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,

FINAL BRIEF OF APPELLANT

Justin D. Bice
SC Bar No.: 78411
Bice Law LLC
406 Tom Hall Street
Fort Mill, SC 29715
(803) 639-8777
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY ERRONEOUSLY DETERMINING THAT RESPONDENTS HAD NO DUTY TO APPELLANT TO PROTECT AGAINST CRIMINAL ACTS OF THIRD PARTIES, RATHER THAN APPLYING STATUTORY DUTIES UNDER SC CODE ANN. §§ 61-4-580 AND 61-6-2220 TO NOT SELL ALCOHOL TO AN INTOXICATED PERSON?**

2. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY ERRONEOUSLY EVALUATING CAUSATION AND FORESEEABILITY BASED UPON THE BREACH OF A DUTY TO EXERCISE REASONABLE CARE TO PROTECT INVITEES FROM HARM, RATHER THAN A STATUTORY DUTY TO NOT SELL ALCOHOL TO AN INTOXICATED PERSON?**

3. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN THE FACE OF EVIDENCE THAT APPELLANT'S INJURIES WERE FORESEEABLE IN THAT RESPONDENTS KNEW OR HAD REASON TO KNOW THAT OVERSERVING ALCOHOL WOULD PROBABLY RESULT IN INJURY OF SOME KIND TO SOMEONE?**

STATEMENT OF THE CASE

On May 16, 2017, Appellant Michele Messer brought this action alleging that Respondents breached their statutory duties and duty of care and were negligent and reckless in serving Defendant Christopher B. Campbell ("Mr. Campbell") to the point of intoxication and in continuing to serve alcohol to Mr. Campbell on the premises when they knew or should have known that he was intoxicated, in violation of SC Code Ann. §§ 61-6-2220 and 61-4-580. (Complaint) (R. pp. 19-28). 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.

On June 26, 2017, Respondents answered with general denials and assertions of numerous affirmative defenses. (Answer) (R. pp. 29-37). On October 13, 2017, Entry of Default was entered

against Mr. Campbell. (Entry of Default) (R. pp. 1-2). On March 13, 2019, Respondents filed an Amended Answer with added defenses. (Amended Answer) (R. pp. 38-47). On March 13, 2019, Respondents filed a Motion for Summary Judgment.

On May 29, 2019, the Honorable Benjamin Culbertson held a hearing ("Hearing") in which he granted Respondents' Motion for Summary Judgment. On May 29, 2019, a Form 4 Order was filed, indicating that counsel for Respondents would prepare a formal order. (Form 4) (R. pp. 16-17). On June 21, 2019, the Order granting Respondents' Motion for Summary Judgment ("Order") was filed. (Order) (R. pp. 3-15). On July 16, 2019, Appellant timely served the Notice of Appeal on Respondents. On July 16, 2019, Appellant requested the transcript from the Hearing. However, Appellant did not receive the transcript until October 28, 2019.

STANDARD OF REVIEW

In reviewing a trial court's decision granting summary judgment, this Court applies the same standard as the trial court applies under SCRCP 56(c). See, e.g., Brockbank v. Best Capitol Corp., 341 S.C. 372, 378-379, 534 S.E.2d 688, 692 (2000). Summary judgment is appropriate only where it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., Calvert v. House Beautiful Paint and Decorating Center, Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); SCRCP 56(c). In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. See, e.g., Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant." Bayle v. SCDOT, 542 S.E.2d 736 (Ct. App. 2001). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be

drawn from them, summary judgment should be denied." Id. at 738. Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. See, e.g., Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 331 673 S.E.2d 326, 327 (2009). A scintilla has been defined by our state Supreme Court as "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Young v. Hyman Motors, Inc., 199 S.C. 233, 19 S.E.2d 109 (1942).

"[S]ummary judgment is a drastic remedy" and "should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." Platt v. CSX Transportation, Inc., 379 S.C. 249, 256-7, 665 S.E.2d 631, 635 (Ct. App. 2008).

