THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-001199

Michelle M. Messer, ...Appellant,

v.

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,

Of which William J. Muse, Individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio are the Respondents,
.....Respondents.

INITIAL BRIEF OF RESPONDENTS

J. BOONE AIKEN, III
SC Bar No.: 307
JENNY DRAFFIN SMITH
SC BAR NO: 76129
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
PO Drawer 1931
Florence, SC 29503
Telephone: 843.669.8787
fax: 843.664.0097
JBA@AIKENBRIDGES.COM
JDS@AIKENBRIDGES.COM

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STATEMENT OF THE CASE

On May 16, 2017, Appellant Michele Messer brought a dram-shop type action against Respondents after she suffered injuries at the hand of Defendant Christopher B. Campbell. Specifically, Defendant Campbell bit part of Appellant's nose off after they left The Sandy Monkey, a bar located in Murrells Inlet, South Carolina. 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 Mr. 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 South Carolina Code Sections 61-6-2220 and 61-4-580. 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.[1]

After answering the Complaint and participating in written and deposition discovery, Respondents filed a Motion for Summary Judgment asserting that, as a matter of law, Respondents owed no legal duty to Plaintiff, and as such could not be found negligent. Specifically, Respondents argued:

> (1) These [Respondents] were not negligent as they owed no duty to [Appellant] to prevent the unforeseeable criminal acts of a third party; and
> (2) [Appellant's] negligence exceeded any negligence of these [Respondents].

See Memorandum of Law in Support of Motion for Summary Judgment. In her Memorandum in Opposition to Respondents' Motion, Appellant argued:

> (1) Genuine issues of material fact remain regarding the foreseeability of [Appellant's] injury.
> (2) Genuine issues of material fact remain regarding whether [Appellant's] alleged negligence exceeded these [Respondents'] negligence.

See Memorandum of Law in Opposition to Summary Judgment.

On May 29, 2019, the parties appeared before the trial court to argue the merits of their respective positions. *See* Motions Transcript. After hearing the arguments, the trial court granted Respondents' Motion for Summary Judgment, entering an Order on June 21, 2019. In its order, the trial court found: "The record is clear in this case that this incident was isolated,

[1] These code sections are cited in full and later referenced and explained in the argument section.

spontaneous, and unforeseeable." *See* June 21, 2019 Order at p. 6. The trial court further reasoned that Respondents had absolutely no knowledge to put them on notice that Defendant Campbell would spontaneously commit a crime. *See id.* Thus, the court ultimately held that under the circumstances of this case, "no duty arose that could have been breached because the criminal acts of a third party happened spontaneously and without any warning, certainly without warning to the [Respondents]." *See id. at p. 12.* Without filing a Motion to Reconsider or any Motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Appellant filed a Notice of Appeal on July 16, 2019. *See* Notice of Appeal. These appellate arguments follow.

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). 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, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby showing that there are genuine issues for trial. *See Miller*, 365 S.C. at 220, 225, 616 S.E.2d at 732. 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. Am. Tel. & 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, "[a] party opposing a properly supported motion for summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that 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). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

STATEMENT OF THE FACTS

On Sunday afternoon, February 8, 2015, Appellant and former Plaintiff, Michele M. Messer, and her former boyfriend and Co-Defendant, Christopher B. Campbell, coincidentally, by default or design, ran into each other at The Sandy Monkey, which was a bar on U.S.-17 Business, in Murrells Inlet, South Carolina. 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 and, 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, Mr. 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 Mr. 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. The Plaintiff has alleged that due to Campbell's intoxication, the attack and subsequent damages suffered by Plaintiff were proximately caused by Campbell being over served alcohol by Defendants. However, there is no evidence in this record that Christopher Campbell was visibly intoxicated.

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

Kathy Montorio, who was the bartender at The Sandy Monkey on February 8, 2015, was asked at her deposition to describe the interaction between Campbell and the Plaintiff while they were in the bar at The Sandy Monkey. Ms. Montorio testified, "There were kisses back and forth and giggling and they were having fun." (Montorio Deposition 65:22-23). Ms. Montorio 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.

