

THE STATE OF SOUTH CAROLINA
in the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-CP-26-03062

Michele 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,

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SC Court of Appeals

RECORD ON APPEAL

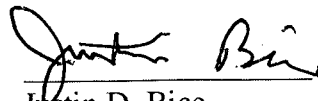
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I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

A handwritten signature in black ink, appearing to read "Justin D. Bice", written over a horizontal line.

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March 13, 2020

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
File No: 2017-CP-2603062**

Michele M. Messer,

Plaintiff,

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.

Entry of Default

This matter came to be heard by the undersigned on Plaintiff's Motion for Entry of Default. Having read Plaintiff's Motion and reviewed the Court file, the Court says as follows:

1. On May 16, 2017, Plaintiff filed in this matter a Complaint and Summonses issued in the name of Defendants.

2. On June 5, 2017, Plaintiff properly served the Summons and Complaint on Defendant Christopher B. Campbell.

3. The time for Defendant Christopher B. Campbell to answer or otherwise respond to Plaintiff's Complaint has expired.

4. Defendant Christopher B. Campbell has failed to answer or otherwise respond to Plaintiff's Complaint.

THEREFORE, it is ORDERED, ADJUDGED, and DECREED, that Plaintiff is entitled to the relief sought in the Complaint and default is hereby entered against Defendant Christopher B. Campbell.

This the _____ day of _____, 2017

Clerk of Court
Horry County, South Carolina



Horry Common Pleas

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

Case Number: 2017CP2603062

Type: Order/Entry of Default

So Ordered

s/Renee N. Elvis, Horry County Clerk of Court

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) 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 protect 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

Electronically signed on 2019-06-21 12:29:38 page 13 of 13

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2603062

Michele Messer
PLAINTIFF(S)

William J Muse et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Motion for Summary Judgment by defendants William J. Muse; NEM, Inc.; The Sandy Monkey; Sharon Cumbie and Kathryn Montorio is GRANTED.
Attorney J. Boone Aiken, III is to prepare a formal order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/29/2019 .

J. Boone Aiken, III for William J Muse, NEM Inc, Kathryn Montorio, Sharon Cumbie, Sandy Monkey
Christopher B Campbell
Justin D. Bice for Michele Messer

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

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

Case Number: 2017CP2603062

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-05-29 14:42:09 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
File No: 2017-CP-26-_____

Michele Messer,

Plaintiff,

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.

Complaint
[Jury Trial Demanded]

Plaintiff, complaining of Defendants, alleges and says as follows:

Parties, Jurisdiction, and Venue

1. Plaintiff Michele Messer ("Plaintiff" or "Ms. Messer") is an adult citizen and resident of Gaston County, North Carolina.
2. Defendant NEM, Inc., d/b/a The Sandy Monkey ("The Sandy Monkey") is a South Carolina corporation, whose principal place of business is 3034 US-17 BUS, Murrells Inlet, SC 29576.
3. Upon information and belief, Defendant William J. Muse ("Mr. Muse") is a resident of Lexington County, South Carolina and on the date of the incident described herein was the owner, operator, president, and licensee of record with the SC Department of Revenue Alcohol Beverage Licensing for The Sandy Monkey.
4. Upon information and belief, Defendant Sharon Cumbie ("Ms. Cumbie") is a resident of Horry County, South Carolina and was the manager of The Sandy Monkey on the date of the incident described herein.

5. Upon information and belief, Defendant Kathryn Montorio ("Ms. Montorio") is a resident of Horry County, South Carolina and was the bartender of The Sandy Monkey on the date of the incident described herein.

6. Defendant Christopher B. Campbell ("Mr. Campbell") is an adult citizen and is currently incarcerated at Lee Correctional Institution in Lee County, South Carolina.

7. This Court has jurisdiction over these parties and claims and is the proper venue for this action.

Facts

8. Defendants The Sandy Monkey and Mr. Muse owned and/or operated a business known as The Sandy Monkey selling beer, wine, and alcoholic liquors.

9. On February 8, 2015, Plaintiff and Mr. Campbell were patrons at The Sandy Monkey. Mr. Campbell was already at The Sandy Monkey when Plaintiff arrived.

10. Ms. Montorio was the only bartender working at The Sandy Monkey while Plaintiff was there that day.

11. Ms. Montorio and The Sandy Monkey, through its employees acting in the course and scope of their employment, served Mr. Campbell a quantity of alcohol causing him to become intoxicated and/or served him while intoxicated.

12. Mr. Campbell's intoxication led him to injuring Plaintiff in the parking lot of The Sandy Monkey ("Incident"). Mr. Campbell choked, beat, and ultimately bit Plaintiff's nose off.

13. Plaintiff suffered severe trauma including a nasal amputation requiring multiple past and future surgical procedures.

14. Upon information and belief, from 2012 – 2015, there were several incidents reported to police upon the premises of The Sandy Monkey and/or in its parking lot, including

instances of assault and battery and disorderly conduct.

15. Upon information and belief, on the date of the Incident, Mr. Muse & Ms. Cumbie were responsible for the hiring, training, supervision, and staffing of The Sandy Monkey's employees, bartenders, and/or wait staff.

16. Upon information and belief, on the date of the Incident, Mr. Muse & Ms. Cumbie were also responsible for planning and implementing The Sandy Monkey's marketing efforts and its policies and procedures regarding serving intoxicated patrons.

First Cause of Action
Negligence / Gross Negligence / Negligence *Per Se* /
Violation of S.C. Code Ann §§ 61-4-580 and 61-6-2220
 Against The Sandy Monkey, William J. Muse,
 Sharon Cumbie, and Kathryn Montorio

17. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set forth herein.

18. Defendants The Sandy Monkey and Mr. Muse owned and/or operated a business selling beer, wine, and alcoholic liquors. Mr. Muse was the holder of a permit authorizing the sale of beer or wine at the bar.

19. Defendants The Sandy Monkey and Mr. Muse and their employees, agents, legal representatives, managers, and/or officers including without limitation Mr. Muse, Ms. Cumbie, and Ms. Montorio owed Plaintiff, as a member of the general public, a statutory duty pursuant to S.C. Code §§ 61-4-580 and 61-6-2220 and a duty of care not to allow their patrons to become intoxicated, not to serve alcohol to its intoxicated patrons, and to protect Plaintiff, as a member of the general public, from the consequences of their patrons' intoxication, to which they contributed.

20. Defendants' duties also included a duty to use reasonable care in the hiring, training, supervision, and staffing of employees; supervision of patrons; maintaining proper policies and procedures regarding the service of alcohol; and operating a licensed drinking establishment in a proper manner.

21. On February 8, 2015, Defendants The Sandy Monkey, Mr. Muse, Ms. Cumbie and Ms. Montorio, individually and/or by and through their employees, agents, legal representatives, managers, and officers breached their statutory duties and duty of care and were negligent, grossly negligent, careless, reckless, willful and wanton in their actions described herein, including without limitation:

- a. In serving Mr. Campbell to the point of intoxication and in continuing to serve alcohol to him on the licensed premises after they knew or should have known that he was intoxicated in violation of SC Code §§ 61-6-2220 and 61-4-580;
- b. In serving alcohol drinks to Mr. Campbell when he was becoming visibly intoxicated;
- c. In continuing to serve alcohol drinks to Mr. Campbell after he was under the influence of alcohol;
- d. In the negligent supervision of patrons, particularly Mr. Campbell;
- e. In the negligent hiring of employees, bartenders, and/or wait staff;
- f. In the negligent training of employees, bartenders, and/or wait staff;
- g. In the negligent supervision of employees, bartenders, and/or wait staff;
- h. In failing to have a reasonable number of employees, bartenders, and/or wait staff on duty;

- i. In creating an atmosphere encouraging the consumption of excessive amounts of alcohol;
- j. In failing to maintain proper policies and procedures about serving intoxicated patrons;
- k. In failing to operate a license drinking establishment in a proper manner;
- l. In violating laws enacted to protect the safety and health of the public;
- m. In generally failing to use the degree of care and caution that a reasonable prudent person would have used under the same circumstances; and
- n. In other particulars that may be discovered prior to trial.

22. Pursuant to South Carolina common law and S.C. Code §§ 61-4-580 and 61-6-2220, The Sandy Monkey and Mr. Muse were responsible for any individual, servant, bartender, server, employee, agent, and/or legal representative serving alcohol to any patron of their business, including Mr. Campbell, and are individually and vicariously liable for the consequences that occurred on February 8, 2015.

23. Defendants caused Mr. Campbell to become and remain intoxicated at all times relevant hereto. Mr. Campbell's intoxication, the attack, and subsequent damages suffered by Plaintiff were proximately caused by Mr. Campbell being overserved alcohol by Defendants The Sandy Monkey, Mr. Muse, Ms. Cumbie, and Ms. Montorio individually or by and through their employees, agents, and legal representatives in violation of South Carolina law.

24. As a direct and proximate result of Defendants The Sandy Monkey, Mr. Muse, Ms. Cumbie, and Ms. Montorio's negligence, gross negligence, recklessness, willfulness, and wantonness, Plaintiff has suffered serious and substantial bodily injuries and damages including

without limitation to past, present and future medical expenses, pain, suffering, loss of earnings, loss of services, scars/disfigurement, loss of use of party of the body and permanent injury.

25. Plaintiff is entitled to judgment against Defendants, jointly and severally, in an amount to be determined by a jury.

Second Cause of Action
Negligence / Gross Negligence
Against Mr. Campbell

26. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set forth herein.

27. Mr. Campbell was under a duty to use reasonable care in controlling his alcohol consumption prior to becoming intoxicated to the point that he was no longer able to control his actions.

28. Without limitation, Mr. Campbell breached his duty of reasonable care and was negligent and grossly negligence in failing to control his alcohol consumption, becoming severely intoxicated, and injuring Plaintiff as detailed herein.

29. The Incident was reasonably foreseeable given Mr. Campbell's prior history of causing injuries to others due to being unable to control his actions after becoming intoxicated.

30. As the direct and proximate result of Defendant's negligence and gross negligence, Plaintiff has suffered serious and substantial injuries and damages including without limitation past, present, and future medical expenses, pain, suffering, loss of earnings, loss of services, scars/disfigurement, loss of use of part of the body, and permanent injury.

31. Plaintiff is entitled to judgment against Defendant, in an amount to be determined by a jury.

Third Cause Action
Assault & Battery
 Alternative Claim against Mr. Campbell

32. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set forth herein.

33. As discussed herein, Mr. Campbell inflicted unlawful, unauthorized violence on Plaintiff when Mr. Campbell attacked and injured Plaintiff suddenly and without warning while Mr. Campbell and Plaintiff were business invitees/patrons at The Sandy Monkey, there for the benefit of The Sandy Monkey.

34. As a direct and proximate result of Mr. Campbell's assault and battery onto Plaintiff, Plaintiff has suffered serious and substantial bodily injuries and damages including without limitation a nasal amputation requiring multiple operations for reconstruction, past, present, and future medical expenses, pain, suffering, loss of earnings, loss of services scars/disfigurement, loss of use of party of the body, and permanent injury.

35. Plaintiff is entitled to judgment against Defendant, in an amount to be determined by a jury.

Fourth Cause of Action
Piercing the Corporate Veil / Alter Ego or Instrumentality /
Amalgamation of Interest or Blurred Vision
 Individual Liability against Defendant William J. Muse

36. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set forth herein.

37. Upon information and belief, Defendant Mr. Muse, in owning and managing Defendant Sandy Monkey, has failed to properly operate the business in the following particulars:

- a. In operating a grossly undercapitalized company;

- b. In failing to observe corporate formalities;
- c. In doing business under the corporate name despite the insolvency of the company;
- d. In siphoning funds of the corporation, if any, to his personal use;
- e. In failing to keep corporate records;
- f. In using the company merely as a façade for the personal business of Defendant Mr. Muse.
- g. In comingling the funds of Defendant The Sandy Monkey with the funds of Defendant Mr. Muse, as well as funds of other individuals and entities; and
- h. Such other particulars as the evidence may show.

38. Upon information and belief, Defendant Mr. Muse's and Defendant The Sandy Monkey's interests and activities have blurred the identity of each so that Defendant Mr. Muse should be individually liable for any judgment resulting from this action against Defendant The Sandy Monkey.

39. Upon information and belief, Defendant Mr. Muse has exhibited a total dominion over Defendant The Sandy Monkey, which has caused or will cause inequitable consequences for Plaintiff. Injustice and fundamental unfairness would occur if Defendant The Sandy Monkey's corporate entity is recognized and Defendant Mr. Muse is shielded from liability.

40. Defendant Mr. Muse should be individually liable for any judgment resulting from this action against Defendant The Sandy Monkey.

Fifth Cause of Action
Punitive Damages
Against all Defendants

41. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set forth herein.

42. Defendants engaged in the wrongful conduct described above maliciously, willfully, and with a conscious indifference and/or reckless disregard for Plaintiff's rights.

43. As a direct and proximate result of Defendants' malicious, willful, reckless and wanton conduct, Plaintiff has suffered damages.

