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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
The Honorable William A. McKinnon

Appellate Case No. 2020-000407

Douglas Kelsey, ... Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner, ... Defendants.

AND

House of Blues Myrtle Beach Restaurant Corporation,..... Appellant,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC,..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court erred in dismissing Appellant's third-party claims against Respondent Throttlefest where the arguments raised required consideration of matter outside the Complaint?

II. Whether the Circuit Court erred in dismissing Appellant's third-party claim for contribution against Respondent Throttlefest where (a) the Court improperly required Appellant to plead or present evidence that Respondents' settlement with the underlying Plaintiff was not in good faith and (b) the Court improperly relied upon *Smith v. Tiffany*[1] to support a finding that dismissal of the contribution cause of action would not impact Appellant's due process and equal protection rights.

III. Whether the Circuit Court erred in dismissing Appellant's third-party claims against Respondent Throttlefest based upon the statute of limitations?

IV. Whether the Circuit Court erred in dismissing Appellant's third-party tort claims based upon the existence of a contractual agreement between Appellant and Respondent Throttlefest?

V. Whether the Circuit Court erred in dismissing Appellant's third-party claims against Respondents American Outlaw Spirits, Full Throttle, and Full Throttle Sloon Shine, based upon a lack of personal jurisdiction?

[1] 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017).

STATEMENT OF THE CASE

First-Party Litigation

The first-party lawsuit was filed in the Horry County Court of Common Pleas on May 12, 2017, asserting various causes of action related to injuries Douglas Kelsey ("Kelsey"), the first-party plaintiff, sustained in a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina. (R. p. 69) Upon the filing of a First Amended Complaint on July 7, 2017, Appellant House of Blues Myrtle Beach Restaurant Corporation; American Outlaw Spirits Incorporated ("American Outlaw Spirits"), Full Throttle LLC ("Full Throttle"), and Full Throttle Sloon Shine, LLC ("Sloon Shine"); Throttlefest, LLC ("Throttlefest"); Travis Scott Wagoner ("Wagoner"); Michael "Fajita Mike" Garner ("Garner"), and others, were all named defendants. (R. p. 84). Kelsey alleged that Appellant and Respondents were liable for the over-service of alcohol to Wagoner during an event called "Throttlefest 2014." See id.

On October 15, 2019, Kelsey filed a Second Amended Complaint, at which time only the House of Blues Defendants and Wagoner remained as defendants in the case. (R. p. 170)

Third-Party Litigation

On October 18, 2019, Appellant answered the Second Amended Complaint and asserted a Third-Party Complaint against Respondents Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine. (R. p. 189)

Throttlefest's Motion to Dismiss

On December 5, 2019, Respondent Throttlefest filed an Answer and Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, followed by a Memorandum in Support of the Motion. (R. pp. 217-237 & p. 247) Appellant filed a Memorandum in Opposition to Throttlefest's Motion. (R. p. 354)

On January 8, 2020, a hearing on Throttlefest's Motion to Dismiss was held before The Honorable Benjamin Culbertson. (R. p. 603) Judge Culbertson orally granted the motion and entered a Form 4 Order providing the same and instructed counsel for Throttlefest to prepare a formal order. (R. p. 628, lines 6-16) (R. p. 57). Judge Culbertson entered a written order granting the motion to dismiss on February 4, 2020, and entered an identical order again on February 5, 2020. (R. p. 44) (R. p. 31)

On February 14, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. (R. p. 442).

On March 4, 2020, Judge Culbertson entered a Form 4 Order denying the Motion to Alter or Amend. (R. p. 28)

Appellant filed the instant appeal from Judge Culbertson's Orders. Throttlefest filed a Motion to Dismiss the appeal, which this Court denied by Order entered on July 28, 2020. The Court consolidated the appeal from Judge Culbertson's Orders with the appeal from Judge McKinnon's Order, discussed *infra.*

American Outlaw Spirits, Full Throttle, and Sloon Shine's Motions to Dismiss

On December 17, 2019, Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine, each filed a separate motion to dismiss the third-party claims, alleging, amongst other things, that the court lacked personal jurisdiction over each entity. (R. pp. 238-246). On January 3, 2020, each of the Respondents filed a corresponding Memorandum in Support of their Motion to Dismiss. (R. pp. 266-353) Appellant filed a Memorandum in Opposition to the motions. (R. p. 372)

On February 5, 2020, a hearing on the Motions to Dismiss was held before The Honorable William A. McKinnon. (R. p. 573) Judge McKinnon heard argument from counsel for the parties and took the matter under advisement. (R. p. 600, line 24 – p. 601, line 1.)

On March 26, 2020, Judge McKinnon entered a written order granting the motion to dismiss. (R. p. 10).

On April 6, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. (R. p. 474) American Outlaw Spirits, Full Throttle, and Sloon Shine filed a Memorandum in Opposition to the Motion to Alter or Amend on April 17, 2020. (R. p. 494)

On July 23, 2020, Judge McKinnon held a hearing on the Motion to Alter or Amend. (R. p. 521) The matter was again taken under advisement. (R. p. 571, lines 2-3).

On July 31, 2020, Judge McKinnon entered an Order granting in part and denying in part the Motion to Alter or Amend and providing that the new Order be substituted in place of the Court's March 26, 2020 Order. (R. p. 1).

Appellant filed the instant appeal from Judge McKinnon's Order. The Court consolidated the appeal from Judge McKinnon's Orders with the appeal from Judge Culbertson's Order, discussed *supra.*

STANDARD OF REVIEW

Rule 12(b)(2), SCRCP Lack of Personal Jurisdiction

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. Cribb v. Spatholt, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009).

Rule 12(b)(2), SCRCP Failure to State a Claim

"Dismissal of an action pursuant to Rule 12(b)(6) is appealable." Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id. In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

STATEMENT OF FACTS

The underlying first-party action arose from a motorcycle-on-motorcycle collision on May 16, 2014, in Myrtle Beach, South Carolina, which resulted in injuries to first-party plaintiff Kelsey. Kelsey alleged that Travis Wagoner was overserved with two free shots of liquor, allegedly given to him by Michael "Fajita Mike" Garner during an event at House of Blues called Full Throttle Saloon Festival, also known also as "Throttlefest 2014." (R. pp.86-87, ¶¶ 8-15); (R. pp. 204-206, ¶¶ 93, 107-109). There is a dispute over whether Garner was acting as an employee or agent of Appellant or Respondents and who was responsible for his training and supervision. Compare R. pp. 86-89, ¶¶8, 29, 40-42), with R. pp. 206-207, ¶¶ 114-117).

Respondents were previously defendants in the first-party action. The first-party claims against Throttlefest were dismissed following an apparent voluntary settlement agreement with Kelsey. (R. p. 63). Subsequently, the first-party claims were dismissed as to American Outlaw Spirits on January 22, 2018 and as to Full Throttle and Sloon Shine on August 13, 2019. (R. p. 68) (R. p. 60).

