THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 02-CP-40-5305

LINDA GAIL MARCUM, as Personal Representative of the Estate of JUSTIN MICHAEL PARKS, ... Appellant,

v.

DONALD MAYON BOWDEN, GLORIA J. BOWDEN, and UTILITY SERVICE AGENCY, INC.,..... Respondents.

FINAL BRIEF OF APPELLANT

Robert L. Widener
Celeste T. Jones
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Gayla S. L. McSwain
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402
(843) 723-7831

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA CONSTITUTION

SOUTH CAROLINA CODE SECTIONS

COURT RULES

STATEMENT OF ISSUES

I. The public policy of South Carolina, as declared by the General Assembly pursuant to specific Constitutional authority, mandates that minors injured as a result of being provided alcohol have a first party claim against the persons illegally providing them the alcohol and precludes a defense of comparative negligence.

II. The trial judge erred in finding the minor possessed "full social and civil rights."

III. The trial judge erred in finding the minor "is barred from recovery because he was a voluntarily intoxicated first party."

IV. The trial judge erred in finding the minor's "negligence exceeded that of the defendants because he voluntarily became intoxicated, and none of the defendants knew he was under twenty-one years old."

V. The trial judge erred in finding the minor's "negligence exceeded the negligence, if any, of the Defendants."

STATEMENT OF THE CASE

This wrongful death action arises from a one-car accident in which the plaintiff-driver (minor) was killed. The principal issue is whether a person under the age of 21, who became intoxicated and sustained injuries as a result thereof, can maintain a first-party action against the person(s) that provided him the alcohol in violation of an applicable statute. This is a case of first impression under South Carolina law, but this Court's decision in *Whitlaw, infra*, virtually compels the conclusion that the action can be maintained. At bottom, this case involves the application of public policy as expressed in the South Carolina Constitution and numerous statutes.

The minor was nineteen years old at the time of the accident, highly intoxicated with a blood alcohol level of 0.29, after consuming a lot of alcohol at the defendants' party. (R.2-3; 4). The personal representative of the minor's estate sued the defendants for violation of statutes making it unlawful for any person to give alcoholic beverages to a person under 21 years of age. (R.17, ¶ 13, citing S.C. Code Ann. §§ 61-4-90 and 61-6-4070). The trial court granted the defendants' summary judgment motion on the following grounds:

(1) Although the South Carolina Constitution empowers the General Assembly to regulate the age for drinking (which it has done), the Constitution:

   (a) "simply allows for the restriction of the sale of alcoholic beverages to persons under age 21"; and

   (b) "does not remove legal rights and responsibilities from persons between ages 18 and 21, nor does it deem them disabled."

   Thus, the minor here was not "a legal minor," nor was he "under any legal disability." And, therefore, he "possessed full social rights." (R.5).

(2) The public policy of South Carolina, as expressed in the Supreme Court's opinions in *Tobias v. Sports Club, Inc.*, 504 S.E.2d 318 (S.C. 1998) and *Lydia v. Horton*, 583 S.E.2d 750 (S.C. 2003), precludes a first-party action for injuries by a voluntarily intoxicated adult. This same public policy applies here and "precludes a first party action by a 19-year-old voluntarily intoxicated person, especially since he is an adult for all other purposes and is only prevented from alcohol consumption by statutory authority." (R.5-6; 7).

(3) The minor had a history of drinking, including drinking and driving. The defendants did not know the minor was intoxicated or under age. The minor drank voluntarily. Therefore, under *Tobias* and *Lydia*, both *supra*, the defendants are entitled to summary judgment, because the minor, "a nineteen year old experienced with drinking alcohol, was a voluntarily intoxicated first party." (R.7-8; 9).

(4) As a matter of law under *Lydia, supra*, the minor was more negligent than the defendants, because:

(a) the minor was highly intoxicated while driving,
(b) he lost control of the car,
(c) the defendants did not know the minor was under 21,
(d) the defendants believed the minor was over 21,
(e) the minor did not appear intoxicated while at the party,
(f) the minor consumed more alcohol after the party but before the accident, and
(g) the minor chose to drive while intoxicated despite a third-party's efforts to stop him. (R.9-11).

In short, the trial court held that despite the provisions of the South Carolina Constitution and statutes, a voluntarily intoxicated 19 year old was an adult in the eyes of the law and held to the same standard. This was manifest error, and it interferes with the express public policy proclaimed by the General Assembly under specific Constitutional authority.

The minor timely filed a post-trial motion, which the trial court denied. The minor timely appealed.

STATEMENT OF FACTS

On December 15, 2001, the date of his death, the minor was 19 years old, employed by Shealy Electric Company ("Shealy"), and taking several classes at Midland's Technical College. He attended the defendants' Christmas party, which was given to promote the business relationship between the minor's employer (Shealy) and the defendant Donald Bowden's employer (Utility Service Agency, Inc.). The defendants hoped to get more business from the minor's employer, and it was in all defendants' financial self interest that everyone at the party, including the minor, had a good time.

