STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A NO.: 2017-CP-26-03062
Michele M. Messer, Plaintiff, vs. William J. Muse, individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; Kathryn Montorio; and Christopher B. Campbell, Defendants.	)	**ORDER**

Date of Hearing:	May 29, 2019
Presiding Judge:	The Honorable Benjamin H. Culbertson
Plaintiff's Counsel:	Justin D. Bice
Moving Defendants' Counsel:	J. Boone Aiken, III

PROCEDURAL HISTORY

THIS MATTER came before me during a regular non-jury term of court in Horry County, Fifteenth Judicial Circuit, Wednesday, May 29, 2019, at 1:00 P.M., on Motion for Summary Judgment on behalf of Defendants William J. Muse, individually and as President of NEM, Inc., NEM, Inc. d/b/a The Sandy Monkey, Sharon Cumbie, and Kathryn Montorio. Present were Justin D. Bice, Bice Law, LLC, Fort Mill, South Carolina, representing Plaintiff Michele M. Messer, and J. Boone Aiken, III, Aiken Bridges, Florence, South Carolina, representing the moving Defendants.

The Sandy Monkey was a bar (now closed) on U.S. 17 Business, in Murrells Inlet, South Carolina, during the time frame in question. William J. Muse was the principal and

owner of NEM, Inc. Sharon Cumbie was the general manager of The Sandy Monkey, and Kathryn Montorio was the bartender at The Sandy Monkey on February 8, 2015.

FACTS

On Sunday afternoon, February 8, 2015, The Plaintiff, Michele M. Messer ("Messer"), and her boyfriend, until a few weeks prior to February 8, 2015, Co-Defendant Christopher B. Campbell ("Campbell") either coincidentally or by design ran into each other at The Sandy Monkey. Both the Plaintiff and Co-Defendant Campbell consumed alcohol and after a few hours at The Sandy Monkey, the Plaintiff and Campbell left the premises and got in Michele Messer's van, which was positioned in a parking lot near but not actually on the parking lot premises of The Sandy Monkey. Suddenly and without warning, Campbell attacked the Plaintiff and bit off part of her nose.

Campbell was initially charged with attempted murder with regard to the assault on Michele Messer and he ended up entering a plea to assault and battery of a high and aggravated nature, which resulted in a fifteen-year prison sentence. At the same time, Campbell pled guilty to involuntary manslaughter on another matter and received a five-year consecutive sentence for that felony.

The Complaint alleges that The Sandy Monkey, by and through its employees and agents, breached their statutory duties and duty of care, and were negligent and reckless in serving Campbell to the point of intoxication and in continuing to serve alcohol to Campbell on the premises when they knew or should have known that he was intoxicated, in violation of sections 61-6-2220 and 61-4-580 of the South Carolina Code. Section 61-6-2220 provides that a person or establishment licensed to sell alcoholic liquors may not sell these beverages to persons in an intoxicated condition . . . . Section

61-4-580 provides that no holder of a permit authorizing the sale of beer or wine, or a servant, agent, or employee of the permittee shall sell beer or wine to an intoxicated person . . . .

The Plaintiff has alleged that Campbell's intoxication, the attack and subsequent damages suffered by Plaintiff were proximately caused by Campbell being overserved alcohol by Defendants.

Five days after this criminal assault on the Plaintiff, Heather Brummett, investigating officer, Horry County Police Department, secured a recorded interview from the Plaintiff and during this interview the Plaintiff told Officer Brummett that she "doesn't remember him being intoxicated," and that he was "more than fine." She further told Officer Brummett that what Campbell drank at The Sandy Monkey was absolutely nothing compared to what he could tolerate.

Ms. Montorio, bartender, was asked if she ever noticed Christopher Campbell demonstrating any type of hostility or anger toward Michele Messer and she responded, "No, not at all." (Montorio Deposition 66:3-6).

Ms. Montorio was asked if she ever noticed any mood swings of Christopher Campbell and she responded, "No." (Montorio Depo 66:7-9).

Ms. Montorio was asked if she ever noticed Christopher Campbell being loud or obnoxious and she testified, "Not at all." (Montorio Deposition 66:10-12).

