SECOND DIVISION
MILLER, P. J.,
ANDREWS and BROWN, JJ.

May 22, 2018

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A18A0713. PILLOW v. MITCHELL

ANDREWS, Judge.

This case arises from a July 2008 automobile collision in which Otis South, while driving under the influence of alcohol, collided with an automobile driven by Fatima Bird. South and Bird died in the collision. In 2009, Bird's mother, Lisa Mitchell, acting as the administrator of Bird's estate and conservator of Bird's two children, brought wrongful death and survival actions against the administrator of South's estate, currently Melinda C. Pillow (hereafter referred to as South's Estate). At the March 2017 jury trial, Mitchell proceeded solely in her capacity as conservator advancing a wrongful death action on behalf of the children for the full value of Bird's life. South's Estate appeals from the judgment entered on the jury's verdict in

favor of Mitchell in the amount of $5,350,000 for the full value of Bird's life. For the reasons that follow, we affirm.

1. South's Estate claims the trial court erred by denying the estate's pre-trial motion to enforce an agreement to settle the case.

At the time of the accident, South was driving a friend's automobile which was insured under a policy issued by Safe Auto Insurance Company. South's Estate contends that pre-trial correspondence between Mitchell's attorney and a Safe Auto claims representative shows that an enforceable settlement agreement was reached. On February 5, 2009, Mitchell's attorney sent two letters to Safe Auto with respect to insurance coverage applicable to the automobile accident – a settlement offer letter and a letter requesting insurance information. The settlement offer letter refers to a prior letter from Safe Auto about a $25,000 policy limit and states, "Of course, I need to verify the full amount of available liability insurance before my client can settle, so please send me the complete requested insurance information." The settlement offer letter also refers to a release previously sent by Safe Auto and requests that Safe Auto send a new limited release. Finally, the settlement offer letter states, "If you can get the check to me for the available bodily injury policy limits with the described release and requested insurance information within twenty days, then my client will

sign the release and those claims will be settled." The letter requesting insurance information (referred to by the settlement offer letter) requests that Safe Auto provide with respect to liability or casualty insurance coverage: (1) a statement under oath by a corporate officer or claims manager stating with regard to each policy of insurance (including excess or umbrella insurance) the name of the insurer, each insured, and the limits of coverage; and (2) copies, under oath, of all liability or casualty insurance policies covering each insured as of the date of the accident, including excess or umbrella insurance. The letter requesting insurance information concludes by stating, "Any settlement for the policy limit will be conditioned upon our receipt of all the requested insurance information." In response, the Safe Auto representative sent two letters: (1) a February 9, 2008 letter stating "our policy limits are $25,000/$50,000," and enclosing a copy of the policy declarations page along with a copy of a proposed limited liability release, and (2) a February 17, 2008 letter enclosing a draft for the $25,000 policy limit along with a revised limited liability release and a copy of the policy declarations page stamped with a statement initialed by the representative that "I hereby certify this policy to be a true and correct copy of Safe Auto Insurance Company's policy." On February 24, 2009, one day before the expiration of the twenty day time limit set forth in the February 5 settlement offer letter, Mitchell's

attorney sent a letter to the representative acknowledging receipt of the February 17 letter, but responding that, in order to settle the case, he needed to receive "all the insurance information requested" before expiration of the twenty day limit. On February 27, 2009, Mitchell's attorney sent another letter informing the representative that, because he had not received the requested insurance information required to settle the case, and the twenty day limit had expired, "we have no agreement to settle these claims for the policy limit" and that suit had been filed.