When Kelsey filed his Second Amended Complaint, Appellant filed an Answer and asserted the following causes of action against Respondents: breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution. (R. p. 189)

In the Third-Party Complaint, Appellant alleged that Appellant and Throttefest entered into a Co-Promotion Agreement ("Agreement") with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. (R. p. 204, ¶ 97); (R. p. 755). Michael Ballard and Jesse James Dupree are affiliated with Throttlefest, LLC, as well as related entities Full Throttle, L.L.C., Full Throttle Sloon Shine, LLC, and American Outlaw Spirits Incorporated, on behalf of which the two men attended the Throttlefest 2014 event. (R. p. 206, ¶¶ 112-113). Appellant avers that throughout the Throttlefest event, Fajita Mike was acting as the employee or agent of Respondents. Id. ¶¶ 114-115. Further, Respondents all had the opportunity and responsibility to supervise and control Fajita Mike and financially benefited from Fajita Mike's alleged actions. Id. at ¶ 116-117.

Throttlefest Motion to Dismiss

Throttlefest's Motion to Dismiss and supporting Memorandum argued that Appellant's third-party claims should be dismissed because "(1) a release was given in good faith by Plaintiff to Throttlefest which extinguished all liability Throttlefest may have to the Plaintiff, thereby discharging Throttlefest from all liability to any other alleged tortfeasor, including House of Blues; (2) Throttlefest and House of Blues' relationship is governed solely by contract and, therefore, House of Blues' causes of action sounding in tort and equity are barred by South Carolina law; and (3) House of Blues' contract-based claims are barred by the statute of limitations." (R. p. 235); (R. p. 247). These arguments were made at the motions hearing before Judge Culbertson on January 8, 2020. (R. p. 609, line 6 – p. 614, line 18; p. 625, line 10 – p. 628, line 5).

Appellant filed a detailed Memorandum in Opposition to the Motion to Dismiss, the content of which it incorporated and summarized orally at the January 8, 2020 hearing. First and

foremost, Appellant argued that dismissal of the third-party claims against Throttlefest would require findings of fact not evident on the face of the third-party Complaint. Additionally, Appellant argued that Throttlefest's settlement with Kelsey did not warrant dismissal of the third-party claims where Throttlefest breached its own duties owed to Appellant, the settlement with Kelsey was not in good faith, and dismissal would violate Appellant's due process and equal protection rights. Appellant further argued that the existence of Appellant's breach of contract claim against Respondent did not preclude Appellant's additional causes of action based in equity and tort. Lastly, Appellant argued that its claims should not be dismissed based upon the statute of limitations. (R. p. 354; R. p. 614, line 24 – p. 615, line 8)

At the January 8, 2020 hearing, Judge Culbertson issued the following oral ruling:

> All right. All right. If I could get you to prepare an order, I'll grant the motion to dismiss. As I understand it, as I look through this, the breach of contract, negligent misrepresentation and the negligence cause of action are barred by the statute of limitations. Likewise, the equitable indemnification, contractual indemnification and the contribution are barred by 15-38-50 since there is a release and they did get a settlement. Based upon those grounds, I'll grant your motion to dismiss. If you would prepare an order to that effect.

(R. p. 628, lines 6-16) This oral ruling was followed by a Form 4 Order and a formal written Order, identical copies of which were filed on February 4 and 5, 2020.[2] (R. p. 57; R. p. 44; R. p. 31)

The circuit court dismissed the third-party claim for contribution against Throttlefest, citing S.C. Code Ann. § 15-38-50 and Smith v. Tiffany, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), based upon the Release entered between Kelsey and Throttlefest. (Order, Feb. 5, 2020,

[2] To the extent that Judge Culbertson's written Order is inconsistent with his oral ruling, the written order controls. See Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998) ("To the extent the written order may conflict with the prior oral ruling, the written order controls."); First Union Nat. Bank of S.C. v. Hitman, Inc., 308 S.C. 421, 422, 418 S.E.2d 545, 545 (1992) (same).

pp. 5-7). The trial court dismissed the remaining causes of action for breach of contract, contractual indemnity, negligent misrepresentation, and negligence, based upon the statute of limitations, finding that the claims accrued in May 2014. (R. pp. 38-40). The court further found that Appellant's causes of action for negligent misrepresentation, negligence, and equitable indemnification were barred by the terms of the Co-Promotion Agreement. (R. pp. 41-42)

On February 14, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. (R. p. 442). Appellant's motion argued that the trial court should amend its Order to correct the following errors and omissions:

1. The trial court failed to rule on Appellant's argument that Respondent's arguments were not proper for Rule 12(b)(6) dismissal because they required the Court to consider information outside of the Third-Party Complaint.

2. The trial court erred in finding that Appellant was required to plead that Respondent's settlement with Plaintiff was not in good faith or present evidence of the same in order for its contribution claim to survive.

3. The trial court erred in relying upon Smith v. Tiffany to find that Appellant's federal and state constitutional rights of due process and equal protection were protected after admitting that the case explicitly failed to consider such arguments.

4. The trial court erred in dismissing causes of action based upon the statute of limitations where the court failed to properly apply the discovery rule and failed to distinguish the accrual of the indemnification claim.

5. The trial court erred in finding that the existence of the Co-Promotional Agreement precluded alternative tort and equitable claims.

6. The trial court erred in failing to address why amendment of the pleadings was not the proper remedy for any alleged deficiency in the initial pleading.

Appellant's motion was decided on the written submissions alone and denied by a Form 4 Order entered on March 4, 2020. (R. p. 28).

American Outlaw Spirits, Full Throttle, and Sloon Shine's Motion to Dismiss

American Outlaw Spirits, Full Throttle, and Sloon Shine's Motions to Dismiss asserted a variety of arguments for dismissal, which were opposed in Appellant's memorandum. See R. pp. 238-246; R. p. 372. These arguments were addressed again in Appellant's motion to alter or amend and the hearing on the motion. (R. p. 474; R. p. 521)

In the circuit court's amended order, the court ultimately resolved the matter solely on the claim of lack of personal jurisdiction. (R. p. 1) Specifically, the Court ruled:

> The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities." House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to hold responsible those non-resident, non-contracting parties with the duties of the contracting party, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival talent" that another entity purportedly obtained—and whom House of Blues reported to the IRS was their employee.
>
> In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina. *See generally Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005)* ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Aviation Assocs. [and Consultants, Inc. v. Jet Time, Inc.]*, [303 S.C. 502, 507-08,] 402 S.E.2d [177,] 180 (nonresident seller's limited

contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing). **The only contact that these entities could be argued to have made here was the requirement by ThrottleFest that House of Blues buy liquor from the Third-Party Defendants to serve at the ThrottleFest event. This singular contact, which was directed by ThrottleFest rather than the Third-Party Defendants themselves, is not enough to create jurisdiction. These Defendants did not conduct the requisite activity to have purposefully availed *themselves* of the laws of South Carolina. In other words, the actions of Throttlefest in South Carolina can subject itself to the jurisdiction to the courts of South Carolina, but not additional parties.**

Additionally, House of Blues alleges that Ballard and Dupree, in conducting their duties as the hosts of ThrottleFest, were also serving as agents of the Third-Party Defendants, by nature of their positions within those companies. House of Blues therefore argues that the contacts made by Ballard and Dupree should be imputed to the Third-Party Defendants. The Court disagrees. **House of Blues has not provided sufficient evidence that Dupree and Ballard were serving as agents for the Third-Party Defendants. Mere conclusory statements or allegations in pleadings concerning Dupree and Ballard serving as agents for these Third-Party Defendants are not enough to base the exercise of jurisdiction upon. As a result, the Court cannot exercise jurisdiction over these parties on this, or any other basis as alleged by House of Blues.**

Because the Court finds it lacks the "power" to hear this matter with regard to these Defendants, the Court need not address the "fairness" prong of personal jurisdiction.