STATEMENT OF THE FACTS

Respondents NEM, Inc. and William J. Muse ("Mr. Muse") owned and operated a bar known as The Sandy Monkey selling beer, wine, and alcoholic liquors in Murrells Inlet, South Carolina. (Complaint ¶ 8, Answer ¶ 8) (R. p. 20, R. p. 30). Mr. Muse was the owner, operator, president, and licensee of record with the SC Department of Revenue Alcohol Beverage Licensing for The Sandy Monkey. (Complaint ¶ 3, Answer ¶ 3) (R. p. 19, R. p. 29). Respondent Kathryn Montorio ("Ms. Montorio") was the bartender and only employee working at The Sandy Monkey while Appellant was there that day. (Complaint ¶ 5 & 10, Answer ¶ 5 & 10) (R. p. 20, R. p. 30). Respondent Sharon Cumbie ("Ms. Cumbie") was the manager of The Sandy Monkey. (Complaint ¶ 4, Answer ¶ 4) (R. p. 19, R. p. 30).

On February 8, 2015, Appellant saw her ex-boyfriend Mr. Campbell when she stopped at The Sandy Monkey. (Complaint ¶ 9, Answer ¶ 9, Order p. 2) (R. p. 20, R. p. 30, R. p. 4). Appellant and Mr. Campbell consumed alcohol at The Sandy Monkey over approximately 2.5 hours. (Eagerton Dep., p. 83, ll. 2-11, Order p. 2) (R. p. 94, lines 2-44, R. p. 4). Mr. Campbell testified that he drank between 10 and 12 bourbon and ginger ales and Jägermeister shots at the Sandy Monkey. (Campbell Dep., p. 20, ll. 16-18) (R. p. 98, lines 16-18). Appellant and Mr. Campbell left the premises and got in Appellant's van where Mr. Campbell choked, beat, and ultimately bit a portion of Appellant's nose. (Complaint ¶ 12, Answer ¶ 12, Order p. 2) (R. p. 20, R. p. 30, R. p. 4).

Mr. Campbell was initially charged with attempted murder for the assault on Appellant. (Order p. 2) (R. p. 4). He ultimately pled to assault and battery of a high and aggravated nature, which resulted in a fifteen-year prison sentence. (Order p. 2) (R. p. 4). Mr. Campbell is currently incarcerated at Lee Correctional Institution in Lee County, South Carolina. (Complaint ¶ 6, Answer ¶ 6) (R. p. 20, R. p. 30).

ARGUMENTS

1. BECAUSE RESPONDENTS HAD STATUTORY DUTIES UNDER SC CODE ANN. §§ 61-4-580 AND 61-6-2220 TO NOT SELL ALCOHOL TO AN INTOXICATED PERSON, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY DETERMINING THAT RESPONDENTS HAD NO DUTY TO APPELLANT TO PROTECT AGAINST CRIMINAL ACTS OF THIRD PARTIES.

The Order granting Respondents' Motion for Summary Judgment cites numerous premises liability cases involving claims against property owners for allegedly failing to keep the premises safe. Appellant has brought no such claim in this case. The claims in the Complaint against the Respondents and the duty in this case are based on statutory duties under SC Code §§ 61-4-580 and 61-6-2220 to not sell alcohol to an intoxicated person.

Among others, the Trial Court cited 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 (Order p. 11) (R. p. 13). In Miletic, this Court determined that Wal-Mart had no duty to protect Miletic and could not have negligently breached that duty, based upon a lack of comparable violent crimes giving Wal-Mart notice. Id. at 333, 529 S.E.2d at 70–71.

The Trial Court erroneously applied these premises liability cases to determine that Respondents had no duty of care toward Appellant:

> 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.

(Order p. 11-12) (R. pp. 13-14) (emphasis added).

Appellant has not claimed Respondents had a duty to provide greater security. No statute and no public policy require a business to routinely provide security. Conversely, public policy and SC Code §§ 61-4-580 and 61-6-2220 impose clear duties to not sell alcohol to an intoxicated person:

> South Carolina Code Ann. § 61-4-580(2) prohibits the knowing sale of beer or wine to an intoxicated person, while § 61-6-2220 prohibits the sale of alcoholic beverages . . . to intoxicated persons. In recognizing a private cause of action for a violation of these statutes, the Court of Appeals stated that their purpose is to promote public safety, and to prevent an already intoxicated person from becoming even more intoxicated, and thus an even greater risk to the public at large, when he leaves the establishment. We agree.

