THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2020-000129

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SC Court of Appeals

Gregory Muxlow, individually
and as Personal Representative
for the Estate of Jennifer
Muxlow..Appellant,

v.

Natasha Anglin, Henrietta Benson, Donita Failey, Arnold Harris, Yokeema Harris, Ruby Tuesday, KC Mulligan's, ARIUM St. Ives, Carroll Management Group, South Carolina Department of Transportation, City of North Charleston, Charleston County, Defendants,

Of whom Ruby Tuesday, KC Mulligan's, ARIUM St. Ives, and
Carroll Management Group are the ....Respondents.

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING RUBY TUESDAY WHERE THE APPELLANT PROPERLY STATED CAUSES OF ACTION AGAINST RUBY TUESDAY

2. WHETHER RUBY TUESDAY OWED A DUTY TO THE DECEDENT TO PROTECT HER FROM ITS MANAGER WHERE RUBY TUESDAY KNEW THE MANAGER WAS ROMANTICALLY PERSUING AND PHYSICALLY ABUSING THE DECEDENT IN VIOLATION OF COMPANY POLICIES

3. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING KC MULLIGAN'S WHERE THE APPELLANT PROPERLY STATED CAUSES OF ACTION AGAINST KC MULLIGAN'S

4. WHETHER THE CIRCUIT COURT ERRED IN DISMISSING CARROLL MANAGEMENT GROUP WHERE THE APPELLANT PROPERLY STATED CAUSES OF ACTION AGAINST CARROLL MANAGEMENT

STATEMENT OF THE CASE

The Estate of Jennifer Muxlow filed suit against multiple defendants – including Ruby Tuesday, KC Mulligan's, and Carroll Management Group – alleging several causes of action related to the decedent's death. The appellant properly pleaded causes of action against the respondents, including facts and allegations that allow it to recover under the law. The respondents moved to dismiss. The parties briefed the issues before the Circuit Court, which took the matter under advisement after a hearing. The Court later issued a Form 4 granting the respondents' motions. The appellant filed a Rule 59(e) motion and preserved all issues for appeal. The Circuit Court denied the appellant's Rule 59(e) motion without a hearing. The appellant timely filed a notice of appeal.

FACTS

Ruby Tuesday hired the decedent and put her in the charge of its manager, Arnold Harris. Harris then pursued the decedent romantically. Ruby Tuesday allowed its manager to carry on a relationship with the decedent, even though that relationship was in clear violation of its policies. After the decedent's father learned of her relationship with Harris, he became understandably concerned, as Harris was a good deal older than the decedent, in addition to being her supervisor. The decedent's father contacted Ruby Tuesday and informed the company of both the policy violation and his concerns for his daughter's well-being. With actual knowledge of the relationship, Ruby Tuesday ignored the policy violation and allowed Harris to continue to date the decedent. Ruby Tuesday allowed the relationship to go unchecked both at its restaurant and away from the restaurant, despite the obvious imbalance inherent in the inappropriate relationship and the accompanying potential harm to the decedent.

As Harris' and the decedent's relationship progressed, the Ruby Tuesday manager began to verbally and physically abuse the decedent. The decedent's father again contacted Ruby Tuesday. He informed them of the ongoing policy violations and told them in no uncertain terms that he was afraid Harris was going to cause the decedent irreparable harm.

On November 20, 2018, using the power created by Ruby Tuesday, Harris took the decedent's car without her knowledge or permission for the purpose of purchasing drugs. In doing so, he left the decedent without her car and her wallet. The decedent began to search for Harris and her car. She called KC Mulligan's because she thought Harris, who was a regular visitor to that establishment, might be there. Although Harris was there, KC Mulligan's staff lied to the decedent – presumably at Harris' request – and told her that he was not. This lie caused the decedent to continue to frantically search for her car and wallet. As the decedent continued her

search for Ruby Tuesday's manager, she was hit by a car and killed. The decedent's parents reported her death and provided a copy of the death certificate to Carroll Management Group, which managed the apartment complex where the decedent lived. Despite having actual knowledge of the decedent's death, Carroll Management Group initiated eviction proceedings against the decedent, causing her family additional pain and anguish.

