

**IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA**

CASE NO:

**MATT KIRCHGESSNER,
Individually, and as Personal
Representative of the Estates of
BAYLOR KIRCHGESSNER and
ADDIE KIRCHGESSNER, his
deceased minor children, and on behalf
of statutory survivors, and LAUREN
KIRCHGESSNER,**

Plaintiffs,

vs.

**TIM M. SMITH, M.D. and BILLY's
STEAMER & OYSTER BAR, INC.,
and SCOTT DONALDSON,**

Defendants.

COMPLAINT

COME NOW the Plaintiffs, MATT KIRCHGESSNER, Individually, and as Personal Representative of the Estates of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children, and on behalf of all statutory survivors, and LAUREN KIRCHGESSNER, by and through their undersigned counsel, and hereby sue TIM M. SMITH, M.D., BILLY's STEAMER & OYSTER BAR, INC., and SCOTT DONALDSON, and alleges as follows:

JURISDICTION, PARTIES, VENUE

1. This is a medical malpractice/wrongful death action for damages against Defendant, TIM M. SMITH, M.D. that exceeds the sum of FIFTY THOUSAND DOLLARS

(\$50,000.00), exclusive of costs, interest and attorneys' fees (The estimated value of Plaintiff's claim is in excess of the minimum jurisdictional threshold required by this Court). Accordingly, Plaintiff has entered "\$50,001" in the civil cover sheet for the "estimated amount of the claim" as required in the preamble to the civil cover sheet for *jurisdictional purposes only* (the Florida Supreme Court has ordered that the estimated "amount of claim" be set forth in the civil cover sheet for data collection and clerical purposes only). The actual value of Plaintiff's claim will be determined by a fair and just jury in accordance with Article 1, Section 21, Fla. Const.

2. This is also a declaratory action as to Defendant, SCOTT DONALDSON.

3. This is also an action pursuant to Florida Statutes §768.125, commonly known as the Florida DRAM Shop Law against Defendant, BILLY's STEAMER & OYSTER BAR, INC.

4. This action is being brought pursuant to Florida Statutes §766.102, et seq., Florida Statutes §768.125, the Florida Wrongful Death Act, the Florida Administrative Code, and the Florida Rules of Civil Procedure, including Rule 1.650.

5. At all times material to this action, Plaintiffs, MATT KIRCHGESSNER and LAUREN KIRCHGESSNER (hereinafter referred to as "Mr. & Mrs. KIRCHGESSNER, respectively), were the parents and natural guardians of their minor children, BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER (hereinafter referred to as "BAYLOR" and "ADDIE" respectively).

6. At all times material to this action, Plaintiff, MATT KIRCHGESSNER was and is the duly appointed Personal Representative of the Estate of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children.

7. At all times material to this action, Mr. & Mrs. KIRCHGESSNER and BAYLOR and ADDIE were residents of Louisville, Kentucky. On or about December 4, 2020, Plaintiffs visited Bay County, Florida for vacation.

8. At all times material to the action, TIM M. SMITH, M.D. (hereinafter “Dr. SMITH”) was and is a physician licensed to practice medicine in the state of Florida and was engaged in the practice of Family Medicine.

9. At all times material to this action, Defendant, Dr. SMITH provided care and treatment to SCOTT DONALDSON at 100 Doctors Drive, Panama City, Florida 32405.

10. At all times material to this action, Defendant, BILLY’S STEAMER & OYSTER, INC. (hereinafter “BILLYS”) was and is a Florida for-profit business, engaged in the business of serving food and beverages, including alcoholic beverages, and with principal place of business at 3000 Thomas Drive, Panama City, Florida 32408.

11. At all times material hereto, Denise Donaldson and SCOTT DONALDSON were the owners, operators, employees, agents and/or servants of BILLYS.

12. In addition, BILLYS employed personnel to assist in serving food and beverages, including alcohol beverages.

13. On information and belief, SCOTT DONALDSON was a frequent patron of BILLYS, and frequently consumed alcoholic beverages on the premises.

14. Consumption of alcohol beverages was not a part of SCOTT DONALDSON’s duties as an owner, operator, employee, agent and/or servant of BILLYS.

15. At all times material hereto, SCOTT DONALDSON (hereinafter “Mr. DONALDSON”), was and is a patient of Dr. SMITH.

16. Venue is proper as the alleged negligence occurred in Bay County, Florida, and as all Defendants either reside or do business in Bay County, Florida.

STATUTORY COMPLIANCE – MEDICAL MALPRACTICE

17. Pursuant to §766.104, Fla. Stat., the undersigned counsel certifies that a reasonable investigation has been conducted as to the matters alleged herein, and it has been determined that there are reasonable grounds for a good faith belief that there was negligence in the care and treatment of Mr. DONALDSON by the Defendant, Dr. SMITH and that grounds exist for the filing of this action against Defendants.

18. Certain conditions precedent to the filing of this action, including compliance with §§ 766.106 and 766.203, Fla. Stat., have been performed by Plaintiffs. A Notice of Intent to Initiate Litigation, along with the corroborating Affidavits of appropriate health care experts, was served by certified mail, return receipt requested, upon Defendant prior to the filing of this Complaint.

19. While the undersigned was able to procure a signed medical records release and authorization from Mr. DONALDSON, and while such authorization was turned over to the prospective Defendant, Mr. DONALDON has refused to sign and provide the authorization designated to accompany the Notice of Intent pursuant to §766.1065, Fla. Stat.

20. This action has been brought within the applicable statute of limitations including all extensions and tolling provisions, as BAYLOR and ADDIE passed away on December 4, 2020.

VICARIOUS LIABILITY

Employment

21. At all times material hereto, Dr. SMITH and was self-employed.

22. At all times material hereto, the persons serving alcoholic beverages to SCOTT DONALDSON at BILLYS were the owners, operators, employees, agents and/or servants of BILLYS.

23. At all times material hereto, including at all times that alcohol was being served to SCOTT DONALDSON, the employees, agents and or/servants of BILLYS, including but not limited to SCOTT DONALDSON and Denise Donaldson, were acting within the course and scope of their employment and/or agency relationship with BILLYS.

FACTS COMMON TO ALL CAUSES OF ACTION

24. On December 4, 2020, BAYLOR and ADDIE were playing miniature golf at the Coconut Creek Family Fun Park in Panama City Beach, Florida with their parents.

25. At that same time, Mr. DONALDSON was traveling west on US Highway 98 Alternate in a 2007 Chevrolet Silverado.

26. At approximately 3:19 p.m., Mr. DONALDSON's vehicle suddenly veered south, crossed the eastbound travel lanes, struck a curb and a wooden fence, and then entered the Coconut Creek Family Fun Park. The front of Mr. DONALDSON's vehicle directly struck BAYLOR and ADDIE, and then continued traveling through the property, crossing a body before coming to a rest.