The minor rode to the party with his work supervisor, because he did not know how to get to the defendants' home. (R.133) Approximately fifteen guests attended the party and defendant Mrs. Bowden told them to help themselves to food and drinks (R.268), which included beer and numerous kinds of hard liquor.[1] The minor drank numerous beers and took numerous shots of Tequila, which was noticed by everyone. (R.305). At least one of the individual defendants had a Tequila shot with him. (R.273). The minor's supervisor also got drunk to the point that he asked his wife to drive. (R.158).

Several different guests saw the minor drink alcohol in the following quantities at the following times:

- Several beers and several shots of Tequila (R.305).
- "Quite a few beers and some shots" (R.272).
- 3 or 4 beers and at least one shot of Tequila prior to 6:00 or 6:15 (R.307).
- At least 3 shots of Tequila within five or ten minutes at approximately 7:15 p.m. (R.108).

[1] Out of $390.11 spent on the food and drinks, Utility Service Agency reimbursed Don Bowden $111.00 for the money spent at J and F Package Store for liquor. (R.300).

Both individual defendants admitted to drinking at the party. (R.213; 268). Neither of them did anything to ascertain the minor's age before providing him with as much beer and liquor as he was able to consume during the party at their home. (R.265). And although their employer had a company policy that any salesman (like Mr. Bowden here) who gives a party must ensure that a sober driver is designated to get everybody home safely from the party, the defendants did not do so at this employer sponsored party. (R.311-311a) Neither of the defendants knew when or how the minor left their house. (R.309)

The minor left the party between 8:30 and 9:00 p.m. and rode with his supervisor back to his car, arriving at his supervisor's home about 9:15 p.m.. (R.139; 143; 276; 277). The minor possibly drank a mini-bottle of an unknown type of liquor at the supervisor's home before getting into his car and driving away at approximately 10:00 p.m.. (R.146-147). At approximately 10:10 p.m., Kourtenay Mott called the minor on his cell phone and "could tell that [the minor] was highly intoxicated because his speech was slurred and he had trouble saying words." (R.306). Thereafter, the minor drove less than two miles, ran off the road driving at approximately 75 mph, and died of multiple head trauma after hitting a tree. His blood alcohol concentration at the time of death was .291 (R.314), almost three times the legal limit in South Carolina.

Assuming the minor consumed alcohol at the defendants' home between approximately 4:00 p.m. and 8:45 p.m., and assuming he consumed a meal at the party, SLED's Chief Toxicologist testified the minor would have consumed more than fourteen 1 ounce drinks to reach a .291 blood alcohol concentration. (R.302). He also testified that a person with a blood alcohol concentration of .291 would be "...visibly drunk..." "...have difficulty walking..." and "...have slurred speech," and that the one mini-bottle

of liquor the minor allegedly consumed between 9:00 p.m. and 10:00 p.m. at the supervisor's home would not have increased his blood alcohol level due to his body's alcohol elimination rate. (R.303; 304).

BACKGROUND LEGAL PRINCIPLES

A. Introduction: As demonstrated below, South Carolina's Constitution, statutes, and case law permit only one conclusion: Persons under the age of 21 are not *sui juris* for all purposes; they "suffer" from numerous, age-based legal disabilities; and the most pervasive disability in the law is their incompetence to make decisions regarding alcohol consumption.

B. The South Carolina Constitution: Article XVII, section 14 of the South Carolina Constitution sets forth the general rule that persons who are 18 or older are *sui juris*, but it expressly excepts all persons laboring under disabilities prescribed elsewhere in the Constitution or as otherwise established by law. It also expressly provides the General Assembly may preclude the sale of alcohol to persons under the age of twenty-one:

> Every citizen who is eighteen years of age or older, *not laboring under disabilities* prescribed in this Constitution or otherwise *established by law*, shall be deemed *sui juris* and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

(emphasis added). The Constitution imposes numerous age-based disabilities:

(1) must be at least 21 to serve in the House of Representatives,[2]

(2) must be at least 25 to serve in the Senate,[3]

(3) must be at least 30 to serve as Governor,[4]

---

[2] S.C. Const. art. III, § 7.
[3] *Id.*
[4] *Id.* at art. IV, § 2.

(4) must be at least 30 to serve as Lieutenant Governor,[5]

(5) must be at least 32 to serve as Chief Justice, Associate Justice of the Supreme Court, Judge of the Court of Appeals, or Circuit Court Judge,[6] and

(6) must be at least 21 to serve as State Librarian or Departmental Clerk.[7]

In addition, Article VIII-A of the Constitution, in its only section, grants the General Assembly plenary power to regulate the manufacture and sale of alcoholic beverages. The General Assembly has gone to great lengths to preclude the sale of alcohol to, and consumption of alcohol by, persons under the age of twenty-one. See subsection, D, *infra*.