44. Plaintiff is entitled to recover punitive damages in an amount to be determined by a jury, but sufficient in amount to deter Defendants and others similarly situated from engaging in such misconduct in the future.

Prayer for Relief

Plaintiff prays that the Court:

1. Grant Plaintiff a trial by jury;
2. Enter a judgment against Defendants jointly and severally for Plaintiff's actual and punitive damages, in an amount to be determined by the jury;
3. Enter a judgment against Defendants jointly and severally for Plaintiff's reasonable costs for this action; and

4. Grant Plaintiff such other and further relief as the Court deems just and proper.

Respectfully submitted,

BICE LAW LLC

s/Justin D. Bice

Justin D. Bice

S.C. Bar No. 78411

justin@bicelaw.us

406 Tom Hall Street

Fort Mill, SC 29715

(803) 639-8777 - Telephone

(704) 612-0273 - Facsimile

Attorney for Plaintiff

Fort Mill, South Carolina

May ____, 2017

Jury Trial Requested.

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.

**ANSWER 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**

TO: JUSTIN D. BICE, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

The Defendants, William J. Muse, individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio, answering the Complaint herein, respectfully allege:

These Defendants deny each and every allegation of the Plaintiff's Complaint not specifically addressed herein. These Defendants allege and say as follows:

FOR A FIRST DEFENSE

1. Answering Paragraph 1: These Defendants admit, upon information and belief, the allegations contained in Paragraph 1 of the Complaint.

2. Answering Paragraph 2: These Defendants admit the allegations contained in Paragraph 2 of the Complaint.

3. Answering Paragraph 3: These Defendants admit the allegations contained in Paragraph 3 of the Complaint.

4. Answering Paragraph 4: These Defendants deny the allegations contained in Paragraph 4 of the Complaint. Sharon Cumbie was not working at The Sandy Monkey the afternoon of February 8, 2015.

5. Answering Paragraph 5: These Defendants admit the allegations contained in Paragraph 5 of the Complaint.

6. Answering Paragraph 6: These Defendants admit, upon information and belief, the allegations contained in Paragraph 6 of the Complaint.

7. Answering Paragraph 7: Paragraph 7 calls for a legal conclusion to which a response is not required.

8. Answering Paragraph 8: These Defendants admit the allegations contained in Paragraph 8 of the Complaint.

9. Answering Paragraph 9: These Defendants admit that on February 8, 2015, Plaintiff and Co-Defendant Campbell were patrons at The Sandy Monkey; except as herein admitted, the remaining allegations contained in Paragraph 9 of the Complaint are denied. In support of said denial, the Defendants state that the Plaintiff arrived at The Sandy Monkey before Co-Defendant Campbell.

10. Answering Paragraph 10: These Defendants admit the allegations contained in Paragraph 10 of the Complaint.

11. Answering Paragraph 11: These Defendants deny the allegations contained in Paragraph 11 of the Complaint.

12. Answering Paragraph 12: These Defendants admit that at some point after the Plaintiff and Co-Defendant Campbell left The Sandy Monkey, Co-Defendant Campbell viciously attacked the Plaintiff and caused the Plaintiff serious and tragic

injury. This act of criminal violence was completely unforeseeable and occurred off of the premises of The Sandy Monkey.

13. Answering Paragraph 13: These Defendants certainly admit that the Plaintiff was tragically injured but they are without information and belief as to the specifics of her treatment.

14. Answering Paragraph 14: These Defendants deny the allegations contained in Paragraph 14 of the Complaint.

15. Answering Paragraph 15: NEM, Inc., through its agents, was responsible for hiring, supervision, and staffing The Sandy Monkey's employees; except as herein admitted, the remaining allegations contained in Paragraph 15 of the Complaint are denied.

16. Answering Paragraph 16: NEM, Inc., through its agents were responsible for operating The Sandy Monkey in compliance with all applicable statutes and regulations. These Defendants further state that this duty was honored. Except as herein admitted, the remaining allegations contained in Paragraph 16 of the Complaint are denied.

FOR A DEFENSE TO THE FIRST CAUSE OF ACTION
Negligence/Gross Negligence/Negligence *Per Se*
Violation of S.C. Code Ann. §§ 61-4-580 and 61-6-2220
Against The Sandy Monkey, William J. Muse,
Sharon Cumbie, and Kathryn Montorio

17. Answering Paragraph 17: These Defendants deny Paragraph 17 of the Complaint.

18. Answering Paragraph 18: These Defendants admit that Mr. Muse was the holder of a permit authorizing the sale of beer or wine at the bar; these Defendants

further admit that Mr. Muse, as President of NEM, Inc., owned The Sandy Monkey, which is a business that sells food in addition to beer, wine, and alcoholic beverages; except as herein admitted, the remaining allegations contained in Paragraph 18 of the Complaint are denied.

19. Answering Paragraph 19: Paragraph 19 calls for a legal conclusion to which a response is not required. To the extent a response is required, denied. These Defendants further state that all such duties under the referenced statutes were honored.

20. Answering Paragraph 20: Paragraph calls for a legal conclusion to which is response is not required. To the extent a response is required, denied. These Defendants further state that all such duties were honored.

21. Answering Paragraph 21: These Defendants deny the allegations contained in Paragraph 21 of the Complaint, including all subparts.

22. Answering Paragraph 22: These Defendants deny the allegations contained in Paragraph 22 of the Complaint.

23. Answering Paragraph 23: These Defendants deny the allegations contained in Paragraph 23 of the Complaint.

24. Answering Paragraph 24: These Defendants deny the allegations contained in Paragraph 24 of the Complaint.

25. Answering Paragraph 25: These Defendants deny the allegations contained in Paragraph 25 of the Complaint.

FOR A DEFENSE TO THE SECOND CAUSE OF ACTION
Negligence/Gross Negligence
Against Mr. Campbell

26. Answering Paragraph 26: These Defendants deny Paragraph 26 of the Complaint.

27. Answering Paragraph 27: These Defendants admit that an individual who consumes alcohol has an obligation to drink responsibly; however, these Defendants deny that Co-Defendant Campbell was visibly intoxicated on the Sunday afternoon in February when this random act of violence occurred. Except as herein admitted, the remaining allegations contained in Paragraph 27 of the Complaint are denied.

28. Answering Paragraph 28: These Defendants admit that an individual who consumes alcohol has an obligation to drink responsibly; however, these Defendants deny that Co-Defendant Campbell was visibly intoxicated on the Sunday afternoon in February when this random act of violence occurred. Except as herein admitted, the remaining allegations contained in Paragraph 28 of the Complaint are denied.

29. Answering Paragraph 29: These Defendants deny the allegations contained in Paragraph 29 of the Complaint.

30. Answering Paragraph 30: These Defendants admit that the Plaintiff suffered serious and substantial injuries as the result of the criminal acts of Co-Defendant Campbell.

31. Answering Paragraph 31: These Defendants admit that the Plaintiff is entitled to judgment against Co-Defendant Campbell in an amount to be determined by a jury.

FOR A DEFENSE TO THE THIRD CAUSE OF ACTION

Assault & Battery

Alternative Claim against Mr. Campbell

32. Answering Paragraph 32: These Defendants deny Paragraph 32 of the Complaint.

33. Answering Paragraph 33: These Defendants admit that Co-Defendant Campbell inflicted unlawful, authorized violence on Plaintiff when Co-Defendant Campbell attacked and injured Plaintiff; except as herein admitted, the remaining allegations contained in Paragraph 33 of the Complaint are denied.

34. Answering Paragraph 34: These Defendants admit that as a direct and proximate result of Co-Defendant Campbell's assault and battery onto Plaintiff, Plaintiff has suffered serious and substantial bodily injuries and damages; these Defendants are without information as to the specifics of all of the Plaintiff's injuries and treatments but acknowledge that Plaintiff sustained a very serious and permanent injury.

35. Answering Paragraph 35: These Defendants admit that the Plaintiff is entitled to a judgment against Co-Defendant Campbell.

FOR A DEFENSE TO THE FOURTH CAUSE OF ACTION

Piercing the Corporate Veil/Alter Ego or Instrumentality/

Amalgamation of Interest or Blurred Vision

36. Answering Paragraph 36: These Defendants deny Paragraph 36 of the Complaint.

37. Answering Paragraph 37: These Defendants deny the allegations contained in Paragraph 37 of the Complaint, including all subparts.

38. Answering Paragraph 38: These Defendants deny the allegations contained in Paragraph 38 of the Complaint.

39. Answering Paragraph 39: These Defendants deny the allegations contained in Paragraph 39 of the Complaint.

40. Answering Paragraph 40: These Defendants deny the allegations contained in Paragraph 40 of the Complaint.

FOR A DEFENSE TO THE FIFTH CAUSE OF ACTION

**Punitive Damages
Against all Defendants**

41. Answering Paragraph 41: These Defendants deny Paragraph 41 of the Complaint.

42. Answering Paragraph 42: These Defendants deny the allegations contained in Paragraph 42 of the Complaint.

43. Answering Paragraph 43: These Defendants deny the allegations contained in Paragraph 43 of the Complaint.

44. Answering Paragraph 44: These Defendants deny the allegations contained in Paragraph 44 of the Complaint.

FOR A SECOND DEFENSE

45. These Defendants further allege that the accident described in the Plaintiff's Complaint and any injuries or damages caused thereby were solely and proximately caused by the negligence, recklessness, willfulness and wantonness of Co-Defendant Campbell, for which these Defendants cannot be held accountable and thus recovery against these Defendants is barred. These Defendants plead negligent, reckless, and criminal acts of Co-Defendant Campbell as a defense in this action.

FOR A THIRD DEFENSE

46. The events that took place on Sunday afternoon, February 8, 2015, after the Plaintiff and Co-Defendant Campbell left the premises of The Sandy Monkey were completely unforeseeable. The actions of Co-Defendant Campbell constituted a random criminal act, and the physical assault and attack by Co-Defendant Campbell upon the Plaintiff was not foreseeable by Defendants William J. Muse, individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio, and thus recovery for the Plaintiff against these Defendants is barred.

FOR A FOURTH DEFENSE

47. These Defendants honored all duties with regard to exercising ordinary care to keep The Sandy Monkey in a reasonably safe condition.

FOR A FIFTH DEFENSE

48. The Plaintiff knew, or should have known, of Co-Defendant Campbell's prior history of violence and, unfortunately, she assumed the risk of physical harm by associating with Co-Defendant Campbell at any time, and specifically on the afternoon of February 8, 2015.

FOR A SIXTH DEFENSE

49. Defendant William J. Muse pleads corporate immunity in bar of this action.

FOR A SEVENTH DEFENSE

50. These Defendants plead the criminal acts of Co-Defendant Campbell in bar of this action.

FOR AN EIGHTH DEFENSE

51. These Defendants allege that an award of punitive damages in this case would violate the 5th, 6th and 14th amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution in that:

- a) The unfettered power to award punitive damages in any manner is wholly devoid of a meaningful standard and is inconsistent with due process guarantees; and,
- b) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness.

WHEREFORE, having fully answered the Complaint of the Plaintiff, these Defendants pray that the said Complaint be dismissed with the costs and disbursements of this action.

By: s/J. Boone Aiken, III

J. BOONE AIKEN, III

Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.

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**ATTORNEYS FOR THE DEFENDANTS,
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

June 26, 2017

(33152)

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.

**AMENDED
ANSWER TO COMPLAINT 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**

TO: JUSTIN D. BICE, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

The Defendants, William J. Muse, individually and as President of NEM, Inc.;
NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio, as an
Amended Answer to the Complaint herein, respectfully allege:

These Defendants deny each and every allegation of the Plaintiff's Complaint not
specifically addressed herein. These Defendants allege and say as follows:

FOR A FIRST DEFENSE

1. Answering Paragraph 1: These Defendants admit, upon information and
belief, the allegations contained in Paragraph 1 of the Complaint.

2. Answering Paragraph 2: These Defendants admit the allegations
contained in Paragraph 2 of the Complaint.

3. Answering Paragraph 3: These Defendants admit the allegations
contained in Paragraph 3 of the Complaint.

4. Answering Paragraph 4: These Defendants deny the allegations contained in Paragraph 4 of the Complaint. Sharon Cumbie was not working at The Sandy Monkey the afternoon of February 8, 2015.

5. Answering Paragraph 5: These Defendants admit the allegations contained in Paragraph 5 of the Complaint.

6. Answering Paragraph 6: These Defendants admit, upon information and belief, the allegations contained in Paragraph 6 of the Complaint.

7. Answering Paragraph 7: Paragraph 7 calls for a legal conclusion to which a response is not required.

8. Answering Paragraph 8: These Defendants admit the allegations contained in Paragraph 8 of the Complaint.

9. Answering Paragraph 9: These Defendants admit that on February 8, 2015, Plaintiff and Co-Defendant Campbell were patrons at The Sandy Monkey; except as herein admitted, the remaining allegations contained in Paragraph 9 of the Complaint are denied. In support of said denial, the Defendants state that the Plaintiff arrived at The Sandy Monkey before Co-Defendant Campbell.