27. BAYLOR was pronounced dead at the scene. He was four (4) years old at the time of his death.

28. ADDIE was pronounced dead enroute to the hospital. She was six (6) years old at the time of her death.

29. It was later determined that Mr. DONALDSON had suffered a seizure while driving his car, and that the seizure caused him to leave the road and enter the Coconut Creek Family Fun Park.

SCOTT DONALDSON and DR. SMITH

30. Mr. DONALDSON has a long documented history of significant alcohol abuse which has resulted in his suffering a seizure disorder, withdrawal seizures, tremors, frequent falls/injuries, loss of consciousness and several motor vehicle accidents.

31. At all times material to this action, Dr. SMITH was and is Mr. DONALDSON's longtime family physician. By October 1996, the earliest chart entry in Dr. SMITH's records, Mr. DONALDSON was already an existing patient.

32. At some point between 1996 and 2000, Mr. DONALDSON developed a seizure disorder, which was most likely a result of his excessive alcohol consumption.

33. In January 2000, Mr. DONALDSON presented to Dr. SMITH's office following a motor vehicle accident wherein he slammed on his brakes and slid into an intersection striking another vehicle. Dr. SMITH made note at that time that Mr. DONALDSON was on Depakote 48mg for a seizure disorder. In June 2000, Dr. SMITH noted that Mr. DONALDSON was on 1500 mg of Depakote daily for seizure disorder.

34. In 2002, Dr. SMITH noted that Mr. DONALDSON was complaining of shaking and tremors in his hands. The records indicate that Dr. SMITH was routinely ordering refills for Mr. DONALDSON's Depakote prescription.

35. On June 12, 2007, Mr. DONALDSON presented to Dr. SMITH's office following a fall which injured his left shoulder. During this visit, Dr. SMITH noted that Mr. DONALDSON had recently been to his neurologist, and that there was concern regarding his

drinking alcohol. Two (2) weeks later, Mr. DONALDSON presented to Dr. SMITH's office following an automobile accident. Dr. SMITH's records claim that Mr. DONALDSON was not at fault for the accident.

36. By November 2009, Mr. DONALDSON was on three anti-seizure medications.

37. On February 24, 2011, Dr. SMITH admitted Mr. DONALDSON to Gulf Coast Medical Center after he presented to the emergency room following suffering a seizure on his way to his neurology appointment. In addition to the seizure, Mr. DONALDSON was diagnosed with a severe electrolyte imbalance, hyponatremia, hypokalemia and hypomagnesemia. As part of the History and Physical, Dr. SMITH noted as follows:

SOCIAL HISTORY: He has had an alcohol problem at times, but he is not really a bad alcoholic, he does drink. He owns a Restaurant and is divorced, has 12-year-old son.

38. While Dr. SMITH made scant mention of Mr. DONALDSON's alcohol use, the consulting cardiologist, Dr. Hari Baddigam, diagnosed Mr. DONALDSON with an abnormal electrolyte imbalance secondary to drinking, alcoholism and alcohol abuse.

39. On March 4, 2011, a couple of days following discharge from the hospital, Mr. DONALDSON followed-up with Dr. SMITH in his outpatient office. At that visit, Dr. SMITH summarized Mr. DONALDSON's recent hospitalization as an admission for right sided pneumonia and atrial fibrillation. The records make no reference to the electrolyte imbalances or the diagnosis of alcoholism/alcohol abuse.

40. Mr. DONALDSON presented again to Gulf Coast Medical Center on March 12, 2011 and was admitted by Dr. SMITH. As part of the History and Physical, Dr. SMITH noted that Mr. DONALDSON's family had reported that he had been drinking heavily. During this admission, a consulting physician, Dr. William McKenzie, diagnosed Mr. DONALDSON with electrolyte imbalance secondary to alcoholism.

41. On October 12, 2011, Mr. DONALDSON once more presented to Gulf Coast Medical Center, and once more was admitted by Dr. SMITH. During the History and Physical, Dr. SMITH noted that Mr. DONALDSON “has been drinking alcohol trying to calm himself down and this has only added to his agitation.” Despite that reported history, Dr. SMITH did not make any alcohol-related diagnoses. In contrast, the consulting cardiologist, Dr. Michael Morrow, charted a history of heavy alcohol intake with a reported history of consuming six (6) alcoholic beverages a day. While Mr. DONALDSON was discharged by Dr. SMITH the next day, the latter noted that Mr. DONALDSON “had been drinking a fair amount of alcohol under lot of stress.” At a follow-up visit two (2) weeks later, Dr. SMITH noted that Mr. DONALDSON was only drinking an occasional glass of wine.

42. On November 13, 2011, Mr. DONALDSON was involved in a serious motor vehicle accident wherein he fractured several vertebrae in his neck. Mr. DONALDSON presented to Dr. SMITH’s office on December 27, 2011, for assessment and evaluation. Dr. SMITH postulated that Mr. DONALDSON’s accident was likely due to his medications or a seizure. The record also mentions that Mr. DONALDSON was taken off Ambien due to mental confusion concerns, however Dr. SMITH goes on to state that he believes that this all due to an electrolyte imbalance.

43. In June 2012, Mr. DONALDSON reported to Dr. SMITH that he had been put on a new anti-seizure medication, Lamictal.

44. On June 1, 2014, Mr. DONALDSON was brought to Gulf Coast Medical Center’s Emergency Room by his mother and sister and with reports that the was “out of his mind” and acting strange. He was once again admitted by Dr. SMITH. Dr. SMITH noted within the History and Physical that Mr. DONALDSON “continued to have some alcoholic beverages from

time to time,” however commented that his sodium was not as low as it had been in the past, and that his blood alcohol level was not elevated. Dr. SMITH once again attributed Mr. DONALDSON’s presentation and issues as secondary to an electrolyte imbalance. As has been the pattern thus far, the consulting physicians’ evaluations painted a much grimmer picture with regards to Mr. DONALDSON’s presentation. Cardiology consultant, Dr. Maher Ayoubi, noted that Mr. DONALDSON was found in his shower with his clothes on, confused, and unable to answer any questions, and consulting neurologist, Dr. Muhammad Zaman Khan, diagnosed chronic alcoholism. A June 8, 2014, consultation by Dr. William McKenzie noted that Mr. DONALDSON was admitted for delirium tremors and alcohol withdrawal. Dr. McKenzie also noted that Mr. DONALDSON likely had a withdrawal seizure while hospitalized. Dr. SMITH noted that Mr. DONALDSON suffered severe withdrawals during his hospital admission, and that he almost coded.

