THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

Appellate Case No. 2016-001312

Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore,..... Appellant,

v.

Green Apple, LLC, doing business as Applebee's, John/Jane Doe, Manager, and Stabler L. Inabinet,.....Defendants.

Of Whom Green Apple, LLC, d/b/a Applebee's is the..... Respondent.

INITIAL REPLY BRIEF OF APPELLANT

BARNES LAW FIRM, LLC
Kathleen Chewning Barnes, SC Bar No. 78854
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, SC 29924
(803) 943-4529

LANIER & BURROUGHS, LLC
Shane M. Burroughs, S.C. Bar No. 70346
shane@landblawfirm.com
Justin T. Bamberg, SC Bar No. 100337
justin@landblawfirm.com
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

FACTS

Appellant replies only as to certain facts that are in dispute. First, Green Apple's statement of facts insinuates that Mr. Moore consumed only two drinks and was not intoxicated when he left Applebee's. (Br. of Resp't pp. 2-3). These issues are in dispute as there is no evidence that Mr. Moore consumed alcohol anywhere else, and because he was intoxicated at the time of the accident. *See* Br. of App. n.3; Applebee's 017. Nevertheless, summary judgment was granted before Appellant was able to depose Green Apple's witnesses and explore these factual issues.

Second, the time the accident occurred is in dispute. The "Traffic Collision Report Form" states the accident occurred at "2239" or approximately 10:39 p.m. (Applebee's 012; Br. of Resp't p. 3). The "Statement/Collision Summary" states the responding officer "was advised by dispatch of a collision" at "2045 hours" or approximately 8:45 p.m. (Applebee's 015, 017). These statements cannot both be true, especially given that Green Apple's records show Mr. Moore allegedly clocked out at 9:06 p.m. (Applebee's 0140). Additional discovery likely would have resolved this factual issue.

ARGUMENT

Green Apple improperly makes a new argument for the first time on appeal. Green Apple argued in its motion for summary judgment and at the hearing, and wrote in the proposed order signed by the lower court, that it is entitled to summary judgment because the case is a dram shop action without proof of an alcohol control statute violation or allegation of a sale of alcohol. No argument was presented by Green Apple that it was entitled to summary judgment on a general negligence claim or lack of duty owed by Green Apple to Mr. Moore, and the lower court did not issue an order or finding on any such arguments. Nevertheless, Green Apple now argues for the first time in this case that summary judgment was appropriate because it is a dram shop action ***and*** because it allegedly did not owe any duty to Mr. Moore. (Br. of Resp't p. 3).

Appellant maintains that the lower court erred in analyzing the pleadings as asserting a dram shop, rather than general negligence, cause of action and that the case was not ripe for summary judgment given the premature stage of discovery. Additionally, Green Apple should not be permitted to add an argument on appeal that it had the opportunity to raise below but did not. Regardless, Green Apple owed a duty to Mr. Moore. For these reasons, the Court should reverse the lower court's orders.

I. Green Apple is Subject to Liability Under the Facts of This Case

Green Apple changes its argument on appeal. It argued below two specific grounds for summary judgment, and drafted a proposed order signed by the lower court ruling on those same two grounds—(1) "pursuant to *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), [] South Carolina does not recognize a first party cause of action against a tavern owner by an intoxicated person predicated on the alleged ***violation of alcohol control statutes***"; and (2) "a cause of action against a seller of alcohol is only available when the seller knowingly ***sells alcoholic beverages*** to an intoxicated person." (Memos. in Supp. of Mot. for Summ. J. p. 1; Mots. for Summ. J. p. 1; Proposed Order pp. 2-6; Order pp. 2-6) (emphasis added). The sole basis for Green Apple's motion was that it did not violate a statute or sell alcohol to Mr. Moore.[1] *Id.*

On appeal, Green Apple distances itself from those arguments by discussing Mr. Moore's "voluntary intoxication" and changing its argument to now assert that *Tobias* and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), stand for the blanket proposition that no voluntarily intoxicated person may ever assert an action arising out of injuries that occur during a period of