10. Answering Paragraph 10: These Defendants admit the allegations contained in Paragraph 10 of the Complaint.

11. Answering Paragraph 11: These Defendants deny the allegations contained in Paragraph 11 of the Complaint.

12. Answering Paragraph 12: These Defendants admit that at some point after the Plaintiff and Co-Defendant Campbell left The Sandy Monkey, Co-Defendant Campbell viciously attacked the Plaintiff and caused the Plaintiff serious and tragic

injury. This act of criminal violence was completely unforeseeable and occurred off of the premises of The Sandy Monkey.

13. Answering Paragraph 13: These Defendants certainly admit that the Plaintiff was tragically injured but they are without information and belief as to the specifics of her treatment.

14. Answering Paragraph 14: These Defendants deny the allegations contained in Paragraph 14 of the Complaint.

15. Answering Paragraph 15: NEM, Inc., through its agents, was responsible for hiring, supervision, and staffing The Sandy Monkey's employees; except as herein admitted, the remaining allegations contained in Paragraph 15 of the Complaint are denied.

16. Answering Paragraph 16: NEM, Inc., through its agents were responsible for operating The Sandy Monkey in compliance with all applicable statutes and regulations. These Defendants further state that this duty was honored. Except as herein admitted, the remaining allegations contained in Paragraph 16 of the Complaint are denied.

FOR A DEFENSE TO THE FIRST CAUSE OF ACTION
Negligence/Gross Negligence/Negligence *Per Se*
Violation of S.C. Code Ann. §§ 61-4-580 and 61-6-2220
Against The Sandy Monkey, William J. Muse,
Sharon Cumbie, and Kathryn Montorio

17. Answering Paragraph 17: These Defendants deny Paragraph 17 of the Complaint.

18. Answering Paragraph 18: These Defendants admit that Mr. Muse was the holder of a permit authorizing the sale of beer or wine at the bar; these Defendants

further admit that Mr. Muse, as President of NEM, Inc., owned The Sandy Monkey, which is a business that sells food in addition to beer, wine, and alcoholic beverages; except as herein admitted, the remaining allegations contained in Paragraph 18 of the Complaint are denied.

19. Answering Paragraph 19: Paragraph 19 calls for a legal conclusion to which a response is not required. To the extent a response is required, denied. These Defendants further state that all such duties under the referenced statutes were honored.

20. Answering Paragraph 20: Paragraph calls for a legal conclusion to which is response is not required. To the extent a response is required, denied. These Defendants further state that all such duties were honored.

21. Answering Paragraph 21: These Defendants deny the allegations contained in Paragraph 21 of the Complaint, including all subparts.

22. Answering Paragraph 22: These Defendants deny the allegations contained in Paragraph 22 of the Complaint.

23. Answering Paragraph 23: These Defendants deny the allegations contained in Paragraph 23 of the Complaint.

24. Answering Paragraph 24: These Defendants deny the allegations contained in Paragraph 24 of the Complaint.

25. Answering Paragraph 25: These Defendants deny the allegations contained in Paragraph 25 of the Complaint.

FOR A DEFENSE TO THE SECOND CAUSE OF ACTION
Negligence/Gross Negligence
Against Mr. Campbell

26. Answering Paragraph 26: These Defendants deny Paragraph 26 of the Complaint.

27. Answering Paragraph 27: These Defendants admit that an individual who consumes alcohol has an obligation to drink responsibly; however, these Defendants deny that Co-Defendant Campbell was visibly intoxicated on the Sunday afternoon in February when this random act of violence occurred. Except as herein admitted, the remaining allegations contained in Paragraph 27 of the Complaint are denied.

28. Answering Paragraph 28: These Defendants admit that an individual who consumes alcohol has an obligation to drink responsibly; however, these Defendants deny that Co-Defendant Campbell was visibly intoxicated on the Sunday afternoon in February when this random act of violence occurred. Except as herein admitted, the remaining allegations contained in Paragraph 28 of the Complaint are denied.

29. Answering Paragraph 29: These Defendants deny the allegations contained in Paragraph 29 of the Complaint.

30. Answering Paragraph 30: These Defendants admit that the Plaintiff suffered serious and substantial injuries as the result of the criminal acts of Co-Defendant Campbell.

31. Answering Paragraph 31: These Defendants admit that the Plaintiff is entitled to judgment against Co-Defendant Campbell in an amount to be determined by a jury.

FOR A DEFENSE TO THE THIRD CAUSE OF ACTION

Assault & Battery

Alternative Claim against Mr. Campbell

32. Answering Paragraph 32: These Defendants deny Paragraph 32 of the Complaint.

33. Answering Paragraph 33: These Defendants admit that Co-Defendant Campbell inflicted unlawful, authorized violence on Plaintiff when Co-Defendant Campbell attacked and injured Plaintiff; except as herein admitted, the remaining allegations contained in Paragraph 33 of the Complaint are denied.

34. Answering Paragraph 34: These Defendants admit that as a direct and proximate result of Co-Defendant Campbell's assault and battery onto Plaintiff, Plaintiff has suffered serious and substantial bodily injuries and damages; these Defendants are without information as to the specifics of all of the Plaintiff's injuries and treatments but acknowledge that Plaintiff sustained a very serious and permanent injury.

35. Answering Paragraph 35: These Defendants admit that the Plaintiff is entitled to a judgment against Co-Defendant Campbell.

FOR A DEFENSE TO THE FOURTH CAUSE OF ACTION

Piercing the Corporate Veil/Alter Ego or Instrumentality/

Amalgamation of Interest or Blurred Vision

36. Answering Paragraph 36: These Defendants deny Paragraph 36 of the Complaint.

37. Answering Paragraph 37: These Defendants deny the allegations contained in Paragraph 37 of the Complaint, including all subparts.

38. Answering Paragraph 38: These Defendants deny the allegations contained in Paragraph 38 of the Complaint.

39. Answering Paragraph 39: These Defendants deny the allegations contained in Paragraph 39 of the Complaint.

40. Answering Paragraph 40: These Defendants deny the allegations contained in Paragraph 40 of the Complaint.

FOR A DEFENSE TO THE FIFTH CAUSE OF ACTION
Punitive Damages
Against all Defendants

41. Answering Paragraph 41: These Defendants deny Paragraph 41 of the Complaint.

42. Answering Paragraph 42: These Defendants deny the allegations contained in Paragraph 42 of the Complaint.

43. Answering Paragraph 43: These Defendants deny the allegations contained in Paragraph 43 of the Complaint.

44. Answering Paragraph 44: These Defendants deny the allegations contained in Paragraph 44 of the Complaint.

FOR A SECOND DEFENSE

45. These Defendants further allege that the accident described in the Plaintiff's Complaint and any injuries or damages caused thereby were solely and proximately caused by the negligence, recklessness, willfulness and wantonness of Co-Defendant Campbell, for which these Defendants cannot be held accountable and thus recovery against these Defendants is barred. These Defendants plead negligent, reckless, and criminal acts of Co-Defendant Campbell as a defense in this action.

FOR A THIRD DEFENSE

46. The events that took place on Sunday afternoon, February 8, 2015, after the Plaintiff and Co-Defendant Campbell left the premises of The Sandy Monkey were completely unforeseeable. The actions of Co-Defendant Campbell constituted a random criminal act, and the physical assault and attack by Co-Defendant Campbell upon the Plaintiff was not foreseeable by Defendants William J. Muse, individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio, and thus recovery for the Plaintiff against these Defendants is barred.

FOR A FOURTH DEFENSE

47. These Defendants honored all duties with regard to exercising ordinary care to keep The Sandy Monkey in a reasonably safe condition.

FOR A FIFTH DEFENSE

48. The Plaintiff knew, or should have known, of Co-Defendant Campbell's prior history of violence and, unfortunately, she assumed the risk of physical harm by associating with Co-Defendant Campbell at any time, and specifically on the afternoon of February 8, 2015.

FOR A SIXTH DEFENSE

49. Defendant William J. Muse pleads corporate immunity in bar of this action.

FOR A SEVENTH DEFENSE

50. These Defendants plead the criminal acts of Co-Defendant Campbell in bar of this action.

FOR AN EIGHTH DEFENSE

51. These Defendants allege that an award of punitive damages in this case would violate the 5th, 6th and 14th amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution in that:

- a) The unfettered power to award punitive damages in any manner is wholly devoid of a meaningful standard and is inconsistent with due process guarantees; and,
- b) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness.

FOR A NINTH DEFENSE

52. These Defendants further allege that if any injuries and/or damages were sustained by the Plaintiff, the said injuries and/or damages were caused by the greater negligence and/or willfulness of the Plaintiff, which negligence and/or willfulness exceeds that of these Defendants, if any, without which greater negligence and/or willfulness on the part of the Plaintiff, the said alleged injury and/or damage would not have occurred or have been sustained and for that reason, the Plaintiff is totally barred from recovery. Should it be determined that the Plaintiff's negligence does not outweigh any negligence on the part of these Defendants, any award to the Plaintiff should be reduced in proportion to the amount of negligence on the Plaintiff's part.

FOR A TENTH DEFENSE

53. These Defendants plead the limitations on damage awards pursuant to S.C. Code Ann. §§ 15-32-510, *et. seq.*, and request bifurcation in accordance with these statutes.

WHEREFORE, having fully answered the Complaint of the Plaintiff, these Defendants pray that the said Complaint be dismissed with the costs and disbursements of this action.

By: s/J. Boone Aiken, III

J. BOONE AIKEN, III

Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.

SC Bar # 307

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**ATTORNEYS FOR THE DEFENDANTS;
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

March 13, 2019

(33152)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2017-CP-26-03062

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

TO: JUSTIN BICE, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendants, William J. Muse, individually and as President of NEM, Inc., NEM, Inc. d/b/a The Sandy Monkey, Sharon Cumbie, and Kathryn Montorio ("these Defendants"), by and through the undersigned counsel, will move before the Resident or Presiding Judge of the Horry County Court of Common Pleas, Fifteenth Judicial Circuit, at the Horry County Judicial Center, Conway, South Carolina, on the tenth (10th) day after service hereof or as soon thereafter as counsel can be heard, for an Order entering Summary Judgment in favor of these Defendants, and dismissing the Plaintiff's Complaint pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure*, on the grounds that there is no genuine issue as to any material fact and that these Defendants are entitled to judgment as a matter of law. This Motion is supported by all pleadings, evidence exchanged in discovery, depositions taken to date, affidavits which may be filed and served subsequently, applicable statutory and case law, and the South Carolina Rules of Civil Procedure.

These Defendants' Motion for Summary Judgment is further supported by a Memorandum of Law filed simultaneously herewith.

Respectfully submitted.

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Sandy Monkey; Sharon Cumbie; Kathryn
Montorio; and Christopher B. Campbell,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2017-CP-26-03062

**MEMORANDUM IN SUPPORT OF
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**

Defendants, William J. Muse, Individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio (hereinafter referred to collectively as "Defendants"), by and through their undersigned counsel, submit the following in support of their Motion for Summary Judgment:

FACTS

On Sunday afternoon, February 8, 2015, the Plaintiff, Michele M. Messer, and her boyfriend and Co-Defendant, Christopher B. Campbell, coincidentally 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 part of her nose off.

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 visibly intoxicated, in violation of S.C. Code §§ 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

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

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, which will be offered for the Court's consideration at the hearing on this Motion. 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 bar tender 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.

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,

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 is no genuine issue for trial. See *Miller*, 365 S.C. at 220, 225, 616 S.E.2d at 730, 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. 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

I. DEFENDANTS WERE NOT NEGLIGENT AS THEY OWED NO DUTY TO PREVENT THE UNFORESEEABLE CRIMINAL ACTS OF A THIRD PARTY.

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).

Whether the law recognizes a particular duty is a question of law for the court. See *Ellis v. Niles*, 479 S.E.2d 47, 49 (S.C. 1996). In the present case, there is no genuine issue of material fact. Defendants owed no legal duty to the Plaintiff. As such, the Court should grant Defendants' Motion for Summary Judgment as they were not negligent.

A. These Defendants were not negligent as they owed no duty to Plaintiff to prevent the unforeseeable criminal acts of a third party.

"In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff." *Bass v. Gopal*, 716 S.E.2d 910 (S.C. 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.*, 542 S.E. 2d 728 (S.C. 2001). "The duty of a storeowner to its invitees is to take reasonable care to protect them." *Bullard v. Ehrhardt*, 324 S.E.2d 61 (S.C. 1984). 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."** (emphasis added). *Munn v. Hardee's Food Sys., Inc.*, 274 S.C. 529, 531, 266 S.E.2d 414, 415 (1980) 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.

The following paragraph is taken from the case of *Crolley v. Hutchins, d/b/a Willoughby's*, 387 S.E. 2d 716 (Ct. App. 1989):

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 time of the negligent act, not after the injury has occurred. *Shepard v. South Carolina Department of Corrections, supra.*

"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. The Defendants had absolutely no knowledge to put them on notice that Defendant Campbell would spontaneously commit such a crime. In fact, both the Plaintiff and Defendant Campbell testified in their depositions that they were having fun and were being affectionate with each other while at The Sandy Monkey.

