# The Supreme Court of South Carolina

In the Matter of Charles F. Bellomy, Petitioner.

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ORDER

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The records in the office of the Clerk of the Supreme Court show that on April 5, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 11, 2007, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Charles F. Bellomy shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 31, 2007

# The Supreme Court of South Carolina

In the Matter of Margaret L. Moses, Petitioner.

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ORDER

---

The records in the office of the Clerk of the Supreme Court show that on November 1, 1976, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 11, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Margaret L. Moses shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 31, 2007

# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 5**

**February 5, 2007**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

Gary Waiters, Respondent,

v.

State of South Carolina, Petitioner.

---

Appeal from Jasper County
James E. Lockemy, Circuit Court Judge

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ON WRIT OF CERTIORARI

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Opinion No. 26257
Submitted December 7, 2006 – Filed February 5, 2007

---

**REVERSED**

---

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Colleen E. Dixon, all of Columbia, for petitioner.

Chief Attorney Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense,

Division of Appellate Defense, of Columbia,
for respondent.

---

**JUSTICE MOORE:** We granted a writ of certiorari to review the grant of post-conviction relief (PCR). We reverse.

## FACTS

Respondent was indicted for distributing crack cocaine after he sold drugs to an undercover agent on July 26, 2000. He pled guilty on March 21, 2001, and was sentenced to five years as a second offender pursuant to S.C. Code Ann. § 44-53-375(B)(2) (Supp. 2005). The offense used to enhance his status to second offender occurred on July 28, 2000, two days after the offense here. On that date, respondent was searched pursuant to arrest on an unrelated charge and found to be in possession of crack cocaine. He pled guilty to possession of crack on September 26, 2000.

Respondent subsequently brought this PCR action claiming he would not have pled guilty had he known he would be sentenced as a second offender. He argued that because the date of the offense used to enhance his punishment occurred after the date of the offense in this case, he should not have been treated as a second offender. The PCR judge found counsel ineffective for failing to raise the issue at the plea hearing and vacated respondent's plea.

## ISSUE

Does the date of the crime determine second-offender status?

## DISCUSSION

Respondent was sentenced as a second offender under § 44-53-375(B)(2).[1] A "second offense" is defined in S.C. Code Ann. § 44-53-470[2] as follows:

> An offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article . . . .

At the time of respondent's plea, he had a prior conviction under § 44-53-375(A), a provision in the same article as § 44-53-470; therefore, under the plain language of § 44-53-470, respondent was properly sentenced as a second offender. *See* Patterson v. State, 359 S.C. 115, 597 S.E.2d 150 (2004) (§ 44-53-470 determines second offender status for conviction under § 44-53-375(A)). Under § 44-53-470, the timing of the crimes is irrelevant to the determination of a subsequent offense so long as there is a prior conviction.[3]

---

[1] This section provides in pertinent part:

> (B) A person who . . . distributes . . . crack cocaine . . . upon conviction:
>
> . . .
>
> (2) for a second offense . . . the offender must be imprisoned for not more than twenty-five years and fined not less than fifty thousand dollars. . . .

[2] This section was subsequently modified in 2005.

[3] Respondent has never claimed the two crimes were part of a continuous course of conduct. *Cf.* State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003) (applying § 17-25-50 to crimes so closely connected as to be treated as one offense).

In conclusion, because respondent was properly treated as a second offender, the PCR judge erred in finding counsel ineffective. Accordingly, the grant of relief is

**REVERSED.**

**TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

Walter McSherry, individually and on behalf of all others similarly situated, and the South Carolina Public Interest Foundation, Appellants,

v.

Spartanburg County Council, Chairman Jeffery A. Horton, Johnnye Code-Stewart, Steve Parker, David Britt, Rock Adams, Ken Huckaby, and Frank Nutt, Respondents.

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Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

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Opinion No. 26258
Heard January 3, 2007 – Filed February 5, 2007

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**AFFIRMED**

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James G. Carpenter and Jennifer J. Miller, both of The Carpenter Law Firm, of Greenville, for Appellants.

Edwin C. Haskell, III, of Spartanburg, for Respondents.

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**CHIEF JUSTICE TOAL:** Walter McSherry and the South Carolina Public Interest Foundation (collectively "Appellants") appeal an order of the circuit court denying their request for declaratory relief and holding that Respondent, Spartanburg County Council ("Council"), properly enacted a $25.00 road maintenance fee ordinance. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

At a publicly advertised Council meeting in February 2005, council member Ken Huckaby made a motion to adopt a road user fee of $25.00 for Spartanburg County. The county attorney moved to have the "first reading of an Ordinance to adopt the road fee by title only," and advised Council that he would have something drafted up for the next meeting. At the time, neither the title nor the ordinance was written. By Council's next meeting, however, the proposed ordinance had been reduced to writing. In late February 2005, Council held a public hearing to discuss the ordinance and the ordinance received second reading. The ordinance received third reading in March 2005. The ordinance became effective July 1, 2005.