The Estate of Jennifer Muxlow filed a complaint and subsequently filed an amended complaint, which contains extensive and detailed facts related to Ruby Tuesday's, KC Mulligan's, and Carroll Management Group's involvement in the decedent's death. The factual background section of the amended complaint alone contains 32 paragraphs and spans five pages. The amended complaint contains eight causes of action, which weave in additional facts related to each defendant's role in the decedent's death.

Notwithstanding the low threshold of Rule 8 and South Carolina case law interpreting Rule 12 motions, the Circuit Court dismissed the appellant's claims against three entities that caused the decedent harm. Because there are numerous cases that require denial of a motion to dismiss the appellant's claims, this Court should reverse the Circuit Court's ruling in compliance with the South Carolina Rules of Civil Procedure.

ARGUMENTS

I. The Circuit Court Erred in Dismissing Ruby Tuesday as a Defendant.

South Carolina Rule of Civil Procedure 12(b)(6) allows a defendant to move to dismiss an action where a plaintiff has failed to set forth sufficient facts to constitute a cause of action. A court should deny a defendant's motion to dismiss, if, upon an examination of the pleadings, "the facts alleged, and inferences therefrom would entitle the plaintiff to any relief on any theory." *Stiles v.*

Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). A court must weigh not only facts, but also *inferences* in the nonmoving party's favor when considering a motion to dismiss. *Dye v. Gainey,* 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). A motion to dismiss "cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985); and *Glass v. Glass*, 276 S.C. 625, 281 S.E.2d 221 (1981).

In determining whether to grant a motion to dismiss, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995) citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In the amended complaint, the appellant alleged that Ruby Tuesday, KC Mulligan's, and Carroll Management Group each owed the decedent duties, which are described in detail in the pleadings. The appellant similarly described the respondents' breaches of those duties in detail and alleged that the respondents' breaches proximately caused the decedent's damages, including her death. Based solely upon the pleadings, the respondents' motions to dismiss must be denied because the appellant stated facts and causes of action that, if taken as true, allow it to recover against the respondents.

Ruby Tuesday's motion is based largely on its argument that it owed no duty to the decedent. In making this argument, Ruby Tuesday confuses an affirmative duty to act with a duty to act reasonably. Ruby Tuesday takes the position that it did not owe a duty to the decedent to follow its own policies and procedures, which were in place to protect employees, such as the decedent. In doing so, it relies upon two North Carolina cases in an attempt to downplay the duty it undertook by implementing policies and procedures to protect its employees. See *Hall v. Toreos,*

Inc. 626 S.E.2d 861 (N.C. Ct. App. 2006) and *Mynhard v. Elon University*, 725 S.E.2d 632 (N.C. Ct. App. 2012).

In citing these North Carolina cases, Ruby Tuesday ignores fundamental tenets of South Carolina law. Under South Carolina law, a duty of care "embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable, and which can be avoided by the defendant's exercise of reasonable care." *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). Put differently, a plaintiff in a negligence action must show that the defendant "did not use the amount of care one ordinarily would have under the circumstances." *See* Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* §20-1 (2002). "Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct." *Rogers v. S.C. Dept. of Parole & Comm. Corr.*, 464 S.E.2d 330, 332 (1995). However, four exceptions to that general rule exist:

> 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002). See generally Hubbard & Felix, *The South Carolina Law of Torts* 57-72 (1990) and *Madison ex rel. Bryant v. Babcock Center*, 371 S.C. 123, 638 S.E.2d 650 (2006).

In this case, Ruby Tuesday not only owed the decedent a general duty of good faith and ordinary care, but also had an affirmative duty under three of the four *Faile* factors.

A. Ruby Tuesday had a general duty to act reasonably.

When "...an act is voluntarily undertaken, the actor assumes a duty to use due care." *Sherer v. James*, 351 SE2d 148 (SC 1986); See, e.g., *Roundtree Villas Association, Inc. v. 4701 Kings Corporation*, 282 S.C. 415, 321 S.E. 2d 46 (1984). As described in the complaint and the plaintiff's response to Ruby Tuesday's motion to dismiss, Ruby Tuesday acted in several ways, including:

placing the decedent under Harris' control; leaving the decedent under Harris' control when its corporate office was notified that Harris was romantically pursuing the decedent in violation of company policies; refusing to do anything to rectify the situation or discipline its manager; and leaving the decedent under its manager's control after being notified Harris was abusing the decedent.