On these facts, we find no error in the trial court's order denying the motion to enforce a settlement agreement. We consider the court's order de novo, view the evidence in the light most favorable to the non-moving party, and apply ordinary principles of contract formation and enforceability to determine whether a settlement agreement was reached. *Torres v. Elkin*, 317 Ga. App. 135, 140-141 (730 SE2d 518) (2012); *LNV Corp. v. Studle*, 322 Ga. App. 19, 19 (743 SE2d 578) (2013). To form an enforceable settlement agreement, there must be mutual agreement between the parties. *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 852 (797 SE2d 814) (2017). Where a settlement offer has been made, "an answer to an offer will not amount to an acceptance, so as to result in a contract, unless it is unconditional and identical with the terms of the offer. To constitute a contract, the offer must be accepted

unequivocally and without variance of any sort." Id. at 852 (citation and punctuation omitted). Moreover, "an offeror is the master of his or her offer, and free to set the terms thereof." Id. at 853 (citation and punctuation omitted). The terms of the settlement offer made by Mitchell's attorney included an explicit condition – Safe Auto's provision of the requested insurance information, including a statement by a corporate officer or claims manager (under oath) of the applicable insurance policy or policies, the name of each insured, the limits of coverage, and a copy (under oath) of every policy covering the loss at issue. Because the facts show that Safe Auto's answer to the settlement offer did not satisfy this condition and was at variance with the terms of the offer, there was no enforceable settlement agreement.

2. South's Estate contends that the trial court erred by excluding evidence of a prior cause of action and judgment for Bird's wrongful death brought by Mitchell under the Georgia Dram Shop Act (OCGA § 51-1-40).

When the present case was tried in March 2017, Mitchell, as the administrator of Bird's estate and conservator of Bird's two children, had previously obtained a March 2011 judgment for damages in the amount of $1,750,000 for Bird's wrongful death against Freese II, Inc., d/b/a Blazing Saddles and a/k/a Club Blaze (Freese II) in a separate cause of action brought by Mitchell under the Dram Shop Act. The

judgment was affirmed on appeal in *Freese II, Inc. v. Mitchell*, 318 Ga. App. 662 (734 SE2d 491) (2012). The damages were awarded after a default judgment was entered against Freese II on allegations in Mitchell's complaint that Freese II violated the Dram Shop Act by serving alcohol to South while he was noticeably intoxicated and knowing that South would soon be driving an automobile; that South returned to his car after being served; and that, while intoxicated, South drove the car into a head-on collision with Bird's car in which Bird was killed. OCGA § 51-1-40; *Freese II*, 318 Ga. App. at 664. The default judgment operated as an admission of the complaint's factual allegations. Id. at 663-664. The factual admissions also supported the conclusion of law in Mitchell's complaint that Freese II's conduct in violation of the Dram Shop Act was a proximate cause of Bird's death, and thus established Freese II's liability for Bird's wrongful death. Id. at 663-665.

In October 2011, in the present cause of action, South's Estate filed a notice of non-party fault pursuant to Georgia's Apportionment Statute (OCGA § 51-12-33) asserting that the jury should be allowed to allocate fault to Freese II on the above-stated basis. The allegations supporting apportionment were also added to the pre-trial order. Under OCGA § 51–12–33 (c), "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the

alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." "A person is considered to have contributed to the alleged injury where that person is shown to have breached a legal duty in the nature of a tort that is owed for the protection of the plaintiff, the breach of which is a proximate cause of his injury." *Johnson Street Properties, LLC v. Clure*, 302 Ga. 51, 58 (805 SE2d 60) (2017) (citations, punctuation and emphasis omitted); *Alston & Bird LLP v. Hatcher Management Holdings, LLC*, 336 Ga. App. 527, 530 (785 SE2d 541) (2016). The defendant has the burden to establish a rational basis for apportioning fault to a non-party, and whether the non-party contributed to the alleged injury is a question of fact for the jury. *Clure*, 302 Ga. at 58.

South's Estate contends that, because the prior default judgment in the Dram Shop action operated as an admission by Freese II of factual allegations that established its liability for Bird's wrongful death in that action, those admissions were admissible as evidence in the present action for the purpose of proving a basis for the jury to apportion fault to non-party Freese II. South's Estate contends that the trial court erred by excluding use of the complaint, pre-trial order, and the judgment from the prior Dram Shop action as evidence of the Freese II admissions.

We find no error in the trial court's refusal to allow Freese II's admission of liability by default judgment in the separate Dram Shop action to be used as evidence in the present action. The trial court correctly rejected the argument by South's Estate that the doctrine of collateral estoppel made Freese II's admission of liability in the default judgment in the Dram Shop action admissible as evidence to establish that liability in the present action.

