package Store as a defendant. Before trial the South Carolina Department of Transportation settled the claim by Mr. Hartfield and they were dismissed as a party to the suit.

The case was tried before the Honorable Larry R. Patterson and a jury on February 5-8, 2007. The trial court directed a verdict in favor of Robert Cockrell, d/b/a Williams Package Store. The jury returned a verdict in favor of the plaintiff against The Getaway Lounge and Grill, Inc. in the amount of $10,000,000. The jury was unable to reach a decision as to Glenn McDonald, d/b/a The Carolina Eight Ball Lounge & Grill. The trial judge, after a hearing, entered an order piercing the corporate veil and entered judgment against Shou Mei Morris, individually as well as the corporation.

Shou Mei Morris and The Getaway Lounge, Inc. filed a timely motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. This motion was denied by order dated February 22, 2007 and filed February 26, 2007. The Getaway Lounge and Grill, Inc. and Shou Mei Morris filed a Notice of Appeal on March 2, 2007.

STATEMENT OF THE FACTS

On July 11, 2007 Jon E. Hartfield was involved in a tragic automobile accident. The automobile in which he was riding collided head on with the automobile driven by Hoyt Helton, who was killed in the collision. Rec. on App. at 161, ll 21-24.. Mr. Hartfield was seriously injured and is totally disabled as a result of the injuries he suffered. The record established that the collision was the fault of Hoyt Helton.

The father of Jon E. Hartfield filed this action against three bars located in Greenwood County pursuant to South Carolina Code § 61-4-580. The evidence showed that at the time of the collision, Mr. Helton had a blood alcohol reading of .212. Rec. on App. at 216, ll 12-19. The testimony was that Mr. Helton arrived at Williams Package Store about 5 p.m. on the day in question. The testimony from all the witnesses, including those called by the plaintiff was that he consumed no alcohol at Williams Package Store. Rec. on App. at 73, ll 17-24. He stayed there until after 7:10 P.M.. Rec. on Appeal at 107, ll 12-15. He next went to the Getaway Lounge located a short distance away. Rec. on App. at 109, ll 15-19. Brad Harrison, testifying for the plaintiff, stated that he saw Mr. Helton at Williams Package Store and later saw him at the Getaway Lounge about 8 P.M. Mr. Harrison testified that when he arrived, Mr. Helton was drinking one beer and then had two others before he left. Rec. on App. at 109, ll 17-23. He stated that he left between 9 and 9:30 P.M.. As he was at home by 9:30 for that is when his girlfriend arrived home. He stated that both he and Mr. Helton left at about the same time. He stated that in his opinion Mr. Helton was not under the influence of alcohol and that if he had thought he were, he would have given him a ride home. Rec. on App. at 116, ll 20-24.

The witnesses for the Getaway testified Mr. Helton left before 8:30 P.M. Barry

Stennett, the bartender for the Getaway testified that he arrived at work shortly before eight to begin his shift. He saw Mr. Helton there when he arrived. A few minutes later he looked for Mr. Helton and he was not at the Getaway. Melissa Storey, who played karaoke at the Getaway, stated she saw Mr. Helton when she arrived but did not see him when she started playing karaoke at 9 P.M. Rec. on Appeal at 356, ll 7-25 to 359, ll 1-13. Other witnesses for the Getaway had Mr. Helton leaving before 9 P.M. . No witness testified that Mr.Helton was noticeably intoxicated while he was at the Getaway Lounge.

Tony Keller, the investigating officer, testified that he interviewed Brad Harrison by telephone shortly after the accident. He received the name from the bartender at the Getaway. The officer interviewed by telephone a witness for Carolina Eight Ball, Inc. The officer never met with any of the witnesses in person and apparently never took any steps to find and interview other witnesses who were present in both the Getaway and the Carolina Eight Ball Lounge. The officer stated that Mr. Harrison told him that he left the Getaway between 9:30 and 10 P.M. The various witnesses testified that Mr. Helton left the Getaway from as early as shortly after 8:00 P.M. until shortly before 9:30 P.M. No witness at trial testified that Mr. Helton left the Getaway after 9:30 P.M.

The witnesses next placed Mr. Helton at the Carolina Eight Ball Lounge at about 10:00 P.M. All witnesses testified he only stayed about five to ten minutes. He talked to his step brother. Rec. on App. at 344, ll 21-25. All the witnesses testified Mr. Helton did not display any visible signs of intoxication when he left the Carolina Eight Ball Lounge. The investigating officer also testified that Billy McDonald told him that Mr. Helton had one beer at the Carolina Eight Ball Lounge. Rec. on App. at 138, ll 16-18. This statement was denied by Mr. McDonald.

