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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

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Appellate Case No. 2020-000129
Trial Court Case No. 2019-CP-10-04193

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Gregory Muxlow, individually and as Personal Representative of 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 and Charleston County, Defendants

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

Respondents.

# FINAL BRIEF OF RESPONDENT RUBY TUESDAY, INC.

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## STATEMENT OF THE CASE

Appellant Gregory Muxlow, individually and as Personal Representative of the Estate of Jennifer Muxlow, commenced this action by filing a Summons and Complaint on April 24, 2019 in Greenville County. Ruby Tuesday filed a Motion to Dismiss and a Motion for Judgment on the Pleadings in response to the initial Complaint. Thereafter, the plaintiff amended his Complaint and filed the Amended Complaint on July 18, 2019. Ruby Tuesday responded to the Amended Complaint by filing again a Motion to Dismiss and Motion for Judgment on the Pleadings. During the pendency of the initial Complaint and before the filing of the Amended Complaint, K.C. Mulligans, the South Carolina Department of Transportation, the City of North Charleston, and Charleston County moved to transfer venue to Charleston County.

The Honorable Edward W. Miller held a hearing on July 23, 2019, granted the Motion to Transfer Venue to Charleston County, and ruled that all of the pending motions, including the motions filed by Ruby Tuesday, would be considered by the court in Charleston County.

Thereafter, all of the pending motions were heard by the Honorable Bentley Price on January 10, 2020. Judge Price granted Ruby Tuesday's Motion to Dismiss and Motion for Judgment on the Pleadings, granted ARIUM St Ives and Carroll Management's Motion to Dismiss, and granted K.C. Mulligan's Motion to Dismiss in a Form 4 Order filed on January 13, 2020. Appellant filed a motion for reconsideration the same day. Ruby Tuesday filed a motion pursuant to Rule 59(e), SCRCP seeking to amend the Form 4 Order to set forth the basis for the granting of the motions. On January 22, 2020 the court granted Ruby Tuesday's motion to amend the judgment and issued an order setting forth its reasons for dismissing Appellant's Amended Complaint. A separate order was issued regarding Carroll Management Group on January 23, 2020. Appellant filed a motion to reconsider on January 23, 2020 and then served the Notice of Appeal on January 24, 2020.

## STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). An appellate court should uphold the circuit court's dismissal of a claim where the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Id. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the motion must be granted if, viewing the evidence in the plaintiff's favor, the "facts alleged in the complaint and inferences reasonably deducible therefore do not entitle the plaintiff to relief on any theory of the case." Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999) *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001). When the dispute is not to the underlying facts but involves the interpretation of the law, it is proper to decide the issue on a 12(b)(6) motion. Id.

A motion for judgment on the pleadings pursuant to Rule 12(c), SCRCP, will be sustained where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action is stated. Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982). Although a Rule 12(c) motion admits the well pleaded facts in a complaint, it "does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law." Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 235, 394 S.E.2d 855, 856 (Ct. App. 1990) (affirming grant of Rule 12(c) motion where circuit where court found no duty).

## FACTS

Appellant Gregory Muxlow filed this action in his individual capacity and as the Personal Representative of the Estate of Jennifer Muxlow. (R. p. 31). The action arises out of an automobile accident which occurred on the night of November 20, 2018 when Ms. Muxlow was struck by a vehicle operated by the Defendant Anglin while crossing Highway 52 on foot in Charleston, South Carolina. (R. p. 33, ¶15; p. 35, ¶29; p. 36, ¶33). Ms. Muxlow unfortunately died as a result of the injuries she sustained. (R. p. 36, ¶37).