45. Mr. DONALDSON presented to Dr. SMITH’s office for a post-discharge office visit on June 13, 2014. Dr. SMITH noted within the HPI that Mr. DONALDSON was again admitted to the hospital for an “extreme electrolyte imbalance” which he attributed to Mr. DONALDSON being put on Trileptal. While the record makes passive mention of “withdrawals” there is no mention of seizures, withdrawal, alcohol use, and/or withdrawal seizures.

46. On November 3, 2014, Mr. DONALDSON presented to Gulf Coast Medical Center following a fall at home. Dr. SMITH was once again the admitting and attending physician. As part of the admitting History and Physical, Dr. SMITH noted that Mr. DONALDSON had a history of a seizure disorder, hypertension, prior motor vehicle accidents, and recurrent a- fibrillation. Dr. SMITH made mention that Mr. DONALDSON has had

problems with alcohol requiring hospitalization. Dr. SMITH also made mention that Mr. DONALDSON experienced withdrawal seizures during his past June hospitalization, and that he was discharged with a prescription for Campral. Dr. SMITH reported within the H&P that Mr. DONALDSON “has not been drinking any alcohol” and that despite a “past history of alcohol abuse” he was not currently drinking.

47. On January 13, 2015, Mr. DONALDSON reported to Dr. SMITH’s office with complaints of feeling terrible and having difficulty sleeping. Mr. DONALDSON’s sodium was noted to be low, and Dr. SMITH noted that Mr. DONALDSON was reporting the return of tremors. There is no indication that Mr. DONALDSON was asked about his alcohol consumption at this visit.

48. On May 4, 2015, Mr. DONALDSON was admitted to Gulf Coast Medical Center due to seizures. He was once again admitted by Dr. SMITH. During consultation with Dr. Amir Haghghat (interventional cardiology), it was reported that Mr. DONALDSON had been drinking the day prior to having seizures, and that he had forgotten to take some of his medications prompting him to present to hospital due to seizure activity. Mr. DONALDSON reported to Dr. Haghghat that he was under a lot of stress and needed to get things straightened out. Mr. DONALDSON’s Alcohol Level was 19 during this hospitalization. Of significance, in discharging Mr. DONALDSON, Dr. SMITH noted that Mr. DONALDSON forgot to take his seizure medications, was drinking, and as a result suffered two (2) grand mal seizures. Dr. SMITH also noted that he instructed Mr. DONALDSON to stop drinking alcohol, however, the record is unclear if that was meant to be temporary or permanent.

49. Mr. DONALDSON presented to Dr. SMITH’s office on May 22, 2015, for follow-up post-discharge. While Dr. DONALDSON made reference again to Mr.

DONALDSON's a-fib and electrolyte imbalance, there is no mention of alcohol use or abuse, or suggesting that alcohol was contributing to any of Mr. DONALDSON's issues.

50. On September 10, 2015, Mr. DONALDSON was brought to Gulf Coast Medical Center after his mother found him at home with blood everywhere, multiple bruises and abrasions, and mental confusion. Within the HPI, Dr. SMITH acknowledged that he has been treating Mr. DONALDSON for chronic problems with alcoholism, seizure disorder, and atrial fibrillation. Dr. SMITH further acknowledged that he was unaware if Mr. DONALDSON had been compliant with taking his medications regularly. Dr. SMITH also noted that Mr. DONALDSON had been suffering from recent anxiety and had been consuming alcohol as a calming mechanism. During physical examination, Dr. SMITH postulated that Mr. DONALDSON's multiple bruises and abrasions were the likely result of seizures "due to not taking his seizure medication." Mr. DONALDSON was admitted into the ICU with a diagnosis of seizure activity, alcohol abuse, chronic a-fib, acute hyponatremia and hypokalemia.

51. During this hospitalization, Mr. DONALDSON was evaluated by several consulting physicians, including neurologist, Dr. Khurram Nazir. Dr. Nazir noted that Mr. DONALDSON has been suffering seizures for 8-9 years and was treating with a neurologist. Dr. Nazir noted that Mr. DONALDSON had a history of alcohol abuse and was on withdrawal protocols (CIWA). Dr. Nazir noted that he reviewed Mr. DONALDSON's past hospital admissions and noticed similar prior admissions where Mr. DONALDSON had been admitted for "alcohol use and electrolyte imbalances provoking seizures." Dr. Nazir also noted that Mr. DONALDSON had not been taking his anti-seizure medications. Following his examination and evaluation, Dr. Nazir recorded the following Assessment and Plan:

The patient is a 52-year old gentleman, who came in with an episode of seizure, unclear on how long and how many, but was found to have multiple metabolic derangements including hyponatremia, hypokalemia, hypomagnesemia, and hypochloremia. He has a history of similar episodes in the past in the setting of drinking alcohol. All these derangements have [sic] known to cause seizure threshold even if you are on antiepileptic coverage, and I think his presentation was due to these provoking factors.

52. During this hospitalization, Mr. DONALDSON was also evaluated by nephrologist, Dr. Scott Dean. Dr. Dean noted that Mr. DONALDSON reported drinking three (3) pitchers of beer a day. Dr. Dean noted a long history of chronic alcoholism. Following examination and evaluation, Dr. Dean recorded the following Assessment/Diagnosis:

Chronic hyponatremia, secondary to long-term alcohol abuse, suspicious for alcoholic liver disease; Hypokalemia; Trauma from multiple falls; Probable cerebral ataxia from chronic alcohol cerebellar toxicity; Muscular atrophy, likely from chronic alcoholism; Atrial fibrillation from acute and chronic alcoholism.

53. Mr. DONALDSON was discharged by Dr. SMITH on September 16, 2015 with final diagnoses of seizure disorder, anemia, mental confusion secondary to severe electrolyte imbalance, hyponatremia, hypokalemia, hypertension, and chronic atrial fibrillation. Dr. SMITH included no alcohol related diagnoses.

54. Less than two (2) weeks later, on September 28, 2015, Mr. DONALDSON presented to Dr. SMITH's office for follow-up following discharge. During this visit, Dr. SMITH noted that "[u]nfortunately, he is drinking alcohol again and I fussed at him one more time about that." Dr. SMITH prescribed Camprel on that date to address alcohol withdrawal.

55. On October 9, 2015, Mr. DONALDSON presented to Dr. SMITH's office with complaints of difficulty sleeping. Dr. SMITH noted that Mr. DONALDSON had been "completely off the alcohol" but had not yet started the Camprel. Despite that report, one (1) week later, Dr. SMITH noted that Mr. DONALDSON was "draggy and mentally confused from

time to time.” A little over one (1) month later, on November 13, 2015, Mr. DONALDSON presented to Dr. SMITH’s office with complaints of right shoulder pain following another fall.