The Court declines to address Third-Party Defendants' other defenses and arguments, as the Court has found it does not have personal jurisdiction over these parties.

(R. pp. 5-7 (emphasis added)).

ARGUMENT

I. The Circuit Court Erred in Dismissing Appellant's Third-Party Claims Against Respondent Throttlefest Where the Arguments Raised Required Consideration of Matter Outside the Complaint.

While Throttlefest's motion was articulated only under Rule 12(b)(6), it required consideration of matters outside of the pleadings for a full and fair adjudication. There was no notice provided to Appellant that the motion to dismiss would be converted to one for summary judgment. Thus, Appellant was not given an opportunity to fully contravene Throttlefest's arguments with deposition testimony, affidavits, and other evidence. The disconnect between the applicable standard and the arguments made by Throttlefest infected the circuit court's rulings on the existence and nature of the prior settlement, the statute of limitations, and the efficacy of the tort claims. Had the proper standard been applied, the circuit court would have found that dismissal was improper and ruled that Throttlefest could raise its claims in a future summary judgment motion.

Throttlefest brought its motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the ruling on which must be based solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001) (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff). If the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure

to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

While a 12(b)(6) motion may be converted to a motion for summary judgment when matters outside the pleading are presented to and not excluded by the Court, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Baird, 333 S.C. at 527, 511 S.E.2d at 73. Where the trial court does not give notice to the parties that it will consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment, the evidence outside of the complaint is not properly considered. Id.

Here, the only document overtly considered by the circuit court was the Co-Promotion Agreement, which was referenced and quoted in the Third-Party Complaint. While Throttlefest offered a copy of its confidential Release with Kelsey to the court at the hearing, Appellant objected that review of such would be matter outside of the pleadings. (R. p. 611, lines 7-16) Nevertheless, the court relied upon the Release to dismiss Appellant's contribution claim. See (R. pp. 33, 35-37). As discussed *infra*, it is not mere existence of a settlement agreement, but the good faith nature of such an agreement, that entitles a settling co-defendant to protections under S.C. Code Ann. §15-38-50. Thus, in order to fairly assess the applicability of the statute, the Court would necessarily have to review the content of the Release. Appellant should also have been given an opportunity to conduct discovery into the circumstances surrounding the release. It is notable that Smith v. Tiffany, upon which Throttlefest relied in support of its argument, involved a motion for summary judgment and not a motion to dismiss.

The circuit court should have found that the viability of the contribution cause of action was not proper for dismissal and could be raised again on summary judgment. The same is true for Throttlefest's claim that the relationship between it and Appellant is purely contractual, a full

and fair evaluation of the argument would have required a review of deposition testimony of various witnesses, which are outside of the Third-Party Complaint.

With respect to Throttlefest's claim that the third-party action is barred by the statute of limitations, the defense of the running of the statute of limitations is an affirmative defense that normally must be asserted in an Answer. Rule 8(c), SCRCP. An affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense. Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). "This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial." Id. However, most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) "when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense...." Id. at 124, 628 S.E.2d at 878. Here, the statute of limitations issue could not be resolved based solely on the pleadings, as the matter of when Appellant could and should have reasonably discovered Throttlefest's contractual breaches and tortious conduct was not apparent form the Complaint. Appellant argued that it had no reason to know of Throttlefest's malfeasance until after it learned of the off-site collision and allegations of the over-service of alcohol by Michael Gardner.

Thus, the circuit court erred in two ways. First, the court failed to notice Appellant that Throttlefest's motion would be converted to one for summary judgment so that Appellant could

present additional material in support of its claims and assert defenses to summary judgment, such as a Rule 56(f) affidavit. Second, despite the lack of formal conversion to a motion for summary judgment, the court proceeded to consider material outside of the pleadings presented by Throttlefest despite the proper standard requiring consideration of only the pleadings and perhaps such an integral document as the Co-Promotion Agreement. Accordingly, Appellant was not given an opportunity to fully contravene Throttlefest's arguments with deposition testimony, affidavits, and other evidence. Had the proper standard been applied by the circuit court, Throttlefest's motion to dismiss would have been denied because the pleadings were sufficient to sustain the causes of action asserted and Throttlefest's arguments were more properly raised after discovery, in a motion for summary judgment.

II. The Circuit Court Erred in Dismissing Appellant's Third-Party Claim for Contribution Against Respondent Throttlefest.

A. The Court Improperly Required Appellant to Plead or Present Evidence that Throttlefest's Settlement with the Underlying Plaintiff Was Not in Good Faith.

The trial court erred in ruling that Appellant's contribution claim was barred by Smith v. Tiffany and S.C. Code Ann. §15-38-50. It was Throttlefest's Motion to Dismiss and memorandum which raised an argument that the contribution cause of action (and all other causes of action) should be precluded pursuant to S.C. Code Ann. §15-38-50 and Smith v. Tiffany. (R. p. 235; R. p. 247) In response, Appellant distinguished Smith v. Tiffany, which was notably a summary judgment case, and argued that this Court's decision would necessarily require consideration of matters outside of the Third-Party Complaint to determine if the settlement with Throttlefest was made in good faith. (R. pp. 359-361)

Nonetheless, the circuit court ruled that Appellant's contribution claim was barred and explained further:

> House of Blues argues that §15-38-50 does not apply here because the settlement between Throttlefest and the Plaintiff was not in "good faith," as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. Nor did House of Blues present anything else that the Court could consider to support this argument. Accordingly, the Court rejects it.

(R. p. 36)

In Smith v. Tiffany, our Supreme Court acknowledged that "achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the [South Carolina Contribution Among Joint Tortfeasors] Act." 419 S.C. at 556, 799 S.E.2d at 483-84. "[T]he legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements." Id. at 557, 799 S.E.2d at 484. The Act provides:

> When a release or a covenant not to sue or not to enforce judgment is given **in good faith** to one of two or more persons liable in tort for the same injury or the same wrongful death:
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (emphasis added).