The Amended Complaint alleges claims against a number of individuals and entities, including Ruby Tuesday. Appellant alleges that Jennifer Muxlow was a server at the Ruby Tuesday location on Northside Drive in Charleston beginning in August of 2016. (R. p. 33, ¶19). Appellant also alleges that during all times of her employment Ruby Tuesday had a company policy against managers dating subordinates and prohibiting "verbal abuse", "offensive or abusive physical contact … unwelcome touches or other unwelcome physical contact, whether on or off company property, whether on or off duty, or in conjunction with work in any way." (R. pp. 33-34, ¶20-21). Despite this policy, Appellant alleges that Defendant Harris, the manager

of the Northside Drive Ruby Tuesday location, pursued a "romantic relationship" with Ms. Muxlow. (R. p. 78, ¶22). Appellant further alleges that Defendant Harris became "verbally, psychologically, and physically" abusive to Ms. Muxlow (R. p. 79, ¶23). Defendant Harris also allegedly took her car without permission and used the car to meet other women for sexual relations and to buy and sell illegal drugs. (R. p.79, ¶23). Ruby Tuesday's answer to the Amended Complaint alleges that Ms. Muxlow was no longer employed with Ruby Tuesday as of April 20, 2017 (R. p. 52, ¶8-10). Counsel for Appellant admitted at the motions hearing that Ms. Muxlow left her employment with Ruby Tuesday months before her death. (Supp. R. p. 97, ln. 9-11).

Appellant alleges that the father of Ms. Muxlow, Billy Muxlow, reported the relationship between Defendant Harris and his daughter to Ruby Tuesday's district manager and corporate office and expressed his concerns regarding the relationship. (R. p. 34, ¶24). Appellant alleges that, upon information and belief, Ruby Tuesday did not terminate, suspend, or otherwise discipline Mr. Harris, ignoring the company policy violation, and allowed Mr. Harris to continue dating Ms. Muxlow. (R. p.34, ¶25). Once Mr. Muxlow learned of Defendant Harris's alleged abusive behavior to his daughter he allegedly informed two Ruby Tuesday employees and the corporate office, whose representative indicated that the report would be investigated. (R. pp. 34-35, ¶26). Appellant alleges that instead of terminating, suspending, or otherwise reprimanding Defendant Harris, Ms. Muxlow's hours were reduced in retaliation for Mr. Muxlow's report of Defendant Harris's misconduct. (R. p. 35, ¶27). The Amended Complaint then alleges that Ms. Muxlow and Defendant Harris moved into an apartment together in August of 2018. (R. p. 35, ¶28).

On the night of November 20, 2018 Defendant Harris allegedly stole Ms. Muxlow's car and wallet with the intent to have sexual relations with another individual and buy cocaine. (R. p. 35, ¶29). The Amended Complaint alleges that "Harris was able to do all of this because his improper abusive relationship with Jennifer was allowed to go unchecked by Ruby Tuesday, even though Ruby Tuesday was repeatedly put on notice of the policy violations that endangered its employee, Jennifer." (R. p.35, ¶29). Appellant's counsel admitted at the motions hearing that Ms. Muxlow and Defendant Harris were living together at the time this incident occurred and that she was not employed by Ruby Tuesday at the time. (Supp. R. p. 97 ln. 9-11). Ms. Muxlow allegedly became distressed and started a frantic search for Defendant Harris and her property. (R. p. 35, ¶30). During this search, Ms. Muxlow crossed Highway 52 and was hit by a vehicle driven by Defendant Anglin, who was allegedly distracted and driving at a high rate of speed and in a grossly negligent manner. (R. p. 36, ¶33). Ms. Muxlow died from her injuries. (R. p. 36, ¶37).

The Amended Complaint asserts a cause of action for recklessness and negligence against Ruby Tuesday for causing the accident and specifically alleges that

> 52. Defendant Ruby Tuesday, through its policies and procedures, undertook certain duties to the plaintiff and other employees. By creating, implementing, and enforcing duties to prohibit employees from dating their subordinates and from engaging in physical or verbal abuse, even when such abuse occurs off company property and is unrelated to work, Ruby Tuesday undertook duties to prevent its employees from being subjected to such conduct, to prohibit employees from forming relationships with their subordinates, to prohibit employees from engaging in abusive language or actions either in the workplace or outside of work, and to properly discipline and terminate employees who violate these policies.

