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Dram shop claim overcomes 7-figure setoff for settlement

*Man hit by drunk driver
recovers \$3M from bar for
his injuries, son's death*

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A man who claimed a Sumter restaurant served wine to an intoxicated customer has settled a wrongful death suit for \$3 million, thanks in part to recent S.C. Supreme Court case law.

Lawyers for plaintiff Paul Schmidt said the court's 2010 decision in a dram shop case helped Schmidt get the settlement despite a multi-million-dollar setoff resulting from an earlier, confidential settlement with the customer's employer.

"We had a very high setoff that we would have had to overcome had we gone to trial — a high seven-figure setoff," said Mount Pleasant lawyer David Yarborough, a member of the plaintiff's legal team.

Schmidt sued the restaurant and a bartender after a 2008 collision in which a woman driving the wrong way down a highway near Sumter crashed into his car. Schmidt's son, 12-year-old Christian, died, and Schmidt suffered severe leg injuries.

Schmidt asserted a wrongful death/negligence claim, negligent infliction of emotional distress and violation of



Yarborough



Applegate



Deas



Plaintiff Paul Schmidt's car lies on U.S. Highway 378 near Sumter after a Sept. 17, 2008, collision with a car driven by an intoxicated motorist. The plaintiff was severely injured, and his son, Christian, died as a result of the collision. Photo provided by Yarborough Applegate Law Firm

dram shop statutes, including S.C. Code Ann. §§ 61-4-580 and 61-6-2220. The case was *Paul Schmidt, individually, and as Personal Representative of the Estate of Christian Schmidt v. Anonymous Restaurant Group*.

A lawyer for the defendants, James C. Cox III, did not return a phone call seeking comment prior to deadline.

The parties settled in mediation on March 21, about a month before trial was set to begin. Lawyers for the plaintiff declined to identify either the customer or the restaurant, citing a confidentiality agreement.

As the parties went through two mediations, the defense emphasized the setoff as a reason for the plaintiff to avoid trial. But the plaintiff's team — Yarborough, Garryl Deas of Sumter and William Applegate of Mount Pleasant — knew the setoff applied only to actual damages and believed they could get punitives for their client.

"They kept saying, 'You know, you have to get a high seven-figure verdict to even touch us.' We countered that they had serious puni-

tive exposure," Yarborough said.

The plaintiff's lawyers argued that the defendants violated dram shop laws, under which the restaurant had a duty to not serve alcohol to intoxicated patrons.

"Because of that violation of the law, we felt certain that we would get a large award of punitive damages," Yarborough said.

But it helped to also poke holes in the restaurant's defenses. That's where the Supreme Court's ruling in July 2010 decision in *Hartfield v. The Getaway Lounge* gave them added leverage.

Under state law, lack of visible intoxication is a defense in dram shop cases. Under *Hartfield*, however, plaintiffs can get around that defense by using experts to estimate a driver's alleged intoxication before an auto collision (see the Aug. 2, 2010, issue of *Lawyers Weekly*).

Decided as the parties were developing their respective cases, *Hartfield* "was a great

■ See **DRAM** on next page

legal development that broke for the plaintiff,” Yarborough said.

Evidence indicated the woman’s blood-alcohol level was almost three times the legal limit four hours after the collision, said lawyers for the plaintiff. They argued that the restaurant had served her eight glasses of wine and that management took no action after a hostess reported the woman was intoxicated when she left.

The bartender denied that the customer was visibly intoxicated at the restaurant, but other evidence indicated she was, Yarborough and Deas said.

“Our strengths were that we had received documentation and testimony from the bartender that she served eight 7-ounce glasses of wine to this lady customer,” Yarborough said. “We had the blood-alcohol content of the lady, which was at 0.214 at the time it was drawn, more likely higher at the time she left.”

Also, the plaintiff’s lawyers claimed that the restaurant violated its own policies by serving more than three alcoholic drinks without management approval. And the hostess testified the customer got into a car and drove over a curb and a bush in the parking lot before heading the wrong way down the street, they said.

The employee asked a manager to call police, but nobody did anything to “assist this lady or in any way give her aid or do anything to address the situation. They basically allowed her to stumble out of the restaurant to her car,” Deas said.

The collision occurred almost an hour later.

“There was time for the police to intercept this lady had the restaurant followed its own internal policies of calling the police any time a drunk person leaves the restaurant,” Yarborough said.