Tobias v. Sports Club, 332 S.C. 90, 92, 504 S.E.2d 318, 319-20 (1998) (citation omitted).

These are the laws and duties that the Trial Court should have applied. The statutory duty to not serve an intoxicated person does not go away because the person does not appear violent.

The duty applies to every person or entity who sells alcohol, every time they serve alcohol. Because respondents had statutory duties under SC Code Ann. §§ 61-4-580 and 61-6-2220 to not sell alcohol to an intoxicated person, the Trial Court erred in granting summary judgment by determining that respondents had no duty to appellant based upon cases involving a duty to protect against criminal acts of third parties.

2. BECAUSE RESPONDENTS HAD STATUTORY DUTIES TO NOT SELL ALCOHOL TO AN INTOXICATED PERSON, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ERRONEOUSLY EVALUATING CAUSATION AND FORESEEABILITY BASED UPON A BREACH OF A DUTY TO EXERCISE REASONABLE CARE TO PROTECT INVITEES FROM HARM.

Like applying the wrong duty (actually no duty), the Trial Court erroneously determined foreseeability, as the correct duty must be the starting point to determine whether the consequences of a breach of such a duty were foreseeable. "The meaning of proximate cause in this connection has been explained as follows: If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury." Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 277, 37 S.E.2d 737, 741 (1946) (emphasis added). "A third party's intervening act is reasonably foreseeable, and the original actor still liable, if the intervening act is a natural and probable consequence of the original actor's conduct." Mellen v. Lane, 377 S.C. 261, 280-86, 659 S.E.2d 236, 246-49 (Ct. App. 2008).

This case is unlike the Burger King case discussed at length and relied upon by the Trial Court, where the plaintiff was trying to hold a property owner responsible for some random person coming onto their property and attacking a customer. See Easterling v. Burger King Corporation, 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016) (Order p. 7-8) (R. pp. 9-10). "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." Brown v. Nat'l Oil Co., 233 S.C. 345, 352-54, 105 S.E.2d 81, 84-85 (1958) (emphasis added) (citation omitted).

Burger King had no involvement in creating the dangerous condition, i.e. they were not a substantial factor in bringing about the harm. Burger King did not get that random attacker intoxicated to 1.5 times the legal limit in violation of their statutory duties to not serve an intoxicated person. Here, the Respondents were directly involved in creating the dangerous condition by overserving Campbell.

This distinction illustrates the importance of starting with the correct duty when determining the natural and probable consequences of a violation of that duty. When analyzing a breach of Burger King's duty of reasonable care to its invitees, foreseeability would be determined by asking if Burger King would have reason to know that a probable consequence was that a complete stranger to them would come onto their property and harm someone. When analyzing a bar's breach of its statutory duty to not serve an intoxicated person, foreseeability would be determined by asking if the bar would have reason to know that a probable consequence was that a customer the bar served past the point of intoxication would go out and harm someone.

The Trial Court erroneously failed to find that the Respondents had a statutory duty to not serve an intoxicated customer. Therefore, they could not and did not determine the natural and probable consequences of a violation of that statutory duty.

3. BECAUSE MORE THAN A MERE SCINTILLA OF EVIDENCE WAS PRESENTED THAT APPELLANT'S INJURIES WERE FORESEEABLE IN THAT RESPONDENTS KNEW OR HAD REASON TO KNOW THAT OVERSERVING ALCOHOL WOULD PROBABLY RESULT IN INJURY OF SOME KIND TO SOMEONE, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT.

a. Irrelevant the manner in which the harm occurred.

The Trial Court based its decision on an erroneous distinction between the foreseeability of the intervention of a negligent actor versus a criminal actor. "I can understand accidentally shooting something. I mean, you're under the influence then, yes, under the influence indicates you cannot safely operate a vehicle, you cannot safely operate a shotgun, you can't do it. There was a negligence. This seems to be an intentional tort by Mr. Campbell." (Hearing Transcript p. 13, ll. 11-17) (R. p. 82, lines 11-17). However, foreseeability must be determined by the same standards whether the intervention is intentional or negligent.