There is a reported case in South Carolina, *Easterling v. Burger King Corporation*, 786 S.E.2d 443 (Ct. App. 2016), which involved an assault which resulted in a nose amputation. In the Burger King case, on July 8, 2008, Easterling was waiting to place his order at a Burger King in Charleston, South Carolina. Defendant Eastwood was in a truck directly behind the Plaintiff. Eastwood rear-ended the Plaintiff but the Plaintiff did not make an issue out of this initial contact. 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. 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. When the Plaintiff

regained consciousness, Eastwood was on top of him and proceeded to violently bite his nose off.

Easterling moved for summary judgment but this motion was denied, which resulted in the appeal. Easterling had contended that the lower court erred in failing to (1) find Burger King breached its duty to take reasonable action to protect him against a foreseeable risk of harm; (2) failing to find Burger King had notice of and created an unreasonable and dangerous condition on the premises; (3) failing to find Burger King breached its duty of care by deviating from its own internal policies; and (4) failing to properly rule upon the arguments and vacating the grant of summary judgment in favor of Burger King.

As set forth in the *Easterling* case, in a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the Plaintiff, (2) the Defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages.

As in this case, in the *Burger King* case, Easterling was an invitee, and in South Carolina the owner of property owes to 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. A business owner has a duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm. The more foreseeable a crime, the more onerous is a business owner's duty of providing security. The presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner.

Regarding foreseeability in the Burger King case, Easterling produced a prior incident's report for the particular Burger King location in question that spanned six years, and 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. 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 a physical assault was foreseeable to Burger King.

B. Plaintiff's Negligence Exceeded any Negligence of these Defendants.

These Defendants further contend that the Plaintiff's negligence exceeded any negligence of these Defendants. Christopher Campbell was a dangerous man. When the Plaintiff met Campbell in May of 2014 (Messer Depo 31:1), he was out of jail on bond for an attempted murder charge. Ms. Messer learned of this information a few months after she met him (Messer Depo 31:22-25; 32:1-2). Then, on January 27, 2015, twelve days before this assault, Campbell appeared at 3947 Gladiola Court, Apartment 304, which was the Plaintiff's apartment, and there was a verbal altercation between Campbell and the Plaintiff, which is maintained on a recorded audio, at which time Campbell threatened the Plaintiff's life as well as the lives of her children. According to the Plaintiff's testimony, "He said he would kill me, and when he was done with me, he pointed toward my boys' room and said that they would be next."

Messer, Michele Deposition 8/2/18 (Page 38:10-17)

- | | | |
|----|---|--|
| 10 | Q | Did he threaten your life? |
| 11 | A | Yes. |
| 12 | Q | Did he threaten the life of your children? |
| 13 | A | Yes. |
| 14 | Q | And can you tell me the words he used? |

15-17 A He said he would kill me, and when he was done with me, he pointed toward my boys' room and said that they would be next.

Following this exchange and threat of physical harm, it is incredulous that the Plaintiff would have anything to do with Campbell; much less, hang with him at The Sandy Monkey, and then get in her vehicle alone with this violent individual. In South Carolina, a Plaintiff is barred from recovery if his/her negligence is in excess of fifty percent which, respectfully, the Court should find as a matter of law. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (S.C. 1991)

CONCLUSION

For the reasons set forth above, these Defendants submit that the Plaintiff cannot establish that these Defendants owed her a legal duty or that these Defendants acted negligently in failing to predict and prevent the unforeseeable criminal acts of Campbell. Furthermore, as a matter of law, the Plaintiff was more than fifty percent at fault when compared with these Defendants and, thus, is barred from recovery. As such, these Defendants respectfully request that the Court grant their Motion for Summary Judgment.

Respectfully submitted.

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Florence, South Carolina

March 13, 2019

(33152)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
File No: 2017-CP-2603062

Michele M. Messer,

Plaintiff,

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.

**Plaintiff's Memorandum of Law
in Opposition to
Defendant's Motion for
Summary Judgment**

Plaintiff, by and through counsel, submits this Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.

Analysis

Genuine issues of material facts remain in this case, and Defendant is not entitled to a judgment as a matter of law as follows:

I. Standard of Review.

Summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure is only appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. See Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

II. Genuine issues of material fact remain regarding the foreseeability of Plaintiff's injury.

These Defendants are essentially arguing that Defendant Campbell's assault on Plaintiff was not foreseeable. Defendants cited in their brief numerous premises liability cases involving claims against property owners for allegedly failing to keep the premises safe. Plaintiff has brought no such claim in this case. The claims in the Complaint against these Defendants in this case are based on their statutory duties under SC Code Section §§ 61-4-580 and 61-6-2220 to not sell alcohol to an intoxicated person.

These Defendants admitted in their Answer (p. 12) that Defendant Campbell choked and beat Plaintiff, in addition to biting her nose. Just because this attack involves a different body part, does not change the fact that everyone knows people get aggressive, make bad decisions, and sometimes hurt people when they are overserved alcohol. SC Courts routinely find that assault and battery offenses are foreseeable consequences of overserving alcohol, including the still pending dram shop case against these Defendants, Acosta v. William J Muse, et al., 2017-CP-26-4625 (Horry County), and the attached Fields v. Sandbar, et al., 2016-CP-46-2428 (York County), attached hereto as **Exhibit A**. In Steele, the Court of Appeals overturned the Trial Court's grant of summary judgment, stating "We are not prepared to say that a shooting, cutting, or other wounding related to the consumption of alcohol is so uncommon an event as to be unforeseeable as a matter of law in all circumstances." Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992).

"[I]t is not necessary that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen that his negligence would probably result in injury of some kind to someone. The wrongdoer may be held liable for anything which, after the injury is complete, appears to have been a natural and probable

consequence of his negligence.” Brown v. Nat’l Oil Co., 233 S.C. 345, 352-54, 105 S.E.2d 81, 84-85 (1958) (emphasis added). “If the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.” See id. (emphasis added) (citing Restatement, Torts, Section 435).

The Jury must determine all issues of foreseeability in this case. See, e.g., Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992) (determining that the issues in the case, including whether the injury by shotgun blast was foreseeable to the Defendant gas station who sold the alcohol and whether Plaintiff was contributorily negligent were “matters to be decided by the factfinder after both parties have fully presented their evidence.”) See also Dixon v. Besco Eng’g, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995) (emphasis added) (“For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable. . . . Whether an intervening act breaks the causal connection is a question for the fact finder”). The jury must determine whether Defendants should have foreseen that overserving alcohol to a customer “would probably result in injury of some kind to someone.” Brown 233 S.C. at 352-54.

Genuine issues of material fact remain in this case regarding the foreseeability of Plaintiff’s injury; therefore, Defendant is not entitled to a judgment as a matter of law.

III. Genuine issues of material fact remain regarding whether Plaintiff’s alleged negligence exceeded these Defendants’ negligence.

The Jury must determine all issues in this matter involving negligence and comparative fault. See, e.g., Anderson v. S.C. Dep’t of Highways & Pub. Transp., 322 S.C. 417, 421-22, 472 S.E.2d 253, 255 (1996) (“If the inferences properly deducible from controverted evidence are doubtful, or tend to show both parties guilty of negligence, and there may be a fair difference of

opinion as to whose act proximately caused the injury complained of, then the question must be submitted to a jury.”)

The Jury would need to consider the extensive evidence in this case to compare any alleged fault of the parties. Below is a brief summary of some of that evidence.

Plaintiff has retained a toxicology expert, Dr. David Eagerton, former Chief toxicologist for SLED and current Department of Pharmacology Chair at Campbell University. Dr. Eagerton stated in his deposition and his expert report that Defendant Campbell would have had a blood alcohol concentration level of 0.139% based on consuming eight drinks at the Sandy Monkey over 2.5 hours. See Eagerton Dep., p. 83, ll. 2-11, attached hereto as **Exhibit B**; see also Dr. Eagerton’s Report, attached hereto as **Exhibit C**.

The parties later deposed Defendant Campbell at the Lee County Correctional Institute. Defendant Campbell testified he was “pretty messed up,” “pretty drunk,” and even “blackout drunk” from the drinks served to him by these Defendants. See Campbell Dep., p. 16, ll. 21-23 & p. 28, ll. 13-17, attached hereto as **Exhibit D**. Defendant Campbell further testified that he actually had between 10 and 12 bourbon and ginger ales and Jägermeister shots at the Sandy Monkey during that same time period. See Campbell Dep., p. 20, ll. 16-18. Defendant Campbell’s BAC was well above the .08% BAC for driving while under the influence, allowing the jury a permissive inference Defendants negligently overserved Defendant Campbell. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010).

Dr. Eagerton concluded that Defendant Campbell became obviously and grossly intoxicated while still being served at The Sandy Monkey, exhibited effects such as a change in demeanor, loss of critical judgment, slurred speech, impaired balance, ataxia and impaired muscular coordination. See Dr. Eagerton’s Report.

Plaintiff has retained a bar service expert, Elizabeth Trendowski. Among her other extensive experience in the alcohol industry, she was one of only 3 Master Trainers for the Training for Intervention Procedures (“TIPS”). TIPS is a training course for the responsible service, sale, and consumption of alcohol, and the one training course alleged to have been taken by the bartender in this matter.

After reviewing the deposition transcripts for the individual Defendants in this matter, Ms. Trendowski testified in her deposition that:

[S]o you had two people sitting at the bar, basically what we call ‘on a mission.’ They weren’t drinking to just be social. They were drinking – they were on a mission, these two, and they drank a lot. They drank until they were grossly intoxicated.

See Trendowski Dep., p. 52, ll. 7-12, attached hereto as **Exhibit E**.

And you could see that through some of the testimony, especially with the bartender... She was too busy. She was too busy to pay attention to Ms. Messer and MR. Campbell, and she said it over and over and over again. She didn’t count the number of drinks. She was too busy. She didn’t communicate with them, because she was too busy. She went to take Ms. Messer’s credit card; she couldn’t get her attention. She – so she gave it to Mr. Campbell, because she was too busy. She had three and four people deep at the bar. One bartender. She was understaffed, and she was set up that day for fail – for failure, because she couldn’t see people outside either. They were coming in. She was the only bartender for 50 or more people, and that just – that ratio just doesn’t work for obvious reasons, for safe service of alcohol.

So she didn’t count the number of drinks. She wasn’t paying attention. She didn’t slow the serve down. She didn’t offer alternative beverages. She did not stop the service of alcohol. She did not offer alternative transportation.

See Trendowski Dep., pp. 52-53, ll. 13-7.

Ms. Trendowski ultimately opined that these Defendants breached their duties to not knowingly serve an intoxicated person, to properly supervise & to properly staff. See Trendowski Dep., p. 51: 19-20; pp. 51-52, ll. 23-3; 55: 8-12; and 77: 2-5.

Regarding the supposed unforeseeability of an attack following overservice of alcohol, Ms. Trendowski stated "nothing good happens when you drink that much alcohol." Trendowski Dep., pp. 72-73, ll. 21-5. Dr. Eagerton stated "there have been certainly other cases of violence associated with alcohol intoxication." Eagerton Dep., p. 71: 5-8. Defendant Campbell was asked about a fight he was previously in at the Islander bar. Campbell was asked if he was intoxicated and he said "oh yeah, absolutely." Campbell Dep., p. 48: 3-5. He further stated "I've never seen a set of handcuffs sober in my life. Never been in any kind of trouble sober." Campbell Dep., p. 54: 10-11.

Extensive evidence exists in this case of these Defendants' negligence that the Jury must weigh against any alleged negligence of Plaintiff. If the Jury determines these Defendants violated safety statutes, their actions would be reckless and willful, allowing for punitive damages. See Austin v. Specialty Transp. Servs., 358 S.C. 298, 314-15, 594 S.E.2d 867, 875-76 (Ct. App. 2004). No such argument can be made for any action Plaintiff took. The Jury must consider that when assessing any percentages of fault.

Most importantly, any alleged negligence of Plaintiff must be compared to the combined negligence of all defendants, including Defendant Campbell, the man who got so drunk he blacked out and attacked Plaintiff. See, e.g., Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991) ("If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants.")

Genuine issues of material fact remain in this case regarding whether Plaintiff's alleged negligence exceeded these Defendants' Negligence; therefore, Defendant is not entitled to a judgment as a matter of law.

Conclusion

Genuine issues of material fact remain in this case; therefore, Defendant is not entitled to a judgment as a matter of law. Therefore, Plaintiff asks the Court to deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

BICE LAW LLC

s/ Justin Bice

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Attorney for Plaintiff

Fort Mill, South Carolina
May 28, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-CP-26-03062

William J. Muse, individually
and as President of NEM, Inc.;
NEM, Inc. d/b/a The Sandy
Monkey; Sharon Cumble; and
Kathryn Montorio,

Respondents,

RECEIVED

JUL 19 2019

SC Court of Appeals

v.

Michele M. Messer,

Appellant.