There is no basis to find that Appellant was required to anticipate that Throttlefest would raise its settlement with Plaintiff as a defense and preemptively plead that such a settlement existed and was not made in good faith. See Stephens v. Hendricks, 226 S.C. 79, 88, 83 S.E.2d 634, 639 (1954) ("It is a general principle that a pleading need and should not, by its averments, anticipate a defense thereto, and negative or avoid it."). Further, to require Appellant to produce evidence that the settlement was not made in good faith at the Rule 12(b)(6) level is to convert the claim to

one for summary judgment. Neither the terms nor the amount of the settlement have been disclosed to Appellant. Appellant was not put on notice that such conversion of the motion from an ordinary dismissal motion would be made so as to subpoena this evidence or call a witness in order to compel the disclosure of the same. Rather, by making this ruling, the circuit court confirmed that it was applying a different standard than that for a Rule 12(b)(6) motion. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) (reversing dismissal where it was apparent the trial court looked beyond the complaint and gave no notice to the parties that it was going to hear the 12(b)(6) motion as a motion for summary judgment). Accordingly, the circuit court's ruling that Throttlefest's settlement with Plaintiff warranted dismissal of Appellant's contribution cause of action should be reversed.

B. The Court Improperly Relied Upon *Smith v. Tiffany* to Support a Finding That Dismissal of the Contribution Cause of Action Would Not Impact Appellant's Due Process and Equal Protection Rights.

The circuit court further erred in its analysis and rejection of Appellant's argument that the application of S.C. Code §15-38-50 to preclude Appellant's contribution claim would violate Appellant's due process and equal protection rights. See S.C. Const. Art. I, § 3; U.S. CONST. amend. XIV. Specifically, the circuit court ruled:

> House of Blues next argues that Smith v. Tiffany did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. **While it is true that Smith v. Tiffany did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Throttlefest back into this case.** Throttlefest has already settled with the Plaintiff. House of Blues had ample opportunity to assert crossclaims against Throttlefest when they were both parties to this case, and further has had opportunities to file a separate action against Throttlefest. House of Blues' constitutional rights are not violated by its inability to bring Throttlefest back into this case. House of Blues further argues that its ability to use the "empty-chair defense" at trial is insufficient to protect its rights. **However, the**

> **emptychair defense was adopted by the legislature and discussed in Smith v. Tiffany as a non-settling defendant's remedy in place of being able to bring settling entities in as parties to a case.**

(R. pp. 36-37)(emphasis added).

The circuit court's reference to past opportunities to file crossclaims or a separate action certainly are improper. If, in fact, the contribution cause of action is precluded now, then the same causes of action raised in a different posture would not be in any better position to survive.

Moreover, the circuit court's reliance upon Smith v. Tiffany's discussion of the empty-chair defense is misplaced. The Smith v. Tiffany Court wrote:

> [P]erhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts. Thus, a critical feature of the statute is the codification of the empty chair defense—a defendant "retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages"—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being "empty").

419 S.C. at 557, 799 S.E.2d at 484 (internal citations omitted). However, the Court specifically noted:

> [B]ecause Appellants' brief includes only conclusory reference to 'due process consideration of fairness and equity' and sets forth no substantive legal argument or supporting citations to authority (even to the due process clauses themselves), we do not consider Appellants' argument that the trial court erred in finding their due process rights were violated by the inability to join [third party defendant] or include him on the verdict form for purposes of allocation."

419 S.C. at 558, n. 3, 799 S.E.2d at 484, n.3. Thus, the discussion of the empty chair defense in Smith v. Tiffany was not grounded in any consideration of due process or equal protection.

The Due Process and Equal Protection Clauses of the South Carolina Constitution and United States Constitution require that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application **must be justified by the law's purpose**." Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007 (emphasis added)) (quoting Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995). Any separate classification "must be reasonable, **not arbitrary**, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id. (emphasis added).

Prior to 2005, South Carolina was a pure joint and several liability state. Any defendant, regardless of percentage of fault allocated by a jury, was liable to pay the entire amount of damages awarded to a plaintiff. On July 1, 2005, the South Carolina legislature modified joint and several liability law, eliminating joint and several liability for "any defendant whose conduct is determined to be less than fifty percent of the total fault …." S.C. Code Ann. § 15-38-15. The clear intent of the legislature was to protect the least-culpable potential tortfeasors, from those who owned the lion's share of culpability.

The Act sets forth the procedure for allocation of fault by the fact finder in matters involving more than one defendant:

> (C) The jury, or the court if there is no jury, shall:
> …
> (3) upon motion by at least one defendant, where there is a verdict … for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict … the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct … that is attributable to each defendant whose

> actions are a proximate cause of the indivisible injury, death, or damage to property." The Act further provides that "[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

Section 15-38-15 continues:

> (D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for **any** or all of the damages alleged by any other party.

As applied, section 15-38-15 provides protections to some defendants (i.e., in cases where all named tortfeasors are named and remain as a defendant) while extinguishing the protections to others (i.e., in cases where not all tortfeasors are named and remain as a defendant). In the latter scenario, the defendants are forced to absorb the entire fault of the non-parties.

Section 15-38-15(D)'s provision regarding an "empty-chair defendant" provides no safety net. The reality is, where a jury cannot apportion fault to a nonparty tortfeasor, a defendant cannot simply argue that the "empty-chair defendant" contributed to a plaintiff's injury or damages or may be liable for any portion of the damages. Subsection (C)(3) provides that the total percentages of fault allocated must be one hundred percent. Accordingly, subsection (D) only provides protection to named-defendants on a "perfect" empty-chair defendant argument. Where a nonparty tortfeasor is liable to a plaintiff in an amount less than one hundred percent, the total liability on the verdict form must still be distributed amongst only the plaintiff and the named defendants. Thus, the protections afforded to some defendants under modified joint and several liability are eliminated, while defendants in other actions where a plaintiff has chosen to bring (and keep) all potential tortfeasors to court are provided the protections. The unfortunate elimination of the protections afforded under modified joint and several liability leads to obscure results.

Justice Pleicones, in his dissent, illustrates this principal through several hypotheticals. See Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (Pleicones, J., dissenting); see also Amity S. Edmonds, Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?, 5 Charleston L. Rev. 679 (2011) ("It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant …. However, if South Carolina courts fail to allow apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from the harsh injustice of joint and several liability could all but vanish without a trace.").

There is no justification for the unequal application of law to defendants in actions where plaintiffs fail to name all potential tortfeasors or settle with one or more them before trial. The inability to assert any cause of action against a nonparty tortfeasor for the purpose of preserving the right to have a jury allocate fault to the nonparty tortfeasor violates the due process and equal protection clauses of the Constitution and the protections afforded to named defendants under the amended joint and several liability laws. See Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (As a matter of public policy, this Court favors settlements, but we do not favor partial settlements that promote rather than discourage further litigation. And we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment. The bottom line is that our public policy favoring fair trials outweighs our public policy favoring partial settlements. (emphasis added)). Accordingly, the circuit court erred in dismissing Appellant's contribution claim against Throttlefest.

III. The Circuit Court Erred in Dismissing Appellant's Third-Party Claims Based Upon the Statute of Limitations.

As discussed more fulling in Issue I, *supra*, the trial court erred in considering matters outside of the Complaint and determining that Appellant "should have known" of its claims for breach of contract, contractual indemnity, negligent misrepresentation, and negligence against Throttlefest during the Event held on Appellant's property on May 9-17, 2014, as such was not apparent from the Complaint. See Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987) ("It is also our opinion that the trial court's ruling on the statute of limitations, *res judicata* and collateral estoppel was error because these defenses were not apparent from the face of the complaint."); Citizens & S. Nat'l Bank of S.C. v. Constr. Enter., 309 S.C. 500, 504, 424 S.E.2d 530, 532 (Ct. App. 1992) (reversing the circuit court's grant of judgment on the pleadings based on the defendant's affirmative defense of the statute of limitations where the complaint raised issues of fact regarding the time limit and the plaintiffs were not required to file a reply to the affirmative defenses). This error warrants reversal.