---

[1] *See* Tr. p. 25 lns. 22-24 ("[T]here is no cause of action in South Carolina against a tavern owner for injuries sustained by an intoxicated person."); p. 26 lns. 18-25 ("[D]ram shop statutes here in South Carolina are really based on statutory law that make it illegal for a tavern owner to sell liquor to an intoxicated person. Sell is the key term right. When they are selling this liquor to someone is when that liability is triggered and that's South Carolina code 61-4-580.").

intoxication. *See* Br. of Resp't p. 5 (characterizing "the umbrella of Tobias' general analysis regarding the ability of a voluntarily intoxicated individual to bring a first-party claim against another for injuries sustained as a result of their own voluntary intoxication); p. 6 (referring to *Lydia* as analyzing "the broad applicability of Tobias"); p. 6 ("[T]he Tobias public policy considerations apply to cases where a voluntarily intoxicated Plaintiff attempts to shift the responsibility from himself to another."). This is not the law of South Carolina and was not the argument made to or ruled upon by the lower court. Thus, this Court should not consider Green Apple's argument.

The facts of this case and the general negligence causes of action pled by Appellant are factually and legally distinguishable from *Tobias* and *Lydia*. The *Tobias* court held that an intoxicated person could not "maintain a first party action against a tavern owner based on alleged violations of statutes imposing criminal penalties for the sale of alcoholic beverages to an intoxicated adult." 332 S.C. at 92-93, 504 S.E.2d at 320. This lawsuit was not brought against Green Apple in its capacity as a tavern owner and does not involve allegations of the sale of alcohol or violations of statutes imposing criminal penalties for the sale of alcohol. This case involves Green Apple's duty to Mr. Moore, an employee it forced to leave its premises at night even though it knew him to be intoxicated, without a phone, and without a way to safely get to his home located fifteen miles away from the restaurant.

Lydia involved an admittedly negligent plaintiff who brought a negligent entrustment action[2] against the defendant who permitted the plaintiff to drive his car with alleged knowledge of the plaintiff's intoxication. 355 S.C. at 40, 583 S.E.2d at 753 (noting Lydia admitted "he was

[2] *See* Br. of App. n.4 (noting differences between a negligent entrustment and general negligence action).

'appreciably impaired' and that he lost control of the vehicle"). Unlike in *Lydia*, where the plaintiff admitted intoxication and that he caused the accident by losing control of the car, Appellant does not admit that Mr. Moore caused the accident. To the contrary, Appellant submitted an expert affidavit of a certified accident reconstructionist who stated:

> . . . Mr. Inabinet was operating his 2002 Acura Legend with headlamps in poor condition at the time of the collision of October 18, 2012.
>
> The condition of the headlamps severely reduced the illumination distance. . . .
>
> If Mr. Inabinet would have maintained his headlamps in a proper condition, and maintain[ed] a proper lookout, he would have been able to see the Plaintiff and avoid the collision by reducing his speed or sounding his horn.

(Aff. of Hill ¶¶ 5-6, 8). Green Apple provided no testimony or evidence to refute this opinion. Appellant maintains that the negligence of Green Apple and Stabler Inabinet caused Mr. Moore's death.

Neither *Tobias* nor *Lydia* stand for the proposition that Green Apple now asserts on appeal—that a voluntarily intoxicated person may never bring a negligence action. If the law were otherwise, then South Carolina courts should have routinely dismissed negligence actions brought by allegedly intoxicated plaintiffs. That has not occurred.

In *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007), the Supreme Court recognized the existence of a first party negligence cause of action against a social host who serves alcohol to adults between the ages of 18 and 20. If there were an absolute bar to recovery by a voluntarily intoxicated person, as Green Apple contends, then the Court would have cited *Tobias* or *Lydia* to reject the actionability of the plaintiff's claim. That the Court did not do so, but in fact recognized liability of a social host to an intoxicated plaintiff, proves that a voluntarily intoxicated person may bring a general negligence action.