C. General South Carolina Statutes: South Carolina's statutes are filled with age-based "disabilities." For example, a person must be 21 or older to engage in numerous professions, including the following:

(1) Attorney,[8]

(2) Campus Police Officer,[9]

(3) Coroner,[10]

(4) Hearing Aid Specialist,[11]

(5) Kinship Foster Parent,[12]

(6) Law Enforcement Officer,[13]

---

[5] S.C. Const. art. III, § 8.
[6] *Id.* at art. V, § 15. The same age requirement is imposed by statute to serve as a family court judge, master-in-equity, and administrative law judge. S.C. Code Ann. §§1-23-520 (Supp. 2003) (ALJ); 14-11-20 (Supp. 2003) (Master); and 20-7-1370(A) (Supp. 2003) (Family Court Judge).
[7] S.C. Const. art. XVII, §1
[8] Rule 402(c)(1), SCACR.
[9] S.C. Code Ann. § 59-116-40(1) (Rev. 2004).
[10] *Id.* at § 17-5-130(A)(4) (Rev. 2003).
[11] *Id.* at § 40-25-100, -110 (Rev. 2001).
[12] *Id.* at § 20-7-2275(D)(2) (Supp. 2003).
[13] *Id.* at § 23-6-440(B)(8) (Supp. 2003).

(7) Lottery Ticket Retailer,[14]

(8) Magistrate,[15]

(9) Nursing Home Administrator,[16]

(10) Physician,[17]

(11) Polygraph Examiner,[18]

(12) Probate Judge,[19]

(13) Private Investigator,[20]

(14) Proprietary Security Business,[21]

(15) Real Estate Broker, Broker-in-Charge, or Property Manager-in-Charge,[22]

(16) Sheriff,[23]

(17) Social Worker,[24]

(18) Supreme Court Librarian,[25] and

(19) Tattoo Artist.[26]

Other statutes impose even higher age requirements for some professions, *e.g.*, 25 or older to be a Guardian ad Litem[27] or Commodity Board Member,[28] and 30 or older to be

[14] S.C. Code Ann. § 59-150-150(A)(2)(h) (Rev. 2004).
[15] *Id.* at § 22-1-10(B)(1) (Supp. 2003).
[16] *Id.* at § 40-35-230(A)(1) (Rev. 2001).
[17] *Id.* at § 40-47-60 (Rev. 2001).
[18] *Id.* at §§ 40-53-70(A)(1) and -110 (Rev. 2001).
[19] *Id.* at §14-23-1040 (Supp. 2003).
[20] *Id.* at §40-18-70(E)(1) (Supp. 2003).
[21] *Id.* at §40-18-60(B)(1) (Supp. 2003).
[22] *Id.* at § 40-57-80(1) (Rev. 2001).
[23] *Id.* at § 23-11-110(A)(4) (Supp. 2003).
[24] *Id.* at §§ 40-63-220(2), -230(2), -240(A)(2), -240(B)(2), and -260(A)(2) (Supp. 2003).
[25] *Id.* at § 60-3-10 (Rev. 1990).
[26] *Id.* at § 44-34-50(A) (NEW).
[27] *Id.* at § 20-7-1547 (A)(1) (Supp. 2003).
[28] *Id.* at § 46-17-200 (Rev. 1987).

Municipal Civil Service Commissioner[29] or the Administrator or Deputy Administrator for the Department of Consumer Affairs.[30]

In addition, the General Assembly has imposed numerous age-based "disabilities" on various conduct, requiring for example that a person be 21 or older to:

(1) be a consenting landowner or consenting freeholder regarding the creation of local improvement districts or imposition of additional local taxes,[31]

(2) ride a motorcycle without a helmet or goggles/face shield,[32]

(3) get a tattoo without parental permission,[33]

(4) buy or possess a pistol,[34]

(5) carry a concealed weapon or have a security weapons permit,[35] or

(6) be an "adult" under the Uniform Gifts to Minors Act.[36]

The General Assembly has imposed numerous other "disabilities" on persons under 21. The Family Court has jurisdiction to require child support beyond age 18,[37] while parents can deed away custody of their unmarried children under the age of 21.[38] An adoptee must be 21 before he is entitled to know the identity of his biological parents and siblings, and he must also be 21 before they are entitled to know his identity.[39] The six-year statute of limitations for injury claims arising from incest or sexual abuse does not begin until the victim reaches 21.[40]

---

[29] S.C. Code Ann. § 5-19-120 (Rev. 2004).
[30] *Id.* at §§ 37-6-507 and -508 (Rev. 2002).
[31] *Id.* at §§ 4-35-30(5) (Supp. 2003)(creation of improvement district under County Public Works Improvement Act), 5-37-2-(6) (Rev. 2004) (creation of improvement district under Municipal Improvement Act of 1999), 6-11-200 (Rev. 2004) (bond issue by a special purpose or service district), 57-19-30 (Rev. 1991) (calling election for additional special road tax), and 59-73-40 (Rev. 2004) (calling election to levy additional property tax for school funding).
[32] *Id.* at §§ 56-5-3660 and -3670 (Supp. 2003).
[33] *Id.* at § 43-34-60(C) (NEW) (persons 18-21 must have parental permission).
[34] *Id.* at § 16-23-30(c), (e) (Rev. 2003).
[35] *Id.* at §§ 23-31-215(A) (Supp. 2003) and 40-18-100(A) (Supp. 2003)
[36] *Id.* at § 20-7-150(1), (11) (Supp. 2003).
[37] *Id.* at § 20-7-420(17) (Supp. 2003).
[38] *Id.* at § 21-21-25 (Supp. 2003).
[39] *Id.* at § 20-7-1780(E)(1)(a) (Supp. 2003).
[40] *Id.* at § 15-3-555 (Supp. 2003).