Appellants instituted this complaint for declaratory relief, contending the ordinance was not lawfully enacted because it did not exist in written form at the time of the first reading. The circuit court upheld the ordinance, finding Council had sufficiently complied with the three reading requirement of S.C. Code Ann. § 4-9-120 (1986).[1]

Appellants filed this appeal, and we certified this case from the court of appeals pursuant to Rule 204(b), SCACR. Appellants present the following issue for this Court's review:

> Did the circuit court err in holding the road maintenance fee ordinance was properly enacted?

[1] Council has since enacted a similar road maintenance fee ordinance and began collecting the fee under that ordinance. This second ordinance has not been challenged in this case. Accordingly, the only fees at issue on appeal are those collected for several months under the initial ordinance.

## LAW/ANALYSIS

S.C. Code Ann. § 4-9-120 (1986) sets forth procedures to be used by County governments in adopting ordinances. It provides, in part:

> The council shall take legislative action by ordinance which may be introduced by any member. With the exception of emergency ordinances, all ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings.

*Id*. Furthermore, S.C. Code Ann. § 4-9-110 (1986) provides that "council shall determine its own rules and order of business." Pursuant to § 4-9-110, Spartanburg adopted the Spartanburg County Council Rules of Procedure. Article 9 of those rules provides, in part, as follows:

> 9-1 ORDINANCES AND RESOLUTIONS IN GENERAL (4-9-120): The Council shall take legislative action by ordinance. . .
>
> 9-2 READINGS: with the exception of emergency ordinances, all ordinances shall be read at three public meetings of the Council on three separate days with an interval of not less than seven days between the second and third reading; provided that a verbatim reading of an ordinance shall not be required unless such reading is requested by a member.
>
> 9-3 FIRST READING: **An ordinance may be introduced for first reading at any meeting of the Council by title only**.[2] No vote shall be taken and no debate or amendment shall be in order. The ordinance shall be referred by the Chairperson to an appropriate committee or to the Council as a whole.

[2] Subsequent to the trial court's issuing its final order, Council amended this language to read, "[t]he title to the ordinance shall be in writing at the time the ordinance is introduced and shall disclose the object of the ordinance."

> 9-4 SECOND READING: Reports on a proposed ordinance shall be presented at the next meeting after the first reading, . . . **Prior to the second reading, a draft of the text of the ordinance shall be delivered to every membe**r. After the proposed ordinance shall have been read, amendments shall be in order . . . . Any member of the Council may require that amendments be in writing.

(emphasis supplied).

Appellants acknowledge that an ordinance may validly be introduced for first reading by title only. However, Appellants assert that the procedure in this case was fundamentally flawed inasmuch as there was no ordinance in existence at the time of the first reading. Although we are disconcerted by the methodology utilized by Council in this matter, we disagree with Appellants' argument.

Our precedent provides:

> [T]he first reading of a bill is merely a formal matter on which no vote is taken, and . . . the construction placed by the Legislature upon its own procedure for so many years should be regarded as the correct interpretation. The courts of almost all of our states have adopted the rule that the legislative construction placed upon doubtful constitutional provisions is entitled to great weight and consideration, and raises a strong presumption that it is correct, and will generally be adopted by the courts.

*Thompson v. Livingston*, 116 S.C. 412, 419, 107 S.E.2d 581, 583 (1921). Furthermore, "[i]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power." *Sloan v. Greenville County*, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003).

As noted, Council's Rules of Procedure Section 9-3 allows for a first reading by title only, and provides that the matter may then be referred to a committee. Section 9-4 then allows that, prior to a second reading, a draft of the text of the ordinance shall be delivered to every member. Implicit in this language is the possibility that the ordinance may be drafted in between the first and second readings. Importantly, nothing in the Code or in Article VIII of the South Carolina Constitution, which authorizes and establishes Home Rule, requires that an ordinance be in written form when it receives first reading. Thus, there is neither a constitutional provision nor a statutory requirement on which this Court could base an invalidation of Council's rules and procedures.

The minutes of the first meeting wherein the road maintenance fee was suggested reveal that Council discussed the proposed ordinance at length and that all members were well aware of the nature and reason for the road maintenance fee. As noted by the circuit court, "considering [Article 9] as a whole, it is clear that the requirements of this Article envision a process where ordinances can be developed from a possibly conceptual idea (section 9-3), to where a draft text of a proposed ordinance is developed and modified (section 9-4)." Although the better practice may have been for the title to be in writing at the time of the first reading, we cannot say that this alone caused the ordinance's enactment to be invalid. *Cf. Bauer v. South Carolina State Hous. Auth.*, 271 S.C. 219, 231, 246 S.E.2d 869, 875 (1978) (legislation is not invalid simply because this Court feels a different methodology would have been more effective).

## CONCLUSION

For the foregoing reasons, we affirm the trial court's decision.