Further, in at least three cases decided after *Tobias* and *Lydia*, our courts have addressed the admissibility of evidence of the plaintiff's voluntary intoxication or drug use in motor vehicle collision cases. *See Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010) (affirming trial court's decision to exclude evidence of the plaintiff's blood alcohol level and traces of drugs in her bloodstream at the time of the accident); *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007) (affirming trial court's decision to admit evidence of pre-accident alcohol consumption by the plaintiff); *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004) (involving motor vehicle collision where plaintiff's post-accident blood test indicated his use of marijuana and remanding for a new trial where the trial court improperly admitted evidence of marijuana and improperly charged the jury on negligence *per se* regarding driving while under the influence). This line of cases discuss, among other issues, the requirement that a party seeking to admit evidence of a plaintiff's voluntary impairment must establish a causal connection between the impairment and the accident. This analysis would have been unnecessary if the alleged impairment were an absolute bar to such claims brought by a voluntarily intoxicated person.

Finally, Green Apple incorrectly asserts that simply because the Amended Complaints reference "South Carolina laws" in one allegation, the lower court properly analyzed them as asserting a dram shop action. (Br. of Resp't pp. 4-5). This is incorrect. The allegation does not cite to a statute or use the word "statutory." (Am. Cmplts. ¶¶ 11.b). The word "laws" includes common law, upon which a general negligence action is based.

The Court should reject Green Apple's attempt to reframe its argument and, should it consider the argument, find that a plaintiff's alleged voluntary intoxication does not prevent him from asserting a negligence action.

II. Green Apple's Duty Argument is Not Properly Before the Court

Green Apple did not argue below that Appellant could not prove Green Apple owed Mr. Moore a duty under South Carolina common law. (Br. of Resp't p. 8) ("[E]ven if the Complaint were reinterpreted and this case were analyzed under a pure negligence standard, as the Appellant requests, this case still fails as a matter of law."). Therefore, this Court should decline to address the issue on appeal.

At the hearing, when Appellant argued this is a general negligence action, not a dram shop liability case, Green Apple did not argue that, even if it is considered a general negligence action, there is no duty. (Tr. pp. 33-34). Green Apple stated, "I'm not quite sure why [Appellant] does not believe it is a dram shop case as his pleading as they are articulated all state that it is based on his intoxication." (Tr. p. 34 lns. 2-5). Green Apple had the opportunity to raise the argument it makes on appeal but chose not to do so. Sustaining the lower court's order under these circumstances would be patently unfair to Appellant.

While a respondent is not required "to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." *I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). "In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." *Id.* at 421, 526 S.E.2d at 724. The Supreme Court has "emphasize[d] that all parties should raise all necessary arguments to the lower court and attempt to obtain a ruling." *Id.* at 422-23, 526 S.E.2d at 725.

This case does not present a situation in which the respondent already won an issue and did not need to argue further to the lower court. *Cf. Id.* at 423, 526 S.E.2d at 725 (noting "when

the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues"). Rather, at the conclusion of the hearing, the lower court did not make a ruling but took the matter under advisement. (Tr. p. 35 lns. 15-16). Thereafter, Green Apple drafted the proposed order that the lower court signed, and Green Apple did not include any ruling in the proposed order on the absence of a duty under general negligence law. (July 24, 2015 letter & Proposed Order).

Appellant argued in a Rule 59(e) Motion to Reconsider that the lower court incorrectly characterized the case as a dram shop action rather than a general negligence action. (Mot. to Recon. pp. 6-9). Green Apple did not file a memorandum in opposition or otherwise argue that the lower court did or should rule that, even if the case involved a general negligence action, Green Apple owed no duty to Mr. Moore. Green Apple had multiple opportunities to raise an argument regarding duty but did not do so. Therefore, this Court should not consider this issue raised by Green Apple for the first time on appeal. *See Semken v. Semken*, 379 S.C. 71, 78, 664 S.E.2d 493, 498 (Ct. App. 2008) (declining to address an additional sustaining ground because "it would be unfair to [appellant] because this argument was not presented to the [lower] court", "[t]he parties never mentioned or discussed" the argument made for the first time on appeal, and the court "may ignore any such arguments"); *Cowburn v. Leventis*, 366 S.C. 20, 35 n.4, 619 S.E.2d 437, 446 n.4 (Ct. App. 2005) (declining to review an additional sustaining ground where the "issue was not argued to the trial court" in a motion or at the hearing).

Green Apple should not be permitted to misinterpret Appellant's pleadings, raise one argument to obtain summary judgment based on its misinterpretation, and then seek to have the order upheld on appeal based on a different argument that it never made below.