Assuming *arguendo* that this matter was proper for disposition in a motion to dismiss, the trial court erred in its analysis. Appellant's Third-Party Complaint was timely filed on October 18, 2019, because House of Blues first notice of the underlying first party claim, which are what gave rise to the third-party claims, was a letter dated October 20, 2016, from Kelsey's counsel sent certified mail to House of Blues.

"The statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); see also Maher v. Tietex Corp., 331 S.C. 371, 376–77, 500 S.E.2d 204, 207 (Ct.App.1998) ("The discovery rule determines the date of accrual for a breach of contract action[,]" and "[p]ursuant to the discovery rule, a breach of contract action

accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence"); Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394–95, 593 S.E.2d 183, 187 (Ct.App.2004) (noting that the "exercise of reasonable diligence" means "that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist").

While actual notice is not the ultimate test, there is no evidence that Appellant had reason to believe that Throttlefest had done anything wrong prior to notice of the first-party claim from Kelsey's counsel after October 20, 2016. Notably, the collision between Wagoner and Kelsey occurred off of Appellant's property. As was articulated to the circuit court, Appellant is not omnipotent of everything that occurs on its property. Rather, Appellant first learned of the allegation of over-service of alcohol to Wagoner by Fajita Mike in the first-party litigation, as well as Throttlefest's other breaches of contract, tortious conduct, and the need for indemnification. Travis Wagoner admitted in his deposition that he was not sure if anyone at House of Blues saw him being served by Fajita Mike. (R. p. 462). Thus, the fact that Throttlefest 2014 was held from May 9-17, 2014, is of no consequence. Instead, the earliest date from which Appellant knew or should have known of its third-party claims against Throttlefest was October 20, 2016.

Appellant further made arguments related to equitable tolling for May 12, 2017 to December 14, 2018, when Throttlefest was a defendant in the first-party litigation. Appellant also argued that equitable estoppel should apply because it was Throttlefest's procurement of false testimony regarding Throttlefest's connection to Fajita Mike that enticed its settlement with Kelsey. (R. p. 354)

To the extent that Throttlefest disputed these facts, Throttlefest did not present any evidence, beyond mere supposition and speculation, that Appellant should have known about Throttlefest's breaches and torts during the Event. This further reveals why the limitations should be resolved only after discovery and on a motion for summary judgment, where consideration of this additional evidence would be proper. Dismissal pursuant to Rule 12(b)(6) was not warranted.

Additionally, the circuit court failed to distinguish the breach of contract and contractual indemnity claims, lumping them together as the same. (R. p. 38). ("The "Contractual Indemnification" cause of action is actually a breach of contract claim, as it alleges that Throttlefest is contractually required to indemnify and defend House of Blues against the allegations made in this case, but has failed to do so."). In First Gen. Servs. of Charleston, Inc. v. Miller, our Supreme Court ruled: "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. There being no judgment at this time, First General's third-party action for indemnity is not time-barred." 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Thus, Appellant's indemnification causes of action are not time-barred.

In sum, the statute of limitations issue was not proper for 12(b)(6) dismissal, the third-party claims were timely filed, and any untimely filing should be excused under the doctrines of equitable tolling and/or estoppel. Accordingly, the circuit court erred in dismissing Appellant's claims based upon the statute of limitations.

IV. The Circuit Court Erred in Dismissing Appellant's Third-Party Tort Claim Based Upon the Existence of a Contractual Agreement Between Appellant and Respondent Throttlefest.

The circuit court further erred in finding that Appellant's third-party claims sounded only in contract, and not in tort. (R. p. 41). The court relied upon language in the Co-Promotion

Agreement between Appellant and Throttlefest that "the parties shall not have any obligations whatsoever to each other outside of the Agreement." Id. The court further ruled:

> House of Blues argues that Throttlefest made representations to House of Blues outside of the Agreement and, therefore, additional duties were created. A review of House of Blues' Third-Party Complaint shows that the representations that House of Blues alleges Throttlefest made were regarding Throttlefest's performance under the Agreement. The Court is not convinced that these alleged representations support tort claims.

(R. p. 42).

The existence of the Agreement and its "exclusive duties" provision are not dispositive regarding the propriety of the tort claims. See, e.g., Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (finding plaintiff properly pled alternative theories of liability); Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded."). "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999). "A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citing State Ports Auth. v. Booz–Allen, 289 S.C. 373, 346 S.E.2d 324 (1986)). "In most instances, a negligence action will not lie when the parties are in privity of contract." Id. "When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." Id.

As one example of how Appellant properly pled its additional and alternative tort claims, Throttlefest has specifically denied that its duties under the Agreement included proper training and supervision of Fajita Mike. Appellant asserted that Throttlefest represented to them by its

words and actions, that Throttlefest would properly train and supervise Fajita Mike. "While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). "The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Id. (internal citations and quotations omitted)). Thus, there was a basis to assert that Throttlefest's breach of duty arose independently of any contract duties between the parties, which is sufficient to support a tort action. See Tommy L. Griffin Plumbing & Heating Co., *supra*.

Relatedly, the circuit court ruled: "House of Blues' Equitable Indemnification cause of action is also dismissed because the Agreement contains cross-indemnification provisions." (R. p. 42). The circuit court overlooked that the Third-Party Complaint raised allegations in contract and tort, such that reliance upon either contractual or equitable indemnification would necessarily depend upon which theory of liability (or both) was determined by the factfinder. If a jury found Throttlefest breached its contract with Appellant, then contractual indemnification would apply. If a jury found that Throttlefest voluntarily undertook a duty outside of the contract and was liable in tort, then equitable indemnity would apply.

Additionally, Appellant argued that to the extent the circuit court determined that there were any defects in its pleading, the proper relief would be to permit amendment of the Complaint.

> A circuit court does not have "discretion" to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.

Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). Despite raising the court's failure to consider amendment as a less drastic relief in Appellant's Motion to Alter or Amend, the circuit court still failed to permit amendment to cure the alleged deficiencies, most likely in light of the circuit court's companion ruling on the statute of limitations.

Accordingly, the circuit court erred in finding that Appellant's tort claims were precluded because of the Co-Promotion Agreement and in denying Appellant the opportunity to amend its Complaint.

V. The Circuit Court Erred in Dismissing Appellant's Third-Party Claims Against Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC Based Upon a Lack of Personal Jurisdiction.

Applicable Law

"The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." Cribb v. Spatholt, 382 S.C. 490, 497, 676 S.E.2d 714, 718 (Ct. App. 2009) (quoting Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct .App. 1988)). Courts may have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. Id. at 498, 676 S.E.2d at 718.

