THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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SC Court of Appeals

Paul M. Burch, Circuit Court Judge

Case No. 2017-CP-40-05538

Latoria R. Cooks .... Appellant,

v.

Pearlz Vista, Inc., d/b/a Pearlz Oyster Bar,
Carolina Ale House Operating Company, LLC, d/b/a
Carolina Ale House, and Art Bar, Inc. .... Respondents

INITIAL BRIEF OF RESPONDENT PEARLZ VISTA, INC., D/B/A PEARLZ OYSTER BAR

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court correctly grant summary judgment to Pearlz Vista, Inc. in this dram shop action where (1) there was no evidence that Pearlz Vista, Inc. knowingly sold or served alcohol to an intoxicated person and (2) Latoria Cooks did not present any affidavits showing she needed more discovery prior to a ruling on Pearlz Vista, Inc.'s properly made and supported motion for summary judgment?

FACTS WITH RESPECT TO
PEARLZ VISTA, INC., D/B/A PEARLZ OYSTER BAR ("PEARLZ")[1]

This appeal stems from the grant of summary judgment to all Respondents in a dram shop action. With respect to the underlying accident, here is what is known: on September 13, 2014, Emily Brown crashed into Latoria Cooks vehicle, injuring Cooks. Brown had been drinking at the time of the accident and had a blood alcohol concentration of .16. (Brown Dep. at 13, 25-26, R. at ____).

What is not known is where and when Brown consumed alcohol prior to the accident. Brown was unable to recall the events leading up to the accident beyond having been in the "Vista." (Brown Dep. at 15, R. at ____). She did not recall whom she was with, where she went, or how much she had to drink. (Brown Dep. at 15-18, R. at ____).

With respect to Pearlz, even less is known. The only reference to Pearlz in the Brown deposition is as follows:

> Q. Going – and I'm not trying to belabor the point, but do you remember any of the bars or restaurants you were at in The Vista that evening?
>
> A. I can tell you the ones we would often go to.
>
> Q. What ones did you often go to?
>
> A. Art Bar, **maybe Pearlz**, and Ale House. That's all I can recall.
>
> Q. Okay. Do you think it would have been the Art Bar, Pearlz, and Ale House that night?
>
> A. Most likely, but I cannot be sure.

(Brown Dep. at 26, R. at ____) (emphasis added). There is no other testimony mentioning Pearlz, nor was any other evidence presented as to Pearlz in response to the summary judgment motion.

[1] Pursuant to Rule 208(b)(6), SCACR, Pearlz hereby adopts by reference the briefs submitted by the other Respondents to this appeal and all arguments and statements of the case and facts contained therein. Pearlz submits this brief to set forth the specific evidence relating to Pearlz.

STANDARD OF REVIEW

On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is warranted when there is no genuine issue of material fact, and it appears that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

When the nonmoving party bears the burden of proof as to an issue, a party seeking summary judgment may meet this standard by pointing out to the trial court "that there is an absence of evidence to support the nonmoving party's case." *Richardson v. State-Record Co.*, 330 S.C. 562, 566, 499 S.E.2d 822, 825 (Ct. App. 1998). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror. *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Id.* A nonmoving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

If a motion for summary judgment has been properly made and supported, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

ARGUMENT

It is telling that Cooks does not include any discussion of the elements of dram shop liability in her brief, but instead focuses solely on general summary judgment case law. There is no indication that the trial court applied the wrong standard in this case. Instead, a review of the order shows that the trial court considered the elements of Cooks's claim and found that there was not a scintilla of evidence as to certain of the required elements. (Order at 4, R. at ____).[2]

I. Cooks has failed to present evidence showing a genuine question of material fact for trial in this dram shop action.

By statute, an establishment licensed to sell beer, wine, or liquor may not knowingly sell beer, wine or liquor to an intoxicated person. S.C. Code Ann. §§ 61-6-2220, 61-4-580(A)(2). South Carolina courts have found that these statutes create a civil right of action on behalf of third parties injured by intoxicated persons. *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 415, 697 S.E.2d 558, 562 (2010) ("*Hartfield II*"). In order to establish liability under these statutes, the plaintiff must prove "that the alleged violators knowingly served alcohol to an intoxicated person or were confronted with such information, from the person's appearance or otherwise, as

[2] The portion of the hearing transcript quoted in Cooks's brief also reflects that the trial court was aware of and applied the scintilla rule. (Tr. at 20, R. at ____) ("I had my say over there a couple of years ago and I told them I thought the Federal Rule should be adopted, but we're stuck with the scintilla rule.").

would lead a prudent man to believe that the person was intoxicated." *Id.*; *see also Daley v. Ward*, 303 S.C. 81, 86, 399 S.E.2d 13, 15 (Ct. App. 1990).

Here, Cooks has presented evidence that Brown was intoxicated at the time of the accident, but no evidence (1) that Pearlz served or sold alcohol to Brown on the night in question or (2) that Pearlz knew or should have known that Brown was intoxicated at the time of any sale or service. Cooks is in error when she states in her brief that "[t]he fact that Ms. Brown testified that Defendants establishments were 'most likely' where she had consumed alcohol is sufficient to establish liability on the defendants." This Court has made it clear that even if Cooks could prove that Brown was at Pearlz on the night in question, that fact alone would not be sufficient for her claim to reach a jury. *See Hartfield ex rel. Hartfield v. McDonald,* 381 S.C. 1, 671 S.E.2d 380 (Ct. App. 2008) ("*Hartfield I*") *cert. denied* February 5, 2010.[3] In *Hartfield I*, this Court affirmed the grant of a directed verdict to South Pointe Pub ("Pub"). In reaching this result, the Court noted that although testimony definitively placed the driver at the Pub on the night of the accident, "testimony from all parties who witnessed Helton on the night of the accident was that he was neither visibly intoxicated, nor actually served alcohol while at the Pub." *Id.* at 5, 671 S.E.2d at 382.