An intervening act by a third person will not relieve the first wrongdoer of liability if such intervention "should have been reasonably foreseen in the attendant circumstances" and if the "intervening act is a natural and probable consequence of the original actor's conduct." Mellen v. Lane, 377 S.C. 261, 283, 659 S.E.2d 236, 248 (Ct. App. 2008) (citation omitted). This standard applies whether the intervention is intentional or negligent and regardless of the manner in which the harm occurred. See, e.g., Id. (finding that a bottle thrown by an unknown criminal actor in a bar fight should have been foreseeable); see also Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992) ("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.")

"If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." Mellen, 377 S.C. at 283 (citation omitted). "It is sufficient that in view of all the attendant circumstances, he should have foreseen that his negligence would probably result in injury of some kind to some one." Id. (citation omitted).

The Trial Court's acknowledgement that driving accidents and negligent shotgun injuries

are foreseeable outcomes of overserving alcohol should end the inquiry regarding whether this attack was a foreseeable outcome of overserving alcohol, as it would be foreseeable to Respondents that overserving alcohol "would probably result in injury of some kind to some one." Id. However, if more were needed, violence (and not just negligence) is a well-known outcome of overserving alcohol.

b. The harm caused by overserved customers is not only foreseeable, preventing such harm is an express public policy in South Carolina.

The only case cited in the Order that actually dealt with a court determining causation related to violations of statutory duties under SC Code Ann. §§ 61-6-2220 and 61-4-580 to not serve an intoxicated person is Crolley v. Hutchins, 387 S.E.2d 716 (Ct. App. 1989). In Crolley, the Court concluded that the attempted suicide was too remote from the alleged statutory violation to establish proximate causation. Id. at 357–58, 387 S.E.2d at 718. The Court reasoned "[o]ne does not expect a person to attempt suicide as a natural and probable result of being served a drink while intoxicated."

Crolley offers little guidance regarding foreseeability in this case, as it was a first party suicide case. The Supreme Court has determined that public policy is not served by allowing such first party claims. See Tobias v. Sports Club, 332 S.C. 90, 92, 504 S.E.2d 318, 320 (1998).

However, preventing harm toward others by overserving alcohol is an express public policy in South Carolina. "In recognizing a private cause of action for a violation of these statutes [SC Code Ann. §§ 61-4-580(2) & 61-6-2220], the Court of Appeals stated that their purpose is to promote public safety, and to prevent an already intoxicated person from becoming even more intoxicated, and thus an even greater risk to the public at large, when he leaves the establishment. We agree." Tobias v. Sports Club, 332 S.C. 90, 92, 504 S.E.2d 318, 319-20 (1998) (citation

omitted). "Imposing liability on a tavern owner for continuing to serve an intoxicated person who later injures others serves public policy by imposing upon the tavern owner a duty to use judgment and discretion. We do not believe that the owner will exercise this judgment and discretion less prudently if he risks a law suit only when the intoxicated person injures others." Id.

c. Violence caused by overconsuming alcohol is a "fact known to everyone."

More importantly, unlike the suicide in Crolley, violence toward others is a well-known and judicially recognized consequence of being overserved alcohol. The U.S. Supreme Court has stated "[a] large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example." Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 2021 (1996) (citing Third Special Report to the U. S. Congress on Alcohol and Health from the Secretary of Health, Education, and Welfare 64 (1978)). The Supreme Court further stated that "[s]ome recent studies suggest that the connection between drunkenness and crime is as much cultural as pharmacological, that is, that drunks are violent not simply because alcohol makes them that way, but because they are behaving in accord with their learned belief that drunks are violent." Id. (emphasis added) (citing Collins, Suggested Explanatory Frameworks to Clarify the Alcohol Use/Violence Relationship, 15 Contemp. Drug Prob. 107, 115 (1988); Critchlow, The Powers of John Barleycorn, 41 Am. Psychologist 751, 754-755 (July 1986)).

The Respondents themselves have a still-pending dram shop case related to an assault that took place after the attack at issue in this case. See Acosta v. William J Muse, et al., 2017-CP-26-4625 (Horry County). They also have been involved in an insurance coverage lawsuit over whether that assault was excluded under their liquor liability policy. See Scottsdale Ins. Co. v. GS Thadius LLC, 328 F. Supp. 3d 527, 534 (D.S.C. 2018).