Ms. Montorio was asked if she ever noticed Christopher Campbell being aggressive toward Michele Messer or anyone else, and she testified, "No." (Montorio Deposition 66:13-16).

Ms. Montorio was asked if when he ordered a drink Mr. Campbell demonstrated slurred speech and she responded, "No." (Montorio Deposition 66:20-22).

Ms. Montorio was asked if when Mr. Campbell got up to go outside if he was staggering and she responded, "No." (Montorio Deposition 66:23-25).

Ms. Montorio was asked if Campbell was creating any scene at any time and she responded, "No." (Montorio Deposition 67:1-3).

Finally, Ms. Montorio was asked if Mr. Campbell was ever visibly intoxicated and she responded, "No." (Montorio Deposition 67:4-5).

The Plaintiff's "dram shop" expert, Elizabeth Trendowski, has been deposed and deposition excerpts are set forth below:

Trendowski, Elizabeth (Page 74:16-20)

16-18 Q Okay, and there was - - there was no hostility at all in the bar between Campbell and Ms. Messer, is that correct?
19-20 A I didn't see anything like that. That's my understanding.

Trendowski, Elizabeth (Page 75:7-18)

7-12 Q Would you agree that nothing happened in the bar at Sandy Monkey between Mr. Campbell and Ms. Messer that would have given Kathy Montorio notice that Mr. Campbell was going to leave the bar, go in the van and bite Ms. Messer's nose off? There was nothing to give her notice of warning of that; is that fair?
13-14 A That's fair. She wouldn't have known that he was going to bite her nose, no, that's true.
15-17 Q Or criminally assault her. Just nothing to give her notice he was going to criminally assault her, as he did?
18 A That's true.

STANDARD OF REVIEW

Summary judgment should be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, *SCRCP*.

The movant must demonstrate there is no genuine dispute of material fact. *Miller v. Blumenthal Mills, Inc.,* 365 S.C. 204, 225, 616 S.E.2d 722, 732 (Ct. App. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *See Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Rife v. Hitachi Construction Machinery Co., LTD*, 363 S.C. 209, 609 S.E.2d, 565 (Ct. App. 2005). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. *Baughman v. American Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

After the moving party has met his initial burden, Rule 56(e) of the *South Carolina Rules of Civil Procedure* requires the opposing party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* In response to a properly supported motion for summary judgment, the opposing party "must come forward with specific facts showing there is a genuine issue of material fact." Id. Thus, "the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact." *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994) (Quoting *Dickert v. Metropolitan Life Ins. Co.,* 206 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C 218, 428 S.E.2d 700 (1993).

LAW/ANALYSIS

In South Carolina, for a plaintiff to recover in a negligence action, the plaintiff must show: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach." *Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002).

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. *Shepard v. South Carolina Department of Corrections*, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989). Where the injury complained of is not reasonably foreseeable, there is no liability. *Woody v. South Carolina Power Company*, 202 S.C. 73, 24 S.E.2d 121 (1943). One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. *Id.* Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred. *Shepard v. South Carolina Department of Corrections, supra.*

The record is clear in this case that this incident was isolated, spontaneous, and unforeseeable. The testimony establishes that the incident occurred in a matter of seconds and was completely unexpected. The moving Defendants had absolutely no knowledge to put them on notice that Defendant Campbell would spontaneously commit such a crime. Without knowledge, there was no duty to protect plaintiff from the acts of a third party, and consequently, there was no breach of the alleged duty to protect as a matter of law. Thus, as will be demonstrated by a long line of precedent explained herein, summary judgment is proper for Defendants.

The most recent case to discuss assault and foreseeability in a similar context is the case of *Easterling v. Burger King Corporation,* 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016), where an assault resulted in a nose amputation (similar to this case). In *Burger King*, on July 8, 2008, Easterling was waiting to place his order at a Burger King in Charleston, South Carolina. *Id.* at 441, 786 S.E.2d at 445. Defendant Eastwood was in a truck directly behind the Plaintiff. *Id.* Eastwood rear-ended the plaintiff, but the plaintiff did not make an issue out of this initial contact. *Id.* After Easterling placed his order, Eastwood began "pushing the accelerator but keeping his foot on the brake so the tires were spinning," making loud screeching noises, and resulting in smoke going everywhere. *Id.* Eastwood rear-ended Easterling a second time and following the second impact, Easterling stepped out of his vehicle to assess the damage and Eastwood lunged at Easterling and grabbed Easterling around the waist resulting in the plaintiff hitting the curb, tripping and falling over backwards, and losing consciousness. *Id.* at 442, 786 S.E.2d at 446. When the plaintiff regained consciousness, Eastwood was on top of him and proceeded to violently bite his nose off. *Id.*