In short, it is clear that persons between the ages of 18 and 21 are not *sui juris* under South Carolina law. They suffer numerous age-based "disabilities" that demonstrate a public policy of treating such persons as not capable of engaging in certain conduct or making certain decisions. That public policy is expressed most strongly in the statutory "disabilities" most relevant here, to-wit: the triangular relationship between age, drinking, and driving. (See subsection D, *infra*).

D. South Carolina Statutes on Age, Drinking, and Driving: South Carolina's statutory regulation of the public policy on this triangular relationship begins with the general proposition that all references to "minors" in the laws of the State are deemed to mean persons under 18 "*except* in laws relating to the sale of alcoholic beverages."[41] Armed with this statutory exception, and with the grants of power from Articles VIII-A and XVII, § 14 of the Constitution, the General Assembly has regulated this area so heavily as to permit only one conclusion: The public policy of South Carolina is that persons under the age of 21 are incompetent to make decisions regarding alcohol. The regulation of this area is so pervasive and detailed that the General Assembly implicitly concluded that minors, regardless of prohibitions directed at their conduct, would nevertheless seek to obtain alcohol. Thus, the General Assembly imposed a duty on others to not provide alcohol to minors, and the defendants here clearly violated that duty.

The regulation of underage drinking and driving is divided into three basic tiers: (1) statutes directed at persons under 21; (2) statutes directed at persons over 21; and (3) driving by persons under 21.

[41] S.C. Code Ann. § 15-1-320(a) (Supp. 2003) (emphasis added).

Persons under 21 cannot buy, possess, or consume alcoholic beverages,[42] and it is unlawful for them to give false information of their age to do so.[43] Upon their conviction for these offenses, the Department of Motor Vehicles (DMV) must suspend their driver's license if they have one.[44] They also cannot participate in any offers to "sample" alcoholic beverages.[45] Persons under 21 cannot get a license or permit for an alcohol related business, nor can any business with a principal under the age of 21.[46] They cannot transport alcoholic beverages to or from a licensed premises.[47] They cannot work as a bartender[48] or in alcohol retail, wholesale, or manufacturing businesses.[49] In short, the General Assembly has gone to great lengths to ensure that persons under 21 have no contact with alcoholic beverages. To further that end, the General Assembly has also imposed numerous obligations on persons who can have lawful contact with alcoholic beverages.

It is unlawful to sell, transfer, or give alcoholic beverages to persons under 21.[50] This prohibition even extends to the delivery of prescription alcohol,[51] as well as the purchase of alcoholic beverages on a licensed premise by someone over 21 for consumption by someone under 21.[52]

An innkeeper must verify a registrant's age before giving them a key to a hospitality cabinet that contains alcoholic beverages,[53] and he may deny accommodations or eject occupants if he reasonably believes the premises will be used or is being used for

---

[42] S.C. Code Ann. §§ 61-6-4710(A), 20-7-8920, and 20-7-8925 (Supp. 2003).
[43] *Id.* at § 61-4-60 (Supp. 2003).
[44] *Id.* at 56-1-746(A) (Supp. 2003).
[45] *Id.* at §§ 61-6-1035(8) and -1640(8) (Supp. 2003).
[46] *Id.* at §§ 61-2-100(E), (H)(2)(f-g); 61-4-520(5); 61-6-110(1) and -1820(6) (Supp. 2003).
[47] *Id.* at § 61-6-4020 (Supp. 2003).
[48] See *id.* at 61-6-2200 (Supp. 2003).
[49] *Id.* at 61-6-4140 (Supp. 2003).
[50] *Id.* at §§ 61-4-50(A), -90, -580(1), and -6-90 (Supp. 2003).
[51] *Id.* at § 61-10-40 (Supp. 2003).
[52] *Id.* at § 61-4-80 (Supp. 2003).
[53] *Id.* at §§ 61-6-2300(2) and -2340(C) (Supp. 2003).

the consumption of alcohol by persons under 21.[54] A business licensed to sell alcoholic beverages must post a sign stating that is unlawful for persons under 21 to possess alcoholic beverages or to give false information about their age to purchase alcohol.[55] Such businesses also cannot have ads that are addressed to persons under 21 or intended to encourage persons under 21 to buy or drink alcoholic beverages.[56]