Rec. on App. at 323, ll 1-13. The wreck occurred about 35 to 40 minutes after the witnesses testified Mr. Helton left the Carolina Eight Ball. No one accounted for Mr. Helton's whereabouts from the time he left the Getaway until the time he arrived at Carolina Eight Ball nor from the time he left Carolina Eight Ball until the wreck.

Shortly before the wreck, when Mr. Helton was about one and one-half miles from the wreck he called his wife and left a message on his answering machine. She stated that her husband did not sound intoxicated on the answering machine message. Rec. on App. 78, ll 1-14. The officer testified as to a different opinion. Rec. on App. at 172, ll 21-25 to 140, ll 1-8. The tape was not introduced into evidence.

Dr. Brewer, a toxicologist testified that a person with a blood alcohol reading of .212 would be noticeably intoxicated to a lay observer. Rec. on App. at 221, ll 18-19. Over the objection of the defendants, he was permitted to testify by using extrapolation as to the probable blood alcohol level when Mr. Helton was at William Package Store if Mr. Helton only had three beers at the Getaway. Rec. on App. 258, ll 17-25 to 259, ll 1-2. He was further permitted to testify, over the objection of the defendant Getaway Lounge, as to whether Mr. Helton would have exhibited signs of intoxication when he was served beer at the Getaway. Rec. on App. at 255, ll 8-25 to 256, l l Dr. Brewer was also of the opinion that due to the fact that the alcohol reading from the ocular fluid was higher than from the blood, Mr. Helton was in the elimination phase at the time of the wreck. He estimated that being in the elimination phase meant that Mr. Helton had not consumed any alcohol for approximately 30 minutes before the wreck.

After the trial the trial court heard testimony as to whether the corporate veil should be pierced. At that hearing the defendant Shou Mei Morris testified that she had not been

actively involved in the day to day operations of the company for several years. The testimony further showed that the corporation had not been very profitable. The day to day operations of the business was conducted by the niece of Shou Mei Morris, Diane Bice. No testimony established that any funds have been siphoned off for the benefits of Shou Mei Morris or Diane Bice. After hearing the testimony, the trial judge ruled on February 22, 2007 that the corporate veil should be pierced and entered a judgment against Shou Mei Morris individually. The order was filed on February 26, 2007.

ARGUMENT

Question I

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 Hoylt 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?

Summary of Argument

The testimony by the plaintiff established that the whereabouts of Hoylt Helton was unknown for a period of from one hour and fifty minutes to one hour and twenty minutes before the wreck. The plaintiff failed to establish that no alcohol was consumed by Mr. Helton during this period of time. Thus, the extrapolation of a blood alcohol level of Mr. Helton was subject to speculation, conjecture and surmise.

Discussion

In an attempt to establish that the employees of the Getaway Lounge knew that Hoyt Helton was grossly intoxicated when he was served alcohol, the plaintiff used the testimony of Dr. William Brewer to establish the appearance of Mr. Helton at the Getaway Lounge. Rec. on App. at 255, ll 8-25 to 256, ll 1-8; 257, ll 5-25 to 258, ll 1-16. This was notwithstanding the facts that Dr. Brewer admitted that he had no knowledge as to whether Mr. Helton had anything to drink after he left the Getaway Lounge. Rec. on App. at 281, ll 5-12; 283, ll 17-25.

Getaway Lounge contends that this evidence was not admissible as it was speculative at best. The Getaway Lounge does not contend the extrapolation as such is not

admissible. Indeed, as argued at the court below, if an accident occurred within minutes of leaving the club then extrapolation serves the purpose of aiding the jury in determining if the person were visibly intoxicated at the time he left a bar minutes before. *See, e.g. El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987)(holding that signs of intoxication at accident scene which was minutes of location of bar admissible to show intoxication at the bar) *See, also, Bruce v. K.K.B., Inc.* 52 S.W.3d 250 (2001)(permitting expert testimony as to signs of intoxication while in bar when wreck occurred within ten minutes of leaving the bar) But those are not the facts of this case.

The testimony in this case is conflicting as to when Mr. Helton left the Getaway. Even plaintiff's counsel admitted the time variance could have been from 9:00 until 10:00. Rec. on App. at 255 ll 8-13. And another time stated Mr. Helton could have left at 8 P.M. Rec. on App. at 256 l 12-13. What the plaintiff is asking the jury to do is speculate as to a fact that the plaintiff has not proven. And that fact is did Hoyt Helton drink anything between the time he left the Getaway and the time of the wreck. On this issue the Plaintiff offered no proof. And he asked the expert to assume as true a fact not proven. When an expert assumes a fact not proven, then the opinion is based upon speculation.