56. On September 22, 2016, Mr. DONALDSON was readmitted into Gulf Coast Medical Center. As with his prior admission, Dr. SMITH was the admitting, attending and discharging physician. At this encounter, Dr. SMITH noted that Mr. DONALDSON “has had a problem with alcohol in the past.” Dr. SMITH also noted that Mr. DONALDSON was suffering from nausea, vomiting and diarrhea, and due to his ill appearance and mental confusion, was ordered to be admitted into this hospital. Dr. SMITH commented that upon arrival to the hospital, Mr. DONALDSON suffered a grand mal seizure. Dr. SMITH noted that Mr. DONALDSON was very mentally confused and dehydrated during examination, and also charted that Mr. DONALDSON had “been drinking alcoholic beverages every day for several days.” Dr. SMITH made no diagnoses, but instead noted that Mr. DONALDSON was being admitted for further therapy and electrolyte replacement.

57. While hospitalized, Mr. DONALDSON was attended to by the Critical Care Service. In contrast to Dr. SMITH, the providers on that service diagnosed Mr. DONALDSON with the following: Alcohol Withdrawal, Acute Encephalopathy secondary to Alcohol Withdrawal, Seizure Disorder Secondary to Alcohol Withdrawal, Aspiration Pneumonia, Hypertensive Urgency, Leukocytosis, Thrombocytopenia and Hyponatremia.

58. Mr. DONALDSON was put on CIWA alcohol withdrawal protocols throughout this admission. It was reported that Mr. DONALDSON’s last known alcohol beverage was earlier that day. Dr. SMITH discharged Mr. DONALDSON with an underwhelming summary of his conditions and issues, this time claiming that Mr. DONALDSON was brought in for severe gastroenteritis, nausea, vomiting, diarrhea and because he suffered a seizure at home. While Dr.

SMITH made no mention of Mr. DONALDSON's alcohol use, he did postulate that Mr. DONALDSON's seizure was secondary to not taking his seizure medications.

59. Mr. DONALDSON presented to Dr. SMITH's office for post-discharge follow-up on October 4, 2016. Dr. SMITH noted that he recently had Mr. DONALDSON in the hospital for electrolyte imbalance but commented that "he is off the alcohol now."

60. On December 30, 2016, Dr. SMITH noted that Mr. DONALDSON had suffered a seizure on Christmas Eve after missing a single dose of his anti-seizure medication, and that a head laceration was repaired in the ER. Dr. SMITH made no mention of the fact that the seizure occurred, once again, while Mr. DONALDSON was driving and resulted in him leaving the road and crashing his car.

61. On February 15, 2017, Mr. DONALDSON was notified by the Florida Department of Highway Safety and Motor Vehicles that their agency had received information regarding Mr. DONALDSON's ability/inability to drive safely due to his medical condition. This was in response to the automobile accident which occurred on December 23, 2016. Within the chart there is a questionnaire from the DMV directed to Dr. SMITH which was filled out as part of evaluating whether or not Mr. DONALDSON would be safe to operate a motor vehicle.

62. Despite having been recently hospitalized for several serious alcohol related illnesses, Dr. SMITH made no mention of them in response to the DMV's questionnaire which asked "what is the probable cause of the loss of consciousness and what treatment, if any, is the patient currently receiving?" In response, Dr. SMITH merely responded "electrolyte imbalance."

63. Although Dr. SMITH had recently opined that Mr. DONALDSON's recent seizure was due to not taking his seizure medications, he likewise failed to inform the DMV of

that history and conclusion. With the opportunity to freely provide additional comments and information, Dr. SMITH merely checked the block indicating that from a medical standpoint, Mr. DONALDSON was safe to drive.

64. On a separate form, filled out on April 17, 2017, Dr. SMITH continued to provide wholly inadequate and/or inaccurate information, as follows:

- a. In response to a question regarding ALL serious illnesses or physical impairments, Dr. SMITH put Seizures Secondary to Electrolyte Imbalance. Despite clear and longstanding diagnoses for alcoholism, alcohol use, alcohol abuse, alcohol withdrawal, alcohol withdrawal seizures, and seizures secondary to alcohol use, none of these conditions were referenced or mentioned.
- b. In response to a request to list all prescribed medications, Dr. SMITH left it blank and failed to notify the DMV that Mr. DONALDSON was on several medications including anti-seizure medications and psychotropic medications.
- c. In response to a question regarding other physicians seen by Mr. DONALDSON in the previous two (2) years, Dr. SMITH listed only Dr. Elzawahry, the outpatient neurologist.
- d. Dr. SMITH failed to disclose Mr. DONALDSON's hospitalizations over the past two (2) years including:
 - i. May 2015: Admitted due to seizures, which Dr. SMITH postulated were due to missing medication and alcohol use;
 - ii. Sept 2015: Admitted after mother found him at home post-seizure; reported drinking up to 3 pitchers of beer a day;

- iii. Sept 2016: Admitted for seizures; dx with seizure disorder secondary to alcohol withdrawal;
- e. When questioned about any emotion problems or mental illness, Dr. SMITH made no editorial comments other than “see attached” which was in likely reference to office records which were provided;
- f. While he did reference that Mr. DONALDSON showed signs of addiction, Dr. SMITH did not expand or clarify as to what signs;
- g. Dr. SMITH also failed to reference Mr. DONALDSON’s numerous hospital admissions due to alcohol related issues and failed to reference that Mr. DONALDSON had suffered seizures while driving even prior to the December 23, 2016 crash;
- h. Dr. SMITH concluded the form by answering “yes” as to whether or not in his opinion Mr. DONALDSON could safely operate a motor vehicle;

65. It would be only two (2) weeks before Mr. DONALDSON would be admitted again into Gulf Coast Medical Center for seizures related to alcohol use. On May 2, 2017, Mr. DONALDSON was once again admitted into Gulf Coast Medical Center by Dr. SMITH. The chief complaint was “passing out and seizure.” Dr. SMITH noted that Mr. DONALDSON had chronic problems with electrolyte imbalances, and that his family had reported that he had been drinking “a lot of beer.” Dr. SMITH postulated that Mr. DONALDSON’s recent seizure was a direct result of an electrolyte imbalance due to drinking alcohol. Dr. SMITH continued on that he was unsure if Mr. DONALDSON was regularly taking his anti-seizure medications. Once again, no admitting diagnoses were made, but instead, Dr. SMITH commented that Mr. DONALDSON would be admitted for IV fluids and Librium.

