THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred in interpreting and analyzing the Amended Complaints as asserting an action for dram shop liability rather than a general negligence action?

II. Whether the lower court erred in ruling on the merits of Green Apple's motion for summary judgment where the parties' discovery was incomplete?

STATEMENT OF THE CASE

This case arises out of an incident in which Respondent Green Apple, LLC, d/b/a Applebee's ("Green Apple"), forced its employee, decedent Shaun Robert Moore, to leave the restaurant while Green Apple knew he was intoxicated, had no phone or mode of transportation, and lived 15 miles away from the restaurant. (R. pp. 16, 21). While walking home, Mr. Moore was fatally struck by a vehicle driven by Defendant Stabler Inabinet. *Id.* at ¶ 9

Appellant Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore, ("Appellant") filed Amended Complaints for wrongful death and survival on August 5, 2014, against Green Apple, Inabinet, and John/Jane Doe Manager at Applebee's. (R. pp. 15-24). On October 2, 2014, Green Apple served answers to the Amended Complaints. (R. pp. 25-36). In February 2015, Inabinet filed a motion for summary judgment. On March 19, 2015, Green Apple filed a motion for summary judgment. (R. pp. 37-38). On May 20, 2015, Appellant filed a Motion to Compel Green Apple and Defendants John/Jane Doe's complete discovery answers and responses. (R. pp. 47-76).

The Honorable Maite Murphy held a hearing on the motions for summary judgment on June 1, 2015.[1] On August 14, 2015, the lower court filed an Order granting Green Apple's motion for summary judgment. (R. pp. 5-10). On August 26, 2015, Appellant filed a Rule 59(e), SCRCP,

[1] The lower court held Inabinet's motion for summary judgment in abeyance pending the completion of outstanding discovery.

Motion to Reconsider, Alter, or Amend. (R. pp. 89-98). On May 3, 2016, the court signed Form 4 orders denying Appellant's Motion to Reconsider. (R. pp. 11-14).

Appellant appeals from the Order granting summary judgment and denying the Motion to Reconsider. (R. pp. 1-4). This Court consolidated the wrongful death and survival actions for appeal.

FACTS

On October 8, 2012, Mr. Moore was employed by Green Apple as a waiter at its Applebee's restaurant in Orangeburg, South Carolina. (R. pp. 16, 21, 25-26, 31-32). On the night of October 8, Green Apple fired Mr. Moore for consuming alcohol while at work. (R. p. 78 ¶ 7). Green Apple then forced Mr. Moore to leave the premises while intoxicated. (R. p. 78 ¶¶ 7-8, pp. 16, 21). When Green Apple forced Mr. Moore to leave prior to the end of his shift, it knew he lived fifteen miles away from the restaurant and did not have a cell phone or transportation. (R. p. 78 ¶ 9, pp. 16-17, 21-22). Further, Appellant alleges Green Apple did not allow Mr. Moore to use the telephone before it forced him to leave the premises.[2] (R. pp. 16-17, 21-22).

After Green Apple forced Mr. Moore out of Applebee's in an intoxicated state, and as he walked along US Highway 21 and attempted to cross the road, he was struck and killed by a vehicle driven by Inabinet. (R. pp. 16, 21). Appellant filed an affidavit of David A. Hill, a certified accident reconstructionist, who stated that, at the time of the accident, Inabinet operated his vehicle "with headlamps in poor condition" which "severely reduced the illumination distance." (R. p. 80 ¶¶ 5-6). In Hill's expert opinion, "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 [Mr.

[2] This is a disputed factual issue. Green Apple contends that the manager who fired Mr. Moore saw him use the phone before he left the premises. (R. p. 116). There are witnesses who will testify Mr. Moore was forced to leave without making a phone call. (R. p. 122).

Moore] and avoid the collision by reducing his speed or sounding his horn." *Id.* at ¶ 8. At the time of his death, Mr. Moore was thirty-one-years-old and a father to a three-year-old daughter. (R. p. 105 lns. 19-21).

Appellant filed wrongful death and survival actions against Green Apple, Inabinet, and John/Jane Doe Manager at Applebee's. (R. pp. 15-24). Appellant asserted a general negligence/gross negligence action against Green Apple based on its failure to maintain proper policies for intoxicated persons on its premises, failure to properly operate a drinking establishment, failure to call a cab for Mr. Moore, and for forcibly removing Mr. Moore from the premises without transportation. (R. pp. 16-17, 22).