ARGUMENTS

I. APPELLANT'S ARGUMENTS ARE NOT PRESERVED FOR APPELLATE REVIEW.

As discussed and explained above, the trial court held Respondents did not owe a common law duty in this instance "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." *See* Order at p. 11. In her brief, Appellant argues the trial court relied on premise liability cases where owners allegedly did not keep their premises safe, while her Complaint is based on statutory duties not to sell alcohol to an intoxicated person. *See* App. Br. at p. 4. Thus, Appellant argues the trial court failed to evaluate the relevant statutory duties in the case at hand. *See id.* at p. 5. To the extent Appellant was not satisfied with the trial court's ruling or, more specifically, to the extent she believes the trial court did not rule on an important issue, she was

obligated to file a Motion to Reconsider under Rule 59 of the South Carolina Rules of Civil Procedure. *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). However, Appellant failed to file the requisite motion to reconsider and is now barred from making these arguments to the court.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564–65, 633 S.E.2d 505, 510 (2006). A long line of South Carolina appellate court cases hold that an issue must be raised and ruled upon by the circuit court to be preserved. *See id.*; *Elam v. S. Carolina Dep't of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In *Elam*, the South Carolina Supreme Court noted a party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. 361 S.C. at 24, 602 S.E.2d at 780. Furthermore, the *Elam* Court explained:

> South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.

Id. at 24–25, 602 S.E.2d at 780. In the *Pye* case, the South Carolina Court of Appeals noted an exception to this rule, but only when an issue not ruled upon is raised to the trial court's attention at a Rule 59(e) hearing. 369 S.C. at 565, 633 S.E.2d at 510.

As Appellant points out to the court, the trial court granted Respondents summary judgment on the basis that no duty arose that could have been breached because the criminal act

of a third party happened spontaneously and without any warning. *See* Order at p. 12. Appellant argues, for the first time, that the trial court should have applied a different set of duties and laws to the facts of this case. Specifically, Appellant now argues that the trial court erred in determining that Respondents had no duty to Appellant to protect against criminal acts of third parties, rather than applying statutory duties under sections 61-4-580 and 61-6-2220 of the South Carolina Code. Because Appellant failed to present this argument to the trial court through a Rule 59(e) Motion, it is not preserved for appellant review. Thus, the appellate court cannot consider the merits of Appellant's arguments and must affirm the trial court's grant of summary judgment to Respondents.

II. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE RESPONDENTS DID NOT OWE APPELLANT A DUTY PURSUANT TO SECTIONS 61-4-580 AND 61-6-2220 OF THE SOUTH CAROLINA CODE.

The trial court correctly granted summary judgement in this instance because the essential purpose of the statutes at issue is not to protect from the *kind of harm* Appellant has suffered; and Appellant is not a member of the class of persons the statutes at issue are intended to protect. Thus, Respondents do not owe her a statutory duty as she now argues here.

Pursuant to section 61-4-580 of the South Carolina Code:

> (A) No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
> (1) sell beer or wine to a person under twenty-one years of age;
> (2) sell beer or wine to an intoxicated person. . . .

Additionally, pursuant to section 61-6-2220 of the South Carolina Code:

> A person or establishment licensed to sell alcoholic liquors or liquor by the drink pursuant to this article may not sell these beverages to persons in an intoxicated condition; these sales are considered violations of the provisions thereof and subject to the penalties contained herein.

Parties may assert private causes of action in certain instances for violations of these statutes.