The Courts of South Carolina have held that an expert may testify as to his opinion but his opinion must be based upon facts proven at trial. *Gathers by and through Hutchinson v. South Carolina Electric & Gas Co.*, 311 S.C. 81, 427 S.E.2d 687 (1993). In this case the plaintiff offered no evidence as to what Mr. Helton had to drink from 9:00 P.M. until the wreck at 10:50 P.M. Without any such proof, the plaintiff's counsel ask the expert to assume Mr. Helton had not consumed any alcohol after he left the Getaway except for one beer.

consumed at the Carolina Eight Ball Lounge. As this Court said in *Gathers* "The hypothetical question must be based on facts supported by the evidence." *Id.* at 82, 427 S.E.2d at 688. The plaintiff has the burden of establishing sufficient facts for his expert to offer an opinion. In this case the plaintiff did not establish sufficient facts for the expert to give an opinion as to the sobriety of Mr. Helton when he was at the Getaway Lounge.

Even the trial judge admitted there was no evidence as to when Mr. Helton consumed the alcohol. As he stated "I don't know where he dranked, dranked in the car, dranked at home, nobody knows, the jury can't guess about it, he can't speculate on it." Rec. on App. at 249, ll 3-9. But Dr. Brewer did in fact speculate as to when Mr. Helton left and when he drank. The end result of the admission of the expert testimony was to say to the jury that Mr. Helton consumed no alcohol after he left the Getaway Lounge when there was no evidence of that fact.

In *Beaulieu v. The Aube Corp.*, 796 A.2d 683 (2002) the Supreme Judicial Court of Maine held that visible evidence of intoxication about one and a half hours after leaving the restaurant building was not sufficient to establish that the patron was intoxicated at the time he was served. As the Court said "Furthermore because the specific time of events preceding the accident is unclear, an hour and a half or more may have lapsed between the service of wine and Sparda's [a witness at the scene] observation. . . . In light of the potential gap between Sparda's observations and the service of wine, a link between the two points in time is tenuous at best and therefore cannot provide the foundation for a conclusion that Crabtree [the patron] exhibited visible signs of intoxication when he was served." *Id.* at 691-692.

The cases that have ruled upon the admissibility of evidence of a person's intoxication at the time of a wreck to prove the person was visibily intoxicated at the time he was

served appear to be decided based upon how recent the wreck was from the time the person left the establishment where he was drinking. If the wreck is a matter of a few minutes, such evidence is admissible. If the time is an about an hour or more it is not admissible. Under the facts of this case as the time variance between the time he left the Getaway until the wreck is so tenuous, the evidence from the expert as to the signs of intoxication exhibited by the deceased at the time he was at the Getaway should have been excluded.

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?

Summary of the Argument

The plaintiff failed to establish any direct proof of the intoxication of Hoyt Helton at the time he was in the Getaway Lounge. The burden of proof is upon the plaintiff to establish that Mr. Helton was visibly intoxicated at the time he was served alcohol by employees of the Getaway. Merely being intoxicated over an hour after leaving a club is insufficient evidence to establish a claim against the Getaway.

Discussion

Alleged liability in this case is established under South Carolina Code of Laws § 61-4-580. The act prohibited by this statute is to "knowingly . . . sell beer or wine to any person while the person is in an intoxicated condition." The statute is not a strict liability statute but must contain some degree of knowledge on the part of the defendant. In *Daley v. Ward*, 303 S.C.

81, 399 S.E.2d 13 (Ct. App. 1990) this Court recognized that the type of knowledge required under the statute is not "knew or should have known." To violate the statute the person must have "such information, from his appearance or otherwise, as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring knowledge of that fact home to him , then the sale was made knowingly." *Id.* at 86, 399 S.E.2d at 15.[1]

Under the facts in this case the plaintiff established no evidence that the employees of the Getaway Lounge knew Hoyt Helton was intoxicated or that there were facts which would bring home to them a duty to make inquiry. Brad Harrison, who testified for the plaintiff, testified that he had known Hoyt Helton for two years prior to his death. Rec. on App. at 102, ll 7-8. He was with Mr. Helton at the Williams Package and South Point Pub and did not see him consume any alcohol at that establishment nor did he appear to be intoxicated. Rec. on App. at 107, ll 2-24. He next saw Mr. Helton at the Getaway about 8 P.M. and was with him until about 9 or 9:15 P.M. Rec. on App. at 109, 15-25. He stated that Mr. Helton had one beer when he arrived and two others after he arrived. Rec. on App. at 88, ll 9-16. They left at the same time. Rec. on App. at 120, ll 18-25. He stated that Mr. Helton did not appear to be intoxicated in any manner. Rec. on App. at 111, 6-20; 116, ll 3-19. He further stated that if he had believed that Mr. Helton had consumed too much alcohol, he would have given him a ride home. Rec. on App. at 116, ll 20-24.