Green Apple filed a motion for summary judgment listing the following two grounds for the motion: (1) South Carolina does not recognize a first party cause of action against a tavern owner for injuries sustained by an intoxicated person based on alleged violations of alcohol control statutes and (2) Appellant did not allege Green Apple sold alcohol to Mr. Moore, which is a necessary element in a dram shop action. (R. pp. 37, 39). Green Apple asserted in its written motion and at the hearing that the lower court should rule in its favor as a matter of law. (R. pp. 41-42, 44, 118). At the hearing, Appellant argued that both of Green Apple's grounds for the motion misconstrue the Amended Complaint allegations, which do not assert liability based on Green Apple's status as a tavern owner, violations of alcohol control statutes, or dram shop liability due to the sale of alcohol. (R. pp. 15-24, 121-26). Rather, Appellant asserts a general negligence action. *Id.*

Prior to the hearing, Appellant filed the Affidavit of Elizabeth Trendowski, a professional hospitality expert with over twenty-five years of experience in the hospitality industry, including

National Safety Standards and policies and procedures. (R. pp. 77-79). Ms. Trendowski's affidavit states, in part, the following:

> At the time Mr. Moore was fired, he was grossly intoxicated and unable to make safe decisions.[3]
>
> 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.
>
> Mr. Moore was unable to physically walk home in a safe manner due to his gross intoxication.
>
> 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.
>
> 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[Green Apple] was negligent in this matter of general liability and as such did not meet the industry standard of care.

(R. pp. 78-79 ¶¶ 8-13, 16-17). Green Apple did not provide an expert opinion, witness testimony, or evidence to counter Ms. Trendowski's opinions, including her opinion that this case is one involving general negligence rather than dram shop liability.

Prior to the hearing on the motion for summary judgment, Appellant filed a motion to compel complete discovery responses from Green Apple. (R. pp. 47-76). At the hearing, Appellant

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[3] Green Apple theorized at the hearing that Mr. Moore left Applebee's and then consumed alcohol at other locations. However, Green Apple acknowledged at the hearing that there is no evidence to support its theory that Mr. Moore left Applebee's and went to any other alcohol-serving establishment. (R. pp. 127-28) ("[I]f he did go indeed."). Therefore, this unsupported theory is nothing but conjecture and, as such, cannot be the basis of a summary judgment ruling and should not be considered by this Court. *See, e.g., Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001) ("All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.").

argued the case was not ripe for a summary judgment ruling because, due to Green Apple's incomplete written discovery responses, the parties had not taken depositions. (R. pp. 105-06, 113, 121, 126).

On August 3, 2015, the lower court signed an Order granting Green Apple's motion for summary judgment. (R. pp. 5-10). The lower court's entire ruling is based on its incorrect interpretation of the Amended Complaints as asserting dram shop liability rather than general negligence. The court ruled as a matter of law that (1) "South Carolina does not recognize a first party cause of action against a commercial host for injuries sustained by the intoxicated person to his own person" and (2) a host's liability "only arises out of . . . [its] violation of criminal statutes prohibiting the knowing sale of alcoholic beverages to an intoxicated person" and Appellant does not allege Green Apple sold alcohol to Mr. Moore. (R. p. 10).

Appellant filed a Rule 59(e), SCRCP, Motion to Reconsider, Alter, or Amend, arguing the court failed to address or rule on her argument that summary judgment is inappropriate because discovery is incomplete and erred in characterizing and analyzing the case as a dram shop liability action rather than a general negligence action. (R. pp. 89-98). The lower court denied the Motion in a Form 4 Order. (R. pp. 11-14).

STANDARD OF REVIEW

"On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Under Rule 56(c), SCRCP, summary judgment is proper only when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). "The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below."

Madison, 371 S.C. at 134, 638 S.E.2d at 655. "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).

As to review of the lower court's interpretation of the Amended Complaints as asserting dram shop, rather than general negligence, causes of action, "[t]he construction of a pleading involves a matter of law" that the court reviews "de novo." *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 621, 776 S.E.2d 426, 429 (Ct. App. 2015) (internal quotation marks omitted).

ARGUMENT

The lower court's orders and Green Apple's entire argument are based upon the incorrect interpretation of Appellant's negligence action as a dram shop action. "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). Appellant does not assert that Green Apple violated a statutory duty. Rather, she asserts that, given Green Apple's knowledge that he had no phone or transportation and lived 15 miles from the restaurant, it acted negligently in forcing him from the premises in an intoxicated state with no means of communication or safe transportation.

I. THE LOWER COURT ERRED IN INTERPRETING THE AMENDED COMPLAINTS AS ASSERTING AN ACTION FOR DRAM SHOP LIABILITY RATHER THAN A GENERAL NEGLIGENCE ACTION

This is a general negligence action, not an action asserting dram shop liability. The lower court erred in interpreting the Amended Complaints as asserting dram shop liability and, thereby,

relying on inapplicable case law. This Court should analyze the allegations of the Amended Complaints as pled, and reverse the lower court's order granting summary judgment.