The South Carolina Supreme Court recognized that there exists a private cause of action for third parties injured at the hands of an intoxicated adult in the case of *Daley v. Ward*, 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990). In *Daley*, the third party was injured by an intoxicated motorist. *See id.* There, the Court noted that the purpose of (then) section 61-9-410 of the South Carolina Code was to protect the public at large from possible adverse consequences of an intoxicated person. *Id.* at 84, 399 S.E.2d at 15. The *Daley* Court relied, in part, on the reasoning in *Christiansen v. Campbell*, 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985), *overruled by Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998). *Id.*

The *Christiansen* case also concerned a case where the complainant sustained injuries from a motor vehicle accident. *See id.* There, Christiansen was injured after he left the bar in an intoxicated state. *See id.* (notably, *Christiansen* has since been overruled by *Tobias*, and it is now clear that South Carolina does not recognize a first-party dram shop cause of action). In its analysis, as relied upon by the *Daley* Court, the South Carolina Court of Appeals found:

> In determining whether civil liability arises from a violation of a penal statute, we look to see whether the statute is one designed to promote public safety, the complaining party is a member of the class the statute is intended to protect, and the party allegedly at fault is a person upon whom the statute imposes specific duties. Section 61–9–410 clearly promotes public safety.

Id. at 167–68, 328 S.E.2d at 354 (internal citations omitted).

Later, in the case of *Tobias v. Sports Club, Inc.*, the South Carolina Supreme Court refused to find that an intoxicated patron who was injured was part of the protected statutory class. 332 S.C. at 92, 504 S.E.2d at 319. Thus, the court explicitly held there is no recognized first-party cause of action in South Carolina because "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 92, 504 S.E.2d at 320. As in the line of cases already cited, *Tobias* involved a complainant who was injured in an automobile accident when he crossed the centerline of the highway. *See id.*

Public policy is not served by allowing recovery in this instance because the resulting injury is too remote.[2] Moreover, Appellant has failed to demonstrate that Respondents owed her a statutory duty. Violation of the statute is not conclusive of liability. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991). In order for Appellant to demonstrate that the bar owner owes her a duty under the statute, she must show: "(1) that the essential purpose of the statute is to protect from the *kind of harm* the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Id.* at 53, 410 S.E.2d at 252 (citing *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). The *Whitlaw* Court further explained: "If the plaintiff makes this showing, [s]he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a

[2] Appellant has failed to present any evidence that Respondents or their agents failed to act under the objective "reasonable person standard" as required under *Daley*. Simply put, there is no evidence that Respondents negligently served alcohol in this case because no evidence demonstrates that Campbell "who, by his appearance or otherwise. . . .was intoxicated."

negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence per se." *Id.* (internal citation omitted).

As the trial court thoroughly explained in its Order and in its dialog during the motions hearing, the kind of harm Appellant suffered is not the kind of harm the statutes at issue are intended to protect against. *See* Hearing Transcript *generally* and Order at pp. 6-12. Furthermore, appellate courts have relied on premise liability cases where criminal acts occur in addressing and ultimately granting defense motions to tavern owners. 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).

In *Bullard*, 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.* There, 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 61-62. 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*, 300 S.C. 355, 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 an intoxicated patron was not the proximate cause of patron's damages. *Id.* at

300 S.C. at 357–58, 387 S.E.2d at 718. In that case, Crolley, through his guardian ad litem, brought suit against a bar 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 [the bartenders] conduct." *Id.* at 356–57, 387 S.E.2d at 717. In its reasoning, the *Crolley* Court relied on *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948). 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 Court of Appeals 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 717-18 (*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.* at 357-58, 387 S.E.2d at 718. 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.

The appellate courts above held that the statutes prohibiting the sale of alcohol to an intoxicated individual were not designed or adopted in order to protect from the *kind of harm* those plaintiffs suffered. The same logic must be applied to undisputed facts in this case. As the trial court correctly observed and pointed out during the motions hearing, "virtually every dram shop case that has come before [the trial court] involved a car accident. That it was foreseeable that if you overserve somebody [and] they get behind the wheel of a car there's going to be an accident." *See* Hearing Transcript at 12. Likewise, the spontaneous isolated attack by Campbell that resulted in his biting off a portion of Appellant's nose is simply not the kind of harm the statutes at hand are intended to protect against—in other words, the purpose of the statutes would not be served should a court find a duty exists. Moreover, Appellant has failed to argue either prong of the *Whitlaw* test above. Consequently, Respondents cannot be charged with the duty of protecting Appellant from the kind of harm she suffered here. Therefore, this court must affirm the trial court's grant of summary judgment in this instance because Appellant failed to demonstrate that the essential purpose of the above statutes is to protect from the *kind of harm*

the she has suffered; and that she is a member of the class of persons the statutes are intended to protect.[3]