66. As was the case during prior admissions, the consulting physicians were able to gather an accurate history which included that Mr. DONALDSON had a history of alcohol abuse, and a social history which included excessive beer drinking. Mr. DONALDSON was examined and evaluated by consulting cardiologist, Dr. Hashem Mubarak, who noted the following impression: Chronic a-fib, Alcohol abuse, Hypertension, Seizure Disorder. “Not sure whether it is related to the alcohol abuse or not,” slight encephalopathy possibly related to alcohol.

67. Within his discussion and recommendations, Dr. Mubarak communicated to Dr. SMITH that following: “I hope he will be compliant with taking the medication although I would raise a flag since he is alcoholic and has higher than average chance to fall and therefore, we need to watch him carefully and consider switching to aspirin.”

68. Dr. Mubarak also commented that he had advised Mr. DONALDSON against continuing to drink alcohol. Despite this alcohol-related hospital admission, Dr. SMITH once again drafted a discharge summary which made absolutely no reference to his alcohol use and abuse.

69. On June 13, 2017, Dr. SMITH noted that two (2) days prior, Mr. DONALDSON had been involved in another motor vehicle automobile accident. While Dr. SMITH noted that “he has not been drinking any alcohol today,” he did not mention or reference Mr. DONALDSON’s recent level of alcohol use. Dr. SMITH merely provided Mr. DONALDSON with Gatorade and salty peanuts.

70. On August 30, 2017, Mr. DONALDSON was brought to Bay Medical Beach ER via ambulance after being found on the floor post seizure. The ER attending physician made

note of a history of seizures, a-fib, and alcohol abuse. A laceration on Mr. DONALDSON's ear was sutured and bandaged.

71. On January 7, 2018, Mr. DONALDSON was once again admitted into Gulf Coast Medical Center by Dr. SMITH. Dr. SMITH noted that Mr. DONALDSON had recently consumed excessive amounts of beer, and that he [DONALDSON] was unsure if he had missed taking several of his seizure medications because he had recently had several seizures. Dr. SMITH noted that Mr. DONALDSON had a history of hyponatremia "because of drinking excessive water." Mr. DONALDSON's sodium and potassium levels were noted to be low, and his liver markers were abnormal. While Dr. SMITH did formulate an admitting diagnosis (seizure activity; electrolyte imbalance), he once again failed to make any reference to Mr. DONALDSON's alcohol use and/or abuse, and once again commented that the hospital admission was merely for intravenous [fluid] replacement.

72. Upon admission, Mr. DONALDSON was evaluated by consulting neurologist, Dr. David Sinclair. Dr. Sinclair noted that Mr. DONALDSON was brought to the hospital due to generalized seizure activity. According to Mr. DONALDSON, he had at least five (5) seizures lasting approximately 45 seconds each. Dr. Sinclair noted that Mr. DONALDSON reported consuming 4-5 beers per day on average, and that he had not had a drink in the 12 hours prior to the episodes. As part of his diagnosis, Dr. Sinclair included "[e]pilepsy-intractable-likely related to chronic alcohol use" and "Alcoholic polyneuropathy." At discharge, Dr. SMITH once again attributed Mr. DONALDSON's seizure to missed medications, however noted that "he had been drinking some alcohol."

73. Less than one (1) month later, on February 2, 2018, Mr. DONALDSON was admitted into Gulf Coast Medical Center following an automobile accident wherein Mr.

DONALDSON suffered a seizure while driving which caused his car to lose control and leave the road. This constitutes the fifth motor vehicle accident which has occurred since Mr. DONALDSON became a patient of Dr. SMITH's.

74. As with the prior admissions, Dr. SMITH was the admitting physician. Dr. SMITH noted that Mr. DONALDSON's sodium was low and made conspicuous mention that his alcohol levels were normal. Despite a hospitalization less than one (1) month prior, wherein Mr. DONALDSON reported drinking 4-5 beers per day, Dr. SMITH commented that "he is not supposed to be drinking any alcohol and rarely drinks a beer."

75. On October 22, 2018, Mr. DONALDSON received notice from the Florida DMV indicating that it was time for a follow-up on his medical condition. The notice included attached forms for Dr. SMITH to complete. The records indicate that Dr. SMITH filled out the forms on June 14, 2019.

76. In between Dr. SMITH's last submission to the DMV (April 18, 2017), and his filling out of this form (June 14, 2019), the following had transpired and was within Dr. SMITH's collective knowledge and understanding:

- a. May 2, 2017 – Admission to Gulf Coast Medical Center for "passing out and seizure" wherein it was reported that he had been drinking "a lot of beer," and where Dr. SMITH postulated that Mr. DONALDSON's recent seizure was a direct result of an electrolyte imbalance due to drinking alcohol;
- b. June 11, 2017 – Automobile accident wherein Dr. SMITH noted that "he has not been drinking any alcohol today;"
- c. August 30, 2017 - Bay Medical Beach ER via ambulance after being found on the floor post seizure;

- d. January 7, 2018 - Admission into Gulf Coast Medical Center for multiple seizures by Dr. SMITH wherein it was noted that Mr. DONALDSON had recently consumed excessive amounts of beer, and that he [DONALDSON] was unsure if he had missed taking several of his seizure medications. This was also where Mr. DONALDSON was diagnosed with “Epilepsy-intractable-likely related to chronic alcohol use” and “Alcoholic polyneuropathy;”
- e. February 2, 2018 - Admission into Gulf Coast Medical Center following an automobile accident wherein Mr. DONALDSON suffered a seizure while driving which caused his car to lose control and leave the road;

77. By this point in time, Dr. SMITH had supervised and cared for Mr. DONALDSON through five (5) car crashes, at least twelve (12) hospitalizations (all of which were for seizures and/or alcohol abuse), and multiple falls. Despite those serious alcohol related events, Dr. SMITH once again filled out the forms without highlighting any of the above information. When asked to list all serious illnesses and physical impairments, Dr. SMITH merely put “seizure disorder (electrolyte imbalance)” and made no mention of Mr. DONALDSON’s other health issues such as alcoholism. When asked about what physicians Mr. DONALDSON has seen in the past few years, Dr. SMITH merely listed Dr. Elzawahry, and failed to reference the numerous hospitalizations, all of which were related to seizures and alcohol use.

78. When asked about frequency of blackouts and fainting spells, Dr. SMITH put that Mr. DONALDSON had not had one since February 2018, and that the possible cause of his blackouts was an electrolyte imbalance.

79. Despite a known history of dizziness and sleep issues, Dr. SMITH answered that there were none. Despite several hospitalizations for alcohol use, abuse and withdrawals, Dr. SMITH made no mention when asked about hospitalizations related to mental or emotional illness.

