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.

APPELLANT'S PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Appellant Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore, petitions this Court for rehearing of the Court's decision in *Lindsey Stewart, Personal Representative of the Estate of Shaun Robert Moore v. Green Apple, LLC, d/b/a Applebee's*, 2019-UP-232 (S.C. Ct. App. filed June 26, 2019). Appellant submits that the Court misapprehended the law or overlooked the evidence when it affirmed the trial court's order granting Respondent's motion for summary judgment. Appellant respectfully requests the Court reconsider its decision for the reasons stated in its briefs, including the following reasons:

I. The Court should reconsider its decision because it addressed an issue that the trial court did not address – whether summary judgment is proper for a general negligence action. The introductory statement to issue 1. in the opinion refers to a "general negligence cause of action", which Appellant interprets as the Court addressing this case as a general negligence action rather than a dram shop action. Once the Court decided this case is one for general negligence, it should have reversed and remanded to the trial court. In the trial court, Green Apple's argument for summary judgment and the trial court's ruling for summary judgment were based on a misinterpretation of this case as a dram shop action rather than a general negligence claim. Green Apple argued for the first time on appeal that it is entitled to summary judgment even as to a general negligence action. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. *Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (internal quotation marks omitted). In this case, the trial court never ruled on the merits of a general negligence

action and this Court should refrain from doing so 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).

II. The Court should reconsider its decision because it relies on inapplicable case law. Despite characterizing the case as a general negligence cause of action, the Court proceeds to cite to dram shop cases as support for its decision. For the reasons stated in Appellant's Briefs, those cases are not applicable to allegations of general negligence not based on statutory violations or a defendant's status as a tavern owner.

III. The Court should reconsider its decision because it is contrary to the Supreme Court's opinion in *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017). In *Donze*, the defendant argued that voluntarily impaired plaintiffs should be precluded from "bringing *any* cause of action to recover damages." *Id.* at 20-21, 800 S.E.2d at 485. The Supreme Court "decline[d] to" agree with that argument. *Id.* at 22, 800 S.E.2d at 486. This Court's opinion is directly contrary to *Donze* because it holds that an intoxicated individual cannot bring a general negligence action. This is also contrary to the numerous cases cited in Appellant's reply brief in which an intoxicated plaintiff was permitted to seek recovery. *See Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007); *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).

IV. The Court should reconsider its decision because, if the Court is going to rule on the merits of summary judgment as to a general negligence action, which Appellant maintains is incorrect, then it should consider and address the evidence that Green Apple forced Mr. Moore to leave the restaurant without allowing him to call for transportation when Green Apple knew that he did not have a cell phone or transportation. (R. pp. 16-17, 21-22, 78). This situation is distinguishable from a typical tavern patron because Green Apple knew that Mr. Moore did not have transportation or a cell phone and that he lived more than 10 miles from the restaurant. *See Russell v. Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991) (holding that police who forced an intoxicated man to leave the scene of a fight owed a duty of care when he died after falling from a train trestle). Further, the Court should consider and address the fact that Appellant submitted an expert affidavit to support its negligence cause of action and Green Apple submitted no evidence to the contrary, expert or otherwise.

V. The Court should reconsider its decision because summary judgment is premature where discovery is incomplete. The Court's parenthetical as to this issue mentions the sufficiency

of time to conduct discovery and whether discovery would have uncovered additional, relevant evidence. Appellant presented ample argument and evidence of both considerations. As to time, the lack of discovery was directly based on *Green Apple's* failure to timely respond to written discovery requests. Green Apple did not respond to Appellant's written discovery requests for six months and sent incomplete responses only *after* it filed a motion for summary judgment. (R. pp. 49-65, 37). As to the discovery of additional, relevant evidence, Appellant wanted to conduct discovery on Mr. Moore's personnel file, witnesses who would testify as to the exact circumstances of Mr. Moore's firing and subsequent removal from the restaurant, witnesses who would testify that Green Apple refused to let Mr. Moore make a phone call before kicking him out of the restaurant, and training and policies of Green Apple on intoxicated persons. Appellant did not receive a "full and fair opportunity to complete discovery" prior to summary judgment, and the Court should reconsider its ruling on this issue. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

CONCLUSION

For the reasons set forth herein and in Appellant's Briefs, the Court should grant the petition for rehearing and reconsider its decision. Appellant requests the Court reverse the lower court's orders and remand the case to proceed in circuit court as a general negligence action.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Appellant's Petition for Rehearing* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 9th day of July, 2019.

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B A R N E S
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Kathleen C. Barnes
Admitted: Georgia | South Carolina

July 9, 2019

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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:

Please find enclosed for filing the original and seven copies of *Appellant's Petition for Rehearing*, in the above-referenced matter. Also enclosed is proof of service and the $50.00 filing fee. Please return the additional copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC

Kathleen C. Barnes

Kathleen C. Barnes

Enclosures

cc: Drew H. Butler
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