III. THE TRIAL COURT DID NOT ERRONEOUSLY EVALUATE CAUSATION AND FORESEEABILITY

The trial court did not find a breach occurred or resulting causation because it determined that under the undisputed facts no duty existed. The resulting injury and nature of Appellant's injury is significant to this analysis, because it is the resulting harm. Therefore, it was essential for the trial court to look at the end result, or the kind of harm Plaintiff suffered in making its analysis. Because there was no duty found or owed to Plaintiff in this instance, there can logically be no resulting causation. Accordingly, the trial court did not erroneously evaluate causation.

Here, Appellant again argues that the trial court erroneously determined foreseeability because it did not identify and start out its evaluation using the correct duty owed. App. Br. 6-7. Further, Appellant maintains that the proper standard for evaluating this case is to determine if the injury is a natural and probable consequence of a statute's violation. *Id.* at 7. Respondents resubmit that the proper evaluation is the *Whitlaw* test above. *See supra.* at pp. 9-15. Respondents crave reference and rely on its above arguments under the *Whitlaw* standard that support a finding that no duty was owed to Appellant under the statutes at hand. *See id.*

However, even if Appellant's assertion is true, the injury Appellant sustained is not the "natural and probable consequence" of the statutory violations. It seems that Appellant is going

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[3] Should the court uphold and affirm the trial court based on this argument, the remaining appellate court arguments are moot because they concern proximate cause and other

to great lengths to avoid the key words-"kind of harm"-because the statutes at hand were most certainly not put into law with this type of injury or action in mind. In her argument, Appellant also maintains that an original actor may still be liable for the conduct of a third party if the intervening act is a natural and probable consequence of the original actor's conduct. *See* App. Br. at 6. The cases Appellant relies on in making this argument do not involve violations of a statute or negligence per se. Rather, they involve criminal acts of third parties—which the trial court has already thoroughly considered.

In the case of *Mellen v. Lane*, 377 S.C. 261, 279, 659 S.E.2d 236, 245 (Ct. App. 2008), as cited by Appellant, the South Carolina Court of Appeals thoroughly explains and defines proximate cause. The court finds that "[c]onduct is the proximate cause of an injury if that injury is within the scope of reasonably foreseeable risks of the conduct." *Id.* at 280, 659 S.E.2d at 246. Further, the court instructed that foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged action. *Id.* Additionally, the court explained that a defendant cannot be held liable for unpredictable or unexpected consequences. *Id.*

The *Mellen* court also describes intervening causes and situations where there is a contention that an intervening agency interrupts the foreseeable chain of events. *Id.* at 281, 659 S.E.2d at 246-47. In instances of a third party's intervening actions, the court found two consequences to be tested: (1) the injury complained of, and (2) the acts of the intervening agency. *Id.* Intervening criminal acts were also discussed by the *Mellen* court, and the court explained:

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foreseeability issues.

> The general rule of law is that when, between [an act] and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person producing the injury, but that such was not intended by the [original actor] and could not have been foreseen by him, the causal chain between the [original act] and the accident is broken.

Id. at 285, 659 S.E.2d at 248–49.

To the extent this analysis applies to this matter and not an analysis under *Whitlaw*, it is Respondents' position that no duty was owed to Appellant under in any circumstance. However, and as an alternative argument, the criminal actions of Christopher Campbell most certainly broke any causal chain. The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen. *Id.* at 161–62, 161 S.E.2d at 173.

The trial court correctly determined that no duty was owed in this instance. A determination that Respondents do not owe Appellant a duty in this instance simply ends the analysis. However, no actor can or should ever be liable for the intentional, criminal, acts of a third party. Moreover, in this instance, like in the *Mellen* case, Campbell's intentional and criminal actions could not have been foreseen. Thus, the trial court must be affirmed.