The wife of Mr Helton testified that on the evening of the wreck her husband left a message on the answering machine and he did not sound intoxicated to her. Rec. on App. at

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[1] While the case cited by the Court in *Daley* involved a minor, the same standard was applied in the case of an intoxicated patron.

78, ll 1-14. She further stated that he was known to frequent four bars only two of which were involved in this action. Rec. on App. at 71, ll 3-8.[2] She further said that the Getaway had on occasions called her to pick up her husband if he had consumed too much alcohol Rec. on App. at 77, ll 4-11.

Robert Cockrell, the co-owner of Williams Package and South Point Pub was called by the plaintiff to testify. He confirmed that Mr. Helton had nothing to drink at his place of business on the afternoon in question. No witness who had first hand knowledge about the condition of Mr. Helton on the day in question, whether the witness was called by the plaintiff or defendant, testified that Mr. Helton was under the influence at the time he was in the Getaway or any time prior to his arrival at the Getaway. The only source of any information concerning the alleged intoxication of Mr. Helton at the Getaway, came from the plaintiff's expert, Dr. William Brewer.

In *Sorensen v. Denny Nash, Inc.*, 249 A.D.2d 745, 671 N.Y.S.2d 559 (Sup. Ct. App. Div. 1998) the court found that expert testimony concerning the intoxication of a bar patron several hours before the wreck was not sufficient to carry the case to the jury. The court said "In short, Hubbard [the plaintiff's expert] does no more than infer that because Slater consumed a certain amount of alcohol throughout the evening and early morning hours and exhibited signs of intoxication at 3:15 A.M., he must have been intoxicated during a period of time three hours before and, more importantly, appeared so." *Id.* at 748, 671 N.Y.S.2d at 561. The same is true in this case. Dr. Brewer did nothing more than assume facts not proven and conclude that Mr.

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[2] Two of the bars he frequented, Lucky's and Simon's, were in the same vicinity as the Carolina Eight Ball. Rec. on App. at 77, ll 12-25

Helton must have been intoxicated at a time from one hour fifty minutes to one hour twenty minutes before the wreck, Mr. Helton must have been intoxicated and must have been visibly so. This is simply insufficient under the facts of this case to carry the case to the jury.

South Carolina does not have a large number of cases that develop the law concerning liability for a business that sells alcohol. The only case to discuss in detail the law concerning the liability of a business to a third party is *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990). The facts of this case do not compare to the facts in *Daley*. In *Daley* the plaintiff was able to establish the driver had left the Windjammer Club only 15 to 20 minutes earlier. The driver testified that he consumed nine beers over a period of four or five hours. He further testified he was intoxicated. Thus in that case, while the bartenders testified they did not believe the driver was intoxicated sufficient evidence was present to submit the case to the jury.

The requirement to establish liability is not that a business sold some alcohol to a patron nor is it that the business sold sufficient amount of alcohol to make the patron legally intoxicated. Liability is imposed only when the plaintiff can establish that the business *knowingly* sold alcohol to a person they knew to be intoxicated. In this case the plaintiff did not present any evidence that would permit a jury to make such a finding.

In *McGuiggan v. New England Telephone and Telegraph Co.*, 398 Mass. 152, 496 N.E.2d 141 (Sup. Jud. Ct.1986) the court held that a social host may be liable for the actions of their guests who are served alcoholic beverages while visibly intoxicated. But the proof must do more than establish a high alcohol level even a few minutes after leaving the residence. The court said "Inherent in what we have said is a rejection of the claim that evidence of Magee's [driver of the car] blood alcohol content raises a dispute on a material fact. The doctor's affidavit

might be thought to raise a factual dispute as to what Magee's apparent condition was just before he left the McGuiggnas [the social hosts]. We need only say that the record does not raise a dispute on any material fact concerning what the McGuiggans knew or reasonably should have known about Magee's sobriety at any relevant time." *Id.* at 162, 496 N.E.2d at 146-147. The affidavit of the expert opined that the driver's blood alcohol at the time he left the party was between .185 and .215.