NOTICE OF APPEAL

Michele M. Messer appeals the order of the Honorable Benjamin H. Culbertson dated June 21, 2019. Appellant received written notice of entry of this order on June 21, 2019.

July 16, 2019

s/ Justin Bice

Justin Bice

Bice Law, LLC

406 Tom Hall Street

Fort Mill, SC 29715

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Attorney for Appellant

Other Counsel of Record:

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Aiken Bridges

Post Office Drawer 1931

Florence, South Carolina 29503

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-CP-26-03062

William J. Muse, individually
and as President of NEM, Inc.;
NEM, Inc. d/b/a The Sandy
Monkey; Sharon Cumbie; and
Kathryn Montorio,

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v.

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on William J. Muse, individually and as President of NEM, Inc.; NEM, Inc. d/b/a The Sandy Monkey; Sharon Cumbie; and Kathryn Montorio by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2019, addressed to their attorney of record, J. Boone Aiken, III, Aiken Bridges, Post Office Drawer 1931, Florence, South Carolina 29503.

July 16, 2019

s/ Justin Bice
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Bice Law, LLC
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Attorney for Appellant

1 STATE OF SOUTH CAROLINA)
 2) IN THE COURT OF
 3 COUNTY OF HORRY) COMMON PLEAS
 4
 5 MICHELE M. MESSER,)
 6 Plaintiff,)
 7 Vs.) CASE NO. 2017-CP-26-03062
 8 WILLIAM J. MUSE, Individually)
 9 and as President of NEM, Inc.;)
 10 NEM, Inc. d/b/a The Sandy)
 11 Monkey; Sharon Cumbie; Kathryn)
 12 Montorio; and Christopher B.)
 13 Campbell,)
 14 Defendants.)

COPY

16 MAY 29, 2019
 17 CONWAY, SOUTH CAROLINA
 18 HONORABLE BENJAMIN H. CULBERTSON, JUDGE

19 A P P E A R A N C E S:
 20 BY: JUSTIN D. BICE, ESQUIRE
 21 Attorney for the Plaintiff
 22 BY: J. BOONE AIKEN, III, ESQUIRE
 23 Attorney for the Defendants (except Campbell)
 24 HATTIE O. GORDON,
 25 OFFICIAL COURT REPORTER

1 THE COURT: 2017-CP-26-3062, Michele M. Messer
2 verses William J. Muse, individually and as president of
3 the NEM Inc., and others. The matter according to my
4 roster is before the Court on a motion for summary
5 judgement. Hold for a second.

6 (Off the record)

7 All right. Again, this is 2017-CP-26-3062, Messer
8 verses Muse and others. According to my roster this is
9 a motion for summary judgement. Please give the court
10 reporter your names and who you represent.

11 MR. BICE: Justin Bice, B-I-C-E, representing the
12 plaintiff Michele Messer.

13 THE COURT: All right.

14 MR. AIKEN: Your Honor, I'm Boone Aiken, I represent
15 all of the defendants except Christopher Campbell. I do
16 not represent Christopher Campbell.

17 THE COURT: All right.

18 MR. AIKEN: So my clients briefly are William J.
19 Muse, NEM, Inc., doing business as The Sandy Monkey.
20 Sharon Cumbie who was the general manager of The Sandy
21 Monkey during the timeframe in question. Kathy Montorio
22 who was a bartender on the afternoon of February 8,
23 2015.

24 THE COURT: All right, sir. And this is your
25 motion?

1 MR. AIKEN: It is, Your Honor.

2 THE COURT: All right. Let me hear from you.

3 MR. AIKEN: Thank you, Your Honor. Your Honor, this
4 case begins on Sunday afternoon February 8, 2015.
5 Either by design or by coincidence, Michele Messer the
6 plaintiff met up with Christopher Campbell that
7 afternoon at The Sandy Monkey. The Sandy Monkey was a
8 bar, Your Honor, off of US 17 Business in Murrells
9 Inlet. It had been there a long time. It lost its
10 lease recently, so it's closed.

11 Michele Messer, William Campbell had some alcohol at
12 The Sandy Monkey. They stayed about two hours. They
13 were having a good time. They left the premises. They
14 got in Michele Messer's van which was parked on property
15 adjacent to, but it was not in the parking lot of The
16 Sandy Monkey. In that van, suddenly without warning,
17 without notice, William Campbell bites Michele Messer's
18 nose off.

19 Mr. Campbell was charged with attempted murder. He
20 pled guilty to assault and battery of a high and
21 aggravated nature. He is serving 15 years at Lee
22 Correctional Institution outside of Bishopville. He's
23 serving an additional five years consecutive sentence
24 for another involuntary manslaughter charge.

25 The complaint in this case alleges that my clients

1 violated the alcohol statutes and served Mr. Campbell
2 alcohol when he was in an intoxicated condition. The
3 complaint alleges that Mr. Campbell was visibly
4 intoxicated. There is not one shred of evidence in this
5 case, no testimony, that Mr. Campbell was visibly
6 intoxicated. Or for that matter, intoxicated.

7 Michele Messer herself starts this dialogue. She
8 was interviewed, Your Honor, by Heather Brummett, a
9 detective with the Horry County Police Department, five
10 days after this assault, five days, on February 13. Was
11 he intoxicated? And she said she doesn't remember him
12 being intoxicated. He was more than fine.

13 She testified that before he drank at The Sandy
14 Monkey is nothing compared to what he can tolerate at
15 home with no visible side affects. So we've heard from
16 her. And I've got her on an audiotape I'm going to try
17 to play in a minute if it works for me, if not, I'll
18 bypass that to save time.

19 Then we go to Kathy Montorio, the bartender. She's
20 been deposed. She said they were sitting at the bar
21 there were kisses back and forth and giggling. They
22 were having fun.

23 "Q: Did you ever notice Christopher Campbell
24 demonstrate any type of hostility or anger toward
25 Michele Messer?

1 A: No, not at all.

2 Q: Did you ever notice any mood swings of
3 Christopher Campbell?

4 A: No.

5 Q: Did you ever notice Christopher Campbell being
6 loud or obnoxious?

7 A: Not at all.

8 Q: Did you ever notice Christopher Campbell being
9 aggressive toward Michele Messer or anyone else?

10 A: No.

11 Q: When he would order a drink, Mr. Campbell, did
12 he have slurred speech?

13 A: No.

14 Q: When he would get up and go outside was he
15 staggering?

16 A: No.

17 Q: Was he creating any scene at the time?

18 A: No."

19 Then we look, Your Honor, at what Elizabeth
20 Trendowski testified to. She holds herself out as a
21 dram shop expert. She is in Florida.

22 THE COURT: What's a dram shop expert?

23 MR. AIKEN: That's what she said she --

24 THE COURT: I mean, what is that? Legal
25 interpretation or a --

1 MR. AIKEN: Well, that's her definition. That's her
2 business is called like Dram Shop Inc., which she -- is
3 she goes around and advises bars on proper service of
4 alcohol. How you might can detect if somebody is under
5 the influence.

6 THE COURT: Okay.

7 MR. AIKEN: She offers training. And she offers
8 criticism on these types of cases.

9 THE COURT: Okay.

10 MR. AIKEN: Was there -- correction. Let me start
11 on this. And the,

12 "Q: Okay. And there was no hostility at all in the
13 bar between Campbell and Ms. Messer; is that correct?

14 A: I didn't see anything like that. That's my
15 understanding.

16 Q: Would you agree that nothing happened in the bar
17 at Sandy Monkey between Mr. Campbell and Michele Messer
18 that would have given Kathy Montorio notice that
19 Mr. Campbell was going to leave the bar, go in the van,
20 and bite Ms. Messer's nose off? There was nothing to
21 give her notice of that, is that fair?"

22 She said,

23 "A: That's fair.

24 Q: She would not have known that he was going to
25 bite her nose off?

1 A: No, that's true.

2 Q: Or criminally assault her? Just nothing to give
3 her notice he was going to criminally assault her as he
4 did?

5 A: That's true."

6 So, Your Honor, on any case like this, a negligence
7 case, you've got to show a duty, a breach of that duty
8 by negligent act or omission, and damages approximately
9 resulting from that breach. And a linchpin of all of
10 this, Your Honor, is foreseeability. Can -- was it
11 reasonably foreseeable at some horrific event like this
12 could have possibly happened.

13 Our Supreme Court on numerous occasions has been
14 clear that the duty of a sole owner to its invitees is
15 to take reasonable care to protect them. That's the
16 duty. Reasonable care. And then on the foreseeability
17 issue in *Crowley verses Hudson's* that is a 1970 --
18 correction, 1989 Court of Appeals case, "a negligent act
19 or omission is a proximate cause of injury if in a
20 natural and continuous sequence of events it produces an
21 injury and without if the injury would not have
22 occurred. Where the injury complained of is not
23 reasonably foreseeable there is no liability."

24 One is my charge with foreseeing that which is
25 unpredictable or which would not be expected to happen

1 as a natural and probable consequence of a defendant's
2 negligent act. Foreseeability is to be judged from the
3 prospective of defendant at the time of the negligent
4 act not at the time the injury occurred.

5 And then believe it or not, Your Honor, there's
6 another case in South Carolina, *Easterling verses Burger*
7 *King* where a plaintiff's nose was bitten off. I was
8 absolutely stunned to find that case and read about it.
9 And that case, the Court granted summary judgement to
10 Burger King. The appeal resulted and the Court of
11 Appeals affirmed the granting of directed verdict.

12 A couple of snippets from that case, "a business
13 owner has a duty to take reasonable action to protect
14 its invitees against the foreseeable risk of physical
15 harm." The Court concluded that none of the incidences
16 examined prior incidences at this Burger King, the Court
17 concluded that none of the incidents were remotely
18 similar to that which occurred on the night in question
19 and accordingly the plaintiff failed to produce any
20 evidence a physical assault was foreseeable by Burger
21 King. So that's argument one.

22 I've got a brief argument on a comparative
23 assumption of risk argument. Michele Messer knew that
24 Christopher Campbell was a dangerous man. She knew it.
25 None of my clients knew it. She started dating this

1 guy, Your Honor, when she knew he was out on bond on an
2 attempted murder charge and yet she hooked up with him
3 twelve days before this assault on February 8. Twelve
4 days. January 27, 2015.

5 Late at night or early in the morning, Christopher
6 Campbell shows up at her apartment, they had been living
7 together. They had some type of dispute or quarrel. He
8 wanted to come in. She didn't want him to come in. He
9 threatened to kill her and her children that night
10 standing on her apartment door. This is Michele Messer.
11 Okay.

12 "Q Did he threaten your life?" That was on January
13 27th.

14 "A: Yes.

15 Q: Did he threaten the life of your children?

16 A: Yes.

17 Q: And can you tell me the words he used?

18 A: He said that he would kill me and when he was
19 done with me, he pointed to my boys' room and said they
20 would be next."

21 She had two young children that were hers staying at
22 her house. They will be next. Can you image? The poor
23 judgement she used by hooking up with this odd guy again
24 or twelve days later when she knew what kind of
25 individual he was.

1 And so when you look at any potential negligence of
2 The Sandy Monkey, by allegedly overserving this
3 gentleman and you compare that -- I'm not talking about
4 Campbell. He's in default. He doesn't get a voice on
5 this case. But if you look at the negligence, if any,
6 of my clients and then you look at Michele Messer's
7 negligence and recklessness in hanging out with this
8 guy, then it seems to me as a matter of law, hers is
9 more than 50 percent which would bar a recovery.

10 So on both grounds, Your Honor, I move for summary
11 judgement of behalf of all of my clients.

12 THE COURT: All right.

13 MR. AIKEN: Thank you.

14 THE COURT: Thank you. All right. Mr. Bice?

15 MR. BICE: Good afternoon, Your Honor. I filed a
16 brief yesterday, do you have access to that?

17 THE COURT: Yes, I do.

18 MR. BICE: Thank you, Your Honor.

19 MR. AIKEN: May I just mention one thing about that,
20 Your Honor?

21 THE COURT: All right.

22 MR. AIKEN: And I'm very fond of Mr. Bice. Is a
23 good lawyer and a good man. I'm not going to do back
24 flips about him. But this same motion was scheduled to
25 be heard before you on April 24th and I was here.

1 THE COURT: Okay.

2 MR. AIKEN: And I approached the bench and mentioned
3 to you that Mr. Bice had an urgent matter that needed
4 attention and, of course, I consented to a continuance.
5 As of that hearing date, nothing had been filed.

6 THE COURT: Okay.

7 MR. AIKEN: And Mr. Bice just filed a memorandum in
8 opposition yesterday about 3:29 and some exhibits. So I
9 just think it would be fair for this motion only to be
10 heard on arguments and what was actually before the
11 Court on April 24th.

12 THE COURT: Okay. Well, see, I don't even know what
13 the exhibits are. Let me just hear from him and I'll
14 make a decision. Go ahead, Mr. Bice.