> [C]ollateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike res judicata, collateral estoppel does not require identity of the claim – so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim.

Body of Christ Overcoming Church of God, Inc. v. Brinson, 287 Ga. 485, 486 (696 SE2d 667) (2010) (citation and punctuation omitted). To invoke collateral estoppel, the adjudication of the issue must be on the merits, and a default judgment satisfies this requirement. *Spooner v. Deere Credit, Inc.*, 244 Ga. App. 681, 682 (536 SE2d 581) (2000). As to identity of parties, that element "does not require that all parties on the respective sides of litigation in both cases be identical but only those by and against whom the defense of [collateral estoppel] is invoked." *Waggaman v. Franklin*

Life Ins. Co., 265 Ga. 565, 566 (458 SE2d 826) (1995); *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 866-867 (463 SE2d 5) (1995). Because South's Estate was not a party to the Dram Shop action, there is no identity of parties, and collateral estoppel does not apply. Moreover, there was no basis to simply admit allegations made in the Dram Shop complaint or pre-trial order as evidence in the present action. We find no error in the trial court's ruling.

3. South's Estate contends that the trial court erred in refusing to admit the pre-trial order in the Dram Shop action into evidence for purposes of impeachment.

Counsel for South's Estate cross-examined Mitchell about whether she had knowledge that South was at the Freese II club on the night of the accident, and Mitchell responded, "How could I know that . . . I wasn't there." At that point, counsel showed Mitchell the pre-trial order from the prior Dram Shop action brought against Freese II and questioned her about allegations made in the pre-trial order that, on the night of the accident, South was at the club; that the club served him alcoholic beverages when he was noticeably intoxicated; and that the club knew South would soon be driving. Mitchell responded that those were the allegations, but that they were made on the advice of the estate's attorney and she had no personal knowledge of the events. South's Estate tendered the pre-trial order for admission into evidence,

and the trial court reserved ruling on admission. After the jury charge, counsel for South's Estate announced to the trial court that "I think you've ruled on this, but I'm not sure it was on the record . . . the pre-trial order . . . that's not going back with the jury under the continuing witness rule, for the record." South's Estate points to no ruling in the record by the trial court on whether the pre-trial order was admitted or excluded from evidence. Assuming (as counsel for South's Estate suggested to the court) that the court ruled the pre-trial order would not go back with the jury under the continuing witness rule, that rule "regulates which documents or recordings go into the jury room with the jury during deliberations and which ones do not" and presupposes the document was admitted into evidence. *Clark v. State*, 296 Ga. 543, 548-549 (769 SE2d 376) (2015); *Gribble v. State*, 248 Ga. 567, 571 (284 SE2d 277) (1981). And since the substance of the document was read in the presence of the jury during the cross-examination, even if it was erroneously excluded from evidence, the error was harmless.

4. We find no merit to the claim that the trial court erred by refusing to allow South's Estate to re-open the evidence because of statements made by counsel for Mitchell during closing argument. During closing argument, counsel stated:

> And one of the things I always want to remind jurors is this is our only opportunity. I have had the privilege of getting to know Lisa Mitchell as a conservator of her granddaughters, and this is her only opportunity on behalf of her granddaughters as the conservator to ever ask you as a jury to come here and ask a jury to find in her favor and to give a large verdict for the wrongful death of Fatima, [the children's] mother. She is never going to get to come to court against the administrator of the estate of Otis South again, and so that's why this is the one opportunity to get that full value.

South's Estate claims that this statement misrepresented the facts, and that South's Estate's motion to re-open the evidence should have been granted to allow evidence showing that Mitchell had previously sued Freese II and recovered a judgment for Bird's wrongful death. Even assuming South's Estate made a timely objection to the above statement, we find no abuse of discretion in the trial court's refusal to re-open the evidence. The statements, taken as a whole, asked the jury for a verdict for Bird's wrongful death against South's Estate for the full value of Bird's life – the same issues addressed by the trial court's charge to the jury.