The South Carolina Long-Arm Statute is codified at Section 36-2-803 of the South Carolina Code. The Long-Arm Statute provides, in relevant part:

> (A) A court may exercise personal jurisdiction over a person who acts directly **or by an agent** as to a cause of action arising from the person's:
> (1) transacting any business in this State;
> …

> (3) commission of a tortious act in whole or in part in this State;
> …
> (7) entry into a contract to be performed in whole or in part by either party in this State;
> …

S.C. Code Ann. § 36-2-803(A)(1), (3), & (7).

Despite the enumerated provisions of the Long-Arm Statute, South Carolina Courts has construed the statute to extend to the outer limits of the due process clause. Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998); Cozi Investments v. Schneider, 272 S.C. 354, 252 S.E.2d 116 (1979) (stating that South Carolina's long-arm statute has been construed as a grant of jurisdiction as broad as constitutionally permissible).

Thus, our courts no longer follow the traditional two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Cribb, 382 S.C. at 498, 676 S.E.2d at 718. Instead, the recent trend compresses the analysis into a due process assessment only. Id. (citing Cockrell v. Hillerich & Bradsby Co. 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.")).

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Id. at 432, 665 S.E.2d at 665. "The court must (1) find

that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." Id. To support a finding of due process, both prongs must be satisfied. *Id.*

To satisfy the "power" prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state." State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 89, 666 S.E.2d 218, 222 (2008). "Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." Id. "This theory of personal jurisdiction is known as the 'stream of commerce' theory." Id. Notably, the South Carolina Supreme Court specifically declined to adopt the "stream of commerce plus" theory advanced by the Respondent, which would require that in addition to placement of a product into the stream of commerce, a defendant must show "additional conduct indicating an intent or purpose to serve the market in the forum state." Id. at 81 n. 5, 666 S.E.2d at 222 n.5 (noting that the United States Supreme Court's opinion in Asahi Metal Ind. Co., Ltd. V. Superior Court of California, 480 U.S. 102 (1987) was merely a plurality opinion).

Under the "fairness" prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008).

"A single transaction is sufficient to confer jurisdiction if these factors are met." Moosally, 358 S.C. at 331, 594 S.E.2d at 884; see also Askins v. Firedoor Corp., 281 S.C. 611, 616, 316

S.E.2d 713, 716 (Ct. App. 1984) ("The cases are legion that a single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration."). Although a single act may support jurisdiction, it must create a "substantial connection" with the forum. Burger King Corp., 471 U.S. 462, 475 n. 18 (1985); White v. Stephens, 300 S.C. 241, 247, 387 S.E.2d 260, 263 (1990). A single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

Discussion

A. There is Personal Jurisdiction Over the Full Throttle and Sloon Shine

The circuit erred in finding that the court lacked specific jurisdiction over Full Throttle and Sloon Shine where there is evidence that both entities were beneficiaries of the Co-Promotion Agreement and were promoted during and benefited from Throttlefest 2014. The Cockrell, Aviation Assocs., and Power Prod. & Servs. Co. cases cited by the circuit court in support of its findings are inapposite from the present case.

The Cockrell case involved dismissal for lack of personal jurisdiction over a Massachusetts research center and professor who certified aluminum baseball bats as meeting certain NCAA regulations, in a lawsuit related to injuries suffered by a teen baseball player injured when a line drive ball off an aluminum bat struck him in the head. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005). The Cockrell Court ruled that Hillerich, the bat manufacturer, unilaterally distributed and sold the bats in South Carolina, and that the respondents had no control over the distribution of the bats and did not profit from their sale. Id. at 494, 611 S.E.2d at 510. Unlike the distinct entities and interests in Cockrell, Appellant has contended that Throttlefest was

acting as the agent of Sloon Shine and Full Throttle, who were direct beneficiaries under the Agreement. See Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption."). As discussed *infra*, Throttlefest's purpose in entering into the Co-Promotion Agreement was, at least in part, to benefit and promote its related entities Sloon Shine and Full Throttle by driving up sales of Sloon Shine's alcohol and drawing visitors to the Full Throttle Saloon in South Dakota.

The Aviation Assocs. case involved dismissal for lack of personal jurisdiction over an Oklahoma broker related to the sale of an aircraft, where any contract entered was not executed or to be performed in South Carolina and the only contact with the broker was unsolicited and unilaterally initiated by the South Carolina entity. Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 506-509, 402 S.E.2d 177, 179-180 (1991). The Aviation Assocs. Court wrote that in conducting the due process inquiry for person jurisdiction "the focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity." Id. at 507, 402 S.E.2d at 180. However, none of the cases relied upon in support of that statement involved related entities with common officers who came to the forum state and participated in the alleged contractual breaches and tortious conduct, as is the case here.

Lastly, the Power Prod. & Servs. Co. case involved dismissal for lack of personal jurisdiction over non-resident former employees and independent contractors, where the Court found that any tortious conduct would have necessarily occurred after the defendants discharge from employment of the South Carolina company, as there was no allegation or evidence that any

trade secrets were misappropriated during their employment. Power Prod. & Servs. Co. v. Kozma, 379 S.C. 423, 433-34, 665 S.E.2d 660, 665-66 (Ct. App. 2008). With respect to River Technologies, the company for whom the former employees were now working, there was only evidence that they considered doing business in South Carolina, but no evidence of any actual commercial activity in South Carolina or movement of its business to this State. Id. at 434-35, 665 S.E.2d at 666-67. Unlike Power Prod. & Servs. Co., there is undisputed evidence that Michael Ballard and Jesse James Dupree both attended Throttlefest 2014 in Myrtle Beach, South Carolina, as well as Throttlefest events at House of Blues in years prior. As discussed *infra*, they wore multiple hats during the 2014 event, including acting as representatives of Throttlefest, Full Throttle, Sloon Shine, and American Outlaw Spirits, promoting their various ventures and brands.

Full Throttle averred that its owner, Michael Ballard's, attendance at Throttle Fest was not sufficient contact to subject Full Throttle to the jurisdiction over this state. Full Throttle further contended that while Appellant alleged that Full Throttle had a responsibility to supervise Michael Garner, there is "undisputed evidence in this case that Garner was *not* an employee of Full Throttle during the Throttle Fest event." (R. p. 272). Full Throttle further argued that it was "inconvenient for Full Throttle to defend this suit in South Carolina" and South Carolina's interest in providing redress for its citizens is diminished when a non-resident does not operate in South Carolina. Id.

Sloon Shine relied upon an argument that it does not directly sell its product in South Carolina; rather, it contracts with distributers who sell throughout the region. Sloon Shine contended that its moonshine is not presently available in South Carolina "and has not been for several years." Sloon Shine further alleged, in the same manner and through the same arguments as Full Throttle, that the due-process requirements have not been met.

Full Throttle Saloon was a reality television series that chronicles the daily operations of the world's largest biker bar, Full Throttle Saloon, located in Sturgis, South Dakota. The concept of bringing Full Throttle Saloon to Myrtle Beach for an event called Throttle Fest began in 2012, with a three-day festival, and continued for four days in 2013 and for ten days in 2014. (R. p. 415, line 17 – p. 417, line 20). Appellant contends that while Throttlefest LLC was the only named entity that entered into the 2014 Co-Promotion Agreement with House of Blues, it was acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine. (R. p. 189, ¶¶ 97, 124).