15 MR. BICE: Yes, Your Honor. The exhibits that are
16 attached to the brief are -- one is a trial court case
17 with roughly similar facts and the rest are all part of
18 deposition transcripts, Your Honor. And then there's
19 case law. I actually intended to bring the brief to
20 court last time and as I was preparing again yesterday,
21 I felt I knew that wasn't proper and I wanted to give --

22 THE COURT: All right. Well, I'm not going to
23 consider the trial court -- any trial court decision.
24 If it's an appellate decision, I'll take a look at it.
25 If it's a deposition, I'll let you argue it.

1 MR. BICE: Okay.

2 THE COURT: I mean, a trial court decision that's --
3 unless you've done an exhaustive study and every trial
4 court has ruled the exact same way then that's -- really
5 doesn't have any value to it.

6 MR. BICE: Yes, Your Honor.

7 THE COURT: All right.

8 MR. BICE: Initially, on the first argument brought
9 up by Mr. Aiken regarding the foreseeability of this
10 type of an injury, all of the cases that he cited in his
11 memorandum in support of the motion are premises
12 liability cases where the allegations involve an unsafe
13 environment and there should be knowledge that there's
14 some sort of a danger there and they need to provide
15 security. None of those cases involve what we have here
16 with the dram shop case where we've alleged that the bar
17 defendants have violated the liquor liability statutes
18 and overserved somebody. And --

19 THE COURT: Well, I mean, excuse me for cutting you
20 off, but virtually every dram shop case that has come in
21 front of me involved a car accident. That it was
22 foreseeable that if you overserve somebody they get
23 behind the wheel of a car there's going to be an
24 accident.

25 MR. BICE: Yes, Your Honor.

1 THE COURT: That's foreseeable. How is biting
2 someone's nose off foreseeable overserving them with
3 alcohol?

4 MR. BICE: Yes, Your Honor. Well, the first claim
5 is, one of the cases I cited in my brief is the Steele
6 verses Rogers case, it's a South Carolina Court of
7 Appeals case. And in that case, a young man who was
8 served alcohol and sometime later accidentally shot
9 someone with a shotgun. And the Court in that case said
10 that they weren't -- let me get the exact words.

11 THE COURT: Well, I mean, even that, I can
12 understand accidentally shooting something. I mean,
13 you're under the influence then, yes, under the
14 influence indicates you cannot safely operate a vehicle,
15 you cannot safely operate a shotgun, you can't do it.
16 There was a negligence. This seems to be an intentional
17 tort by Mr. Campbell.

18 MR. BICE: Yes, Your Honor. That was only caused
19 due to the alcohol, Your Honor.

20 THE COURT: But how is that foreseeable to a
21 bartender? In other words, if I overserve you alcohol,
22 should I know that you're going to go out and rob a bank
23 and shoot at the teller?

24 MR. BICE: Well, in the Steele verses Rogers case,
25 again, Your Honor, it's as if the Court was not prepared

1 to say that a shooting or a cutting or other wounding
2 related consumption of alcohol is so uncommon an event
3 to be unforeseeable as a matter of law. And in this
4 case, Your Honor, it's an assault and battery with the
5 added crazy fact of a nose bite it's conceded in the
6 answer that he choked her and that he hit her as well as
7 ultimately the nose bite. And that's foreseeable to any
8 bar and that's the purpose of the liquor liability
9 statute is because people make bad decisions when
10 they're drunk including hurting people.

11 THE COURT: So when would there ever be an
12 unforeseeable event from someone who is overserved?

13 MR. BICE: Harm from fights is something that every
14 bar owner knows can happen when they overserve somebody.
15 And that's something that our experts have testified to
16 and that's something defendant Campbell testified to.
17 He actually said he's never seen a pair of handcuffs in
18 his life when he wasn't drunk at a bar.

19 And the other involuntary manslaughter charge that
20 was mentioned is actually another bar case here in the
21 local area where he was overserved alcohol and got in a
22 fight and ultimately somebody ended up dying.

23 And, Your Honor, in the *Brown verses National Oils*,
24 Supreme Court case that's cited in my brief as well, it
25 says, "it's not necessary that the person charged with

1 negligence had contemplated the particular event which
2 occurred. It's sufficient that they should have
3 foreseen that their negligence in overserving someone
4 would probably result in injury of some kind to
5 someone." And that's the whole reason there is the line
6 of cases about providing security at bars.

7 And that lower court decision that I did mention is
8 assault and battery dram shop case where somebody was
9 overserved, got in a bar fight, and punched somebody,
10 and killed them.

11 THE COURT: That's a fight in the bar?

12 MR. BICE: It was in the bar, yes, Your Honor.

13 THE COURT: Okay.

14 MR. BICE: Your Honor, whether something is
15 foreseeable is something for the jury to determine.
16 Again, in that *Steele verses Rogers* case, it says, "that
17 any issue of who's more at fault and any issue of
18 whether an injury that occurs later is foreseeable to
19 the defendants is something that has to go to the jury."

20 And another case I cited, *Dixon verses Besco*
21 *Engineering* case it says, "whether an intervening act of
22 race that cause a connection is a question for the fact
23 finder." So, Your Honor, in this case the jury would
24 have to determine whether overserving alcohol to a
25 customer would probably would result in injury of some

1 kind to someone including the injury that occurred in
2 this case.

3 Your Honor, regarding the second issue of the
4 alleged negligence of my client exceeding the negligence
5 of the bar defendants, the jury would have to consider
6 all the extensive evidence in this case that we've
7 through the extensive discovery that we've conducted
8 regarding the bar's negligence in overserving defendant
9 Campbell. We've hired a toxicology expert Dr. David
10 Eagerton, a former SLED agent who determined that based
11 on the number of drinks Mr. Campbell consumed, his blood
12 alcohol level was .139, well over the .08 blood alcohol
13 level.

14 And in the *Hartfield verses Getaway* case, that's a
15 presumption that the jury is allowed to have that there
16 was a breach of the duty to not overserve alcohol. And
17 Campbell himself said that he was pretty drunk even
18 blackout drunk from the 10 to 12 bourbon and
19 Jagermeister drinks that he had at The Sandy Monkey.

20 And Dr. Eagerton concluded that his affects would
21 have been change in demeanor, loss of critical
22 judgements, slurred speech, and impaired coordination.
23 And the bar services expert that was mentioned, Your
24 Honor, heard -- she has extensive training for proper
25 service of alcohol. She was actually a -- they call it

1 TIPS, a training for intervention procedures trainer,
2 master trainer, one of three in the country and she
3 testified that the bar was negligent because they didn't
4 count the number of drinks given the short timeframe.
5 They didn't pay attention to the drinks. They didn't
6 slow the service down. They didn't offer alternative
7 beverages and ultimately she would find that they
8 breached their duties to not knowingly serve an
9 intoxicated person and they violated their duties to
10 properly supervise and to properly staff the bar.

11 And Ms. Trendowski and Dr. Eagerton also testified
12 about how well-known it is in the industry that
13 intoxication leads to violent behavior and over service
14 of alcohol. And how known that is in the industry and
15 Mr. Campbell himself said "I've never seen a set of
16 handcuffs sober in my life." All of his prior issues
17 including another current pending lawsuit involved him
18 being overserved alcohol in the same area.

19 And, Your Honor, as regarding any alleged fault of
20 Ms. Messer, there's evidence that a jury could determine
21 was violation of a safety statute and willful and
22 reckless behavior allowing for punitive damages and
23 there's no such allegations of that against Ms. Campbell
24 -- or against Ms. Messer, so a jury would take that into
25 account in determining what amount of fault they place

1 on the parties.

2 And, furthermore, Your Honor, there's a case that's
3 cited in my brief that says that when you're comparing
4 the comparative fault, it's the plaintiff against all
5 the defendants including Mr. Campbell. So that's
6 something that the jury would have to take into account
7 when they're determining what percent the parties are at
8 fault. Accordingly, Your Honor, we would ask that you
9 deny the defendant's motion.

10 THE COURT: All right. Anything else?

11 MR. AIKEN: Just one or two sentences. I could
12 understand Mr. Bice's argument if there was one slither
13 of evidence that would have given Kathy Montorio notice
14 that, you know, this guy might be dangerous. He might
15 hurt somebody. But there's nothing about that. They
16 were having a good time.

17 One of his experts Eagerton did say that with .13
18 which is intoxicated to where you shouldn't drive, it's
19 not just slam base drunk, but it's more than the legal
20 limit I would concede that. He said he should have
21 slurred speech. He should have had impaired bouts. In
22 fact, he said he did. He did have impaired muscular
23 coordination. No testimony of any of that's in this
24 record, Your Honor. Nobody will testify that he gave
25 signs of being intoxicated other than his experts on

1 their speculation. I just don't see how we can possibly
2 have foreseen this.

3 THE COURT: The Burger King case that you reference
4 --

5 MR. AIKEN: Yes, sir.

6 THE COURT: -- was that a motion for summary
7 judgement?

8 MR. AIKEN: Yes, sir.

9 THE COURT: Okay.

10 MR. AIKEN: And it was granted. They appealed it.
11 The Court of Appeals affirmed it. I'll give you that
12 cite.

13 THE COURT: Okay. Because I thought your argument
14 was foreseeability was strictly a jury question.

15 MR. BICE: Your Honor, in that case that was a
16 premises liability case regarding whether there was a
17 proper amount of security at the bar. And there -- in
18 here we're not talking about that. We're talking about
19 a liquor liability case whether or not they should have
20 known that overserving someone could lead to a fight.

21 And in the Steele case that I cited, the Court of
22 Appeals overturned the trial courts granted summary
23 judgement saying we're not prepared to say that the
24 shooting and cutting or wounding related to the
25 consumption of alcohol is someone found in the event to

1 be in the foreseeable as a matter of law.

2 THE COURT: Okay.

3 MR. AIKEN: It was a foreseeability case as well.

4 THE COURT: All right. All right. Mr. Aiken, if I
5 could get you to prepare an order granting the motion
6 for summary judgement. I'm not granting it on the
7 comparative negligence because I think that is a jury
8 question. I am granting it on the foreseeability that
9 there was no way that it could be foreseeable that you
10 overserve this guy in a bar who appears to be getting
11 along with another patron and that they leave together
12 that somehow that's going to turn into an assault of
13 this nature off the premises and I just don't see that.

14 You know, if they had left in the van and he was
15 involved in a wreck, yeah, that's foreseeable. If there
16 was some type of argument or some type of conflict in
17 the bar and he was overserved and they could see that
18 that would indication, but there's nothing here to
19 indicate that there was any hostility between these two
20 at all and that he was going to flip once he went
21 outside. So I'm going to grant your motion. If you
22 would prepare an order.

23 MR. AIKEN: Yes, sir.

24 MR. BICE: Thank you, Your Honor.

25 - - -END OF REQUESTED TRANSCRIPT OF RECORD- - -

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

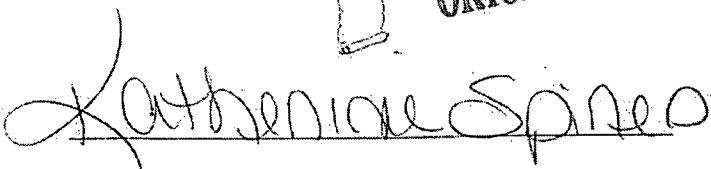
COUNTY OF HORRY)

I, HATTIE O. GORDON, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 29th of May, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

(This transcript was transcribed from the record taken by Hattie O. Gordon)

August 25, 2019

 ORIGINAL

Katherine A. Spires

Registered Professional Reporter

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
3 Michele M. Messer,) C/A No.: 2017-CP-26-03062
4 Plaintiff,)
5 v.)
6 WILLIAM J. MUSE, individually)
and as President of NEM, Inc.;)
7 NEM, Inc. d/b/a The Sandy)
Monkey; Sharon Cumbie; Kathryn)
8 Montorio; and Christopher B.)
Campbell,)
9 Defendants.)

10
11 DEPOSITION

12 OF

13 DAVID H. EAGERTON, Ph.D., DFTCB
14
15
16
17
18
19
20
21
22
23

24 At Raleigh, North Carolina

Reported by:

25 July 31, 2018 - 10:30 a.m.

Dawn Eddinger

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2 FOR THE PLAINTIFF MICHELE M. MESSER:

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10

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12 SANDY MONKEY, SHARON CUMBIE AND KATHRYN MONTORIO:

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21

22

23

24

25

1 A This is the first, to my knowledge.

2 Q Okay. Are you aware of any other cases like
3 that, like this where -- where a victim's nose
4 was bitten off?

5 A I'm not aware of any other cases where a
6 victim's nose was bit -- bitten off, but there
7 have been certainly other cases of -- of
8 violence associated with alcohol intoxication.

9 Q Okay. Have you seen a rap sheet on Mr.
10 Campbell?

11 A To the extent that we've already discussed that
12 intake history or whatever, but I have not seen
13 an extensive rap sheet or -- or criminal
14 history.

15 Q So if he had a rather extensive criminal
16 history, assaults and batteries and those types
17 of things, you just don't know that.

18 A I don't know that. That's right.

19 Q Do you know if he had ever been accused of
20 attempted murder prior to February 8 of 2015?

21 A I believe -- I believe -- I can't recall
22 specifically because I didn't write it down,
23 but I believe there was something in his
24 history about something for that nature.

