STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	CASE NOS. 2014-CP-38-802, -803
	)	
Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S RULE 59(e), SCRCP, MOTION TO RECONSIDER, ALTER, OR AMEND**
v.	)	
	)	
Green Apple, LLC, doing business as Applebee's, John/Jane Doe, Manager, and Stabler L. Inabinet	)	
	)	
Defendants.	)	

Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore, ("Plaintiff") moves this Court under Rule 59(e), SCRCP, to reconsider, alter, or amend its August 3, 2015 Order granting Green Apple, LLC's ("Green Apple") motion for summary judgment. This Motion is based on the memorandum of law below and exhibits filed along with this Motion, the pleadings, and applicable law, as well as any other evidence or memorandum of law that Plaintiff may submit to the Court at or prior to a hearing on this Motion. For the reasons stated below, Plaintiff requests the Court reconsider its Order and deny Green Apple's motion.

STANDARD

"For summary judgment purposes, a court must view the facts in the light most favorable to the non-moving party." *Metts v. Mims*, 384 S.C. 491, 500, 682 S.E.2d 813, 818 (2009). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Moore v. Weinberg*, 373 S.C. 209, 216, 644 S.E.2d 740, 744 (Ct. App. 2007) (internal citation

omitted). "Generally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause." *Folkens v. Hunt*, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct. App. 1986).

BACKGROUND

On October 18, 2012, Green Apple, employed Shaun Robert Moore at Applebee's Restaurant in Orangeburg, South Carolina. (Am. Cmplt. ¶ 6; Ans. of Green Apple ¶ 5). Mr. Moore began his shift around 4:30 pm. (Aff. of Johnson, ¶ 4). After observing Mr. Moore consume alcohol while at work, Green Apple terminated his employment prior to the end of his shift and forced him to leave the premises. (Am. Cmplt. ¶ 7; Ans. of Green Apple ¶ 5). Plaintiff alleges, due to Mr. Moore's employment relationship with Green Apple for a number of months, Green Apple knew Mr. Moore had no form of transportation and no cellphone, and lived approximately 15 miles from the restaurant. (Am. Cmplt. ¶ 8). After Green Apple forced Mr. Moore to leave the premises in an intoxicated state, Defendant Inabinet's vehicle struck and killed Mr. Moore, a pedestrian, on U.S. Highway 421. (Am. Cmplt. ¶ 9; Ans. of Green Apple ¶ 5).

On August 5, 2014, Plaintiff filed Amended Complaints asserting wrongful death and survival actions against Defendants. Plaintiff asserted a negligence action against Green Apple based on its failures to maintain proper policies for intoxicated persons on its premises, to operate a licensed drinking establishment properly, to call a cab for Mr. Moore, and for forcibly removing Mr. Moore from the premises without transportation. (Am. Cmplt. ¶ 11).

On March 19, 2015, Defendant Green Apple, LLC, filed a motion for summary judgment with two bases—(1) South Carolina does not recognize a first party dram shop cause of action and (2) Green Apple did not sell alcohol to Mr. Moore. (Mot. p. 1). On May 20, 2015, Plaintiff filed

a Motion to Compel discovery responses from Green Apple and John/Jane Doe, Manager. Despite Plaintiff's service of a spoliation letter to Green Apple, Plaintiff never received Mr. Moore's personnel file and is advised "that personnel file no longer exists," leaving Green Apple in a superior position as to important evidence at the time of its summary judgment motion. (**Exh. 1**, Tr. p. 28 lns. 10-18). Plaintiff explained to the Court that she did not take any depositions prior to the hearing because she was waiting to receive full discovery responses from Green Apple. (Exh. 1, Tr. pp. 14, 19).

The Court held a hearing on Green Apple's motion for summary judgment on June 1, 2015.[1] At the hearing, Plaintiff argued the motion for summary judgment is not ripe due to the outstanding motion to compel and the fact that no depositions occurred as of the hearing date. (Exh. 1, Tr. pp. 12, 14-16, 19, 28-29, 33). Plaintiff presented the affidavit of Elizabeth A. Trendowski, a founder of Dram Shop Forensics, LLC, and person with "extensive education, training, and experience in the field of hospitality, including restaurant and bar operations teaching safe alcohol service, bar operations, [and] managing establishments." (**Exh. 2**, Aff. of Trendowski).[2] Plaintiff's counsel explained to the Court that her case is not a dram shop liability case pursuant to South Carolina statutes but, instead, is a general negligence case. (Exh. 1, Tr. p. 28, 32-33). Ms. Trendowski's affidavit states:

> At the time Mr. Moore was fired, he was grossly intoxicated and unable to make safe decisions.
>
> Mr. Moore was forced to leave the Applebee's premises without any alternatives to safely transport him home.
>
> Mr. Moore lived approximately 15 miles away.