5. South's Estate claims the trial court erred by granting a directed verdict in favor of Mitchell on the issue of apportionment of fault to non-party Freese II under OCGA § 51-12-33.

At the close of evidence, the trial court granted Mitchell's motion for a directed verdict on the issue of apportionment of fault to Freese II – concluding that South's

Estate failed to produce evidence from which the jury could find that Freese II breached a legal duty under the Dram Shop Act that was a proximate cause of Bird's wrongful death. The Dram Shop Act (OCGA § 51-1-40) provides in relevant part that

> [a person] who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such . . . person when the sale, furnishing, or serving is the proximate cause of such injury or damage.

OCGA § 51-1-40 (b). In support of its apportionment of fault claim, South's Estate relied largely on circumstantial evidence to prove Freese II's violations of the Dram Shop Act. A medical examiner and a police officer testified that blood testing done on South after the 2:00 a.m. fatal collision showed he had a blood alcohol level of .398, far in excess of the legal limit of .08, and that a person at that alcohol level would have displayed noticeable signs of intoxication. South's surviving spouse testified (by deposition) that she spoke with South by phone at 9:30 pm (about 4.5 hours prior to the collision), and he told her he was at a club on Moreland Avenue with some friends. But she "didn't know which one it was," and said, "I have no idea where they were." When the spouse spoke to South again by phone around midnight (about 2 hours prior to the collision) he was driving the car, and he told her he was

going to drop off his friends and come home. Counsel asked if during the phone conversation it sounded like South had been drinking, and she responded, "He sounded fine to me. We had like a lengthy conversation for like 30 minutes. He did not sound like he was intoxicated . . . [We had] just like a regular conversation . . . And was like, I'm about to drop them off . . . [and] I'm coming straight home." Other evidence showed that the Freese II club was located on Moreland Avenue.

> Under OCGA § 9–11–50(a), a motion for directed verdict will be granted "[i]f there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict." A directed verdict is improperly granted if there is "any evidence" to support the case of the nonmoving party.

Caswell v. Caswell, 285 Ga. 277, 279 (675 SE2d 19) (2009) (citation omitted). Where there is a lack of any evidence to support an essential element of the nonmovant's claim, a directed verdict is proper. *Gospel Tabernacle Deliverance Church, Inc. v. From the Heart Church Ministries, Inc.*, 312 Ga. App. 355, 358 (718 SE2d 575) (2011). Moreover, when a party relies on inferences from circumstantial evidence to prove a point, "not only must those inferences tend in some proximate degree to establish the conclusion sought, but must also render less probable all inconsistent conclusions." *Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 736 (639 SE2d

352) (2006) (citation and punctuation omitted). "An inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility." *Niles v. Board of Regents of the Univ. System of Ga.*, 222 Ga.App. 59, 61 (473 SE2d 173) (1996) (citation and punctuation omitted).

The direct and circumstantial evidence, with all reasonable deductions therefrom, was sufficient to prove that South was noticeably intoxicated from alcohol consumption at the time of the 2:00 a.m. collision with Bird and for some period of time prior to the collision. But as to the claim that, about 2 to 5 hours prior to the collision with Bird, the Freese II club located on Moreland Avenue knowingly sold alcoholic beverages to South while he was in a state of noticeable intoxication, we find an absence of evidence. Evidence showed that South was at a club on Moreland Avenue at 9:30 p.m., and that the Freese II club was located on Moreland Avenue. But there was no direct evidence that South was at the Freese II club. South's spouse said she "didn't know which one it was." There was no direct evidence showing that South was noticeably intoxicated when he was at a club on Moreland Avenue. The circumstantial evidence relied on to prove these elements of the claim was insufficient as a matter of law because it raised only conjecture or possibility and did not support inferences which rendered less probable all inconsistent conclusions.

Because there was a lack of direct or circumstantial evidence necessary to establish essential elements of the apportionment claim, the trial court did not err by granting the directed verdict.

6. South's Estate claims the trial court erred by ruling that Mitchell was not collaterally estopped from proceeding on the issue of damages. We find no error for the reasons stated in division 2, supra.

Judgment affirmed. Miller, P. J., and Brown, J. concur.