25 Q Okay.

1 Q And you reference his, Mr. Campbell's,
2 elimination rate. So you have concluded that
3 at 4:30 p.m. he would have a blood alcohol
4 level, would have had, of 0.139 percent.

5 A Yes, sir. That's assuming the average
6 elimination rate --

7 Q Right.

8 A -- like we've been talking about, and that's
9 assuming him consuming eight standard drinks
10 over that time frame.

11 Q Okay.

12 A That would be his blood alcohol level.

13 Q Okay. Now, the last paragraph is interesting
14 to me. You've got: It is my opinion that
15 within a reasonable degree of scientific
16 certainly both Ms. Messer and Mr. Campbell
17 became intoxicated while at The Sandy Monkey.
18 It is also my opinion that they became
19 obviously and grossly intoxicated while they
20 were still being served at The Sandy Monkey.
21 Throughout the afternoon both would have likely
22 exhibited effects such as a change in demeanor,
23 loss of critical judgment, slurred speech,
24 impaired balance, ataxia and impaired muscular
25 coordination.

SOUTH CAROLINA
HORRY COUNTY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
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.)
_____)

Thursday, September 6, 2018
Bishopville, South Carolina

Videotaped deposition of CHRISTOPHER B. CAMPBELL, a witness herein called for examination by counsel for Plaintiff in the above-entitled matter, pursuant to notice, before Kelly Lynn Reiter, Court Reporter and Notary Public in and for the State of South Carolina, taken at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, South Carolina, commencing at the hour of 1:57 p.m.

1 APPEARANCES:

2
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9 and Montorio:

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15 Videographer:

16 Bruce Moody, CLVS
17 American Production Services, LLC
18 1763 Earl Drive
19 Fort Mill, South Carolina 29715

20 * * *

1 ever in her entire life. She had never set foot in
2 there. So, you know, I knew that was bogus. I knew she
3 was there, tracking me.

4 At first, you know, the -- the conversation was
5 emotional, but not angry, not violent, nothing like
6 that. And then it just kind of smoothed out after that,
7 and we ended up having a pretty good day.

8 Q. Okay.

9 A. Until it went tragically awry.

10 Q. Well, tell me what a "good day" was to you.
11 What was actually happening?

12 A. Well, I mean, we were hanging out. We were
13 both really social. We were talking with -- with --
14 with everybody that was in there, having -- I mean, we
15 were having a good time. We were having fun. We
16 were -- we were affectionate with each other.

17 You know, we had been going through this-and-
18 that, and we had decided to -- well, I was actually
19 staying at my friend's house, and you know, we were
20 trying to work out our -- our issues.

21 And then, I guess -- I guess when we got -- I
22 mean, both of us -- both of us got pretty messed up,
23 pretty drunk. And I remember her -- she was trying to
24 keep a guy -- and he's a local doctor, and I can't think
25 of his name to save my life. She was trying to keep him

1 MR. AIKEN: Object to the form.

2 Q. And you can answer it, if you understood it.

3 A. Yeah, I understood what you're talking about.

4 If we had done this deposition two weeks after, I would
5 have been able to tell you more accurately. I would say
6 I'm going to go by my tab. Because people tend to not
7 buy me drinks. I tend to buy other people drinks. I
8 mean, that's -- that's generally the way it's been.

9 You know, Michele liked to do the Jagermeister.
10 She didn't like to do them alone. She typically split
11 them, so they would be -- it would be one shot, two
12 ways. So it would be like an ounce-and-a-quarter split
13 two ways, her taking half and me taking half.

14 Q. Okay.

15 A. So that, you know, that -- I would say, you
16 know, all told, maybe -- you know, with the shots that
17 she bought me and what I had, I -- anywhere between
18 10 and 12 drinks all day.

19 Q. That you had --

20 A. That I --

21 Q. -- 10 or 12 drinks?

22 A. -- had personally.

23 MR. BICE: Okay. We can mark this as
24 Exhibit 1.

25 (Campbell Exhibit 1 marked for identification.)

1 Q. So would that be about halfway through --

2 A. Yeah.

3 Q. -- the time you were there?

4 A. Yeah.

5 Q. All right. Were you exhibiting any outward
6 signs of being intoxicated?

7 A. Not that most people can notice.

8 Q. Okay. Well, what kind of signs were there?

9 A. What? That I knew that I was intoxicated? I
10 just knew that I was intoxicated, you know. You just --
11 you feel it. I'm sure you've had a couple too many, and
12 you know when -- when you've had too many.

13 But yeah, I -- I wasn't sloppy, fall-down
14 drunk. I don't get like that. I just -- I just don't.
15 But unfortunately, I have gotten blackout drunk before,
16 and -- and I was blackout. And by the end of it,
17 I was blackout.

18 Q. By the end of the evening, you were?

19 A. Yeah, I was blacked out. It took weeks and
20 weeks and weeks to have any kind of recollection of --
21 of what had transpired.

22 Q. And --

23 A. I woke up in jail in Surfside and don't know
24 how I got there.

25 Q. Okay. Was the blackout part after you got to

1 Q. And were you a patron at the time?

2 A. Yes.

3 Q. All right. Would you say that you and the
4 other man were intoxicated?

5 A. Oh, yeah, absolutely.

6 Q. Okay. And did Michele know about that bar
7 fight?

8 A. Yeah, she was the cause of it.

9 Q. Okay. And why was she the cause of it?

10 A. She -- her and I had started dating, and she
11 was doing everything in her power to try to see
12 where I stood. And then the guy that she continued to
13 flirt with -- continued to flirt with even after, you
14 know, it was explained to him, "Look, man, back off."
15 He continued with -- with his behavior, and I
16 just had enough. So I hit him. You know, then his
17 friends jumped in, and then my friends jumped in, and
18 then -- like I said, it was -- a couple of punches were
19 thrown. It wasn't anything.

20 Q. All right.

21 A. It wasn't anything consequential. I guess the
22 police didn't even get called, so that was pretty much
23 it.

24 Q. All right. And then after the -- the incident
25 that occurred with Michele was in her van. Is that

1 Q. And what was the disorder that you said that
2 she --

3 A. Alcohol behavioral disorder.

4 Q. -- diagnosed you with? Okay. And what is your
5 understanding of that condition?

6 A. As far as I know, you don't know how to act
7 when you get drunk. I mean, that's to -- to sum it up.
8 And that probably stands to reason.

9 Q. Why do you say that?

10 A. I've never seen a set of handcuffs sober in my
11 life. Never been in any kind of trouble sober.
12 Everything that's ever happened to me has happened
13 because of alcohol, period. That goes all the way back
14 to high school.

15 Q. And is that only once you've become intoxicated
16 or anytime you have alcohol?

17 A. Well, I don't -- I don't -- I've never been a
18 social drinker. You know what I mean? I've never --
19 I'm -- I've never had a beer in my life. And if I
20 drink, I drink to the point of -- if not complete
21 intox -- I drink at least until I have a buzz.

22 I mean, my decision-making has -- has
23 definitely suffered for it in the past. You know,
24 any -- any kind of -- I have better sense when I'm sober
25 to do anything that I've ever, ever done drunk. You

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) 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.

* * * * *

DEPOSITION OF: ELIZABETH TRENDOWSKI, ACS, ALS
DATE TAKEN: Thursday, November 7, 2018
TIME: 1:00 P.M. to 3:24 P.M.
PLACE: ST. AUGUSTINE COURT REPORTERS
1510 NORTH PONCE DE LEON BLVD
SUITE A
ST. AUGUSTINE, FLORIDA 32084
REPORTED BY: SHERRIE L. BURNS, RPR-CP, FPR
Court Reporter and Notary Public

* * * * *

ST. AUGUSTINE COURT REPORTERS
1510 North Ponce de Leon Boulevard, Suite A
St. Augustine, Florida 32084
904-825-0570

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16 Cumbie; and Montorio.

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1 anything to them. She didn't communicate with them,
2 because that's what her testimony was as well. She
3 never spoke to them. She never communicated with them,
4 and on and on that went.

5 So in terms of doing some intervention
6 following the TIPS program, she breached the TIPS
7 program, because there -- not just that, but there were
8 a number of things that she breached the TIPS program
9 for failing to do, but that was one --

10 Q Let's go and cover those. It might be a good
11 time to.

12 A Sure.

13 Q What other -- what other TIPS protocols did
14 she breach? If they're listed here, just point them out
15 to me.

16 A Sure. They would be listed in the conclusions
17 over here.

18 Q Okay.

19 A One of them is counting the number of drinks
20 served. Communicating with a patron.

21 Q What's your thoughts on counting the number of
22 drinks? What opinions do you have there?

23 A Counting the number of drinks is the gold
24 standard for us in the bar business. When you can do
25 it. There are some establishments where counting the

1 number of drinks is next to impossible to do, but when
2 people are sitting at the bar and you're writing down
3 what they are drinking, it's just the gold standard.
4 You know exactly what people are drinking, when they're
5 drinking it, how often they drink it, and why they're
6 drinking it, basically.

7 So you had two people sitting at the bar,
8 basically what we call "on a mission." They weren't
9 drinking for taste. They weren't drinking to just be
10 social. They were drinking -- they were on a mission,
11 these two, and they drank a lot. They drank until they
12 were grossly intoxicated.

13 And you could see that through some of the
14 testimony, especially with the bartender, because -- you
15 know, I like bartenders. And so I listened to her -- I
16 kind of listened to it, even though I was reading it,
17 because I understood what she was doing. She was too
18 busy. She was too busy to pay any attention to
19 Ms. Messer and Mr. Campbell, and she said it over and
20 over and over again.

21 She didn't count the numbers of drinks. She
22 was too busy. She didn't communicate with them, because
23 she was too busy. When she went to take Ms. Messer's
24 credit card, she couldn't get her attention. She -- so
25 she gave it to Mr. Campbell, because she was too busy.

1 She had three and four people deep at the bar. One
2 bartender. She was understaffed, and she was set up
3 that day for fail-- for failure, because she couldn't
4 see people outside either. They were coming in. She
5 was the only bartender for 50 or more people, and that
6 just -- that ratio just doesn't work for obvious
7 reasons, for safe service of alcohol.

8 So she didn't count the number of drinks. She
9 wasn't paying attention. She didn't slow the service
10 down. She didn't offer alternative beverages. She did
11 not stop the service of alcohol. She did not offer
12 alternative transportation.

13 Now, you know -- and I was looking at, okay,
14 alternative transportation. How would she know who was
15 driving and who wasn't driving and would they drive
16 there or would they walk? It doesn't matter. So I take
17 all of that into consideration, and some --
18 Mr. Campbell's testimony was interesting because he
19 talked about Ms. Messer being outside the bar, going --
20 trying to stop some doctor from driving. And people
21 came into the bar to get him, because she was making --
22 from Mr. Campbell's testimony, she was making a fool out
23 of herself, because she was intoxicated. So he told her
24 just to, you know, stop. And it was him that told her
25 that, not the bartender.

1 herbal liquor. It's just not good. Anyway, he was
2 drinking bourbon and ginger and then having shots of
3 Jaeger. And then she was drinking -- her testimony was
4 she was drinking Captain Morgan and Coke and doing
5 Jaeger shots. And the bartender never stopped the
6 service of alcohol. She never intervened. Never
7 communicated.

8 So my testimony is she breached the industry
9 standard of care, TIPS training, because that's their
10 adopted house policy, and South Carolina's statute that
11 says you can't knowingly serve somebody who's
12 intoxicated. And she certainly should have known.

13 Q Okay. All right. What else about Michele
14 Messer King's deposition testimony that we have not
15 talked about was particularly relevant to you?

16 A I think that was -- that was a pretty good
17 overview of it.

18 Q Okay. How about Christopher Campbell. Have
19 we covered him sufficiently, or do you want to point
20 something out on your notes on Mr. Campbell?

21 A No. I think I covered that pretty well. We
22 can talk about it more, but I think I -- I believe I
23 talked about that enough for now.

24 Q Okay. How about Sharon Cumbie?

25 A I think we -- I believe we already talked

1 argument. But I believe that was outside -- I actually
2 couldn't tell whether it was inside the bar or outside
3 the bar. It wasn't really clear to me, but they started
4 an argument at that point.

5 Q Okay. But that was -- as far as you know,
6 that was outside the bar?

7 A I couldn't tell if it was inside or outside,
8 but I -- it made more sense that it would have been
9 outside.

10 Q Okay. Do you have some of these
11 audio-recordings of these different witnesses that
12 everybody said that what happened outside in the car was
13 completely without warning, without notice. It was
14 basically a random criminal act?

15 A I read that, yes -- or I heard that, yes.

16 Q Do you have any reason to say, "Well, I don't
17 believe that"?

18 A No, no. My testimony is going to be in the
19 bar what the bartender did or should have done and then
20 on their way out.

21 Q Okay. But there was no conduct between
22 Mr. Campbell and Ms. Messer in the bar before Kathy
23 Montorio that would have given her notice that something
24 bad is going to happen in a few minutes. Would you
25 agree with that?

