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

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.

FINAL REPLY BRIEF OF APPELLANT (TO RESPONDENT RUBY TUESDAY)

Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

OTHER AUTHORITIES

REPLY TO RESPONDENT'S ARGUMENTS

I. Ruby Tuesday confuses evidence of duties with duties themselves.

Fundamental to civil law is a basic axiom that parties have a duty to act reasonably. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) and Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* §20-1 (2002). In trying to avoid responsibility for its several breaches in this case, Ruby Tuesday has confused an affirmative duty to act with a duty to act reasonably.[1] Now, Ruby Tuesday confuses evidence related to duties with duties themselves. The fact that Ruby Tuesday created policies and procedures at all settles the point at issue – that Ruby Tuesday owed a duty of care to its employees. Ruby Tuesday's violation of its own policies is proof of its breaches.

Ruby Tuesday also misunderstands *Burns v. S. Carolina Comm'n for Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994). As Ruby Tuesday states on page 6 of its brief, "a person incurs no liability for failure to take steps to benefit others or to protect others from harm not created by his own wrongful act." Ruby Tuesday's argument has two major flaws. First, Ruby Tuesday's tortious conduct is not limited to a "failure" alone. Ruby Tuesday *acted* when it failed to properly screen its manager, when it put the decedent in his charge, when it ignored reports of its manager's abuse of the decedent, and when it ignored reports of violations of its policy forbidding managers from dating subordinates or abusing employees. Second is the obvious fact that harm to the decedent *was* created by Ruby Tuesday's wrongful acts. Ruby Tuesday, not the decedent, put the decedent in charge of Ruby Tuesday's unfit manager. Ruby Tuesday, not the decedent, allowed Harris to violate company policies and procedures related to managers using their power to abuse employees. Upon any scrutiny at all, Ruby Tuesday's reliance on *Burns* collapses entirely.

[1] Ruby Tuesday did have an affirmative duty to act for the reasons set forth in *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002), but Ruby Tuesday also had a general duty to act reasonably.

Next, in citing language from *Carson v. Adgar*, 486 S.E.2d 3 (1997), Ruby Tuesday lists multiple factors giving rise to its affirmative duty to act. "An affirmative legal duty" exists where it is created by "statute, contract, relationship, status, property interest, or some other special circumstance." *Id*. The appellant has already articulated the duty arising from the relationship between the decedent and both Ruby Tuesday and the decedent's injurer, Ruby Tuesday's manager. The appellant has also described in detail the special circumstances surrounding the decedent's employment with Ruby Tuesday, her relationship with its manager, and Ruby Tuesday's deliberate policy violations, which contributed to the decedent's death. The rationale of the *Carson* Court largely overlaps with *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002).

II. Ruby Tuesday's reliance upon the Circuit Court's order amounts to a circular reliance on its position.

By continuing to rely upon the Circuit Court's dismissal of the appellant's claims against Ruby Tuesday, the respondent is essentially arguing, "I am right because I say I am right." Initially, the Court granted Ruby Tuesday's motion with a Form 4. (R. pp. 1-3). Then, Ruby Tuesday filed a Rule 59(e) motion to alter or amend so that it could submit a proposed order written the way Ruby Tuesday wanted. (R. 115-116). As far as counsel is aware, the Circuit then changed its order, adopting Ruby Tuesday's self-serving order without making any changes whatsoever. (R. pp. 4-19).

Courts often review and consider attorneys' prepared proposed orders. However, in a case like this, in which Ruby Tuesday repeatedly essentially relies upon its own argument as authority, it is worth mentioning the Circuit Court's change to its order and adoption of Ruby Tuesday's order *in toto*. Ruby Tuesday makes such a reliance on page 7 of its brief, stating, "the circuit court correctly found that Ruby Tuesday owed no duty to Appellant or Appellant's decedent based on

these policies."

Ruby Tuesday's self-serving order is also important because of Ruby Tuesday's, and therefore a *South* Carolina court's, reliance upon *North* Carolina law. *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) are North Carolina cases that are not binding on South Carolina courts. As a result, the dismissal relying upon those cases was in error. Both states contain the word "Carolina," but the similarity ends there. For example, our neighbors to the north bar recovery completely where an injured person is found to be even 1% negligent. That is not the law in South Carolina, and neither is the law of the pair of North Carolina cases cited by Ruby Tuesday and contained in the lower court's order. As set forth in the appellant's initial brief, those cases ignore fundamental tenets of South Carolina law. In South Carolina, 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). *See also* Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* §20-1 (2002).

It its brief, Ruby Tuesday attempts to shift focus from the lower court's misplaced reliance upon North Carolina cases by citing to *Doe 2 v. Citadel*, 805 S.E.2d 578 (Ct. App. 2017). However, Ruby Tuesday's reliance upon that case is similarly misplaced. Again, it is not the "violation of an internal policy" that created Ruby Tuesday's duties. Rather, the duties existed and Ruby Tuesday later breached them, as the appellant described in his initial brief. Ruby Tuesday's policies and procedures are certainly evidence that show the duties existed; Ruby Tuesday's violation of its own policies and procedure is even better evidence.