80. Dr. SMITH also reported to the DMV that Mr. DONALDSON was “off all alcohol” despite a known history of addiction, excessive alcohol consumption, and binge drinking. Dr. SMITH once again verified that in his opinion Mr. DONALDSON was safe to operate a motor vehicle. At no time did Dr. SMITH inform the DMV that since his last submission, Mr. DONALDSON had been involved in two (2) other seizure-related automobile accidents.

81. On June 6, 2018, Mr. DONALDSON presented to Dr. Elzawahry’s office for evaluation of his seizure disorder. At that visit, Dr. Elzawahry acknowledged a history of traumatic brain injury and a breakthrough seizure in April 2018. Dr. Elzawahry noted with this chart that Mr. DONALDSON was experiencing tremors and a worsening of tremors, and within that diagnosis recorded a social history of drinking 2-3 beers a night.

82. Mr. DONALDSON returned to Dr. Elzawahry’s office on January 23, 2019, with report that his tremors were worsening, especially in the afternoon. Dr. Elzawahry again noted that Mr. DONALDSON was consuming 2-3 beers every day.

83. Mr. DONALDSON returned to the office on July 23, 2019, and was once again seen by Dr. Elzawahry. At this visit, Dr. Elzawahry diagnosed Mr. DONALDSON with hyponatremia which he postulated was likely due to alcohol abuse. Within the chart, Dr. Elzawahry noted that Mr. DONALDSON “underwent rehab 12/2018 but may or may not have

fallen off the wagon.” Within the same chart, Dr. Elzawahry noted that Mr. DONALDSON was still continuing to consume 2-3 beers daily.

84. An August 12, 2019, EEG was normal indicating that Mr. DONALDSON’s current problems were not related to any type of epilepsy, but rather was a result of his alcohol abuse.

85. On October 7, 2019, Dr. SMITH noted that Mr. DONALDSON had not had a seizure in about a year, and also commented that this information was “sent in” presumably to the Florida DMV. Dr. SMITH further noted that it had not been received, and that a copy of the last visit would be resent.

86. Less than two (2) weeks later, on October 18, 2019, Mr. DONALDSON’s mother brought him into the office due to an alleged medication error. At that visit, Dr. SMITH noted that Mr. DONALDSON had been recently drinking beer. There is no indication that Dr. SMITH reported this to the Florida DMV, or that he created an addendum which would alert the DMV that Mr. DONALDSON had starting consuming alcohol again.

87. Four (4) days later, on October 22, 2019, Mr. DONALDSON presented to Dr. Elzawahry’s office due to disequilibrium, which Dr. Elzawahry’s attributed to Mr. DONALDSON being prescribed several psychotropic medications. At that visit, Dr. Elzawahry commented that he was having significant difficulty with getting Mr. DONALDSON to comprehend his explanation of his medical issues. Dr. Elzawahry noted that he was ordering labs due to concern for Mr. DONALDSON’s alcohol history.

88. Mr. DONALDSON presented to Dr. Elzawahry once again on June 2, 2020. At that visit, Dr. Elzawahry noted that Mr. DONALDSON was no longer on Ativan (a hypnotic), and that he had not seen his primary care physician for over six (6) months. Also at this visit,

Dr. Elzawahry noted that Mr. DONALDSON's tremors and restless leg syndrome were "much worse." Mr. DONALDSON reported that he was still consuming 2-3 beers a day.

89. On December 2, 2020, Mr. DONALDSON presented to Brain & Spine Specialist, but instead of seeing Dr. Elzawahry, Mr. DONALDSON was seen by Dr. Achraf Makki. At that visit, Mr. DONALDSON reported that he was drinking 6-8 beers per day. Dr. Makki noted that Mr. DONALDSON had fallen at the gym resulting in a concussion. Dr. Makki also noted that Mr. DONALDSON was experiencing alcohol withdrawal symptoms including tremors in the office. Mr. DONALDSON reported to Dr. Makki that his tremors seemed worse that day and that he had a recent heavy workload.

90. Two (2) days later, Mr. DONALDSON suffered a seizure while driving resulting in the deaths of BAYLOR and ADDIE.

FACTS RELEVANT TO DRAM SHOP CLAIMS

91. At all times material hereto, Mr. DONALDSON and Denise Donaldson were the owners and operators of BILLYS.

92. Upon information and belief, Mr. DONALDSON frequented BILLYS and during his time there, consumed copious amounts of alcohol while present at BILLYS.

93. Consumption of alcohol is not a part of Mr. DONALDSON's duties as an owner, operator, employee and/or servant of BILLYS, and therefore, his consumption was as a patron of BILLYS.

94. Upon information and belief, Denise Donaldson and other employees/agents of BILLYS furnished alcoholic beverages to Mr. DONALDSON while he was present at BILLYS.

95. Upon information and belief, at all times material hereto, Denise Donaldson, as well as the employees/agents of BILLYS, were aware of Mr. DONALDSON's struggles with

alcohol, including that he was a habitual drinker who had been hospitalized on numerous occasions for alcohol related incidents including multiple falls and multiple seizures.

96. Upon information and belief, at all times material hereto, Denise Donaldson as well as the employees/agents of BILLYS were aware that Mr. DONALDSON had crashed his car several times due to alcohol related seizures.

97. At all times material hereto, the employees and agents of BILLYS knew or should have known that it would be unsafe for Mr. DONALDSON to consume alcoholic beverages due to his known medical history which strongly indicated that he was struggling with alcohol addiction. In addition, Mr. DONALDSON's appearance and actions were such that even a lay person would recognize his struggles with alcohol.

98. Despite knowledge of the above, BILLYS, by and through their employees and/or agents, willfully continued to serve Mr. DONALDSON copious amounts of alcohol drinks on a regular basis, including at or around the time of this incident.

99. In the days prior to the December 4, 2020, crash, Mr. DONALDSON continued to consume copious amounts of alcoholic beverages, including those provided to him at BILLYS while on the premises.

100. Habitual alcohol consumption resulted in Mr. DONALDSON suffering from seizures which were poorly controlled due to his alcoholism and non-compliance with anti-seizure medications.

101. All of Mr. DONALDSON's seizures have been related to alcohol consumption and non-compliance with his medications.

FACTS RELEVANT TO DECLARATORY ACTION

102. Prior to initiation of mandatory Pre-Suit, pursuant to Chapter 766, Florida Statutes, the Plaintiffs enjoyed cooperation from Defendant, Mr. DONALDSON in investigating whether or not his physicians had committed medical negligence. Through the aid of his personal counsel, the undersigned was able to obtain a general Authorization for Release of Protected Health Information (PHI) pursuant to the Health Insurance Portability and Accountability Act, more commonly known as HIPAA. The authorization allowed unfettered access to Mr. DONALDSON's medical records from the relevant facilities.