1 A Oh, not even a little bit, no. The amount of
2 alcohol -- gee, nothing good happens when you drink that
3 much alcohol. No, she had -- she -- that was -- biting
4 somebody's nose off is not totally foreseeable, but
5 nothing good is going to happen when you serve that much
6 alcohol and somebody consumes that much alcohol.

7 If he had done that and Ms. Messer had driven
8 or he had driven that motorcycle at those high BACs --
9 just as you asked me before, that's most of my cases.
10 Nothing was done. No communication. No stopping
11 service of alcohol. So the amount of drinks, the amount
12 of drinks. She was right there, you know, at the bar.
13 It doesn't get easier than that for a bartender to know
14 the number of drinks served.

15 Q The testimony is that Kathy Montorio had no
16 notice of any prior criminal activity of Mr. Campbell.

17 A That's -- yeah, that was my understanding.

18 Q Okay. And that nothing happened in the bar,
19 in the bar, that would have given Kathy Montorio notice
20 that this gentleman, who was lovey-dovey with his
21 girlfriend was going to go outside, get in her van, and
22 assault her and bite her nose off?

23 A She wouldn't have had anything specific like
24 that that she would have thought about, no. Based on
25 the number of drinks. Her training -- look, her

1 training is TIPS training. It's a great program. She
2 had the knowledge. She had the knowledge. She chose
3 not to apply that knowledge.

4 Q But not everybody who gets drunk in a bar is
5 going to conduct some criminal act later. You would
6 agree with that?

7 A Many of them drive drunk.

8 Q Okay.

9 A Many of them.

10 Q How about --

11 A What?

12 Q Okay. I agree some do drive drunk, but not
13 everybody who gets drunk is going to either drive drunk
14 or assault somebody. Get a cab. Get an Uber?

15 A I agree with that.

16 Q Okay. And there was -- there was no hostility
17 at all in the bar between Campbell and Ms. Messer; is
18 that correct?

19 A I didn't see anything like that. That's my
20 understanding.

21 Q Okay.

22 A Yeah.

23 Q Okay. Fair enough.

24 A Could I take a two-minute break, sir?

25 Q Yes. Take as long as you need.

1 MR. AIKEN: Off.

2 (Short recess.)

3 BY MR. AIKEN:

4 Q I think I'm pretty much finished with
5 conclusion one, but let me ask you this, kind of the
6 same thing I have been asking.

7 Would you agree that nothing happened in the
8 bar at Sandy Monkey between Mr. Campbell and Ms. Messer
9 that would have given Kathy Montorio notice that
10 Mr. Campbell was going to leave the bar, go in the van
11 and bite Ms. Messer's nose off? There was nothing to
12 give her notice of warning of that; is that fair?

13 A That's fair. She wouldn't have known that he
14 was going to bite her nose, no, that's true.

15 Q Or criminally assault her. Just nothing to
16 give her notice he was going to criminally assault her,
17 as he did?

18 A That's true.

19 Q Okay. All right. We can cover these. You've
20 got 13 other opinions. Let's just go through them. And
21 if -- you might have already answered all of them, but
22 let's go to No. 2. If you would read it and see if you
23 have any thoughts in addition to what you've already
24 told me.

25 A No. 2, "Sandy Monkey breached the industry

1 Q Okay.

2 A I talked about No. 6. "Sandy Monkey failed to
3 supervise the bar on 2/8/18 when they knew or should
4 have known there was a party being held on the day of
5 the incident."

6 Q Okay.

7 A No. 7, "Sandy Monkey failed to have a
8 sufficient number of staff working on 2/8/18."

9 No. 8, "Bartender Kathy Montorio failed to
10 recognize or ignore Mr. Campbell and Ms. Messer's signs
11 of intoxication on 2/8/18. Any reasonably trained" --

12 Q I'm sorry. Go ahead.

13 A "Any reasonably trained or attentive bartender
14 should have seen the signs of intoxication and stopped
15 the service of alcohol."

16 Q And those signs of intoxication would have
17 been the number of drinks, even though there was nothing
18 demonstrative about their conduct, and their romantic
19 relationship?

20 A The rate of consumption -- well, she
21 ignored -- she either didn't recognize them or ignored
22 them, because she didn't communicate with them, so the
23 signs would have been there if she would have
24 communicated. You assess and you reassess every time
25 you serve someone.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

MICHELE M. MESSER,

Plaintiff,

vs. CASE NO. 2017-CP-2603062

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.

VIDEOTAPED

DEPOSITION OF: KATHRYN ELAINE MONTORIO

DATE: October 15, 2018

TIME: 11:10 a.m.

LOCATION: AWR Conference Room 104
1293 Professional Drive, Suite D
Myrtle Beach, South Carolina

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: KAREN M. ERNST, CSR
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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KATHRYN MONTORIO; AND CHRISTOPHER B.
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14 ALSO PRESENT:

15 RICK CARROLL
16 Videographer

17 SHARON CUMBIE

18 WILLIAM J. MUSE

19 (INDEX AT REAR OF TRANSCRIPT)
20
21
22
23
24
25

1 BY MR. AIKEN:

2 Q. You just said, Kathy, this happened
3 three years ago, and you're somewhat fuzzy, but is
4 it true you do remember the interaction between
5 Christopher Campbell and Michele Messer at The
6 Sandy Monkey bar?

7 A. Oh, yes.

8 Q. Okay. And tell me again about that
9 interaction. Were they friendly? Just describe
10 what you observed between the two of them.

11 A. When she came in, she sat down. When I
12 took her credit card for the tab, because I didn't
13 know her, she said she was waiting on a friend. So
14 then later, Chris came in and sat directly next to
15 her, and then it would have seemed that they were
16 together like boyfriend and girlfriend.

17 Q. Okay.

18 A. I had never seen her before, but I'm
19 like, okay, that must be his girlfriend.

20 And they turned, and they were hands --
21 you know, facing each other at the bar, hands on
22 each other's legs, and there were kisses back and
23 forth and giggling, and they were having fun.

24 Q. Okay.

25 A. They were having a good time.

1 Q. Okay.

2 A. Yes.

3 Q. Did you ever notice Christopher
4 Campbell demonstrate any type of hostility or anger
5 toward Michele Messer?

6 A. No, not at all.

7 Q. Did you ever notice any mood swings of
8 Christopher Campbell?

9 A. No.

10 Q. Did you ever notice Christopher
11 Campbell being loud or obnoxious?

12 A. Not at all.

13 Q. Did you ever notice Christopher
14 Campbell being aggressive toward Michele Messer or
15 anybody else?

16 A. No.

17 Q. Did you ever notice any pushing or
18 shoving between the two?

19 A. No.

20 Q. When he would order a drink,
21 Mr. Campbell, did he have slurred speech?

22 A. No.

23 Q. When he would get up to go outside, was
24 he staggering?

25 A. No.

1 Q. Okay. Was he creating any scene at any
2 time?

3 A. No.

4 Q. Okay. Was he ever visibly intoxicated?

5 A. No.

6 Q. Okay. Thank you. That's all I have.

7 MR. BICE: That's it.

8 THE VIDEOGRAPHER: This concludes the
9 video deposition of Kathryn Montorio. We are now
10 off the record. The time is 12:39.

11 (The witness, after having been advised
12 of her right to read and sign this transcript,
13 waives that right.)

14 (The deposition was concluded at
15 12:39 p.m.)

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July 25, 2018

Mr. Justin Bice
Bice Law, LLC
406 Tom Hall Street
Fort Mill, SC 29715

Re: Sandy Monkey

Dear Mr. Bice:

I have received additional documents and information since my first report. I have reviewed these documents and considered the information and its impact on my opinion. The additional information does not alter my original opinion, but it does further support it. Specifically, I have reviewed the following documents:

- 1) Medical Records, Michele Messer, Grand Strand ER, 2/08/2015;
- 2) Medical Records, Michelle Messer, MUSC, 2/08/15 – 2/11/2015;
- 3) Recorded Interview – Christopher Campbell, 2/15/2015;
- 4) Recorded Interview – Kate McAndrew, 2/13/2015;
- 5) Recorded Interview – Kathy Montorio, 2/13/2015;
- 6) Recorded Interview – Michelle Messer at HCPD, 2/16/2015;
- 7) Recorded Interview – Michelle Messer, 2/13/2015;
- 8) Recorded Interview – Robin Kearney, 2/13/2015;
- 9) Recorded Interview – Sharon Cumbie, 2/13/2015;
- 10) Sandy Monkey Sales Receipt, Michelle Messer;
- 11) Wells Fargo Combined Statement of Accounts for Christopher Campbell, 1/24/2015 – 2/23/2015;
- 12) Christopher Campbell Inmate Search Detail Report; and
- 13) Incident Report, Case Number 15011838, 2/08/2015.

According to the information given, at approximately 4:35 p.m. on February 8, 2015 Michelle Messer was assaulted by Christopher Campbell in her vehicle which was in the parking lot of the Sandy Monkey Bar. The assault resulted in severe trauma to the nose and face of Ms. Messer. Ms. Messer was transported to Grand Strand Medical Center where her serum alcohol was measured to be 238 mg/dL at 5:23 p.m. This is equivalent to a whole blood alcohol level of 0.202% w/v. Mr. Campbell was taken into custody after resisting arrest to the extent that he was tasered twice to achieve compliance. Both Ms. Messer and Mr. Campbell had been drinking at the Sandy Monkey since approximately 2:00 p.m. that afternoon.

As you requested I have estimated the blood alcohol concentration of Mr. Campbell at the time of the incident. This estimation is based on the information provided and by using the Widmark Equation and the average rate of elimination for moderate drinkers (0.015%/hour) that is commonly used by Forensic Toxicologists.

The Widmark equation states that the amount of pure ethanol consumed is equal to the weight of the person consuming the ethanol multiplied by the volume of distribution of ethanol and the concentration of ethanol in the blood, or

$$A = WrCt / 0.8.$$

A is the amount of pure ethanol consumed (ml)

W is the weight (grams)

R is the volume of distribution (in Males this is 0.68; in Females this is 0.55)

Ct is the concentration of ethanol in blood (as the decimal equivalent)

0.8 is the specific gravity of ethanol (g/ml)

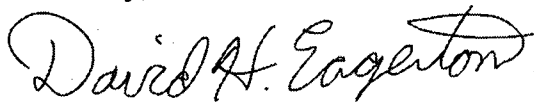
Using this formula and the body weights of Ms. Messer (170 pounds) and Mr. Campbell (215 pounds), we can determine that after one alcoholic drink Mr. Campbell's blood alcohol level would be approximately 0.022% w/v and Ms. Messer's blood alcohol level would be 0.034% w/v. Since Ms. Messer began drinking at 2:00 p.m. had a blood alcohol level of 0.202% at 5:23 p.m., we can estimate that during that time she would have eliminated approximately 0.053% (0.015%/hr x 3.5 hr). We then add this amount to the measured amount and see that she consumed enough alcohol to reach a level of 0.255% (without any elimination). We then divide this number by 0.034% per drink to reveal that Ms. Messer likely consumed the equivalent of approximately 8 standard drinks during that time. One alcoholic drink contains approximately 15 ml of pure ethanol. For example, a 12-ounce beer containing 4% ethanol by volume contains 14.4 ml of pure ethanol (12 ounces x 30 ml/ounce = 360 ml; 360 ml x 0.04 = 14.4 ml). One and one half ounces of 80 proof liquor contains 18 ml of pure ethanol (1.5 ounces x 30 ml/ounce = 45 ml; 80 proof is equal to 40% ethanol by volume; 45 ml x 0.4 = 18 ml). For simplicity, we can assume that one 12-ounce beer is approximately equal to one mixed drink.

Since Mr. Campbell also began drinking at approximately 2:00 p.m. that day and witnesses state that he was consuming alcohol at a rate that was similar to the rate that Ms. Messer was drinking, we can assume that he consumed approximately 8 alcoholic beverages during that time. The maximum blood alcohol level for Mr. Campbell would achieve after 8 drinks would be approximately 0.176%. Since he consumed these beverages over a 2.5 hour period, we must also account for elimination. During that time he would have eliminated approximately 0.0375%, resulting in a blood alcohol level of approximately 0.139% at 4:30 p.m. Mr. Campbell's bank records show a purchase of \$56.00 at the Sandy Monkey on February 8, 2015, which is consistent with the purchase of alcoholic beverages.

It is my opinion that, within a reasonable degree of scientific certainty, both Ms. Messer and Mr. Campbell became intoxicated while at the Sandy Monkey. It is also my opinion that they became obviously and grossly intoxicated while they were still being served at the Sandy Monkey. Throughout the afternoon, both would have likely exhibited effects such as a change in demeanor, loss of critical judgment, slurred speech, impaired balance, ataxia, and impaired muscular coordination.

Please let me know if you have any questions or if I can be of further assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "David H. Eagerton". The signature is fluid and elegant, with a large initial 'D' and a long, sweeping underline.

David H. Eagerton, Ph.D., F-ABFT
Attachment

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