(R. p. 39, ¶52). Appellant also alleges that the corporate defendants (presumably including Ruby Tuesday) are liable for their own actions "and vicariously liable through the doctrine of *respondeat superior* for the actions of their agents and/or employees." (R. p. 38, ¶48). In addition, Appellant alleges causes of action for negligent hiring, supervision, and retention (R. p. 41, ¶64-68) and includes causes of action for survival and wrongful death (R. p. 42, ¶69-79). Appellant also alleges that Ruby Tuesday's "failure to enforce company policies designed for the protection of both employees and the general public" violates South Carolina Unfair Trade Practices Act. (R. pp. 42-43, ¶80-86).

## ARGUMENTS

I. BECAUSE SOUTH CAROLINA DOES NOT RECOGNIZE A DUTY BASED ON A COMPANY'S POLICIES AND PROCEDURES, THE CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S CLAIMS AGAINST RESPONDENT RUBY TUESDAY

"In any negligence action, the threshold issue is whether the defendant owed a duty of care to the plaintiff." Bass v. Gopal, Inc., 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011). The issue of whether a duty is owed to the plaintiff is a question of law to be decided by the court. Id. "At common law, there was no duty imposed on a person to act." Burns v. S. Carolina Comm'n for Blind, 323 S.C. 77, 79, 448 S.E.2d 589, 590 (Ct. App. 1994). "A person generally incurs no liability for failure to take steps to benefit others or to protect others from harm not created by his own wrongful act." Id. Pursuant to South Carolina law, "[a]n affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). Specific to the circumstances of this case, "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Faile v. S. Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). The South Carolina appellate courts have fashioned

five exceptions to this rule: 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. Id. The Amended Complaint bases Ruby Tuesday's duty on the theory that the employee handbook containing company policies against dating subordinates and verbal and physical abuse was a voluntary undertaking, stating "Defendant Ruby Tuesday, through its policies and procedures, **undertook** certain duties to the plaintiff and other employees" (R. p. 39, ¶52) (emphasis added).

As a matter of law, the circuit court correctly found that Ruby Tuesday owed no duty to Appellant or Appellant's decedent based on these policies. Assuming the allegations regarding the contents of the policy are true for the purposes of the motion, they do not create a duty. Appellant recognizes that Ruby Tuesday cited two North Carolina cases in support of its position that it owed no duty to Ms. Muxlow, stating that "[i]n citing these North Carolina cases, Ruby Tuesday ignores fundamental tenets of South Carolina law." (App. Initial Brief, p. 5). However, Appellant completely disregards the circuit court's and Ruby Tuesday's reliance on the South Carolina Court of Appeals decision in Doe 2 v. Citadel, 421 S.C. 140, 805 S.E.2d 578 (Ct. App. 2017). (App. Initial Brief, pp. 4-5). Appellant's brief does not mention Doe 2 v. Citadel, in which this Court specifically rejected Appellant's argument that a company's internal policies and procedures constitutes a voluntary undertaking of a duty. Doe 2 v. Citadel, 421 S.C. 140, 805 S.E.2d 578 (Ct. App. 2017). This Court held that the adoption of a company policy is not a voluntary undertaking and is not sufficient to create a legal duty in South Carolina. Id. A company policy can be evidence of a standard of care if a duty is already established by law, but if no duty has been established, then evidence of the standard of care is not relevant. Id. This

Court concluded that a "violation of an internal policy does not give rise to the voluntary assumption of a duty and does not establish that [the defendant] owed a duty of care as a matter of law." Doe 2 v. Citadel, 421 S.C. at 149, 805 S.E.2d at 583 (Ct. App. 2017). As noted by several courts in North Carolina, adopting Appellant's argument and holding that company policies are voluntary undertakings that create a duty would "discourage, indeed penalize, voluntary assumption or self-imposition of safety standards by commercial enterprises, thereby increasing the risk of danger." Hall v. Toreos, II, Inc., 626 S.E.2d 861,867 (N.C. Ct. App. 2006) and Mynhard v. Elon University, 725 S.E.2d 632 (N.C. Ct. App. 2012).