Putting the decedent under a dangerous manager's supervision, ignoring policy violations in place to protect employees like the decedent, violating the policy that requires discipline of the offending manager who has abused a server, and other actions are just that – actions. When Ruby Tuesday acted in the ways described in the complaint, it had a duty to act reasonably. It did not act reasonably, and its failure to act reasonably directly contributed to the decedent's death. Because the appellant pleaded as much in its case, the Circuit Court should have denied Ruby Tuesday's motion to dismiss without even reaching an analysis under *Faile.*

B. A special relationship existed between Ruby Tuesday and the decedent.

In addition to its general duty to act reasonably, Ruby Tuesday owed duties to the decedent under three of the four *Faile* factors. First, Ruby Tuesday had a special relationship with the decedent. See *Ballou v. Sigma Nu Gen. Fraternity,* 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). As a result, it had a duty to protect her from being romantically pursued and physically abused by a manager in clear violation of company policy. By employing Harris and the decedent, Ruby Tuesday had a special relationship with each. This is especially true since Ruby Tuesday promulgated policies and procedures intended to protect the safety and well-being of employees, such as the decedent, who might be romantically pursued by their superiors, such as Harris.

More importantly, in his amended complaint, the appellant clearly described the relationship that existed between Ruby Tuesday and the decedent. Ruby Tuesday chose to hire the

decedent and expected her to fulfill certain duties as an employee. In exchange, the decedent was entitled to payment for her work and for her employer to enforce its policies. The decedent's expectation of policy enforcement is especially justifiable with respect to policies clearly designed to protect employees from the dangers inherent in relationships defined by a power imbalance. Ruby Tuesday owed a duty to the decedent because of its special relationship with her.

C. Ruby Tuesday created and undertook duties, which it breached.

Second, Ruby Tuesday voluntarily undertook to protect employees, including the decedent, by promulgating policies and procedures that prohibit managers, like Harris, from dating subordinate employees, like the decedent. The rationale behind these policies is simple: a romantic relationship between a manager and a subordinate is characterized by a power imbalance, which creates an unhealthy and potentially dangerous dynamic for the subordinate.

By creating policies and procedures that prohibit managers from dating employees, Ruby Tuesday undertook a duty to enforce those policies and procedures. See *Caldwell v. Jim Walter Homes, Inc.*, 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987). As the appellant alleged in its amended complaint and as Ruby Tuesday has acknowledged, the decedent's father called Ruby Tuesday on multiple occasions to report Harris' inappropriate relationship with his daughter. The decedent's father not only informed Ruby Tuesday that Harris was involved in a romantic relationship with the decedent, but he specifically told Ruby Tuesday that, by allowing this relationship to continue, it was violating its policy (*i.e.*, Ruby Tuesday was breaching its duty). When Ruby Tuesday continued to ignore its breach, the decedent's father again called Ruby Tuesday and told the company that he was worried for the safety of his daughter. Again, Ruby Tuesday did nothing to curb Harris' inappropriate conduct and instead continued to violate its policy, even with actual knowledge of the harm Harris was causing the decedent.

In South Carolina, "it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Assn., Inc. v. Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984); *Miller v. City of Camden*, 317 S.C. at 33-34, 451 S.E.2d at 404 (1997). Once Ruby Tuesday assumed to act by promulgating policies and procedures to protect subordinates from improper romantic relationship with their managers, it undertook a duty to act with due care by enforcing those policies. By failing to enforce those policies when it had actual knowledge of policy violations, Ruby Tuesday breached its duty.

D. Ruby Tuesday created a risk of harm to the decedent.

Third, where a defendant creates a risk, he owes a duty of care to the plaintiff. *Caldwell v. Jim Walter Homes, Inc.*, 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987); *Restatement (Second) of Torts* §§ 323-24A (1965). Ruby Tuesday created an unnecessary risk of harm when it allowed Harris to initiate and pursue a romantic relationship with the decedent, his subordinate, in clear violation of corporate policy. Ruby Tuesday had policies in place that forbade Harris from pursuing the decedent romantically, dating the decedent, and physically abusing the decedent.

It is undisputed that Ruby Tuesday had actual knowledge of Harris' violation of its policies, romantic pursuit of a younger subordinate employee, and physical abuse of an employee. The decedent's father directly informed Ruby Tuesday multiple times that Harris violated those policies and that, as a result, he feared for his daughter's physical, mental, and emotional well-being. Had Ruby Tuesday followed its own policies and discharged the duty it created, it could have easily eliminated the risk of harm that ultimately caused the decedent's death. However, rather than discharging its duty by terminating Harris for his misconduct and abuse, Ruby Tuesday chose to allow Harris to continue his pattern of abuse at the cost of the decedent's safety. As a

result of the risk created by Ruby Tuesday, the decedent was abused by its manager and ultimately killed.