103. That same authorization included acknowledgement by the signatory, Mr. DONALDSON, as follows:

The undersigned acknowledges that once the PHI is disclosed, it may be re-disclosed to individuals or organizations that are not subject to the federal privacy regulations such as expert witnesses, litigants, insurance companies, and even may become public record if filed with a court of law.

104. That same authorization was used by the Plaintiffs to obtain Mr. DONALDSON's relevant medical records, including the records from Dr. SMITH and Mr. DONALDSON's treating neurologists.

105. That same authorization was provided to Defendant, Dr. SMITH, as part of the Notice of Intent to Initiate Medical Malpractice Litigation. In addition, the Plaintiffs provided copies of all relevant medical records they were able to obtain as part of their investigation.

106. Unfortunately, prior to initiation of Pre-Suit, and while Plaintiffs were still engaged in their own investigation of these claims, Mr. DONALDSON withdrew his cooperation in that he failed to provide the Plaintiffs with the requested authorization that typically accompanies a Notice of Intent to Initiate Medical Malpractice Litigation as required by Chapter

766, Florida Statutes. That statutory authorization allows prospective defendants to obtain any and all of claimant's medical records.

107. In this matter, such authorization was not required as the claimants are BAYLOR and ADDIE, and not Mr. DONALDSON. While statutory authorizations for the children were not provided along with the NOI, in an effort to satisfy the rigors of the statute, the Plaintiffs provided those authorizations in February 2023.

108. Upon information and belief, Mr. DONALDSON suffered another recent fall which saw him hospitalized and later transferred to a rehab facility. As such, and because Mr. DONALDSON remains a represented person, the undersigned was unable to procure any additional authorizations from Mr. DONALDSON.

Table of Claims

COUNT ONE (1):	Medical Malpractice/Wrongful Death - TIM M. SMITH, M.D.
COUNT TWO (2):	DRAM SHOP/Wrongful Death - BILLYS
COUNT THREE (3):	Declaratory Action – SCOTT DONALDSON

COUNT ONE (1)
NEGLIGENCE OF TIM M. SMITH, M.D.
Medical Malpractice

109. Plaintiffs reallege and reaver all of the allegations contained in paragraphs 1 through 97 as though fully set forth herein.

110. At all times material hereto, there existed a physician-patient relationship between Dr. SMITH and Mr. DONALDSON.

111. By virtue of that physician-patient relationship, Defendant, Dr. SMITH, had a duty to provide Mr. DONALDSON with medical care and treatment consistent with the prevailing professional standard of care, which is that level of medical care, skill and treatment

which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by a reasonably prudent similar health care provider.

112. The duty owed by Dr. SMITH to Mr. DONALDSON extended to BAYLOR and ADDIE as his conduct and actions foreseeably created a broader zone of risk which posed a threat of harm to others. BAYLOR and ADDIE were within that foreseeable zone of risk, as it would be foreseeable that Mr. DONALDSON would continue to drive his automobile despite his ongoing medical and substance abuse problems.¹

113. Defendant, Dr. SMITH, was negligent and breached the prevailing professional standard of care with regards to the care and treatment provided to Plaintiff, Mr. DONALDSON, in the following respects:

- a. Failing to provide timely and appropriate medical care and treatment;
- b. Failing to accurately and adequately document patient's history;
- c. Failing to appropriately address Mr. DONALDSON's struggles and problems with alcohol;
- d. Improperly diagnosing Mr. DONALDSON with electrolyte imbalances without addressing alcohol abuse as the primary cause;
- e. Failing to adequately consider, address, and manage Mr. DONALDSON's seizures;
- f. Failing to appreciate, consider, address and diagnose Mr. DONALDSON with alcohol abuse and/or dependency;
- g. Failing to counsel Mr. DONALDSON regarding the risks associated with operating his motor vehicle despite a history of uncontrolled seizures;
- h. Failing to counsel Mr. DONALDSON regarding the risks associated with consuming alcohol despite a history of seizures;
- i. Failing to counsel, warn and/or caution Mr. DONALDSON that his excessive alcohol use/abuse would substantially increase his risks of breakthrough seizures;
- j. Failing to counsel, warn and/or caution Mr. DONALDSON that he should not drive an automobile during times that he is routinely consuming alcohol;

¹ *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 501 (Fla. 1992)(The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. See *Kaisner [v. Kolb]*, 543 So.2d [732][at] 735 [Fla. 1989] (citing *Stevens v. Jefferson*, 436 So.2d 33, 35 (Fla.1983)). The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold legal requirement for opening the courthouse doors, whereas the latter is part of the much more specific factual requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.")

- k. Improperly recommending reinstatement of Mr. DONALDSON's driver's license despite him being medically unfit to drive;
- l. Failing to perform thorough and comprehensive examinations and evaluations of Mr. DONALDSON;
- m. Failing to consider and conclude that Mr. DONALDSON's frequent electrolyte imbalances and seizures were the result of excessive alcohol use;
- n. Failing to recommend inpatient treatment for alcohol abuse/dependency;
- o. Failing to caution and/or warn Mr. DONALDSON that his chronic alcohol use could lower his threshold for seizures;
- p. Failing to create adequate and complete medical records;

114. As a direct and proximate result of the acts and/or omissions of Defendant, Dr. SMITH, hereinabove alleged, Mr. DONALDSON suffered a predictable seizure which resulted in his vehicle leaving the road on December 4, 2020, and which then resulted in the deaths of BAYLOR and ADDIE due to injuries sustained when his vehicle collided with them.

115. Plaintiff, MATT KIRCHGESSNER, Individually, and as Personal Representative of the Estates of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children, and on behalf of all statutory survivors, and LAUREN KIRCHGESSNER, claims the following damages pursuant to the Florida Wrongful Death Act:

- a. Estate of BAYLOR KIRCHGESSNER: Loss of future earnings; loss of prospective net accumulations of the estate; any medical or funeral expenses charged to the estate and/or paid on behalf of the decedent;
- b. Estate of ADDIE KIRCHGESSNER: Loss of future earnings; loss of prospective net accumulations of the estate; any medical or funeral expenses charged to the estate and/or paid on behalf of the decedent;
- c. MATT KIRCHGESSNER, surviving parent: Loss of future services, medical and funeral expenses, and mental pain and suffering, both past and future;

- d. LAUREN KIRCHGESSNER, surviving parent: Loss of future services, medical and funeral expenses, and mental pain and suffering, both past and future.

WHEREFORE, Plaintiffs, MATT KIRCHGESSNER, Individually, and as Personal Representative of the Estates of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children, and on behalf of all statutory survivors, and LAUREN KIRCHGESSNER, demand judgment for all damages allowed by law, costs, interest (if and when applicable), against Defendant, TIM M. SMITH, M.D., and further demand trial by jury on all issues so triable.