Appellant cites Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) to support that Ruby Tuesday had a special relationship with the decedent. However, this case does not support the proposition for which it is cited. In Ballou, the Court held that "[w]hether the relation between two persons is such as gives rise to a duty to use due care is a pure question of law for the court to determine." Ballou 291 S.C. at 146, 352 S.E.2d at 492 (citing 57 Am.Jur.2d *Negligence* § 36 at 384 (1971)). Since the South Carolina Supreme Court had previously recognized that fraternities owed a duty of care to pledges to not cause them injury during the initiation process, the court held that a duty existed. Id. In the instant matter, this Court has previously held that company policies cannot be used to establish a duty as a matter of law. *See* Doe 2 v. Citadel, 421 S.C. at 149, 805 S.E.2d at 583 (Ct. App. 2017).

Appellant also argues that "[b]y creating policies and procedures that prohibit managers from dating employees, Ruby Tuesday undertook a duty to enforce those policies and procedures", citing Caldwell v. Jim Walter Homes, Inc. as support. (App. Brief p. 7). In Caldwell, the South Carolina Court of Appeals found that the defendants undertook a duty to inform the plaintiffs that their property was in danger of being sold for a tax delinquency based

on a "course of dealing" where the defendant had paid the taxes for the plaintiffs for the last seven years. Caldwell v. Jim Walter Homes, Inc., 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987). As previously discussed, the South Carolina Court of Appeals has specifically addressed the Appellant's argument in Doe 2 v. Citadel, 421 S.C. 140, 805 S.E.2d 578 (Ct. App. 2017) and found that these types of policies and procedures do not constitute an "undertaking".

Appellant's allegations against Ruby Tuesday in the Amended Complaint are based solely on Ruby Tuesday's policies and procedures constituting an undertaking that created a duty to Appellant. (R. p. 39, ¶52). South Carolina precedent clearly establishes that these policies cannot be used to establish a duty. To hold that an employee handbook containing policies against dating creates a duty to protect an adult, not even employed at Ruby Tuesday, from her live-in boyfriend's actions at their apartment is beyond reason. Counsel for Appellant admitted at the motions hearing that Ms. Muxlow left her employment with Ruby Tuesday "months before" her death. (Supp. R. p. 97, ln. 9-11). In fact, as of April 20, 2017, Ms. Muxlow was no longer employed with Ruby Tuesday. (R. p. 52, ¶ 8-10). This accident occurred on November 20, 2018, eighteen months after she left Ruby Tuesday.

All of Appellant's arguments hinge on Ruby Tuesday's policies and procedures constituting an undertaking. As a matter of law, Ruby Tuesday's policies and procedures did not create a duty to protect Ms. Muxlow and the circuit court correctly dismissed the claims against Ruby Tuesday as a matter of law. "If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123 at 135-36, 638 S.E.2d 650 at 656 (2006).

## II. THE CIRCUIT COURT PROPERLY FOUND THAT RESPONDENT RUBY TUESDAY'S ALLEGED NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF APPELLANT'S INJURIES AS A MATTER OF LAW

As discussed above, the circuit court correctly determined that Ruby Tuesday owed no duty to Appellant as a matter of law. Additionally, the circuit court's order also properly found that, if a duty was owed, any breach of that duty was not the proximate cause of the Appellant's injuries as a matter of law.

"Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided." Vinson v. Hartley, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). "Where the injury complained of is not reasonably foreseeable, there is no liability." Hurd v. Williamsburg County, 353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2003). "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. at 612-13, 579 S.E.2d at 144-45.

Noting that the "decedent had not been an employee at Ruby Tuesday for over eighteen months when the sequence of events which led to her death occurred", the circuit court found "there is no reasonable inference adduced from the allegations in the complaint that the [Appellant's] decedent would not have suffered injuries but for the negligence of Ruby Tuesday." (Order, R. pp. 16-17). The circuit court also found that the allegations in the Amended Complaint contained several intervening causes that broke any causal chain between Ruby Tuesday's alleged failure to follow its policies and procedures and the death of Ms. Muxlow, including Ms. Muxlow choosing to live with Defendant Harris as her boyfriend, Defendant Harris stealing her vehicle to buy cocaine and have sex with another woman, Ms. Muxlow

deciding to cross a major road at night on foot looking for Defendant Harris, and Ms. Muxlow being struck by a vehicle operated negligently by a distracted individual with no connection to Ruby Tuesday. (Order, R. p. 17).