These entities are all owned and managed by either Michael Ballard and/or Jesse James Dupree. Ballard and Dupree are the managing members of Throttlefest LLC. Id. at ¶¶ 97, 112-113). Ballard is also the sole managing member of Full Throttle and Sloon Shine. Id. at ¶ 112. Dupree is also the sole incorporator and officer of American Outlaw Spirits. Id. at ¶ 113.

Further, both Sloon Shine liquor and American Outlaw Spirits liquor were being distributed, purportedly for free, by Fajita Mike at Throttle Fest 2014. Id. at ¶¶ 105-109. Jesse James Dupree previously testified that he attended Throttlefest 2014 along with several other personalities from the Full Throttle Saloon show, including Michael Ballard, Michael "Fajita Mike" Garner, and Greg "Goat" Cook. (R. p. 421).

Full Throttle's contention that the actions of Fajita Mike are unrelated to Michael Ballard and Throttlefest are without foundation. The bases for the allegations asserted by Appellant against Full Throttle (as well as the other third-party defendants) is that owners Michael Ballard and Jesse James Dupree attended the Throttlefest event as representatives of their respectively owned companies. House of Blues further contends that Ballard and Dupree were tasked with and had the opportunity and responsibility to supervise and control Fajita Mike's actions. (R. p. 189,

¶¶ 97-117). Accordingly, Fajita Mike—at a minimum—was an agent of the corporations and companies owned and represented at Throttlefest 2014 by Ballard and Dupree.

Indeed, House of Blue's manager Robert Simeone confirmed his understanding that Fajita Mike was under the control of Ballard—acting on behalf of all entities owned and controlled by Ballard:

> Q. Do you have a recollection of having an express understanding with ThrottleFest that Fajita Mike and his activities would be limited to the deck versus inside the Music Hall?
>
> A. **Fajita Mike's movements were under the direction of Mike Ballard. Mike Ballard told Fajita Mike the role that he wanted him to play.**
>
> Q. How do you know?
>
> A. **Mike told me that's what he was going to have him do.**
>
> …
>
> Q. So…Steve-O, who was not a house of Blue employee, had supervisory power over House of Blues employees?
>
> A. Over the crew that Mike brought that we put on our payroll so that could pour drinks. They brought a bar manager with them every year to schedule those girls, tell them when they worked – when they would work and make sure that we knew who was coming. They would communicate with us and tell us what staff they were bringing with them and when they were going to show up each year.
>
> Q. Prior to ThrottleFest, did you know Steve-O?
>
> A. No.
>
> Q. How was House of Blues able to evaluate whether Steve-O would be, I guess, an appropriate individual to manage people selling alcohol under the House of Blues license?
>
> A. He came -- he came with Mike [Ballard]. I mean, that was part of Mike's entourage, you know. The people that we listed before were part of ThrottleFest's crew: Mike, Jesse, Goat, Fajita….

(R. p. 411, lines 13-22; p. 412, lines 1-23) (emphasis added)).

During Michael "Faijta Mike" Garner's deposition in the first-party action, taken on October 9, 2018, he testified:

> Q. Jackyl performed at the House of Blues 2014, correct?
>
> A. Yes.
>
> Q. **You were selling, I guess, shots that night of S'Loonshine; is that correct?**
>
> A. **I'm sure. Probably, S'Loonshine and Jesse James and something else.** I mean, I don't remember exactly what we were selling.
>
> …
>
> Q. And the flavors, **what type of liquor were you selling?**
>
> A. I did -- we did, you know, **primarily the Jesse James and S'Loonshine**. We also did like Fireball and all the other stuff, too. I mean, it just depended on whatever was -- you know, really it depended on the crowd.

(R. p. 427, lines 10-17; p. 428, lines 12-18)(emphasis added)).

Travis Wagoner, the at fault driver who was allegedly overserved at Throttle Fest 2014 testified to the following at his deposition, held April 23, 2018:

> Q. …Sum total, how many -- how many alcoholic drinks did you have at House of Blues while you were there?
>
> A. I had about four of the -- those can beers. They serve can beers. I want to think that they was 22 ounce.
>
> Q. Okay.
>
> A. And one liquor drink and we had – I think it was two or three liquor shots.
>
> Q. Okay.
>
> A. **And two of the liquor shots was served by somebody from the group with the moonshine -- or the show. The -- the Full Throttle show.**
>
> Q. The Full Throttle show. When you say --
>
> A. **Fajita Mike.**
>
> Q. So two out of those three liquor shots that you're telling me about were served to you by Fajita Mike?

A. Yes.

Q. All right. With regard to the -- to the television show involving Throttlefest, had you ever seen that television show?

A. Some.

Q. Did you know who Fajita Mike was?

A. Just a little, yeah.

Q. So you understood him to be a television personality that appeared on that TV show?

A. Yes.

Q. **You didn't understand him to be an employee of House of Blues, did you?**

A. **No.**

…

Q. All right. **Who at House of Blues saw you being served by Fajita Mike?**

A. **I don't know that -- for sure that somebody had saw.**

Q. Okay.

A. But it --

Q. **So you're just guessing.**

A. **Yes. That's a – that's a guess.**

…

Q. **…Were there any of the seven to eight drinks that you're telling me that you consumed at the House of Blues that were just given to you?**

A. **Yes. The -- the two shots from Fajita Mike.**

Q. Okay. They were just given to you?

A. Yes.

Q. There was no sale?

A. No.

…

Q. Okay. And you said that Fajita Mike gave you the two shots; right?

A. Yes.

Q. Did he approach you, or did you approach him?

A. There was somebody -- well, we approached him.

Q. Okay.

A. The way to say, yes.

Q. Was he by himself?

A. No. He had a girl with him.

Q. Okay. Well, do you know who the girl was?

A. No. I -- I assume that she was actually -- well, she had cups and stuff with her.

Q. **Did she have on any identifying clothing that would let you know who she was?**

A. **Like something to do with the – the shine, the moonshine, or whatever it's called.**

Q. Okay. So was she wearing a House of Blues T-shirt?

A. No.

Q. **She was wearing a T-shirt of the brand of liquor?**

A. **Yes. As I recall, yes.**

Q. Okay. All right. Do you know who she worked for?

A. No.

(R. p. 433, line 9 – p. 434, line 14; p. 435, line 20 – p. 436, line 2; p. 437, line 18 – p. 438, line 2; p. 439, line 7 – p. 440, line 10 (emphasis added)).

Wagoner was also familiar with the Jesse James Dupree, as the lead singer of Jackyl, who was promoting SloonShine on stage.

Q. The band Jackyl performed while you were there; correct?

A. Correct.

Q. **Do you recall the lead singer of Jackyl chugging the moonshine while he was on stage?**

A. **Yes.**

(R. p. 441, lines 9-14 (emphasis added)).