SC Courts routinely acknowledge that criminal offenses are foreseeable consequences of overserving alcohol. "The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences." State v. Vaughn, 268 S.C. 119, 126, 232 S.E.2d 328, 331 (1977) (emphasis added) (criminal case involving charges of aggravated assault); see also State v. Plemmons, 296 S.C. 76, 78, 370 S.E.2d 871, 871-72 (1988) (discussing statutory mitigating circumstances in criminal cases for voluntary intoxication pursuant to S.C. Code Ann. § 16-3-20(C)(b)(2), (6), & (7)).

Violence caused by overconsuming alcohol is foreseeable because it is a "fact known to everyone."

d. Additional facts of this case showing foreseeability.

Plaintiff 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 Mr. 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. (Eagerton Dep., p. 83, ll. 2-11 and Eagerton Report) (R. p. 94, lines 2-11 and R. pp. 118-121).

The parties later deposed Mr. Campbell at the Lee County Correctional Institute. Mr. Campbell testified he was "pretty messed up," "pretty drunk," and even "blackout drunk" from the drinks served to him by Respondents. (Campbell Dep., p. 16, ll. 21-23 & p. 28, ll. 13-17) (R. p. 97, lines 21-23 & R. p. 99, lines 13-17). Mr. Campbell further testified that he had drank between 10 and 12 bourbon and ginger ales and Jägermeister shots at the Sandy Monkey. (Campbell Dep.,

p. 20, ll. 16-18) (R. p. 98, lines 16-18). Mr. Campbell's BAC was well above the .08% BAC for driving while under the influence, allowing the jury a permissive inference Respondents negligently overserved Mr. Campbell. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558 (2010).

Dr. Eagerton concluded that Mr. 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. (Dr. Eagerton's Report) (R. pp. 118-121).

Plaintiff 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 Respondents 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.

(Trendowski Dep., p. 52, ll. 7-12) (R. p. 105, lines 7-12).

> 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.

(Trendowski Dep., pp. 52-53, ll. 13-7) (R. pp. 105-106, lines 13-7).

Ms. Trendowski ultimately opined that Respondents breached their duties to not knowingly serve an intoxicated person, to properly supervise & to properly staff. (Trendowski Dep., p. 51: 19-20; pp. 51-52, ll. 23-3; 55: 8-12; and 77: 2-5) (R. p. 104, lines 19-20; R. p. 104, lines 23-25; R. p. 105, lines 1-3; R. p. 107, lines 8-12; and R. p. 112, lines 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) (R. p. 108, lines 21-28; R. p. 109, lines 1-5). Dr. Eagerton stated "there have been certainly other cases of violence associated with alcohol intoxication." (Eagerton Dep., p. 71: 5-8) (R. p. 93, lines 5-8). Mr. 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) (R. p. 100, lines 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) (R. p. 101, lines 10-11).

e. Jury must determine whether the attack was foreseeable.

A 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) ("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 Respondents 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.

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 331 673 S.E.2d 326, 327 (2009).

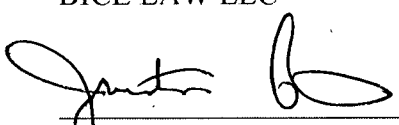
The Trial Court acknowledged that bad things happy when people are overserved. Defendant Campbell, the experts in this case, and Courts at all levels have all acknowledged that people become violent when overserved alcohol. Appellant has presented far more than a mere scintilla of evidence regarding whether the overservice of alcohol would probably result in injury of some kind to someone.

CONCLUSION

Because the Trial Court failed to apply the proper statutory duty, because the Trial Court could not properly analyze causation without applying the correct duty, and because more than a mere scintilla of evidence was presented that appellant's injuries were foreseeable, the Trial Court erred in granting summary judgment to Respondents. This Court should reverse and remand this case for a trial on the merits.

Respectfully submitted,

BICE LAW LLC



Justin D. Bice
S.C. Bar No. 78411
justin@bicelaw.us
406 Tom Hall Street
Fort Mill, SC 29715
Telephone/Fax: (803) 639-8777
Attorney for Appellant

March 13, 2020