In *Kirby v. Morales*, 50 Mass. App. Ct. 786, 741 N.E.2d 855 (2001) the plaintiff sought to use an expert to testify as to the degree of intoxication by the driver at the restaurant he left before the wreck. In holding the decision of the lower court to direct a verdict against the plaintiff was proper, the court said "Here, the evidence was uncertain as to the time which elapsed between the accident and the last beer imbibed by Morales [the driver] at the lounge and the amount of alcohol consumed by Morales during that unknown period." *Id.* at 793, 741 N.E.2d at 861. The court then further concluded "A tavern keeper's 'negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.' . . . Because there was no evidence that an employee of the Lounge served Morales excessive amounts of alcohol, or continued to serve Morales after he appeared to be intoxicated, we conclude that there was not sufficient evidence from which a rational jury could infer that the Lounge was aware of Morales state of intoxication." *Id.* at 794, 741 N.E.2d at 861. *See, also, Barrie v. Hosts of America, Inc.*, 94 Wash2d 640, 618 P.2d 96 (1980)(holding that blood alcohol level of .29 two hours after leaving the bar did not create a factual issue as to condition of patron while at the bar.)

The plaintiff may complain that the requirement to establish the obvious intoxication of the patron is too great. That is not the case. An establishment that sells alcohol is

not a guarantor of the conduct of patrons who consume alcohol on the premises and then leave. The burden is upon the plaintiff to establish more than the fact that the patron was intoxicated or even grossly intoxicated. The plaintiff must establish that a particular patron was in fact visibly intoxicated at the time the business served him an alcoholic beverage. To permit the plaintiff to establish that a considerable time later a patron was in fact intoxicated permits a jury to find liability based upon speculation and conjecture. The plaintiff must do more than establish that something is possible to create liability. The plaintiff must prove it is probable to tilt the scales in his favor.

QUESTION III

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

Summary of Argument

Before a business is liable under the statute the plaintiff must prove that the patron is visibly intoxicated. The statutory inference created for the criminal statute does not concern or relate to visible intoxication. To charge the jury that they may infer the patron was under the influence at .10 was misleading to the jury and lessened the degree of proof placed upon the plaintiff.

Discussion

Before the charge to the jury the trial judge discussed the proposed charges with counsel. Rec. on App. at 422, ll 21-25 to 423, ll 1-24. After the jury was charged defense counsel renewed his objection. Rec. on App. at 439. Defense counsel again raised the issue in his post trial motion. Rule 59 Motion, para. 1. The charge of an inference of being under the

influence in a criminal case has no bearing in a civil case where the issue is not the driving ability of the deceased, but whether the deceased was visibly intoxicated when he left the Getaway Lounge. Also, the charge erroneously gave the impression to the jury that they may infer that Hoyt Helton was under the influence if his blood alcohol reading was over .10% and therefore persons who served him alcohol should have known he was under the influence.

The question before the jury was whether Hoyt Helton was visibly intoxicated at the time he left the Getaway Lounge. Whether Mr. Helton was under the influence to the extent he was not able to legally operate an automobile is a separate question distinct from the question the jury had to answer. No case in South Carolina addresses this issue and few in other states have addressed it. In *Suskey v. Loyal Order of Moose Lodge # 86*, 325 Pa. Super. 94, 472 A.2d 663 (1984) the Superior Court of Pennsylvania ruled that a trial court did not err in refusing to charge to the jury the statutory presumption law as to alcohol levels. As the court said "[A] person with a breathalyzer indicant of 0.11 for example, may *or* may not be visibly intoxicated. The relationship between legal intoxication in re: competency to operate a motor vehicle and visible intoxication is simply too attenuated to support a mandatory application of the presumption under § 1547 to a civil case requiring proof of visible intoxication." *Id.* at 100, 472 A.2d at 666.

In addition, *State v. Carrigan*, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985) supports the position of the Getaway Lounge. When the blood alcohol result was introduced, the plaintiff never attempted to prove that the blood was taken pursuant to the requirements of S. C. Code § 56-5-2950. Under *Carrigan*, the failure to establish that the blood was taken in compliance with the requirements of the implied consent statute renders the inferences arising

from the statute inadmissible. In holding the lower court erred in charging the inferences, this Court said "It does not appear from the evidence that the test administered to Carrigan was at the direction of the law enforcement officer who arrested him, as required by subsection (a). Neither does it appear that the test was administered by a person trained and certified by the South Carolina Law Enforcement Division, using methods approved by that agency, as also required by subsection (c)." *Id.* at 615-616, 328 S.E.2d at 122.