Importantly, Michael Ballard, in addition to his role as co-owner of Throttlefest, LLC, also had an interest in the promotion of the liquor sales for Sloon Shine. It was Michael Ballard who

contacted Fajita Mike and procured his attendance at Throttle Fest 2014. (R. p. 429, lines 9-17). While Full Throttle maintains that "[i]t is a real estate holding company which transacts no business in South Carolina," House of Blues has not been provided any opportunity to conduct even limited discovery on the jurisdictional issue or cross-examine the affiant regarding this matter in order to test its veracity. (R. p. 268) It is also notable that the 2014 Co-Promotion Agreement originally had Full Throttle listed as the contracting party rather than Throttlefest. (R. p. 413, line 16 – p. 414, line 24).

Considering all of these facts, Appellant satisfied its burden to establish personal jurisdiction. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of entities that included Full Throttle and Sloon Shine. Ballard's Affidavit does not address 2014 sales of Sloon Shine but he admits that South Carolina sales comprised three percent of Sloon Shine's revenue in 2015. (R. p. 765, ¶ 18). Further, Sloon Shine was being sold at Throttle Fest 2014, including by Fajita Mike, was chugged by Jesse Dupree on-stage during the Jackyl concert, and was advertised on a t-shirt worn by the young woman who allegedly assisted Fajita Mike in distributing shots to Wagoner. All of these activities were directed at promoting the Full Throttle, Throttle Fest, and Sloon Shine brands to residents of South Carolina and give rise to the causes of action alleged in the Third-Party Complaint, satisfying the "power" prong of due process based upon both the stream of commerce theory and the entities minimum contacts with the State. See State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 90-91, 666 S.E.2d 218, 223 (2008) (holding that South Carolina court properly asserted personal jurisdiction over foreign cigarette manufacturer regardless of how the cigarettes arrived in South Carolina pursuant to stream of commerce theory); Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004)

("[A] single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration.").

Regarding the "fairness" prong, though not addressed in the circuit court's Order, these entities participated in a ten-day event at Throttle Fest 2014, which was the third annual event, growing in length each year. These entities were serving as promoters of alcohol, amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from South Dakota and Tennessee is hardly unusual or burdensome. The only known employees who would be called to testify would be Jesse Dupree and Michael Ballard, whereas Appellant has a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since these entities wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise their employee and agent, Fajita Mike, resulting in the alleged over service of alcohol to a bike week patron. Thus, South Carolina's exercise of jurisdiction is both reasonable and fair. See McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); see also Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976) ("No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.").

Accordingly, the trial court's ruling that there was a lack of personal jurisdiction over Full Throttle and Sloon Shine should be reversed.

B. There is Personal Jurisdiction Over American Outlaw Spirits

In arguing that the circuit court lacked personal jurisdiction, American Outlaw Spirits incorporated the arguments of Full Throttle and Sloon Shine regarding the lack of minimum contacts and the failure to satisfy the due process analysis, albeit with regard to the contacts of the owner of American Outlaw Spirits, Jesse James Dupree, rather than the contacts by Michael Ballard. In addition, American Outlaw Spirits averred that the single brand of liquor manufactured by it, Devils Devil Cinnamon Whisky, was not placed into production until 2018.

As an initial matter, Dupree's affidavit provided: "American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin producing this liquor until 2018. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018. … American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina." (R. p. 763, ¶¶ 6, 7, and 13).

Dupree's assertions in his affidavit are **directly controverted by his own deposition testimony** in the first-party action provided on October 9, 2018. Specifically, Dupree testified:

> Q. **Now, American Outlaw Spirits, does it have any other product *other than the bourbon*?**
>
> A. **Yes.**
>
> Q. What are those products?
>
> A. The Devil's Devil.
>
> Q. What kind of alcohol is that?
>
> A. It's a cinnamon whiskey.
>
> Q. **Any other product?**
>
> A. **A Tennessee – there's a bourbon and a Tennessee – there's honey bourbon, spice bourbon, regular bourbon,**

the Tennessee whiskey and the Devil's Devil cinnamon whiskey.

Q. Is the Devil's Devil a separate label from Jesse James Dupree's bourbon; is it sold as Devil's Devil?

A. Yes.

…

Q. **What American Outlaw Spirits Products were available for sale in May 2014?**

A. **To the best of my recollection, the Jesse James products that were selling in 2014 available for sale would be the Jesse James regular bourbon, the Jesse James spice bourbon, and the Jesse James honey bourbon**.

Q. **And to your personal knowledge or recollection, were all three of those products for sale at House of Blues May of 2014 during Throttlefest?**

A. **To the best of my recollection, I think they were all three there.** I also recall that there was times that the House of Blues was not able to get all three of them.

(R. p. 422)(emphasis added)).

This direct testimony from Dupree undermines the validity of the statements within his affidavit. Additionally, Dupree admitted, after reviewing photographs taken during Throttlefest, that there were both S'loonshine products as well as American Outlaw Spirits/Jesse James Dupree products photographed. (R. p. 423).

To the extent that the discrepancy between the affidavit and testimony—which were never explained by Respondent—is based on some allegation that the Jesse James brand of liquor was being distributed by predecessor entity of American Outlaw Spirits, this does not connote a lack of personal jurisdiction but a need to clarify the proper party in interest.

As discussed more fully *supra*, the facts and law support a finding of personal jurisdiction over American Outlaw Spirits. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of

entities that included American Outlaw Spirits. An American Outlaw Spirits liquor was being sold at Throttle Fest 2014 and distributed by Fajita Mike. These activities were directed at promoting the American Outlaw Spirits brand to residents of South Carolina and gave rise to the causes of action alleged in the Third-Party Complaint, satisfying the "power" prong of due process based upon both the stream of commerce theory and the entities minimum contacts with the State. See State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 90-91, 666 S.E.2d 218, 223 (2008) (holding that South Carolina court properly asserted personal jurisdiction over foreign cigarette manufacturer regardless of how the cigarettes arrived in South Carolina pursuant to stream of commerce theory); Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004) ("[A] single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration.").

Though not addressed by the circuit court, regarding the "fairness" prong, these entities participated in a ten-day event at Throttle Fest 2014, which the third annual event, growing in length each year. American Outlaw Spirits was serving as a promoter of its own alcohol, amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from Georgia is hardly unusual or burdensome. The only known current, employee of American Outlaw Spirits is Jesse Dupree, whereas the first-party plaintiff and House of Blues have a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since American Outlaw Spirits wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise its' employee and

agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron. Thus, South Carolina's exercise of jurisdiction is both reasonable and fair. See McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); see also Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976) ("No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.").

Accordingly, the trial court's ruling that there was a lack of personal jurisdiction over American Outlaw Spirits should be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court (1) reverse the Order of Dismissal entered by Judge Culbertson in favor of Respondent Throttlefest, LLC; (2) reverse the Order of Dismissal entered by Judge McKinnon in favor of Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC; and (3) remand this matter to the circuit court.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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FINAL BRIEF OF APPELLANT

Columbia, South Carolina
August 29, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
The Honorable William A. McKinnon

Appellate Case No. 2020-000407
Case No. 2017-CP-26-03008

Douglas Kelsey,.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner,..... Defendants.

AND

House of Blues Myrtle Beach Restaurant Corporation,.....Appellant,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b).

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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Columbia, South Carolina
August 29, 2021