III. Green Apple Owed a Duty to Mr. Moore

Even if the Court chooses to address the duty issue that was not raised to the trial court, Appellant establishes numerous bases demonstrating that Green Apple owed Mr. Moore a duty in this case. "The question of whether a duty to act arises in a given case may depend on the existence of particular facts." *Johnson v. Jackson*, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012). "When there are factual issues regarding whether the defendant voluntarily undertakes a duty, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." *Id.* at 160, 735 S.E.2d at 668.

Appellant submitted an expert affidavit regarding Green Apple's duty in this case. Elizabeth Trendowski, a professional hospitality expert, stated, in part:

> Mr. Moore was forced to leave the Applebee's premises without any alternatives to safely transport him home. . . .
>
> Applebee's[Green Apple] was negligent in failing to find alternative transportation for Mr. Moore to safely get home.
>
> Applebee's[Green Apple] 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[Green Apple] had notice of the dangerous condition they put Mr. Moore in by identifying his grossly intoxicated condition. . . .
>
> Based on the information provided to me, it is my opinion that Applebee's[Green Apple] was negligent in this matter of general liability and as such did not meet the industry standard of care.

(Aff. of Trendowski ¶¶ 9, 12-14, 17). Green Apple did not provide an expert opinion or evidence to counter Ms. Trendowski's opinions establishing that it owed Mr. Moore a duty of reasonable care to find transportation and comply with industry standards. *See Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only

submit a mere scintilla of evidence to withstand a motion for summary judgment."). Thus, the record before the lower court was that a duty existed and was breached by Green Apple.

In *Russell v. Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991), the decedent plaintiff "became intoxicated at a" restaurant, "went outside after being asked to leave the premises," and "engaged in an altercation during which he sustained a severe head laceration." *Id.* at 87, 406 S.E.2d at 338. When the police arrived, people "were attempting to render aid" to the decedent, and, he alleged in the complaint, that the police took control of the situation away from those individuals. *Id.* at 87-88, 406 S.E.2d at 339. The police did not arrest the decedent and forced him to leave the premises. *Id.* at 88, 406 S.E.2d at 339. The decedent "walked alone unassisted from the scene", and he subsequently died after falling 100 feet into a creek below a train trestle. *Id.* The Supreme Court found the police officers owed a duty of care to the intoxicated decedent. *Id.* at 89, 406 S.E.2d at 339. The Court cited to the *Restatement (Second) of Torts*, § 323[3] for the proposition that a party may undertake a duty to render protective services to another, and found the complaint "alleges facts sufficient to state a cause of action." *Id.* at 89-90, 406 S.E.2d at 339-40. The same result is warranted in this case.

Green Apple intentionally and knowingly permitted Mr. Moore to consume alcohol while at work with the intention of firing him as a result, based on Green Apple's suspicion before the shift started. (Tr. pp. 30, 23). Green Apple then affirmatively undertook to stop Mr. Moore from

---

[3] Section 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

finishing his shift, took him to the manager's office, and made him leave the premises without a phone or transportation and in an intoxicated state. (Tr. p. 23). *See Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006) ("[A] duty to use due care may arise where an act is voluntarily undertaken."); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("If an act is voluntarily undertaken, []the actor assumes the duty to use due care."). Green Apple did not use due care in orchestrating its scheme to fire Mr. Moore and remove him from the premises. In taking the actions it did, Green Apple breached its duty to Mr. Moore.

Green Apple had policies, procedures, and specific training in place to address the identification of an intoxicated person and how to safely handle that situation. (Tr. p. 31; Aff. of S. Johnson). Such procedures and training would be unnecessary absent a duty to a known intoxicated person. Moreover, Green Apple likely has policies and procedures that address the termination of employees. However, because summary judgment was granted before the completion of discovery, Appellant was unable to explore whether or not any such policies or procedures would have applied to, and were followed in regards to, the termination of Mr. Moore.