When the DMV issues a special ID card to someone under 21, it "must be marked, stamped, or printed to *readily indicate*" the person is under 21.[57] When a law enforcement officer arrests someone under 21 for a traffic violation and believes that person may have been drinking, the office may order blood alcohol tests.[58] Persons under 21 are considered to have given consent to blood alcohol tests.[59] The DMV must suspend the driver's license of any person under 21 who is caught driving with a blood alcohol level of 0.02% or higher,[60] which is substantially (75%) lower than the maximum blood alcohol level of 0.08% for persons over 21.[61] The law enforcement agency with jurisdiction must investigate any accident resulting in injury or death to someone under 21 if there is cause to believe that person had consumed alcohol.[62] Upon the commencement of such an investigation, SLED must assist in whatever capacity necessary, including the prosecution of criminal charges against anyone who provided the alcoholic beverage to the person under 21.[63]

---

[54] S.C. Code Ann. at §§ 45-2-30(A)(3) and -60(3) (Rev. 1987).
[55] *Id.* at §§ 61-4-70 and -6-1530(1) (Supp. 2003).
[56] *Id.* at § 61-6-1510 (Supp. 2003).
[57] *Id.* at § 56-1-3350 (Supp. 2003) (emphasis added).
[58] *Id.* at § 56-1-286(C) (Supp. 2003).
[59] *Id.* at § (B).
[60] *Id.* at § (A).
[61] *Id.* at § 56-5-2933 (Supp. 2003).
[62] *Id.* at § 23-3-160 (Supp. 2003).
[63] *Id.*

The exceptions to the prohibition against giving alcohol to persons under 21 serve only to highlight the public policy decision that such persons are not competent to make decisions regarding alcohol consumption. A spouse, parent, or guardian, who is over the age of 21, may serve alcohol in their home to their spouse, child, or ward who is under the age of 21.[64] Thus, the General Assembly has limited underage drinking to the safe haven of a home, but only when the decision is made by a spouse, parent, or guardian who is over the age of 21. A person under the age of 21 may also taste an alcoholic beverage or consume a small amount, but only in the context of a religious ceremony or culinary education. As to the religious ceremony exception, the law specifies that the alcohol must have been lawfully purchased, thereby again putting the responsibility of any "religious" consumption on the shoulders of someone over the age of 21.[65] As to the "culinary education" exception, the law again requires that the instructor be over the age of 21 and limits the exception to tasting only, without any consumption or imbibing, under the direct supervision and control of the instructor, and subject to the approval of the State Commission on Higher Education.[66] Thus, again, the General Assembly has given the decision to a person over the age of 21 under very strict guidelines.

E. South Carolina Case Law: In *Tobias v. The Sports Club, Inc.*, 504 S.E.2d 318 (S.C. 1998), this Court held there was no first party action for violation of statutes prohibiting the service of alcohol to intoxicated persons when the would-be plaintiff was an adult. As to minor plaintiffs, however, this Court noted: "We leave for another day the issue of whether we will recognize a first party action brought by a minor." Id. at 320. That day has arrived.

---

[64] S.C. Code Ann. §§ 61-4-90 and 61-6-4070 (Supp. 2003).
[65] *Id.*
[66] *Id.*; see also § 59-103-195 (Rev. 2004)(directing Education Commission to establish rules for and regulate use of the "culinary education" exception).

This Court's decision in *Whitlaw v. The Kroger Co.*, 410 S.E.2d 251 (S.C. 1991) is both instructive and persuasive, if not controlling. There, the defendant grocery store sold beer to one minor, who was accompanied by a second minor. The purchasing minor gave some of the beer to the second minor, who then got drunk, drove his car into a tree, and died. The decedent's father sued the grocery store for wrongful death, claiming that violations of statutes that prohibited the sale of beer to minors gave rise to a private cause of action.[67] Answering a certified question from the United States District Court for the District of South Carolina, and applying the test in *Rayfield v. South Carolina Dep't of Corrections*, 374 S.E.2d 910 (S.C. App. 1988) for when statutory violations give rise to a claim for negligence, this Court held a private cause of action would exist if the plaintiff proved a violation of the statute(s) that proximately caused an injury. In so ruling, this Court noted that these statutes "are designed to prevent harm to the minor who purchased the alcohol." 410 S.E.2d at 253.