"The character of an action is primarily determined by the allegations contained in the complaint." *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (internal quotation marks omitted). Green Apple should not be permitted to contort the allegations of Appellant's Amended Complaints to its advantage to fit within inapplicable case law. "It is well established that the plaintiff is the master of his complaint." *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 627 (D.S.C. 2006) (internal quotation marks omitted); *see also Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) ("The effect of this order is to prevent the [Plaintiffs] from being architects of their own complaint . . . ."); *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.").

Appellant does not allege Green Apple sold Mr. Moore alcohol, as required in a dram shop action. Appellant does not seek to hold Green Apple liable due to its status as a tavern owner. Rather, Appellant seeks to hold Green Apple liable because it knew of Mr. Moore's intoxication and lack of a phone or transportation but forced him out of the premises any way. (R. pp. 16-16, 21-22, 126 lns. 1-6). For example, Ms. Trendowski's affidavit states Green Apple "was negligent in ***failing to find alternative transportation*** for Mr. Moore to get home safely." (R. p. 78 ¶ 12) (emphasis added). The general negligence allegations in this case are legally different from an action alleging dram shop liability. Appellant submitted an uncontradicted expert opinion that Green Apple was negligent for failing to find transportation for Mr. Moore or taking reasonable steps to protect him from foreseeable danger despite its knowledge of his intoxicated condition,

thereby confirming that this is a general negligence, rather than a dram shop, action. Ms. Trendowski, stated "this matter is a general liability case based upon my education, knowledge and experience in the hospitality industry." (R. p. 78 ¶ 16). Green Apple did not submit an affidavit or witness testimony contrary to her opinions of negligence.

Green Apple intentionally and knowingly permitted Mr. Moore to consume alcohol while at work with the express intention of firing him for doing so. (R. pp. 123, 116). Anticipating that Mr. Moore would consume alcohol, Green Apple allowed it to happen, confronted him, took him to a manager's office, made him count out his tips, fired him, and made him leave the premises prior to the end of his shift and without a phone or transportation. (R. p. 116 lns. 14-18). *See, e.g.*, *Fickling v. City of Charleston*, 372 S.C. 597, 607, 643 S.E.2d 110, 116 (Ct. App. 2007) (reversing the trial court's decision to grant a directed verdict as to whether a duty existed because "there is more than one inference that may be drawn as to whether" the defendant exercised control). With knowledge of Mr. Moore's alcohol consumption and intoxication, and his lack of any means of communication or safe transportation, Green Apple had a duty to act reasonably in procuring Mr. Moore safe transportation from the Applebee's restaurant. (R. p. 78 ¶ 12). By intentionally orchestrating the scheme to fire Mr. Moore and kick him off of the premises in an intoxicated condition, Green Apple breached its duty of care to Mr. Moore by knowingly exposing him to a dangerous condition.

The lower court cited to *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), in support of its decision. (R. p. 7). *Tobias* is inapplicable to the facts of this case and the allegations in the Amended Complaints. 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 statutes imposing criminal penalties for the ***sale of***

alcoholic beverages to an intoxicated adult." *Id.* at 91, 93, 504 S.E.2d at 319-20 (emphasis added). This case does not involve an action against a tavern owner predicated on the sale of alcoholic beverages to an intoxicated adult. Rather, the Amended Complaints allege Green Apple was negligent in failing to maintain proper policies for intoxicated persons on its premises, failing to properly operate a drinking establishment, failing to call a cab for Mr. Moore, and for forcibly removing Mr. Moore from the premises without transportation, thereby subjecting him to foreseeable danger. (R. pp. 16-17, 21-22, 78 ¶ 13). Therefore, the holding in *Tobias* is neither applicable to nor dispositive of this case. The lower court erred in interpreting the Amended Complaints as asserting a dram shop liability action and, thereby, erred in applying the holding in *Tobias*.

Two other cases cited by the lower court are similarly distinguishable from and inapplicable to the facts and allegations of this case. Both cases involve allegations of the continued service or sale of alcohol to an intoxicated or underage person. *See Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 415-16, 697 S.E.2d 558, 562-63 (2010) (determining in a dram shop action that the plaintiff presented sufficient evidence the defendant tavern owner knew of the driver's intoxication when it sold him beer); *Marcum v. Bowden*, 372 S.C. 452, 455, 643 S.E.2d 85, 86 (2007) (holding "[a]n adult social host who knowingly and intentionally serves or causes to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages proximately resulting from the host's service of alcohol"). This case does not involve allegations that Green Apple served or sold alcohol to Mr. Moore to cause his death. Rather, Appellant alleges Green Apple acted negligently in forcing Mr. Moore from the premises when it knew him to be

intoxicated, without a cell phone or transportation, and 15 miles away from home without the means or ability to get there safely. The reasonableness of this conduct is for a jury to determine.