When the evidence is viewed in the light most favorable to Cooks, the most she can establish is that Brown was intoxicated and "maybe" was at Pearlz at some point during the night of the accident. She has no evidence, not even a scintilla, that Brown was served or sold alcohol at Pearlz or that Pearlz knew or should have known she was intoxicated when she was served or

[3] Although the Supreme Court's *Hartfield II* decision and this Court's *Hartfield I* decision address the same accident, the opinions do not address the same defendant. *Hartfield II* provides a recitation of the evidence relating to where and when the driver consumed alcohol on the night in question.

purchased alcohol. South Carolina courts have long required that plaintiffs present evidence establishing all elements of their claims. *See Turner v. Am. Motorists Ins. Co.*, 176 S.C. 260, 180 S.E. 55, 56–57 (1935) (describing the scintilla rule as follows, "[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views. It does not set aside the rule of force in this state relating to res ipsa loquitur, which doctrine does not prevail in this state."). Thus, Cooks has not met her burden of showing a genuine question of material fact for trial in the face of the properly made and supported summary judgment motion, and the trial court was correct in granting summary judgment.

II. The trial court did not err in granting summary judgment on the eve of trial where Cooks did not present any affidavits showing she needed additional discovery.

Cooks did not object to and does not contest the chronology submitted to the trial court at the hearing in this matter. (Chronology, R. at ____; Order at 1, R. at ____). As shown there, nearly four years had elapsed between the accident and the hearing on the Respondents' motion for summary judgment. (Chronology, R. at ____). During that time, Cooks filed and settled another lawsuit with Brown and conducted a deposition of Brown. (*Id.*).

With respect to this case, nearly a year elapsed between the filing of the complaint and the motion hearing. (*Id.*). The matter was heard on September 5, 2018 and was on the jury roster for the week of September 17, 2018 with the roster meeting the Friday before. (*Id.*).

As set forth in Rule 56(e), SCRCP, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. **If he does not so respond,**

summary judgment, if appropriate, shall be entered against him." (Emphasis added). Cooks did not submit any affidavits in opposition to the motion for summary judgment. (Order at 3-4, R. at ____).

If Cooks believed she needed additional discovery, Rule 56(f), SCRCP required her to present the trial court with affidavits explaining why she needed more time. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery. The rule does not apply in the situation presented where no affidavits were filed whatsoever."); *see Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) ("If the party opposing the motion for summary judgment cannot provide affidavits to justify his opposition, he must submit an affidavit providing reasons why such affidavit cannot be obtained."); *Matter of Estate of Smith*, 419 S.C. 111, 121, 796 S.E.2d 158, 163 (Ct. App. 2016) ("Rule 56(f) contemplates an affidavit will be filed at or before the hearing."). As a result, there was no basis for the trial court to defer a ruling or to deny the motion for summary judgment on this basis.

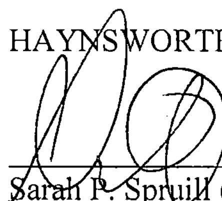
Instead, Cooks argued at the hearing and in her motion to reconsider that she needed to depose Brown prior to a ruling on the motion. (Tr. at 14, R. at ____; Motion at 4-5, R. at ____). However, she had already deposed Brown in the earlier lawsuit on June 19, 2017. Thus, she was aware of the earlier testimony and had not adduced any additional evidence in the intervening time prior to the hearing. Given the earlier deposition, the time that had elapsed, and in the absence of any affidavits, the trial court was within its discretion in granting the motion pursuant to Rule 56(c), SCRCP based on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Cooks failed to meet her burden as described in Rule 56(e) and summary judgment was entered against her as mandated by the rule.

CONCLUSION

For these reasons and those presented by the other Respondents in this appeal, the trial court's grant of summary judgment should be affirmed.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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Dated: June 28, 2019

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In The Court of Appeals

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Paul M. Burch, Circuit Court Judge

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Carolina Ale House, and Art Bar, Inc. .... Respondents

PROOF OF SERVICE

I certify that I have served the *Initial Brief of Respondent Pearlz Vista, Inc., D/B/A Pearlz Oyster Bar* and *Designation of Matter* on all attorneys of record by depositing a copy of it in the United States Mail, postage prepaid, on June 28, 2019, addressed to:

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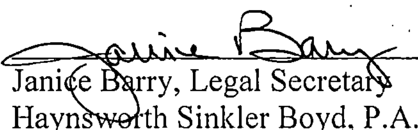

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June 28, 2019

The Honorable Jenny Abbott Kitchings
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Re: Latoria R. Cooks v. Pearlz Vista, Inc., d/b/a Pearlz Oyster Bar, Carolina Ale House Operating Company, LLC, d/b/a Carolina Ale House, and Art Bar, Inc.
Appellate Case No. 2018-002026

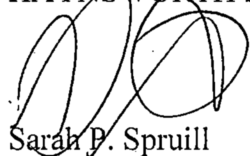
Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the Initial Brief of Respondent Pearlz Vista, Inc., d/b/a Pearlz Oyster Bar and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced case together with a Proof of Service. Please file the originals and return a clocked copy to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.



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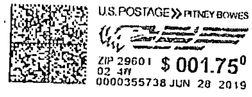

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