IV. APPELLANT'S INJURIES WERE NOT FORESEEABLE AND RESPONDENTS DID NOT KNOW AND DID NOT HAVE REASON TO KNOW THAT THIS TYPE OF INJURY WOULD OCCUR.[4]

[4] Appellant's remaining arguments have not been raised to and ruled upon by the trial court and are not preserved for appellate review. *Pye v. Estate of Fox*, 369 S.C. 555, 564–65, 633 S.E.2d 505, 510 (2006); *Elam v. S. Carolina Dep't of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

a. The manner in which the harm occurred is important and must be considered.

The trial court's distinctions between negligent acts of third parties and intentional/criminal acts of third parties was an important distinction that must be upheld. The fact that Appellant was injured by the intentional and criminal acts of a third party is completely relevant to the analysis at hand. Appellant conveniently fails to mention the *Bullard* case in her brief to the court where the South Carolina Supreme Court ruled in a similar fashion as this trial court. 283 S.C. 557, 324 S.E.2d 61.

There, the supreme court granted a tavern owner's motion for nonsuit after finding that the tavern owner did not owe a duty to protect a customer from the criminal act of a third party. 283 S.C. 557, 324 S.E.2d 61. The *Bullard* Court reasoned that, as a matter of law, a bar could not have foreseen its patron throwing a bottle. *Id.* at 559, 324 S.E.2d at 62. Thus, no duty arose that could have been breached because the intentional act 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.*

As has been argued repeatedly herein, to the extent the correct standard to use in this analysis is the "natural and probable consequence" standard, Respondents would still not owe Appellant a duty in this instance. The type of injury and the manner in which the injury occurred could not have been foreseen. Thus, as the trial court correctly held Respondents did not have a duty in 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.

b. The harm was not foreseeable and preventing this type of harm is not the public policy in South Carolina

Respondents have already addressed the public policy behind the statutes at issue and craves reference to the analysis above. *See supra.* at pp. 9-15. In summary, it is Respondents' position that public policy is not served by allowing recovery in this instance because the resulting injury is too remote. Moreover, Appellant has failed to demonstrate that Respondents owed her a statutory duty under either prong of the *Whitlaw* test. *Whitlaw v. Kroger Co.*, 306 S.C. at 53, 410 S.E.2d at 252 (holding claimant must demonstrate (1) that the essential purpose of the statute is to protect from the *kind of harm* the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect in order to demonstrate a duty owed). The trial court has correctly held that the kind of harm Appellant suffered is not the kind of harm the statutes at issue are intended to protect against. Thus, there is no duty, statutory or otherwise, owed to Appellant in this instance. It would be entirely unreasonable to expect a bartender or tavern worker to foresee a violent act such as this occurring after patrons leave the premises. Therefore, the trial court's grant of summary judgment must be affirmed.

c. Alcohol leading to violence is not an issue properly before this court or the trial court and is not part of the duty analyses.

Appellant's remaining arguments are not relevant to this analysis and have not been presented to the trial court. Within the third section of Brief, Appellant maintains that violence caused by overconsuming alcohol is a "fact known to everyone." App. Br. 10. Whether or not intoxicated adults commit crime and whether this is a widely held belief is not an issue before the court, nor was this an issue before the trial court. In making her arguments, Appellant cites

to dicta from cases and treatises that do not analyze dram shop cases. More importantly, none of these cases consider the two important prongs from the *Whitlaw* test. Appellant's blanket assertion regarding alcohol and violence is a red herring and not part of the analyses that must be considered now. In this instance, Respondents do not owe Plaintiff a duty either under the dram-shop statutes or under the common law.[5]

The trial court correctly considered whether Respondents owed Appellant a common law duty. "In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011). "Generally, a person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty." *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 36, 542 S.E.2d 728, 730 (2001). "The duty of a storeowner to its invitees is to take reasonable care to protect them." *Bullard v. Ehrhardt*, 283 S.C. at 559, 324 S.E.2d at 62. The duty of a storeowner to take reasonable care to protect its invitees "does not extend to protection from criminal attacks from third parties unless the storeowner *knew or had reason to know of the criminal attack.*" *Id.* (emphasis added). The case of *Munn v. Hardee's Food Sys., Inc.*, held that despite an incident earlier that night involving a group of people making derogatory comments of a racial nature, there was no reason for Hardee's to expect a violent fight would break out. 274 S.C. 529, 531, 266 S.E.2d 414, 415 (1980).