The same is true in this case. The arresting officer testified that he was not present when the blood sample was taken. It was taken at the coroner's officer but the record did not establish who the person taking the blood was. The statute provides "Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED." The record does not establish that whoever took the blood complied with proper SLED procedures. Rec. on App. at 164, ll 9-15.

As the plaintiff did not establish that the blood sample taken complied with SLED regulations, the trial court erred in charging the inference.

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 ?

Summary of the argument

S. C. Code § 61-4-580 is not violated only by knowingly selling alcohol to an intoxicated person. The server must know the patron was intoxicated at the time of the sell. To

establish a knowing violation, the patron would have to have been visibly intoxicated for the server to violate the statute.

Argument

a. Visibly intoxicated

The Getaway Lounge requested a simple charge to explain to the jury what burden was placed upon the plaintiff to establish its case. The charge was requested to emphasize the fact that simply being intoxicated was not a violation of the law. On that issue the Getaway Lounge requested that the judge charge the jury as follows: "Before you can find the defendant liable, the plaintiff must prove that Hoyt Helton was visibly intoxicated." This request was denied by the trial court.

The Getaway contends that this request was proper. The statute is not violated by selling alcohol to an intoxicated person. The statute requires that the sell of alcohol to a patron be knowingly made which requires knowledge that the person was visibly intoxicated not knowledge that the person had been drinking and may be intoxicated.

South Carolina does not have what is commonly called a "Dram Shop Law." The liability is imposed under S. C Code § 61-4-580. The question is should South Carolina impose a standard of visible intoxication to find liability under that section. Most states either through the wording of their Dram Shop statute or by applying common law principles impose standard that either require visible intoxication or the virtual equivalent. *See, e.g. Alaniz v. Rebello Food & Beverage, L.L.C.*,, 165 S.W.3d 7 (Tex. App. Houston 2005) (plaintiff must prove patron was obviously intoxicated under Tex. Alco. Bev. Code § 202(b)(1)); *Kirby v. Morales*, 50 Mass. App. Ct. 786, 793, 741 N.E.2d 855, 861 (2001) ("[N]egligence lies in serving alcohol to a person who

already is showing discernible signs of intoxication."); *Sorensen v. Denny Nash, Inc.*, 249 A.D.2d 745, 671 N.Y.S.2d 599 (Sup. Ct. App. Div. 1998) (plaintiff must prove patron was visibly intoxicated under N. Y. Alcoholic Beverage Control Law § 65[2]); *McGuiggan v. New England Te. & Te. Co.*, 398 Mass. 152, 496 N.E.2d 141 (Sup. Jud. Ct. 1986) (imposing common law obligation on social host for liability if guest is obviously intoxicated and host knew or reasonably should have known guest was grossly intoxicated); *Suskey v. Loyal Order of Moose Lodge # 86*, 325 Pa. Super. 94, 472 A.2d 663 (1984) (plaintiff must prove patron is visibly intoxicated under 47 P.S. § 4-493(1))

As noted in the discussion of Question II above, the South Carolina statute is violated only when an establishment knowingly sells alcohol to an intoxicated person. The requirement under the state is not that the establishment make a knowing sell, but that the establishment know the patron is intoxicated. This would required that the patron have some appearance of intoxication. In *Daley* the plaintiff had requested a charge that stated "To prove a violation of the statute I previously read to you, the Plaintiff must prove that the Defendant's 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 plaintiff's position that such a charge was proper under South Carolina law, this Court held "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.* In reversing the judgment for the defendant this court then concluded "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." *Id.* at 87, 399 S.E.2d at 16 (emphasis added). Thus this Court recognized that before liability could be imposed the patron had to be visibly intoxicated. The trial Court erred in failing to give the charge requested by the Getaway Lounge.

B. High alcohol reading

The second part of the requested charge was that a high alcohol reading alone is not sufficient to find an establishment liable. In *Sorrensen*, the court acknowledged this fact when it said "It is beyond cavil, however, that proof of a high alcohol count in an individual served alcohol does not, without more, provide a sound basis for drawing inferences about that person's appearance or demeanor." *Sorrensen*, at 747, 671 N.Y.S.2d at 561.