Evidence of a failure to follow internal procedures has been found to establish a duty. In *Murray v. Bank of America, N.A.*, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003), this Court found a bank owed a duty to a plaintiff when someone found the plaintiff's lost driver's license and opened an imposter account with it at the Bank. *Id.* at 341-42, 580 S.E.2d at 196-97. This Court held "a relationship between the Bank and [the plaintiff] arose sufficient to impose upon the Bank a duty of care when [the plaintiff] went to the Bank seeking closure of the account" and the "Bank failed to follow its own procedures" to close the imposter account. *Id.* at 344, 580 S.E.2d at 198. Similarly, in this case, Green Apple owed Mr. Moore a duty but failed to follow its own procedures to identify an intoxicated person, safely handle the situation, and terminate an employee.

Whether Green Apple permitted Mr. Moore to make a phone call before forcing him to leave the premises is a disputed factual issue.[4] However, the fact that Green Apple says it did do so is some evidence that it recognized its duty to Mr. Moore to ensure his safety given his known alcohol consumption and condition. Where there is conflicting evidence as to the existence of a duty, the inference must be drawn in the non-moving party's favor. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006); *see also Fickling v. City of Charleston*, 372 S.C. 597, 607, 643 S.E.2d 110, 116 (Ct. App. 2007) (reversing the trial court's order granting a directed verdict as to the non-existence of a duty where "there is more than one inference that may be drawn"); *Vaughn v. Town of Lyman*, 370 S.C. 436, 444, 447-48, 635 S.E.2d 631, 636-38 (2006) (reversing summary judgment for the defendant and finding that, as to the existence of a common law duty and a duty by voluntary undertaking, "more than one inference may be drawn" and "there is a genuine issue of material fact"; therefore, the issue "should be resolved by the fact finder").

The majority of Green Apple's duty argument is based on *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). However, *Carson* is not dispositive of this case. In *Carson*, the decedent plaintiff worked in the defendant's landscaping business and the defendant knew the decedent did not have a driver's license. *Id.* at 214, 486 S.E.2d 3. After the decedent and defendant finished work, they drank beer during the afternoon and into the evening. *Id.* at 215, 486 S.E.2d 3. When the decedent became disruptive in the car, the defendant pulled over and the decedent got out of the car and refused to get back inside. *Id.* The defendant "decided to briefly drive away" and, before he returned, the decedent was struck by a truck. *Id.* at 216, 486 S.E.2d 3.

---

[4] Green Apple contends that the manager who fired Mr. Moore saw him use the phone before he left the premises. (Tr. p. 23). There are witnesses who will testify Mr. Moore was forced to leave without making a phone call. (Tr. p. 29).

In determining whether the defendant owed a duty to the decedent, the Supreme Court analyzed the *Restatement (Second) of Torts*, § 324, which refers to a duty when one "***takes charge of*** another who is helpless adequately to aid or protect himself." *Id.* at 217, 486 S.E.2d 3 (emphasis added). The Court analyzed the proof necessary to show a defendant has "taken charge of" the injured party. *Id.* at 217-18, 486 S.E.2d 3. The Court then analyzed whether, under the facts of *Carson*, the defendant took charge of the decedent and found that, even if he ordered the decedent out of the car, this was not evidence that he took charge of the decedent. *Id.* at 219, 486 S.E.2d 3. Thus, *Carson* applies only to a situation in which the plaintiff alleges the defendant owes a duty because the defendant took charge of the plaintiff under § 324 of the *Restatement*. That is not the allegation in this case and is not the only means of proving the existence of a duty.

Here, Appellant alleges that Green Apple had a duty to (1) maintain proper policies and procedures for the transportation of known intoxicated persons on its premises; (2) operate its restaurant consistent with South Carolina laws, (3) call a cab for Mr. Moore, whom it knew to be intoxicated and fifteen miles from home with no transportation or phone, and (4) not forcibly remove an intoxicated person without transportation. (Am. Cmplts. ¶ 11). As explained above, these allegations and the evidence presented support a finding that Green Apple owed a duty to Mr. Moore under the circumstances of this case. The Court may find the existence of a duty for any one of a number of reasons, including the expert affidavit of Ms. Trendowski stating Green Apple had a duty to find alternative transportation, Green Apple's undertaking of a duty, or Green Apple's violation of its procedures to safely handle an intoxicated person. Furthermore, allowing the completion of discovery may have led to the discovery of additional facts supporting additional general negligence causes of action, such as wrongful termination.