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[1] Defendant Inabinet filed a motion for summary judgment, which the Court also heard on June 1, 2015.

[2] Plaintiff also presented the Court with the affidavit of accident reconstruction expert David Hill.

Mr. Moore was unable to physically walk home in a safe manner due to his gross intoxication.

Applebee's was ***negligent*** in failing to find alternative transportation for Mr. Moore to safely get home.

Applebee's failed to take ***reasonable*** steps to protect Mr. Moore from ***foreseeable*** danger and to ***exercise reasonable care*** by allowing Mr. Moore to walk 15 miles in a grossly intoxicated condition.

Applebee's had notice of the dangerous condition they put Mr. Moore in by identifying his grossly intoxicated condition. . . .

This matter is a general liability case based upon my education, knowledge and experience in the hospitality industry.

Based on the information provided to me, it is my opinion that Applebee's was ***negligent in this matter of general liability*** and as such did not meet the industry standard of care.

(Exh. 2, Aff. of Trendowski) (emphasis added). At the time of the hearing, Plaintiff did not have Mr. Moore's personnel file or the requested policies and procedures from Green Apple. (Exh. 1, Tr. p. 28, 30).

On August 3, 2015, the Court signed an Order granting Green Apple's motion for summary judgment. (**Exh. 3**). Plaintiff received a copy of the filed Order via email on August 19, 2015. This Motion to Reconsider is timely filed.

In its Order, the Court made two rulings: (1) South Carolina does not recognize a first party cause of action against a tavern owner for injuries sustained by an intoxicated person and (2) dram shop liability arises only when the plaintiff alleges the defendant sold alcohol to the plaintiff, which Plaintiff in this action did not allege. The Court did not address or rule on Plaintiff's arguments regarding incomplete discovery or the proper characterization of this case as a general negligence action rather than a dram shop liability action. Plaintiff moves the Court to reconsider and alter its Order for the reasons stated below.

ARGUMENT

I. Discovery is Not Complete

The Court's Order does not address Plaintiff's argument that summary judgment is inappropriate because discovery is not complete. (Exh. 1, Tr. pp. 12, 14-16, 19, 28-29, 33). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (internal quotation marks and citation omitted); *see also Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (holding "the trial court abused its discretion in granting summary judgment before Doe had a full and fair opportunity to complete discovery").

Plaintiff promptly served discovery requests on Green Apple on October 24, 2014. (Mot. to Compel). Green Apple did not serve any response until March 25, 2015. (Exh. A to Mot. to Compel). Green Apple filed its motion for summary judgment on March 19, 2015, six days prior to responding to Plaintiff's discovery requests. (Mot. p. 1). At the hearing, Plaintiff argued summary judgment is premature because written discovery is incomplete and, consequently, the parties have yet to take a deposition in this case. (Exh. 1, Tr. pp. 14, 19). The Court did not rule on this argument.

Plaintiff demonstrated that further discovery will uncover additional evidence relevant to the issue of Green Apple's liability in this case. (Exh. 1, Tr pp. 29-31). Plaintiff stated at the hearing that Green Apple failed to produce Mr. Moore's personnel file and that "[t]here are witnesses who will testify that they didn't see [Mr. Moore] make the phone call. They saw him get forced to leave the premises." (Exh. 1, Tr. p. 29 lns. 15-17). Plaintiff also stated that Sandra

Johnson, an assistant manager who took part in Mr. Moore's termination, received low scores on her alcohol training, which raises a question as to her credibility. (Exh. 1, Tr. p. 31). Plaintiff presented the expert affidavit of Ms. Trendowski, who opined "that Applebee's was negligent in this matter of general liability and as such did not meet the industry standard of care" and stated her opinion is "subject to change if additional information becomes available." (Exh. 2).

The Court erred by not considering Plaintiff's argument that summary judgment is premature because discovery is incomplete.

II. This is a General Negligence Action, Not a Dram Shop Liability Action

The Court's holdings are based on an incorrect characterization of this case as a dram shop liability action. Plaintiff alleges a general negligence action. These two causes of action are legally and factually distinct. The Order does not address Plaintiff's argument that the case should be analyzed as pled—as a general negligence action—rather than as Green Apple improperly characterizes it—as a dram shop liability action. *See, e.g.*, *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 627 (D.S.C. 2006) ("It is well established that the plaintiff is the master of his complaint.") (internal quotation marks omitted); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, Op. No. 27532, 24 (Sup. Ct. June 17, 2015) (Shearouse Adv. Sh. No. 23) ("The effect of this order is to prevent the Morrows from being ***architects of their own complaint***, and deprives them of bringing their case against the defendant of their own choosing." (emphasis added)); *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) ("It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.").