The lower court also erred in relying on *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003). (R. p. 8). *Lydia* involved an action for first party negligent entrustment in which the plaintiff brought suit against the defendant based on an allegation that the defendant allowed the plaintiff to drive his car while the plaintiff was intoxicated. *Id.* at 37, 583 S.E.2d at 751. The Supreme Court held that South Carolina does not recognize a first party negligent entrustment claim. *Id.* at 39, 43, 583 S.E.2d at 752, 754. This is a general negligence action, not a negligent entrustment action.[4] Therefore, the holding in *Lydia* is neither applicable to nor dispositive of this case.

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." (R. p. 7). 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

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[4] *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.").

no one may ever owe him a duty of due care. *See, e.g.*, *Baltimore & O. R. Co. v. Green*, 136 F.2d 88, 93 (4th Cir. 1943) ("Want of due care for her own safety must be proved; it cannot be presumed. The presumption is the other way."); *Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 288 (4th Cir. 1998) (holding that a decedent driver's intoxication at the time of an accident and the fact that he caused the accident did not abrogate the vehicle manufacturer's duty to design a crashworthy vehicle). Green Apple owes a duty of care to its employees and patrons, including Mr. Moore, and it is for a jury to determine whether Green Apple breached that duty by removing Mr. Moore from the premises in the manner it did.

The lower court erred in interpreting and analyzing this case as a dram shop action rather than a negligence action. This Court should reverse.

II. THE LOWER COURT ERRED IN RULING ON THE MERITS OF THE SUMMARY JUDGMENT MOTION BECAUSE DISCOVERY WAS INCOMPLETE

The lower court did not expressly rule on Appellant's argument that a summary judgment ruling is premature because she did not have a full and fair opportunity to complete discovery. When Appellant sought a ruling on this issue in a Rule 59(e), SCRCP, motion, the court summarily stated it already ruled upon all arguments properly raised. (R. pp. 11-14). By granting summary judgment prior to the completion of discovery, the lower court essentially found that Green Apple was entitled to summary judgment on the existing factual record of Mr. Moore's general negligence claim and that, despite the inability to complete discovery, no issue of material fact will ever exist. The court erred.

At the time the court granted summary judgment, Green Apple had failed to provide complete responses to Appellant's written discovery requests, Appellant's motion to compel discovery was pending, and the parties had not conducted any depositions. Further, the court's ruling prior to the completion of discovery prevented Appellant from developing facts to support

the general negligence claims or discover new facts which might have led to the assertion of additional negligence allegations.

"[S]ummary 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) (reversing the lower court's decision to grant summary judgment where the plaintiff "demonstrated a likelihood that further discovery will uncover additional evidence" and the plaintiff was "not dilatory in seeking discovery"); *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").

Appellant demonstrated a likelihood that further discovery will uncover additional relevant evidence. Counsel for Appellant stated at the hearing that, when retained as counsel in this case, he sent a spoliation letter to Green Apple. (R. p. 121 lns. 10-11). Despite the letter, Green Apple informed Appellant that Mr. Moore's personnel file no longer exists. *Id.* at lns. 15-18. Appellant further represented that there are witnesses who are expected to testify Green Apple did not permit Mr. Moore to make a telephone call but, rather, forced him to leave the restaurant. (R. p. 122 lns. 16-17). Appellant informed the court that Sandra Johnson, an assistant manager who took part in Mr. Moore's termination and exit from the restaurant, received low scores on her alcohol training, raising questions as to her credibility in assessing a person's intoxication level, such as Mr. Moore when she fired him and forced him off the premises. (R. p. 124). Further, Appellant stated that Green Apple's failure to provide complete discovery responses delayed Appellant's ability to take depositions. (R. pp. 105-06, 113, 121-22, 126). The development of any of the above-referenced information is likely to support Appellant's general negligence action and could also lead to the

discovery of additional, relevant facts. Such facts may provide a basis for Appellant to file an amended complaint with additional general negligence allegations.

The record shows that Appellant was not dilatory in seeking discovery. Appellant promptly served discovery requests on Green Apple, shortly after filing the Amended Complaints. (R. pp. 49-65). Green Apple did not respond to discovery until six months later, and six days ***after*** it filed the motion for summary judgment at issue in this appeal. (R. pp. 49-65, 37). Within sixty days of receiving the inadequate responses, Appellant filed a Motion to Compel complete discovery responses. (R. pp. 47-48). The responses and document production sought were necessary prior to taking depositions of Green Apple employees and other witnesses. (R. pp. 113, 121). The case was only seven months old when Green Apple filed its motion for summary judgment, and there was plenty of time remaining to complete the necessary discovery prior to the case appearing on a trial roster.

The lower court erred by ruling on the merits of Green Apple's motion before Appellant received a full and fair opportunity to complete discovery.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the Court reverse the lower court's order and remand the case to proceed as a general negligence action as pled.

Respectfully submitted,

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

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

Respectfully submitted,

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