Appellant quotes Kennedy v. Custom Ice Equipment Co., 271 S.C. 171, 246 S.E.2d 176 (1978) for the proposition that "ordinarily", proximate cause is a question of fact for the jury. (App. Initial Brief, p. 9). A review of the allegations in the Amended Complaint reveals that this is not an ordinary case. In Kennedy, the South Carolina Supreme Court also quoted its prior holding in Wilson v. Marshall, 260 S.C. 271, 195 S.E. 2d 610 (1973), stating:

> Questions of negligence, proximate cause and contributory negligence are ordinarily questions of fact for the jury, **as to which the trial court's only function is to inquire whether particular conclusions are or not the only reasonable inferences to be drawn from the evidence**. If the facts in controversy and the inferences deducible therefrom are doubtful, or if they tend to show both parties guilty of negligence or willfulness, and there may be **a fair difference of opinion as to whose act or whose acts produced or contributed to the injury complained of as a direct and proximate cause**, questions of negligence, proximate cause and contributory negligence should be submitted to the jury.

Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 175, 246 S.E.2d 176, 178 (1978) (emphasis added) (internal citations omitted). The Court also referenced its decision in Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978), in which it held that it was error to submit proximate cause to a jury "where the only reasonable inference to be drawn" was that a product was not defective. Kennedy, 271 S.C. at 176, 246 S.E.2d at 178.

In the instant matter, the circuit court properly found that "the only reasonable inference to be drawn" from the allegations of the Amended Complaint is that any alleged breach of a duty by Ruby Tuesday in not enforcing its company policies was not the proximate cause of Ms. Muxlow's death. There can be "no fair difference of opinion as to whose act or acts" were the proximate cause of the injuries complained of. As the allegations of Appellant's Amended

Complaint clearly state, Ms. Muxlow was struck while crossing Highway 52 on foot by a vehicle operated "at a high rate of speed" by Defendant Anglin, "who was distracted and acting in a grossly negligent manner." (R. p. 36, ¶33). Ms. Muxlow "died as [a] result of the injuries she sustained in the collision." (R. p. 36, ¶37). Ruby Tuesday could not reasonably foresee that a failure to follow its dating guidelines would result in Ms. Muxlow being killed while crossing a highway at night after being struck by a vehicle negligently operated by a driver wholly unrelated to Ruby Tuesday eighteen months after she left Ruby Tuesday's employment. Since the only reasonable inference that can be drawn from the allegations of the Amended Complaint is that the alleged acts of Ruby Tuesday were not the proximate cause of any of the Appellant's alleged injuries or damages, the circuit court properly decided this issue as a matter of law. *See* Tuten v. Joel, 410 S.C. 104, 116, 763 S.E.2d 54, 61 (Ct. App. 2014) (holding a court may decide proximate cause as a matter of law "when the evidence is susceptible to only one inference").

## III. THE CIRCUIT COURT CORRECTLY DISMISSED APPELLANT'S CLAIMS AGAINST RESPONDENT RUBY TUESDAY FOR VICARIOUS LIABILITY, NEGLIGENT HIRING, NEGLIGENT SUPERVISION, NEGLIGENT RETENTION, AND VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT ON THE GROUNDS THAT APPELLANT'S AMENDED COMPLAINT FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED

Appellant's brief does not specifically address the portion of the circuit court's order dismissing Appellant's claims against Ruby Tuesday for vicarious liability, negligent hiring, negligent supervision, negligent retention, and for violation of the South Carolina Unfair Trade Practices Act. However, the circuit court correctly determined that Appellant's Amended Complaint failed to state claims upon which relief could be granted against Ruby Tuesday for these causes of action.

After detailing the requirements of vicarious liability in South Carolina, the exclusion of liability for intentional acts, and the lack of any allegation that Defendant Harris was acting within the scope and course of employment at Ruby Tuesday at the time of this incident, the circuit court correctly held that Appellant's Amended Complaint contains "no factual allegation to support the vicarious liability claim against Ruby Tuesday". (Order, R. p. 13).