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[5] Respondent again craves reference to previous sections in this brief that address whether a statutory duty is owed in this instance and will not restates those previous position again for brevity's sake. *See supra* at pp. 9-15.

In this instance, there is no question but that this incident was isolated, spontaneous, and unforeseeable. The testimony establishes that the incident occurred in a matter of seconds and was completely unexpected. Respondents had absolutely no knowledge to put them on notice that Defendant Campbell would spontaneously commit such a crime. In fact, both Appellant and Defendant Campbell testified in their depositions that they were having fun and were being affectionate with each other while at The Sandy Monkey. Without knowledge, there was no duty to protect Appellant 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 established by a long line of precedent, summary judgment was proper for Respondents.

The most recent case to discuss assault and duties to protect 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*, 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 protect its invitees against the *foreseeable* risk of harm. *Id.* at 446, 786 S.E.2d at 448 (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. at 531, 266 S.E.2d at 415 (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. *See e.g., Bullard v. Ehrhardt,* 283 S.C. 557, 324 S.E.2d 61 (1984); *Miletic v. Wal-Mart Stores, Inc.,* 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000); *Callen v. Cale Yarborough Enterprises, d/b/a Hardee's* 314 S.C. 204, 442 S.E.2d 216 (Ct. App. 1994); *Crolley v. Hutchins,* 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). As South Carolina appellate courts have held in similar cases and contexts, Respondents had no duty to protect Appellant from the criminal actions of Campbell in this matter. Thus, without a common-law duty owed to Appellant, Respondents could not have negligently breached that duty.

The spontaneous isolated criminal attacks by Campbell on Appellant, 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. Respondents 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 Respondents. Accordingly, summary judgment was proper in this instance because there is no evidence indicating Respondents knew or had reason to know that the violent act committed upon Appellant would later occur, and the trial court's ruling must be affirmed.

d. Appellant's additional facts do not impact the analyses regarding whether duties were owed in this instance

Appellant maintains that she has facts, or more than a scintilla of evidence, that indicate Christopher Campbell was intoxicated on the night of the incident. App. Br. 11-13. Further, she quantifies his alcohol level in several instances through the assistance of an expert toxicologist. *See id.* However, facts and calculations taken from the standpoint of a witness who was not present on the night of the incident who opines about how drunk she believes Christopher Campbell was on the night of the incident is nothing more than a red herring. Appellant's expert's "additional facts" do not and should not impact the analysis of whether Respondents owed a duty.

The focus of the statutory duty or negligence per se analysis concerns whether applicable statutes were meant to protect Appellant from the *kind of harm* those claimants suffered. On the other hand, the focus of the common-law duty concerns Respondent's knowledge *at the time* of the incident that would put them on notice that a criminal act such as the one committed by Campbell would likely occur. There are zero facts in the record before the court that put Respondents on notice that criminal activity was afoot or likely to occur later that night. As

appellate courts have held over and over, unless Appellant knew or had reason to know acts were occurring or about to occur on the premises that pose imminent probability of harm to Appellant, there is no duty.[6] Knowledge in these situations is not to be determined with the benefit of hindsight.