The collision left the plaintiff’s crushed car lying upside-down on the highway. Trapped in the wreckage, the plaintiff was unable to help his injured son, who lay nearby and died at the scene, Yarborough said.

The customer was uninjured, Deas said. She was later sentenced to 12 years in prison on two counts of felony DUI.

The son’s death was the focus of the wrongful death component of the negligence claim, which also included the father’s injuries. The negligent infliction of emotional distress action centered on the father as a bystander to his son’s death.

The defense also argued that the customer could have been bought alcohol elsewhere after leaving the restaurant. “But there was never any concrete evidence to establish that,” Deas said.

Another defense was that the customer and her co-workers, who were staying at a hotel next door, had assured the bartender that it was OK to serve them more alcohol because they wouldn’t be driving anywhere, Yarborough said.

Also, the defendants argued that their conduct wasn’t unreasonable. Under that theory, the customer was at fault because the restaurant “didn’t drive the car ... and didn’t crash into this child and kill him,” Yarborough said.

The plaintiff’s lawyers rejected that.

“You often hear the analogy of that the car driven by a drunk driver is like a loaded gun,” Deas said. “Well, in this particular situation, the car driven by this drunk driver, if it’s the loaded gun, then this restaurant loaded it and cocked it and put this gun in the drunk driver’s hand.”

Settlement Report

Brief statement of claim: This was an alcohol-liability case against a restaurant stemming from an automobile collision that occurred on Sept. 17, 2008. The plaintiff claimed that the collision occurred because an intoxicated customer left the restaurant and drove the wrong way down U.S. Highway 378 in Sumter, crashing head-on into the plaintiff’s car, killing 12-year old Christian Schmidt and injuring his father, Paul Schmidt.

The plaintiff claimed that evidence showed the restaurant’s bartender served the customer eight 7-ounce glasses of wine, or more than two bottles, to the point of extreme intoxication over the course of four-and-a-half hours on Sept. 17, 2008. Also, a co-worker of the customer observed that the customer was intoxicated and unsteady on her feet, according to the plaintiff. A restaurant employee later saw the customer stumbling out of the restaurant, getting lost in the parking lot and finally, after finding her car, running over the curb and a bush, driving around in circles and then pulling out of the parking lot and driving the wrong way down the street, the plaintiff alleged.

The employee, the plaintiff claimed, then went into the restaurant and told management that “a drunk lady just walked out and drove away from here and ran over a bush. You need to call 911 so no one gets hurt.” Management did not call 911, the plaintiff claimed.

The customer ended up driving the wrong way down Highway 378 for over a mile before the collision occurred, the plaintiff claimed. A hospital test showed her blood-alcohol level four hours after her last drink was 0.214, almost three times the legal limit of intoxication, the plaintiff said.

Principal injuries (in order of severity): Death of Christian Schmidt; Paul Schmidt suffered injuries to his leg and shoulder.

Special damages: Approximately \$100,000 in past medical bills for Paul Schmidt and \$1 million in future medical treatment.

Tried or settled: Settled at second mediation 30 days prior to trial date.

County and court where tried or settled: Sumter County

Case name: *Paul Schmidt, individually, and as Personal Representative of the Estate of Christian Schmidt v. Anonymous Restaurant Group*

Date concluded: March 21, 2011

Amount: \$3 million

Insurance carrier: Fireman’s Fund

Expert witnesses, areas of expertise and hometown: David H. Eagerton, Ph.D, DFTCB, toxicology/retrograde analysis (Lexington); Elizabeth Trendowski, dram shop and alcohol liability expert, Robson Forensic (Glastonbury, Conn.); Dr. Marshall A. White, neurology and pain management (Sumter); Sarah Lustig, RN, LNC, CLCP, life-care planner (Mount Pleasant); Oliver Wood Jr., Ph.D, economist (Columbia); and Ken Richardson, P.E., accident reconstruction (Mount Pleasant)

Attorneys for plaintiff: David B. Yarborough Jr. and William E. Applegate IV, both of the Yarborough Applegate Law Firm (Mount Pleasant); and Garryl L. Deas of The Deas Law Firm (Sumter)

Attorney for defendant: James Cox III of the Grier, Cox and Cranshaw Law Firm (West Columbia)

Other useful info: A substantial confidential settlement was reached between the plaintiffs and the customer’s insurance company prior to the institution of litigation against the restaurant. Due to the setoff from the earlier settlement, the plaintiff would have had to get an actual damages verdict in the high seven-figures in order to recover anything from the restaurant at trial. The customer was sentenced to 12 years in prison.