Most recently, in *Barnes v. Cohen Dry Wall, Inc.*, 592 S.E.2d 311 (S.C. App. 2003), the Court of Appeals held a third-party action existed against a social host for violation of statutes that prohibited giving alcoholic beverages to minors.[68] There, a nineteen year old employee attended an employees' Christmas party given by the employer, got drunk, drove his car into a two-car accident, and was killed, as was the passenger in the other car. The passenger's estate sued the host, and the Court of Appeals upheld a jury verdict against the host.[69] The court acknowledged the general rule that

[67] The claim was brought under two now-repealed statutes, S.C. Code Ann. §§ 61-9-40 and 61-9-410 (repealed). These repealed statutes have been replaced with §§ 61-4-50 and 61-4-580 (Supp. 2003) and contain the same prohibitions.
[68] See S.C. Code Ann. §§ 61-4-90 and 61-6-4070 (Supp. 2003).
[69] The minor's estate also sued the host. The jury returned a verdict for the host, finding the minor was 80% at fault under the circumstances of that case, which included the following: (1) the host hired a professional bartender to verify the guests' age; and (2) the host provided designated drivers to anyone needing a ride home. There was also evidence that the minor brought his own alcohol to the party, after having been told by his supervisor that he would not be served at the party. The minor's estate did not appeal the jury verdict. There are no similar facts in the present case.

social hosts cannot be held liable to third-parties for serving alcoholic beverages to adult guests.[70] The court held, however, that this rule did not apply because: (1) alcohol was served to a minor, not an adult; (2) in violation of statutes making it unlawful for anyone to give alcoholic beverages to a minor; and (3) these statutes were intended to protect the minor and the public at large from the dangers of the minor's intoxication.

ARGUMENTS

I. THE PUBLIC POLICY OF SOUTH CAROLINA, AS DECLARED BY THE GENERAL ASSEMBLY PURSUANT TO SPECIFIC CONSTITUTIONAL AUTHORITY, MANDATES THAT MINORS INJURED AS A RESULT OF BEING PROVIDED ALCOHOL HAVE A FIRST PARTY CLAIM AGAINST THE PERSONS ILLEGALLY PROVIDING THEM THE ALCOHOL AND PRECLUDES A DEFENSE OF COMPARATIVE NEGLIGENCE.

The overriding question presented here is whether this Court will allow the standards developed in its cases regarding intoxicated adults to be applied to cases involving minors. The General Assembly has already answered this question with a public policy decision that persons under the age of 21 are incompetent and not adults regarding alcohol consumption. Application of adult standards of behavior would frustrate and undermine this public policy developed under specific authority granted the General Assembly by the Constitution.

"Public policy is basically for the legislature." *Brown v. Drake*, 270 S.E.2d 130, 132 (S.C. 1980). When the General Assembly enacts a statute embodying a particular public policy choice, the courts cannot annul the legislative determination by substituting their own views of public policy. *Hollman v. Bulldog Trucking Co.*, 428 S.E.2d 889, 893 (S.C. App. 1993). Courts have the power to declare public policy under the common law, but only in the absence of a legislative determination on the matter. *State v. Baucom*, 531

[70] The court also noted the possibly contrary ruling in *Tobias, supra*, wherein this Court allowed a third-party action. The distinction, albeit unspoken, may be that *Tobias* involved a licensed business serving alcohol to an intoxicated adult patron, as opposed to a social host (or a business) serving alcohol to an adult who was not intoxicated at the time of the service.

S.E.2d 922, 925 (S.C. 2000); *Russo v. Sutton*, 422 S.E.2d 750, 753 (S.C. 1992). Common law doctrines that interfere with the effectuation of public policy underlying a statute must yield to that public policy. *Shelton v. Oscar Mayer Foods Corp.*, 481 S.E.2d 706, 708 (S.C. 1997); *State v. McCoy*, 261 S.E.2d 159, 160-161 (S.C. 1979). This includes the General Assembly's public policy decisions regarding the effect that the age of a person has on his competence, legal status, and legal relationship to others. *State v. Rogers*, 527 S.E.2d 101, 104 (S.C. 2000), *citing Doe v. Greenville Hosp. System*, 448 S.E.2d 564, 566 (S.C. App. 1994); *Standard v. Shine*, 295 S.E.2d 786, 788 (S.C. 1982).

Here, the General Assembly has determined that it is illegal for adults to provide alcoholic beverages to persons under the age of 21. Thus, under the analysis in *Rayfield, supra*, as approved and applied by this Court in *Whitlaw, supra*, persons under the age of 21 have a first party claim against such adults for injuries resulting from the breach of the statutory prohibition. Moreover, the General Assembly has determined that persons under the age of 21 are incompetent to make decisions regarding the consumption of alcohol. The common law doctrine of comparative negligence must yield to that determination or it will interfere with the effectuation of public policy underlying the alcohol statutes. If a person is incompetent to make a decision, he or she manifestly cannot be negligent in making the decision. Accordingly, the trial judge erred in finding the minor did not have a claim and also in finding that any such claim was barred by the doctrine of comparative negligence.

II. THE TRIAL JUDGE ERRED IN FINDING THE MINOR POSSESSED "FULL SOCIAL AND CIVIL RIGHTS."

In part B of its order, the trial court summarily reviewed Article XVII, § 14 and concluded the minor "possessed full social and civil rights." (R.5). Armed with this

erroneous conclusion, the trial court proceeded to treat the minor as an adult under the law with respect to alcohol.