Appellant cannot demonstrate (and has even failed to argue) that she suffered an injury or the "kind of harm" that the dram shop statutes were designed to protect against or that she is a member of the class of persons the statutes were intended to protect. Therefore, her negligence per se argument fails as a matter of law. Furthermore, Appellant can point to no evidence from the night of the incident that would create a question of fact that notice was warranted, and thus, a duty was owed under the common law. Therefore, the trial court correctly found that no duty was owed to Appellant in this instance and granted summary judgment for Respondents.

e. Because no duty was owed in this instance, a jury should not determine foreseeability, and, alternatively, there was no proximate cause in this instance as a matter of law

The tort analysis ends once it is determined that no duty was owed. As Respondents have argued throughout herein, no duty was owed to Appellant pursuant to the dram-shop statutes or under the common law. As an alternative argument, Respondents maintain that this is a case where foreseeability can be decided as a matter of law and is not a jury question.

This court ruled, as a matter of law, that there was no proximate cause in the case of *Crolley v. Hutchins*, 300 S.C. at 357–58, 387 S.E.2d at 718, which has been previously referenced and discussed herein. *See supra* at pp. 12-14. As this court explained there:

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[6] Notably, the violent incident did not occur on Respondent's premises but in an area over which

> 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. Where the injury complained of is not reasonably foreseeable there is no liability. 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. Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred.

Id. at 357, 387 S.E.2d at 717. In its reasoning the *Crolley* court held that Crolley's attempted suicide was likewise too remote from the alleged statutory violation to establish proximate causation. *Id.* at 357, 387 S.E.2d at 718. This court reasoned that it would be unreasonable to anticipate that a person would "attempt suicide as a natural and probable result of being served a drink while intoxicated." *Id.* Accordingly, this court determined, based on the facts and remoteness of Crolley's injury that there was no proximate cause as a matter of law. *Id.* at 357–58, 387 S.E.2d at 718.

The *Crolley* Court relied on the Supreme Court case of *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324, finding Scott to be controlling. *Id.* at 357, 387 S.E.2d at 717. In *Scott*, a druggist dispensed barbiturates to Scott without a prescription and in violation of a state statute. *Id.* at 488, 48 S.E.2d at 325. Later, Scott hanged himself while allegedly under the influence of the drugs. *Id.* Ultimately, the supreme court found that Scott's suicide could not have reasonably been foreseen, and the court held that proximate cause was not shown as a matter of law. *Id.* at 495, 48 S.E.2d at 328. It further reasoned: "It is axiomatic that the violation of a statute, while negligence per se, will not support a recovery for damages unless such violation proximately caused or contributed to the injuries complained of." *Id.* at 489, 48 S.E.2d

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Respondent did not and could not exercise control.

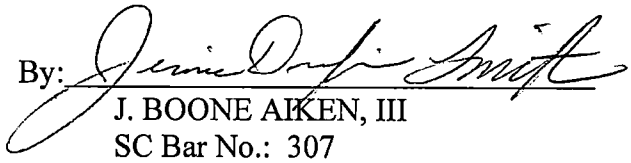
at 326. The *Scott* court also considered whether Scott's tragic death was a natural and probable consequence of the sale to him of the barbiturate capsules, and whether it have been foreseen in the normal course of events. *Id.* The court noted in its analysis that Scott's act was "a new and independent agency [that] does not come within and complete a line of causation from the injury to the death so as to render the one responsible for the injury civilly liable for the death." *Id.* at 495, 48 S.E.2d at 328. Furthermore, the *Scott* court expressed: "We think it would be going entirely too far in this case, on the face of the complaint, to hold that the unlawful sale of the barbiturate capsules brought about a condition of suicidal mania as the natural and probable consequence of the sale, or that this result should have been reasonably foreseen by the respondent." *Id.*

It is Respondents' firm position that no duty was owed to Appellant pursuant to the dram-shop statutes or under the common law. Thus, the tort analysis ends once it is determined that no duty was owed, and determination regarding breach or proximate cause is an unnecessary inquiry. However, to the extent causation needs to be addressed, Campbell's actions and Appellant's resulting injury could not have been reasonably foreseen by Respondents. The violent, sudden attack by Campbell could not and was not the natural and probable consequence of serving drinks to Appellant and Campbell. Moreover, the result is too remote from the alleged statutory violation to establish proximate causation, and it would be entirely unreasonable to anticipate that Campbell would violently attack a purported friend or partner at a later time and place based on his and Appellant's behavior as described herein. Therefore, as an alternative argument, there was no proximate cause in this instance as a matter of law.