E. Ruby Tuesday's breach proximately caused the decedent's death.

As outlined above, the pleadings contain facts and allegations that describe in detail the duty that Ruby Tuesday owed to the decedent, as well as Ruby Tuesday's breach of that duty. The question of whether Ruby Tuesday's breach proximately caused the decedent's death should be answered by a jury. "Ordinarily, the question of proximate cause is one of fact for the jury . . .." *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978).

"The touchstone of proximate cause in South Carolina is foreseeability." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) citing *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). "The test of foreseeability is whether *some* injury to another is the natural and probable consequence of the complained-of act." *Id.* (emphasis added). It is clear that "some injury to another" was foreseeable to Ruby Tuesday, because if it was not, Ruby Tuesday would not have promulgated the policies specifically designed to protect employees such as the decedent. In fact, the harm to the decedent was especially foreseeable in this case. As alleged in the amended complaint, after Ruby Tuesday refused to adhere to its policy – even after the decedent's father put the company on notice – the decedent's father again called Ruby Tuesday and specifically told the company that he was worried for the physical safety of his daughter.

II. The Trial Court Erred in Dismissing KC Mulligan's as a Defendant.

The appellant sufficiently pleaded causes of action against KC Mulligan's. The appellant's amended complaint contains numerous factual allegations against KC Mulligan's that, if taken as true, would allow the appellant to recover against KC Mulligan's. In Paragraph 31 of the

appellant's amended complaint, the appellant alleges that Harris frequented KC Mulligan's and that the decedent called the bar during her frantic search for her car. The appellant goes on to allege in the following paragraph that KC Mulligan's knew that Harris was at the bar but lied to the decedent, knowing that those lies would cause the decedent to continue searching for Harris. As a result of these lies and the decedent's continued search for Harris, the plaintiff was struck by a car and killed.

The question is not whether KC Mulligan's actions proximately caused the appellant's damages – that is a jury question. *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978). Rather, the question is whether the appellant can recover from KC Mulligan's if the allegations of the amended complaint are taken as true. The answer to that question is yes.

III. The Trial Court Erred in Dismissing Carroll Management Group as a Defendant.

In his amended complaint, the appellant made allegations that, if taken as true, would allow the appellant to recover against Carroll Management Group. Specifically, in Paragraph 82 of the amended complaint, the appellant alleges that Carroll Management Group improperly "initiated eviction proceedings after the decedent's death and even though they had knowledge of the decedent's death." Additionally, in Paragraph 83, the appellant alleges that Carroll Management Group violated the South Carolina Unfair Trade Practices Act by engaging in improper business practices that affect the public. These allegations, together with others throughout the amended complaint, if taken as true, would allow the appellant to recover from Carroll Management Group. As a result, the Circuit Court erred in granting Carroll Management Group's motion to dismiss.

CONCLUSION

The amended complaint far surpasses the bare minimum for the appellant to allege facts that, taken with any reasonable inferences deducible therefrom, would entitle it to recover on any

theory of his case with respect to the respondents. The appellant therefore respectfully requests that this Court reverse the Circuit Court's dismissal of Ruby Tuesday, KC Mulligan's, and Carroll Management Group.[1]

Respectfully submitted,

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[1] Since the appellant has stated a claim exceeding twenty dollars, the motions to dismiss should also be denied so as not to deprive the appellant of his constitutional right to a jury trial guaranteed by the Seventh Amendment of the United States Constitution and by the South Carolina Constitution.

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Of whom Ruby Tuesday, KC Mulligan's, ARIUM St. Ives, and
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PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant and the Appellant's Designation of Matter, by depositing copies of it in the United States Mail, postage prepaid, on May 4, 2020, addressed to its attorneys of record Catharine Griffin at P.O. Box 8057, Columbia, SC 29202; Christopher Lizzi at 2170 Ashley Phosphate Road, Suite 402, North Charleston, SC 29406; and Jack Gresh and Elizabeth Fulton Morrison at 111 Coleman Boulevard, Suite 301, Mount Pleasant, SC 29464.

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