Ruby Tuesday has cited to *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488 (Ct. App. 1986) in an effort to support its duty argument, arguing "[w]hether the relation between two persons is such as gives rise to a duty…is a pure question of law for the court to determine." This case, however, does not support Ruby Tuesday's argument. The only conceivable interpretation of Ruby Tuesday's citation is that Ruby Tuesday believes a court should rule that no special relationship exists where an employer 1) puts the injured server in the injuring manager's charge, 2) ignores reports of its manager violating policy and romantically pursuing the server, 3) ignores reports of the manager physically abusing the server, and 4) continues to put the injured server in the injuring manager's charge. Frankly, the contention that no special relationship existed in the facts as pled cannot be taken seriously. Importantly, 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). Each of the above clearly constitutes actions.

Ruby Tuesday's policies can really only be interpreted one way: managers are prohibited from becoming romantically involved with servers and from physically abusing them. These policies create an implicit assurance to would-be employees that they will be safe while employed at Ruby Tuesday and, at the very least, will not be harmed by their managers. When servers, such as they decedent, rely upon that assurance of safety only for Ruby Tuesday to repeatedly ignore injury and danger, Ruby Tuesday has not only violated its policies but has clearly breached a duty.

III. Proximate cause is a jury question.

On page 10 of its brief, Ruby Tuesday states that "the circuit court correctly determined that Ruby Tuesday owed no duty to Appellant as a matter of law." Again, Ruby Tuesday cites to what it wrote in its proposed order, which the lower court not only adopted, but changed its original

order to include. Most noteworthy is Ruby Tuesday's citation to the lower court's adoption of Ruby Tuesday's language, "…the allegations in the Amended Complaint contained several intervening causes that broke any causal chain between Ruby Tuesday's alleged failure…and the death of Ms. Muxlow […]." (Ruby Tuesday's Resp. Br. p. 10). The question of what proximately caused the decedent's death – is for a jury, a right which is guaranteed by the Seventh Amendment of the United States Constitution. See also *Kennedy v. Custom Ice Equipment Co*., 246 S.E.2d (1978).

Ruby Tuesday attempts to distinguish *Kennedy* by taking the position that the decedent's case is an exception to this well-established rule, citing *Wilson v. Marshall*, 195 S.E.2d 610 (1973). In doing so, Ruby Tuesday tries to fit a square peg into a round hole. *Kennedy* is not similar on the facts, and the decedent's case does not fit within *Kennedy*'s very narrow exception. To accept Ruby Tuesday's argument is first to endorse the premise that an employer can 1) create the danger at issue, 2) ignore warnings the danger will cause harm, and 3) repeatedly create the dangerous situation until harm results, and second to prevent a jury from finding that a causal link existed between Ruby Tuesday's breach and the harm to the decedent.

Interestingly, *Wilson* also acknowledges the well-established rule that, "[q]uestions of negligence, proximate cause and contributory negligence are ordinarily questions of fact for the jury…" The *Wilson* court goes a step further by stating that when "facts in controversy and the inferences deducible therefrom are doubtful" and when there is a difference of opinion as to "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." *Id*.

IV. The Circuit Court ignored long-standing case law governing motions to dismiss when it adopted unchanged Ruby Tuesday's proposed order dismissing causes of action for vicarious liability, negligent hiring, negligent supervision, negligent retention, and the South Carolina Unfair Trade Practices Act.

"Generally, in considering a 12(b)(6) motion, the court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston County*, 713 S.E.2d 604 (2011); *Doe v. Greenville County Sch. Dist*., 651 S.E.2d 305, 307 (2007). "The 12(b)(6) motion may not be sustained if 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); *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Dye v. Gainey,* 320 S.C. 65, 463 S.E.2d 97 (Ct. App.1995); *Brown v. Leverette*, 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).

Ruby Tuesday stated in its proposed order, which the lower court accepted, that the appellant failed to allege facts which allow him to recover. (R. p. 8). A reading of the complaint shows that this is untrue. The factual background in the appellant's amended complaint contains 32 paragraphs and spans five pages, with additional facts woven through each cause of action. (R. pp. 33-38). Dismissal where the facts at issue have been pled, especially in the detailed and thorough way they were pled in this case, is simply inconsistent with the law in South Carolina.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that the Appellate Court reverse the Circuit Court's ruling.[2]

[2] Since the appellant has stated a claim exceeding twenty dollars, dismissal of his claims has deprived him of his constitutional right to a jury trial guaranteed by the Seventh Amendment of the United States Constitution and by the South Carolina Constitution.

Respectfully submitted,

HAWKINS & JEDZINIAK, LLC

s/ Joshua T. Hawkins
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com

Attorneys for Appellant

Greenville, South Carolina
September 1, 2020

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

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, Charleston County, Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief to Ruby Tuesday complies with Rule 211(b), SCACR

Respectfully submitted,

HAWKINS & JEDZINIAK, LLC

s/ Joshua T. Hawkins
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com

Attorneys for Appellant

Greenville, South Carolina
September 1, 2020