CONCLUSION

The trial court properly determined that no duty was owed to Appellant in this instance. Appellant has failed to properly preserve her negligence per se argument, and it cannot be considered on the merits herein. However, as thoroughly analyzed and argued above, Respondents do not owe Appellant a duty either under a statute or under common law. Thus, because no duty was owed, there can logically be no breach or proximate cause. Alternatively, and to the extent causation needs to be addressed, there is no proximate cause as a matter of law in this instance because Appellant's resulting injury could not have been reasonably foreseen by Respondents. Therefore, the trial court's grant of summary judgment must be affirmed.

Respectfully submitted,

By: 

J. BOONE AIKEN, III
SC Bar No.: 307
JENNY DRAFFIN SMITH
SC BAR NO: 76129
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
PO Drawer 1931
Florence, SC 29503
Telephone: 843.669.8787
fax: 843.664.0097
JDS@AIKENBRIDGES.COM
JBA@AIKENBRIDGES.COM

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-001199

Michelle M. Messer, ...Appellant,

v.

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,

Of which William J. Muse, Individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio are the Respondents,
.....Respondents.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on January 27, 2020, addressed to her attorney of record, Justin D. Bice, 406 Tom Hall Street, Fort Mill, South Carolina 29715.

By: 

JENNY DRAFFIN SMITH
SC BAR NO: 76129
J. BOONE AIKEN, III
SC Bar No.: 307
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
PO Drawer 1931
Florence, SC 29503
Telephone: 843.669.8787
fax: 843.664.0097
JDS@AIKENBRIDGES.COM
JBA@AIKENBRIDGES.COM

ATTORNEYS FOR THE RESPONDENTS WILLIAM J. MUSE, INDIVIDUALLY AND AS PRESIDENT OF NEM, INC.; NEM, INC. D/B/A THE SANDY MONKEY; SHARON CUMBIE; AND KATHRYN MONTORIO

Florence, South Carolina
January 27, 2020

J. Boone Aiken, III •
Saunders M. Bridges, Jr. •+
E. Glenn Elliott •
Matthew N. Tyler •
James M. Saleeby, Jr.
J. David Banner
Samuel F. Arthur, III
Jay R. Lee
Preston B. Dawkins, Jr.
Carrie A. Fox •
J. Rufus Bratton, III
Jenny D. Smith
Lanier S. Felten

•Certified Mediator/Arbitrator
+Also Admitted District of Columbia

Aiken Bridges Attorneys at Law

JDS@AIKENBRIDGES.COM
843-669-8787, ext. 304
Facsimile: 843-664-0097

Alvin A. Coleman (1930-1995)

January 27, 2020

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Michelle M. Messer, Appellant v. William J. Muse, Individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Crumbie; and Kathryn Montorio, Respondents.
Appellate Case No.: 2019-001-199
Our File No.: 33152

Dear Ms. Kitchings:

Enclosed with this letter please find the original and one (1) copy of the Initial Brief of the Respondent, and the original and one (1) copy of the Designation of Matter for Record on Appeal in the above-referenced matter. Please file the same with your Court.

We are also enclosing the original Certificate of Counsel and original Proof of Service indicating service by mail this day of service upon the Appellant's counsel.

Thank you for your assistance in this matter. Should you have any questions or comments regarding any of the above, please do not hesitate to call.

With kind regards, I remain

Sincerely,

JENNY DRAFFIN SMITH

JDS/lhn
Enclosure

Cc:

Justin D. Bice
406 Tom Hall Street
Fort Mill, SC 29715

First Class Mail

Aiken Bridges
Attorneys at Law
P.O. Drawer 1931
Florence, SC 29503

RECEIVED
JAN 28 2020
SC Court of Appeals

To:
Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211