The circuit court also properly dismissed Appellant's claims for negligent hiring, supervision, and retention. Noting that the claims for negligent hiring, supervising, and retention are all based on section 317 of the Restatement (Second) of Torts as adopted in the South Carolina Supreme Court's decision in Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495, 496 (1992), the circuit court correctly held that Appellant failed to allege facts meeting the requirements for liability under this section. The Amended Complaint contains no allegations that Appellant's decedent was intentionally harmed by Ruby Tuesday's employee on Ruby Tuesday's premises or that he was using a chattel of Ruby Tuesday or that Ruby Tuesday's (1) knew or had reason to know it had the ability to control its employee and (2) knew or should know of the necessity and opportunity for exercising such control. Restatement (Second) of Torts § 317 (1965) (emphasis added). *See also* Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495, 496 (1992) (affirming grant of summary judgment on negligent supervision claim where there was no evidence that employee harmed third party while on the premises of employer or using employer's chattel). The Amended Complaint does not contain allegations meeting any of these requirements, and does not even contain allegations that Defendant Harris was an employee of Ruby Tuesday when the incident occurred. Therefore, the circuit court correctly held that the required elements for these claims were not alleged and properly dismissed them as a matter of law.

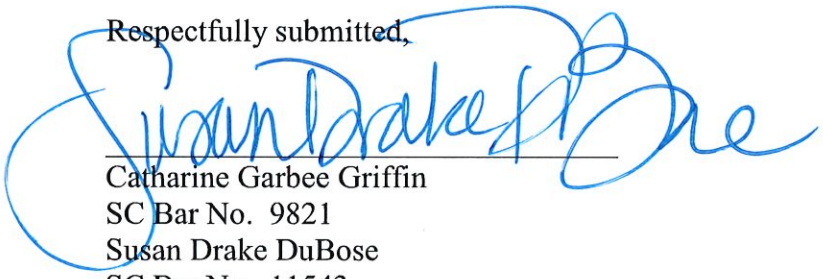
The dismissal of Appellant's sixth cause of action, a claim under the South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA") on behalf of the Estate, was also proper since SCUTPA explicitly prohibits claims brought in a representative capacity. The statute provides that "[a]ny person who suffers any ascertainable loss of money or property . . . may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. § 39-5-140(a) (2013). *See also* Wogan v. Kunze, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008) (affirming circuit court's grant of summary judgment on a SCUTPA claim brought by the PR of an estate). The circuit court also held that the SCUPTA claim against Ruby Tuesday failed as a matter of law on the additional ground that employer-employee relationships fall outside the scope of unfair trade practices statutes in South Carolina, citing Miller v. Fairfield Communities, Inc., 299 S.C. 23, 28, 382 S.E.2d 16, 20 (Ct. App. 1989). This case held that claims arising out of an employment relationship fall outside the scope of SCUTPA. Therefore, the circuit court properly held that Appellant's SCUPTA claim failed to state a claim on which relief could be granted on two separate grounds.

## CONCLUSION

"To recover for negligence, a 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) damage proximately resulting from the breach." Washington v. Lexington Cty. Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 207 (Ct. App. 1999). "The absence of any one of these elements renders the cause of action insufficient." Id. The Appellant's causes of action in the instant matter were properly dismissed by the circuit court on the grounds that Ruby Tuesday did not owe Ms. Muxlow a duty based on its employee policies and procedures as a matter of law in

South Carolina. The circuit court also properly held as a matter of law that, even in the event a duty was owed, any breach of that duty was not the proximate cause of Ms. Muxlow's death after being struck by a negligent driver that had no connection to Ruby Tuesday while crossing a highway on foot at night a year and a half after she left Ruby Tuesday's employment. Furthermore, the circuit court properly held that the Amended Complaint failed to state facts sufficient to constitute causes of action against Ruby Tuesday for vicarious liability, negligent hiring, negligent supervision, negligent retention, and for violation of the South Carolina Unfair Trade Practices Act. For all the above reasons, this Court should affirm the circuit court's dismissal of the Appellant's Amended Complaint as to Ruby Tuesday.

Respectfully submitted,



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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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