Contrary to the trial court's analysis, Article XVII, § 14 does not simply allow the General Assembly to prevent minors from purchasing alcohol. More importantly, it specifically recognizes and excepts persons "laboring under disabilities .... otherwise established by law." As demonstrated above in the "Background Legal Principles" section of this brief, the General Assembly has imposed numerous, age-based, legal disabilities, which demonstrate that persons under 21 are not *sui juris*, especially with respect to alcohol. The General Assembly has decided and proclaimed that persons under 21 are incompetent to make decisions regarding alcohol. Thus, with respect to alcohol (and many other things), and contrary to the trial court's conclusion, the minor is legally disabled, is a legal minor, and does not possess full social and civil rights. Finally, and most importantly, the trial court ignored the duty at issue here, to-wit: the defendants' duty to not provide alcohol to persons under 21, a duty they admittedly breached in this case.

III. THE TRIAL JUDGE ERRED IN FINDING THE MINOR "IS BARRED FROM RECOVERY BECAUSE HE WAS A VOLUNTARILY INTOXICATED FIRST PARTY."

In part C of its order, the trial court proclaims as public policy that "voluntarily" intoxicated minors, as a matter of law, are barred from bringing first-party actions against persons that illegally provide alcohol to them. (R.5-7). This declaration is based on the trial court's application of the standards developed by this Court in cases involving voluntarily intoxicated adults. As a matter of law and public policy, as declared by the General Assembly, persons under 21 are not adults with respect to alcohol.

The trial court also relies upon and quotes the Court of Appeals' decision in *Barnes, supra*, which recognized a third party action against persons illegally providing alcohol to a minor. The trial court's quote, however, is incomplete:

> In so holding such, however, the Court of Appeals also recognized *Tobias*' holding: "... that our alcohol statutes do not create a first party cause of action ... but that they do permit a third party action." In turn, the holding in *Tobias* remains unaffected by *Barnes*.

(F.6)(citations omitted)(emphasis in original). The second ellipsis in the quote represents the following language: "for an intoxicated *adult* patron." 592 S.E.2d at 313, n.8 (emphasis added)(*quoting, Tobias, supra*). Thus, *Barnes* does not preclude a first-party action by a minor.

Moreover, the trial court simply ignored this Court's holding in *Whitlaw, supra*, which recognized a first party action by a minor against a commercial establishment illegally selling alcohol to a minor. It also ignored the Court of Appeals' reliance on *Whitlaw*. And it again ignored the duty at issue here, to-wit: the defendants' duty to not provide alcohol to a person under 21.

Finally and most importantly, the trial court ignored the General Assembly's declaration of public policy in the alcohol statutes. This public policy precludes the trial court's fundamental ruling and conclusion that minors are to be treated as adults and subjected to legal standards established for adults with respect to alcohol. This public policy establishes that minors are incompetent to make decisions regarding alcohol and therefore, contrary to the trial court's conclusion, a minor's intoxication cannot be voluntary, at least with respect to the party that illegally provided alcohol to him.

IV. THE TRIAL JUDGE ERRED IN FINDING THE MINOR'S "NEGLIGENCE EXCEEDED THAT OF THE DEFENDANTS BECAUSE HE VOLUNTARILY BECAME INTOXICATED, AND NONE OF THE DEFENDANTS KNEW HE WAS UNDER TWENTY-ONE YEARS OLD."

In part D of its order, the trial court opens its analysis with two lengthy paragraphs describing the minor's prior experience with, and bad decisions about, alcohol. (R.7-8). This type of experience is the precise reason that the General Assembly imposed a duty on the defendants and other adults to not provide alcohol to minors; they are incompetent to make sound and reasonable decisions about alcohol consumption. The fact that others may have violated this duty in the past with respect to the minor is irrelevant to, and not a defense to, the defendants' breach of that duty in this case.

The trial court also finds that the defendants thought the minor was over 21, because he appeared to be to them, and that no one told them the minor was intoxicated. (R.8). These contentions are irrelevant.

The statute imposing the duty on the defendants is not dependent upon their knowing the minor is intoxicated. The statute prohibited them from providing any alcohol to the minor under any circumstance. Their duty does not depend on whether the minor was intoxicated or whether they knew he was intoxicated.

The defendants' duty also does not depend on whether the minor appeared to them to be over the age of 21. The statute does not proscribe providing alcohol to persons who appear to be under 21; it proscribes providing it to persons who are under 21. As adults giving a party with an open, self-serve bar and having guests that they did not know, it was their duty to affirmatively ensure compliance with the statute. There is no evidence that they did anything to confirm their beliefs or assumptions about the minor's age. They simply contend he looked to be over 21 and did nothing more.

Finally, the trial court again held here that the minor "voluntarily" consumed alcohol. (R.8; 9). The General Assembly, however, has declared that persons under 21 are not competent to make decisions on alcohol consumption and therefore, as a matter of law and public policy, the minor was not "voluntarily" intoxicated. And the defendants undeniably breached their duty to not provide alcohol to the minor.