The logic behind such a statement is obvious. People react to alcohol differently. As the test is not whether the patron was intoxicated, but rather was the patron visibly intoxicated, a blood alcohol reading by itself is meaningless. While the plaintiff did have an expert to testify, the jury still needed to be cautioned not to rely upon a high blood alcohol to the exclusion of other evidence.

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)?

Summary of the Argument

In *Daley* this Court specifically rejected a "should have known" standard for liability of a patron who consumes alcohol on the premises of an establishment licensed to sell alcohol. The record contains no direct evidence Hoyt Helton was visibly intoxicated when he was in the Getaway Lounge. The improper charge was, therefore prejudicial to the Getaway Lounge.

Argument

The trial judge charged the jury that the plaintiff had to prove "that the employees of that business that sold the alcohol knew or should have known he [Hoyt Helton] was intoxicated." Rec. on App. at 427, ll 19-21. The Getaway Lounge made a proper objection to the charge. Rec. on App. at 408, ll 1-25 to 410, ll 1-16; 439, ll 7-9; Rule 59 Motion, paragraph 4.

To charge the jury that Getaway is liable if its employees "should have known" Hoyt Helton was intoxicated lessens the proof required under the law of South Carolina. Should have known would impose a negligence standard for a violation that requires that it be made knowingly. *See*, S.C. Code 61-4-580. To permit the jury to decide liability based upon what a server should have known would imply that if they are merely negligent in their observations of the patron, liability is imposed. Under the *Daley* case liability is imposed only if the server is negligent in interpreting the observations. For example, if a patron is seated during the entire time he is in the bar, a server would have limited opportunities to observe the patron to interpret if he is indeed visibly intoxicated. While one could argue the server after serving several beers is negligent in failing to require the patron to perform some sobriety tests to determine if the patron is under the influence, such is not the law. If the tests had been performed, the server would have known the patron was intoxicated and therefore the server should have known. But that is not

the law in South Carolina.

If a server negligently fails to observe a visibly intoxicated patron because they simply did not look or were preoccupied in talking to other customers at the table, then liability would be imposed under our statute. A server may not use blinders to fail to observe the visibly intoxicated patron, but the server is under no obligation to take affirmative steps to determine the sobriety of the patron prior to or while serving the patron. As this Court in *Daley* noted, it is the visibly intoxicated patron that imposes liability not the patron who may be intoxicated but has no visible signs of the intoxication. The charge to the jury given by the trial court permitted the jury to find liability based upon a pure negligence standard not negligence in failing to observe a visibly intoxicated patron.

Had the trial judge given the charge requested as to the requirement that the patron must be visibly intoxicated, then the plaintiff could argue this charge is harmless. With a visible intoxication charge, the "should have known" charge arguably would have focused the jury on the question of was the server negligent in failing to observe the visible signs of intoxication not whether the server was negligent in failing to determine if the patron was intoxicated.

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?

Summary of the Argument

The plaintiff failed in his burden of proving the fundamental unfairness in recognizing the corporate entity The Getaway Lounge and Grill, Inc. Without a finding of fundamental unfairness, even the failure to observe all corporate formalities does not justify piercing the corporate veil. The trial court erred in piercing the corporate veil in this case.

Argument

The testimony at the post trial hearing shows that the Getaway Lounge and Grill, Inc. was incorporated in 1992. Shou Mei Morris was the president and her niece, Diane Bice was the vice-president. Rec. on App. at 458, ll 9-17. The corporation was a non-profit established to operate a lounge. Rec. on App. at 464, ll 1-14. As such it was able to operate seven days a week.

Ms. Morris testified that in about 2000 she ceased to be an active participant in the lounge and turned the day to day operation of the lounge over to her niece Diane Bice. Rec. on App at 470, ll 18-22. After 2000 only Diane Bice could sign checks on the account. Rec. on App. at 6-10. The charter for the corporation is still active and has not been revoked. Rec. on App at 470, ll 8-13. The corporation also complied with all Department of Revenue regulations. Rec. on App. at 473, 16-18. For the years 2003 through 2005 the gross income of the corporation was slightly over $200,000. Rec. on App. at 475, ll 8-25 to 476, ll 1-9. Diane Bice received a salary from the corporation of about $20,000 per year. Defendant's Exhibits 2,3,4.

The testimony further established that in 2000 Ms. Morris rented her house to a tenant while she was out of town and many records were thrown away. Rec. on App. at 468, ll 11-15. The plaintiff issued a subpoena to the accountant for the corporation. He received the income tax returns for the years 2003 through 2005. Rec. on App. at 462, ll 10-14. The

accountant did not testify. No testimony at the hearing established that any monies from the corporation were siphoned off to either of the officers. The corporate meetings were informal and actual minutes were not taken. Rec. on App. at 486, ll 22-25 to 487, ll 1-3.