COUNT TWO (2)
NEGLIGENCE OF BILLYS STEAMER & OYSTER BAR, INC.
Dram Shop Liability

116. Plaintiffs reallege and reaver all of the allegations contained in paragraphs 1 through 100 as though fully set forth herein.

117. On or about December 4, 2020, Defendant, BILLYS owned and operated a restaurant which served, furnished and provided alcohol beverages.

118. The actions, or inactions, of BILLYS, by and through its agents, employees and/or servants, more particularly described above, were in the course and scope of their employment with the Defendant in serving alcoholic beverages to SCOTT DONALDSON.

119. At all times material hereto, Mr. DONALDSON was habitually addicted to alcoholic beverages.

120. At all times material hereto, the employees, agents and servants of BILLYS knew that Mr. DONALDSON was habitually addicted to alcoholic beverages and knew that he was someone who was susceptible to alcohol-related seizures.

121. At all times material hereto, there was in full force and effect Florida Statutes §768.125, which states that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person not of lawful drinking age, may become liable for any injury or damage caused by or resulting from the intoxication of said minor.

122. On numerous occasions prior to December 4, 2020, one or more agents, servants and/or employees willfully and unlawfully furnished alcoholic beverages to SCOTT DONALDSON, whom said agents, servants and/or employees knew and/or should have known was habitually addicted to alcoholic beverages.

123. As a direct and proximate result of Defendant, BILLYS' violation of Section 768.125, Florida Statutes, specifically in continuing to routinely furnish alcohol to a person known to be habitually addicted, Mr. DONALDSON suffered an alcohol-related seizure while driving his automobile on December 4, 2020, which resulted in the wrongful deaths of two (2) minor children, ADDIE and BAYLOR.

124. Plaintiff, MATT KIRCHGESSNER, as Personal Representative of the Estate of BAYLOR KIRCHGESSNER a, claims the following damages pursuant to the Florida Wrongful Death Act:

- a. Estate of BAYLOR KIRCHGESSNER: Loss of future earnings; loss of prospective net accumulations of the estate; any medical or funeral expenses charged to the estate and/or paid on behalf of the decedent;
- b. Estate of ADDIE KIRCHGESSNER: Loss of future earnings; loss of prospective net accumulations of the estate; any medical or funeral expenses charged to the estate and/or paid on behalf of the decedent;

- c. MATT KIRCHGESSNER, surviving parent: Loss of future services, medical and funeral expenses, and mental pain and suffering, both past and future;
- d. LAUREN KIRCHGESSNER, surviving parent: Loss of future services, medical and funeral expenses, and mental pain and suffering, both past and future.

125. WHEREFORE, Plaintiffs, MATT KIRCHGESSNER, Individually, and as Personal Representative of the Estates of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children, and on behalf of all statutory survivors, and LAUREN KIRCHGESSNER, demand judgment for all damages allowed by law, costs, interest (if and when applicable), against Defendant, BILLY'S STEAMER & OYSTER BAR, INC., and further demand trial by jury on all issues so triable.

COUNT THREE (3)
DECLARATORY ACTION AS TO SCOTT DONALDSON

126. Plaintiffs reallege and reaver all of the allegations contained in paragraphs 1 through 107 as though fully set forth herein.

127. Chapter 766, Florida Statutes sets forth several requirements and conditions precedent for initiation of a medical malpractice civil action. Among those is a requirement to put the prospective Defendants on notice of the intent to initiate litigation by service of a formal Notice of Intent which contains affidavits of merit and copies of all relevant medical records.

128. In addition, Section 766.1065, Florida Statutes requires that an Authorization for Release of Protected Health Information be provided to the prospective Defendants. The purpose of this authorization, is to allow the prospective Defendants access to protected health information that is potentially relevant to the claim. While the undersigned did not provide this authorization along with their Notice of Intent, they did provide Mr. DONALDSON's relevant

medical records and a signed medical authorization, pursuant to HIPAA, which allowed access to his relevant medical records.

129. In addition, Dr. SMITH, as Mr. DONALDSON's primary care physician, had electronic access to all of his relevant medical records including his own office chart, records relevant to Mr. DONALDSON numerous hospitalizations (wherein Dr. SMITH was the admitting physician and therefore would have full access), and records from the neurology office as Dr. SMITH was the referring physician. The provided authorization also allowed Dr. SMITH and his legal team to share those records and information regarding Mr. DONALDSON's PHI.

130. Despite said access, Defendant, Dr. SMITH has alleged that the Plaintiffs have not satisfied the requirement of Chapter 766, specifically that they have not provided a signed 766.1065 authorization, and with anticipated argument that this somehow resulted in prejudice in investigating these claims.

131. Given the unique nature of these claims, whereby the medical records and history of the decedent is not relevant, but where the medical records and history of a non-claimant are relevant, said rules create an impracticality with regards to complying with the rigors of the statute. As such, Plaintiffs' right and access to the courts is potentially and unjustifiably limited.

WHEREFORE, the Plaintiffs, MATT KIRCHGESSNER, Individually, and as Personal Representative of the Estates of BAYLOR KIRCHGESSNER and ADDIE KIRCHGESSNER, his deceased minor children, and on behalf of all statutory survivors, and LAUREN KIRCHGESSNER, seek a declaratory ruling confirming their satisfaction of the requirements of Chapter 766, as Dr. SMITH and his legal team were provided with all relevant medical records with which to evaluate these claims, and as Dr. SMITH and his legal team were provided with a signed authorization for release of Mr. DONALDSON's medical records.

In the alternative, Plaintiffs seek a declaratory ruling which relaxes the statutory requirement for submission of a 766.1065 authorization, so that this matter may proceed on its merits.

In the alternative, Plaintiffs seek a declaratory ruling compelling Mr. DONALDSON to provide said 766.1065 authorization so that the statutory requirements can be satisfied.

In the alternative, the Plaintiffs seek a declaratory ruling, wherein this Court would use its own authority and power to compel production of Mr. DONALDSON's medical records under Florida law to the satisfaction of the Defendant, and so that he and his legal team may evaluate these claims.

CERTIFICATE OF GOOD FAITH INVESTIGATION

I, Jack T. Cook, Esq., hereby certify that there has been a reasonable investigation conducted pursuant to Chapter 766, Florida Statutes, in order to determine if there are grounds for a good faith belief that there has been negligence in the care and treatment of SCOTT DONALDSON by each named Defendant.

/s/ Jack T. Cook

Jack T. Cook, Esq.

Respectfully submitted and filed this February 7, 2023.

/s/ JACK T. COOK

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