V. THE TRIAL JUDGE ERRED IN FINDING THE MINOR'S "NEGLIGENCE EXCEEDED THE NEGLIGENCE, IF ANY, OF THE DEFENDANTS."

In part E of its order, the trial court concludes the minor was comparatively negligent (more than 50%) as a matter of law. (R.9-11). This conclusion rests upon repetition of the same fundamental errors made earlier in the order, to-wit: finding that the minor was "voluntarily" intoxicated, applying standards developed in cases pertaining to intoxicated adults, and finding that the defendants did not know the minor was intoxicated and believed he was over 21. Repeating these errors, made in concluding that the minor did not have a cause of action, is no less erroneous in concluding the minor was comparatively negligent as a matter of law.

As a general rule, minors over the age of fourteen are subjected to the adult standard of care on questions of negligence and comparative negligence. *McCormick v. Campbell*, 329 S.E.2d 752 (S.C. 1985); *Standard v. Shine*, 295 S.E.2d 786 (S.C. 1982). This common law doctrine, like the doctrine of comparative negligence, must yield to the public policy proclaimed by the General Assembly in exercising specific authority granted by the Constitution. *Shelton* and *McCoy*, both *supra*. It is South Carolina's public policy that persons under the age of 21 are incompetent to make decisions regarding alcohol consumption. Applying an adult standard of care as the trial court did here, will conclusively preclude any first-party actions by a minor over the age of fourteen for injuries caused by intoxication after being provided alcohol illegally.

This Court should promote rather than frustrate the public policy established by the General Assembly. The breadth and depth of the General Assembly's statutory control over underage drinking permits only one conclusion: As a matter of law and public policy, persons under the age of 21 are incapable of making adult decisions regarding alcohol consumption. Thus, unlike adults, their intoxication is not and cannot be "voluntary" in the legal sense, because they are legally incompetent to make the decision to drink alcohol. This Court should hold that persons under the age of 21 are incapable of negligence, or any other fault, in deciding to consume alcohol illegally provided by another, because they are incompetent to make this decision. To hold otherwise would be the height of hypocrisy; with the law and public policy saying that such persons are not adults with respect to deciding to drink, but suddenly become adults when they drink alcohol illegally provided to them by another. Accordingly, as a matter of law, a minor cannot be found comparatively negligent in a first party action against the person illegally providing alcohol to the minor.

Assuming this Court concludes comparative negligence is a defense to a first-party action by a minor, it should not apply the standards developed in cases involving intoxicated adults. Persons over the age of 21, who illegally provide alcohol to persons under the age of 21, should not be allowed to defend on the basis of simple negligence by someone that cannot legally possess or consume alcohol. If minors are to be chargeable with any fault in deciding to consume alcohol illegally provided to them by another, the law should proclaim that they can never be more than 50% negligent as compared to the person illegally providing the alcohol. Alternatively the law should require defendants to prove more than negligence in order to defend a first-party claim. They should be required to show that the minor's act of drinking alcohol illegally provided by the

defendant arose to gross negligence, recklessness, or assumption of the risk, and the defense should be subjected to the clear and convincing standard of proof. The foregoing rules will promote South Carolina's public policy against underage drinking, albeit not as well as the rule that should be applied here, to-wit: that minors cannot be found comparatively negligent in a first-party action.

Assuming this Court concludes the standard rules for comparative negligence apply to this case, the trial court nevertheless erred. It is axiomatic that the negligence of a party is ordinarily a question of fact for the jury. The trial court simply and blindly applied the standards developed by this Court in cases involving intoxicated adults. There are factual issues that a jury should decide as between the adult defendants and the minor plaintiff. The defendants, as adults holding a party that included unknown guests with access to an open, self-serve bar, had a duty to ascertain the age of persons drinking at their party so as to not violate their statutory duty. There is no evidence that they did anything to ascertain the minor's age other than look at him and "believe" he was over 21. They did not ask him his age. They did not have a bartender with instructions to ascertain the age of anyone requesting a drink. They did not announce that persons under 21 should not attend the party or not drink at the party, either prior to or at the party. In short, they did nothing to ensure their own compliance with the duty to not provide alcohol to persons under 21. Whether a minor's decision to drink under these circumstances was more negligent than the persons creating these circumstances manifestly is a question of fact for the jury.

CONCLUSION

As a matter of public policy, the General Assembly has proclaimed that persons under the age of 21 are incompetent to make decisions regarding alcohol, including the decision to drink and drive. This public policy compels the conclusion that minors can bring first-party actions against persons illegally providing them alcohol without being subjected to the defense of comparative negligence. For these reasons, and for the reasons set forth above, the appealed order should be reversed and the case remanded for trial.

Respectfully Submitted,

Robert L Widener
by Jane W Priller with permission

Robert L. Widener
Celeste T. Jones
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Gayla S. L. McSwain
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402
(843) 723-7831

ATTORNEYS FOR APPELLANT

Columbia, SC
February 17, 2005

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant complies with Rule 211(b) SCACR.

Robert L. Widener

Robert L. Widener by Carmen Mirkl with permission
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800