IV. The Lower Court Erred in Ruling on the Summary Judgment Motion When Discovery was Incomplete

Generally, "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). At the time the lower court granted summary judgment in this case, the parties' written discovery was incomplete and they had not conducted any depositions.

Green Apple insinuates that Appellant was dilatory in seeking discovery for not taking a deposition for ten months after filing this action. (Br. of Resp't p. 14). Green Apple fails to acknowledge that it did not respond to Appellant's written discovery requests for over six months and that its incomplete responses came six days ***after*** Green Apple filed its motion for summary judgment. (Exh. A to Mot. to Compel; Mot. p. 1). Green Apple should not be permitted to delay and withhold discovery while, at the same time, seek summary judgment.

Green Apple cites to *Dawkins v. Field*, 354 S.C. 58, 580 S.E.2d 433 (2003), for the proposition that summary judgment may be appropriate even if the parties have not completed discovery. (Br. of Resp't p. 15). However, the Supreme Court acknowledged in *Dawkins* that the case presented "unusual circumstances" as to its decision to grant summary judgment despite incomplete discovery. 354 S.C. at 71, 580 S.E.2d at 439. There are no such unusual circumstances in this case and Green Apple argues none.

Finally, Green Apple's duty argument provides an example of the necessity for further discovery in this case. Green Apple incorrectly asserts that the existence of a duty is always a matter of law for the court. To the contrary, the existence of a duty may be a disputed issue for the fact finder. *See Vaughn*, 370 S.C. at 448, 635 S.E.2d at 638 (holding "the factual issues regarding whether the defendant did in fact voluntarily undertake" a duty "should be resolved by the fact finder"); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) ("Where

there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder."). Thus, the lower court erred by granting Green Apple's motion for summary judgment before Appellant received a full and fair opportunity to complete discovery.

CONCLUSION

For the reasons set forth in Appellant's Briefs, the Court should reverse the lower court's orders and remand the case to proceed in circuit court as a general negligence action.

Respectfully submitted,

Kathleen C. Barnes

BARNES LAW FIRM, LLC
Kathleen Chewning Barnes
SC Bar No. 78854
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, SC 29924
(803) 943-4529

LANIER & BURROUGHS, LLC
Shane M. Burroughs
S.C. Bar No. 70346
shane@landblawfirm.com
Justin T. Bamberg
S.C. Bar No. 100337
justin@landblawfirm.com
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Attorneys for Appellant
October 5, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
The Honorable Maite Murphy

RECEIVED
OCT 11 2016
SC Court of Appeals

Appellate Case No. 2016-001312

Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore,..... Appellant,

v.

Green Apple, LLC, doing business as Applebee's, John/Jane Doe, Manager, and Stabler L. Inabinet,.....Defendants.

Of Whom Green Apple, LLC, d/b/a Applebee's is the..... Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Initial Reply Brief of Appellant* has been served upon the following pro se party of record by mailing one copy by United States Mail, addressed as shown below this 5th day of October, 2016.

Drew H. Butler
Richardson Plowden and Robinson, PA
P.O. Box 21203
Charleston, SC 29413

Michelle P. Kelley
Richardson Plowden and Robinson, PA
P.O. Drawer 7788
Columbia, SC 29202

October 5, 2016

Kathleen C. Barnes

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

B A R N E S

LAW FIRM | LLC

Kathleen C. Barnes
Admitted: Georgia | South Carolina

October 5, 2016

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore v. Green Apple, LLC, d/b/a Applebee's*
Appellate Case No. 2016-001312

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Appellant Lindsey Stewart's Initial Reply Brief of Appellant in the above-referenced case. Also enclosed is proof of service of the Brief.

Please file the documents and return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving counsel for the Respondent with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC

Kathleen C. Barnes

Kathleen C. Barnes

Enclosures

cc: Drew H. Butler, Esquire
Michelle P. Kelley, Esquire
Shane Burroughs, Esquire (via email)
Justin Bamberg, Esquire (via email)

Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924

U.S. POSTAGE PITNEY BOWES

ZIP 29924 $ 002.41⁰
02 1W
0001388445 OCT. 05. 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211