Dram shop liability originates in the Courts "recognizing a private cause of action for a ***violation of . . . statutes***" that prohibit the ***sale*** of alcohol to ***an already intoxicated person***. *Tobias v. Sports Club*, 332 S.C. 90, 92, 504 S.E.2d 318, 319 (1998) (citing S.C. Code Ann. §§ 61-4-

580(2), 61-6-2220) (emphasis added). A dram shop action "[i]mpos[es] liability on a tavern owner for ***continuing to serve an intoxicated person*** who later injures others." *Id.* at 92, 504 S.E.2d at 319 (emphasis added). "Dram shop liability is based on ***statutory duties*** imposed on establishments licensed to sell alcoholic beverages that prohibit them from serving minors or intoxicated persons." Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action § 15.C.1, 118 (4th ed. 2009) (emphasis added).

Plaintiff's action is not based on statutory duties or allegations that Green Apple sold or continued to serve Mr. Moore after he became intoxicated. Plaintiff's action alleges Green Apple was negligent in forcing a person it knew to be intoxicated to leave the premises with no transportation, cell phone, or other means to get to a home Green Apple knew is located 15 miles from the restaurant. (Am. Cmplt ¶ 11).

Three of the four cases cited in the Court's order involve factual allegations of the continued sale or serving of alcohol to an intoxicated or underage person. *Tobias*, 323 S.C. at 347, 474 S.E.2d at 451 ("Tobias alleged he was served intoxicating liquors at a bar in the Ramada Hotel . . . when he was already noticeably intoxicated."); *Marcum v. Bowden*, 372 S.C. 452, 456-57, 643 S.E.2d 85, 87 (2007) ("The decedent, aged 19, attended the party where alcoholic beverages were available to all guests."); *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 415-16, 697 S.E.2d 558, 562 (2010) (affirming the trial court's denial of a directed verdict on the basis that the plaintiff presented sufficient evidence the defendant knew of the driver's intoxication when it sold him beer). Plaintiff does not seek to impose liability on Green Apple based on the continued sale or serving of alcohol to an intoxicated person. Rather, she seeks to impose liability for Green Apple's conduct in knowingly forcing Mr. Moore to leave the premises prior to the end of his shift, without transportation, without a cell phone, with knowledge of his intoxication, and with

knowledge that he lived approximately 15 miles from the restaurant. There is no evidence that Mr. Moore actually obtained any means of transportation when Green Apple forced him to leave the premises while intoxicated. The issue is not the fault for Mr. Moore's intoxication, but the fault for his location in harm's way at the time of the fatal impact. Green Apple intentionally and knowingly abandoned Mr. Moore, an employee until terminated that night, in an intoxicated state with no transportation and no means of communication. The reasonableness of that conduct is a question for the jury to determine.

In the fourth case cited by the Court, *Lydia v. Horton*, 355 S.C. 36, 586 S.E.2d 750 (2003), the Supreme Court declined to recognize a first party negligent ***entrustment*** action where the defendant allowed the intoxicated plaintiff to drive his vehicle. *Id.* at 39, 586 S.E.2d at 752. This is not a negligent entrustment case. It is a general negligence case. These causes of action have different elements of proof. *Compare McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986) (listing elements of "negligent entrustment" as "(1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking, (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver"), *with Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002) ("To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach."). Therefore, *Lydia* is not applicable to the facts of this case or the negligence action at issue.

The dram shop liability cases cited in the Court's Order are factually distinguishable from this general negligence case. The Court erred in analyzing this case as a dram shop liability action

simply because it involves an intoxicated plaintiff. That a case involves intoxication does not make it a dram shop liability case. A plaintiff is entitled to bring the causes of action she chooses. Green Apple should not be permitted to characterize Plaintiff's complaint to its advantage. Green Apple's entire motion is based upon its incorrect characterization of the action as a dram shop case rather than a general negligence action. The Court should reconsider its Order and analyze Green Apple's summary judgment motion as applied to the general negligence allegations in the Amended Complaint.

Finally, the Order misinterprets *Tobias* as standing for the proposition that South Carolina "does not recognize a first party cause of action against a tavern owner for injuries sustained by the intoxicated person." (Order p. 3). In *Tobias*, the Supreme Court held "South Carolina does not recognize a 'first party' cause of action against the tavern owner by an intoxicated adult ***predicated on*** an alleged violation of S.C. Code Ann. §§ 61-5-30 and/or 61-9-410 (1990)." 332 S.C. at 91, 504 S.E.2d at 319 (emphasis added). The Supreme Court did not hold in either *Tobias* or *Lydia* that an intoxicated plaintiff can never have a cause of action against a tavern owner based on allegations other than statutory violations. The fact that a person is intoxicated does not mean that no one may ever owe him a duty of due care.

CONCLUSION

For the reasons stated above, Plaintiff requests the Court reconsider, alter, or amend its Order, and deny Green Apple's motion for summary judgment.

[*Signature block appears on the following page.*]

Dated: 8·26·15

LANIER & BURROUGHS, LLC

By: _____

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