Summary judgment was granted in favor of Burger King and the plaintiff appealed. *Id.* at 444, 786 S.E.2d at 447. As in this case, the *Burger King* court noted in its reasoning that Easterling was an invitee, and in South Carolina the owner of property owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of duty. *Id.* at 446, 786 S.E.2d at 448. The appellate court also noted that a business owner has a duty to take reasonable action to protects its invitees against the *foreseeable* risk of harm. *Id.* (emphasis in original).

Commenting on foreseeability, Easterling produced a prior incidents report for that particular Burger King location that spanned six years. *Id.* at 448, 786 S.E.2d at 449. While the report demonstrated a pattern of police responding to calls at the Burger King for various problems, it revealed only one incident of armed robbery occurring on Burger King's premises. *Id.* The Court concluded that none of the incidents were remotely similar to that which occurred on the night in question and, accordingly, the plaintiff failed to produce any evidence that a physical assault was foreseeable to Burger King. *Id.* at 450, 786 S.E.2d at 450. Therefore, the circuit court's grant of summary judgment in Burger King's favor was affirmed. *Id.*

A long line of South Carolina cases has a similar precedent. As a general rule, our appellate courts recognize that a storeowner is not generally charged with the duty of protecting its customers against the criminal acts of third parties. *See e.g.*, *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977) (adopting the imminent harm rule, under which a landowner owes no duty to protect invitees from violent acts of third parties, unless the owner knows or has reason to know "acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee"), *abrogated by Gopal,* 395 S.C. at 138–39, 716 S.E.2d at 915; *Munn v. Hardee's Food Sys., Inc.*, 274 S.C. 529, 531, 266 S.E.2d 414, 415 (1980) (holding that evidence indicating a group of people met under spontaneous circumstances as a result of some derogatory, racial comments made outside of the Hardee's restaurant, and not in the presence of its employees, was insufficient to show Hardee's knew or had reason to know such acts were occurring or about to occur and, thus, was insufficient to establish the restaurant's liability for the decedent's fatal injuries).

Several appellate cases have relied on *Shipes* and *Munn* in granting defense motions. The Supreme Court granted a tavern owner's motion for nonsuit in the case of *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984). There, the South Carolina Supreme Court found that the tavern owner did not owe a duty to protect a customer from the criminal act of a third party. *Id.* In *Bullard*, a tavern patron left the bar (after being asked to leave), returning shortly, and within seconds threw a beer bottle, striking plaintiff in the eye (though intending to strike another customer). *Id.* at 558, 324 S.E.2d at 62. The *Bullard* Court reasoned that, as a matter of law, a bar could not have foreseen its patron throwing a bottle and, therefore, no duty arose that could have been breached because it happened spontaneously, leaving no time for the bar to try to prevent something of which it had no knowledge or reason to know would happen. *Id.* at 559, 324 S.E.2d at 62.

The case of *Crolley v. Hutchins*, 387 S.E.2d 716 (Ct. App. 1989) is also instructive for this analysis. There, the South Carolina Court of Appeals upheld the circuit court's grant of summary judgment and holding that the bartender's alleged statutory violation in serving alcohol to intoxicated patron was not proximate cause of patron's damages. *Id.* In that case, Crolley, through his guardian ad litem, brought suit against a bar (Willoughby's) and bartender alleging negligence *per se* because of the violation of the statute which prohibited the sale of alcohol to an intoxicated person. *Id.*