To pierce the corporate veil, the law requires more than for the plaintiff to establish that the corporation has failed to comply with corporate formalities. *Mid-South Management Co., Inc. v. Sherwood Developement Corp.*, 374 S.C. 588, 649 S.E.2d 135 (Ct. App 2007). The court may disregard the corporate form only when equity requires that the corporate form be disregarded. *Hunting v. Elders*, 359 S.C. 217, 597 S.E.2d 803 (2005). The Courts of South Carolina have also recognized that with closely held corporations, the factors recognized in *Sturkie v. Sifly*, 280 S.C. 394, 396 S.E.2d 316 (Ct. App. 1984) have less importance. *Hunting*.

In this case, the facts establish that a valid corporation was established in 1992 and has operated with a valid charter since that date. Thus, the plaintiff bears the burden of establishing that the facts and equity require that the corporate entity be disregarded. The court has divided the analysis of piercing the corporate veil into two prongs. The first prong is to look at eight factors and whether the dominate stockholder observed those factors. The second prong is to determine if the failure to pierce the corporate veil would result in fundamental unfairness.

As the plaintiff has failed to establish any facts sufficient to establish the second prong, the defendant would examine it first. In *Hunting* this Court determined that to establish fundamental unfairness, the party seeking to pierce the corporate veil must "[E]stablish that the defendant was aware of the plaintiff's claim against the corporation and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard to the property of the corporation and in disregard of the plaintiff's claim in the

property." *Hunting*, at 228, 597 S.E.2d at 809. Arguably the plaintiff became aware of a possible claim shortly after the accident when the highway patrol officer contacted the Getaway Lounge concerning the accident. Although there is no indication that the officer told anyone at that time that Mr. Helton was intoxicated at the time of the wreck. The record contains no testimony as to any self-dealing by Shou Mei Morris after the date of the accident. In fact the record establishes that for years before the wreck, Ms. Morris had very few dealings as an officer of the corporation. The dominate shareholder both before and after the wreck was Diane Bice. Ms. Bice was running the day to day activities of the business and was the sole signatory on the checking account.

In *Hunting*, this Court noted that after Mr. Elders knew of the possible claim, "[H]e nevertheless acted in a self-serving and unfair manner by siphoning off substantial sums of money, commingling and transferring assets which he held in his own name to different entities, transferring stock in the corporation to other individuals without a valuable consideration, and then finally dissolving the corporation." *Id.* at 229, 597 S.E.2d at 809. No such facts even remotely exist in this case. The evidence does not establish that Ms. Morris siphoned off any funds, dissolved the corporation or took any action as it relates to the corporation.

As this Court said in *Mid-South Management Co.*, "The main purpose of piercing the corporate veil is to prevent the likelihood of injustice or unfairness if the corporate entity is sustained." *Id.* at 599, 649 S.E.2d at 141. If a stockholder has siphoned off substantial assets that could be used to pay a judgment then one can argue that injustice has been created that would justify piercing the corporate veil. The burden is upon the plaintiff. The plaintiff has offered no proof that any corporate funds have been siphoned off by Shou Mei Morris. Since

2000 she has not even had the right to sign checks on the corporation. She has not been the dominate stockholder. The plaintiff has simply failed to show how holding Shou Mei Morris personally liable for the debt of a corporation to which she was not the dominate stockholder would be unjust to the plaintiff.

The mere fact that the corporation does not have assets to pay the substantial judgment rendered in this case does not mean it is unfair or unjust to the plaintiff to not pierce the corporate veil. Such a finding can only be made when the dominate stockholder has taken steps to line their pocket with corporate funds that could have been used to pay the judgment. The record is devoid of any such evidence in this case.

CONCLUSION

For the foregoing reasons the defendants request that this Court reverse the judgment in this matter on the ground that the facts are not sufficient to sustain the verdict, reverse and remand this matter to the lower court for a new trial and to hold that the plaintiff has failed to establish a proper basis for piercing the corporate veil.

February 8, 2008

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THE STATE OF SOUTH CAROLINA

In the 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final 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, a copy of the Certificates of Counsel 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 Hartley
(Notary Public for South Carolina)
My Commission expires: 2/13/08

THE STATE OF SOUTH CAROLINA

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Sandy Traynham

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

Mary Jane Harden
(Notary Public for South Carolina)
My Commission expires: 1/24/13