After consuming several alcoholic drinks, the Defendants refused to serve Crolley additional alcohol because he appeared intoxicated. *Id.* at 356, 387 S.E.2d at 717. Crolley then refused to pay his bill and was arrested for disorderly conduct; removed from the bar; and taken to the Richland County Detention Center, where he later tried to commit

suicide. *Id.* There, the court noted that even if Defendants were negligent *per se* "Crolley must still prove that the injuries from his attempted suicide were the proximate result of Hutchins's conduct." *Id.* at 356–57, 387 S.E.2d at 717. In its reasoning, the *Crolley* Court relied on *Scott v. Greenville Pharmacy, Inc.*, 48 S.E.2d 324, in which a druggist dispensed barbiturates to Scott without a physician's prescription in violation of statute. *Id.* at 357, 387 S.E.2d at 717. Scott committed suicide while under the influence of the barbiturates, and Scott's widow sought damages; but the South Carolina Supreme Court held there was no proximate causation as a matter of law. *Id.* The *Scott* Court reasoned:

> We think it would be going entirely too far . . . to hold that the unlawful sale of the barbiturate capsules brought about the condition of suicidal mania as the natural and probable consequence of the sale, or that this result should have been reasonably foreseen by the druggist.

Id. at 357, 387 S.E.2d at 718 (*citing Scott*, 212 S.C. at 495, 48 S.E.2d at 328).

Likewise, in *Crolley*, the Court concluded that the attempted suicide was too remote from the alleged statutory violation to establish proximate causation. *Id.* The *Crolley* Court reasoned:

> One does not expect a person to attempt suicide as a natural and probable result of being served a drink while intoxicated. The only inference to be drawn from the evidence is that the attempted suicide was an act which Hutchins could not reasonably have foreseen and anticipated when he served Crolley. Thus, there was no proximate causation, as a matter of law.

Id. at 357–58, 387 S.E.2d at 718.

In yet another premise liability action concerning a drive-through, the appellate court upheld summary judgment in *Callen v. Cale Yarborough Enterprises, d/b/a Hardee's* 314 S.C. 204, 442 S.E.2d 216 (Ct. App. 1994). There, plaintiff got into an altercation with occupants of the car in front of him, and ultimately, an occupant struck Callen across the face with a piece of lumber. *Id.* at 205, 442 S.E.2d at 217. There, Callen had admitted

that the fight happened very quickly and without warning. *Id.* Ultimately, the court held summary judgment was proper because there was no evidence Hardee's knew or had reason to know the violent act in question was occurring or about to occur. *Id.* at 206, 442 S.E.2d at 218. The *Callen* court held:

> Under South Carolina law, a merchant or restaurant owner is not charged with the duty of protecting its customer against criminal acts of third parties when it did not know or have reason to know that such acts were occurring or have reason to know that such acts were occurring or about to occur.

Id. at 206, 442 S.E.2d at 217.

The appellate court also upheld summary judgment in *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000), where a customer was abducted from a store parking lot. There, Miletic brought action against Wal-Mart for failing to protect her from criminal acts of third parties. *Id.* In upholding summary judgment, the court reasoned that Wal-Mart did not have a duty to protect Miletic from an attack like the one she suffered because the "store simply had no notice of any comparable violent crimes occurring in the two years prior, and no incidents occurred on that particular night to put Wal–Mart on notice of an impending violent car jacking." *Id.* at 333, 529 S.E.2d at 70–71. Thus, the court held Wal-Mart had no duty to protect Miletic and could not have negligently breached that duty. *Id.*

In this case at hand, the spontaneous isolated criminal attacks by Campbell on the Plaintiff, after they both happily left the bar, could not have reasonably been foreseen and anticipated when Campbell was last served alcohol at The Sandy Monkey. Thus, as a long line of South Carolina courts have held, in this situation, Defendants cannot be charged with the duty of protecting plaintiff against criminal acts of third parties when it did not know or have reason to know that such acts were occurring or about to occur.

Consequently, no duty arose that could have been breached because the criminal act of a third party happened spontaneously and without any warning, certainly without warning to the Defendants. Accordingly, summary judgment is proper in this instance because there is no evidence indicating Defendant knew or had reason to know that the violent act committed upon plaintiff would later occur.

AND IT IS SO ORDERED.

BENJAMIN H. CULBERTSON, CIRCUIT COURT JUDGE, FIFTEENTH JUDICIAL CIRCUIT

At Chambers

June _____, 2019

Horry Common Pleas

Case Caption: Michele Messer VS William J Muse , defendant, et al

Case Number: 2017CP2603062

Type: Order/Summary Judgment

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148