**MOORE, BURNETT, JJ., and Acting Justices James W. Johnson, Jr. and L. Casey Manning, concur.**

# The Supreme Court of South Carolina

Linda Gail Marcum, as Personal Representative of the Estate of Justin Michael Parks, Appellant,

v.

Donald Mayon Bowden, Gloria Bowden, and Utility Services Agency, Inc., Respondents.

---

AND

---

Rudolph Barnes, as Personal Representative of the Estate of Doris Ann Barnes, Respondent,

v.

Cohen Dry Wall Inc., and Aelina Martin, as Personal Representative of the Estate of Orin Tilman Feagin, Defendants,

Of Whom Cohen Dry Wall Inc. is the Petitioner.

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ORDER

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We granted petitions for rehearing in Marcum v. Barnes, Op. No. 26035 (S.C. Sup. Ct. filed August 29, 2005) and Barnes v. Cohen Dry Wall Inc., Op. No. 26036 (S.C. Sup. Ct. filed August 29, 2005). We now withdraw those opinions, and substitute the attached opinion which disposes of both appeals.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

February 1, 2007

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

Linda Gail Marcum, as
Personal Representative of the
Estate of Justin Michael Parks, Appellant,

v.

Donald Mayon Bowden, Gloria
Bowden, and Utility Services
Agency, Inc., Respondents.

---

Appeal From Richland County
James R. Barber, Circuit Court Judge

---

**AFFIRMED**

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Gayla S.L. McSwain, of McNair Law Firm, of Charleston, and Robert L. Widener, Celeste T. Jones, and Andrew G. Melling, all of McNair Law Firm, of Columbia, for Appellant.

Eric G. Fosmire, of Collins & Lacy, Karl S. Brehmer, and J. Austin Hood, of Brown & Brehmer, all of Columbia, for Respondents.

---

**AND**

---

Rudolph Barnes, as Personal Representative of the Estate of Doris Ann Barnes, Respondent,

v.

Cohen Dry Wall Inc., and Aelina Martin, as Personal Representative of the Estate of Orin Tilman Feagin, Defendants,

Of Whom Cohen Dry Wall Inc. is Petitioner.

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ON WRIT OF CERTIORARI TO COURT OF APPEALS

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Appeal From Berkeley County
Clifton Newman, Circuit Court Judge

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Opinion No. 26259
Reheard May 23, 2006 – Refiled February 5, 2007

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**REVERSED**

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N. Heyward Clarkson III, Charles F. Turner, Jr., and Sean A. Scoopmire, all of Clarkson, Walsh, Rheney & Turner, of Greenville, for Petitioner.

George J. Kefalos, of Charleston, for Respondent.

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**JUSTICE PLEICONES:** These cases ask whether an adult social host who serves alcoholic beverages to an underage guest, that is, a person between the ages of 18 and 20 who is not a minor but who cannot, in most instances, legally consume alcohol, owes a duty to the guest or to third parties injured or killed by the guest in an alcohol related incident. We recognize today this common law duty:

> An adult social host who knowingly and intentionally serves**,** or causes to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages proximately resulting from the host's service of alcohol.[1]

Because our decision today creates tort liability where formerly there was none, a social host will be liable only for claims arising after the effective date of this decision. See, e.g., Toth v. Square D Co., 298 S.C. 6, 377 S.E.2d 584 (1989).[2] We therefore affirm the circuit court order in Marcum which

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[1] As the issue is not before us, we leave for another day the question whether an adult social host who is merely negligent in allowing the consumption of alcoholic beverages by a minor guest under the age of 18 may incur liability. Let there be no doubt, however, that an adult social host who knowingly and intentionally serves, or causes to be served, alcoholic beverages to a minor under 18 is liable to both the guest and third parties.

[2] Although the dissent acknowledges this general rule, it would adopt a rule that occasionally "rewards" the plaintiff in the case where the new tort duty is adopted by giving that plaintiff the right to proceed on the new theory. The dissent cites numerous cases which allegedly support this new rule. Four of those cases involve the abolition of immunity defenses and a fifth the abolition of the assumption of the risk defense: simply put, the abolition of an affirmative defense does not create a new duty.

Further, in Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 377 S.E.2d 584 (1989) and Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985), this Court did allow the plaintiffs to proceed on the new tort theory, but pointed out in each case that the change had been foreshadowed. See Ludwick, 287 S.C. at 222, 337 S.E.2d at 215 ("language in recent opinions of this Court and our Court of Appeals reflects…the likelihood that the [strict application of the employment at will] doctrine will be reviewed in an appropriate South Carolina case"); Kinard, 286 S.C. at 581, 336 S.E.2d at 466 ("modern trend recognizes that emotional tranquility is an interest worthy of protection;" and noting in footnote that new tort had recently been rejected in a different case because its facts did not state a claim); compare Charleston County School Dist. v. State Budget & Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) (tort retroactivity is permissible where "new tort" is simply an extension which had been clearly foreshadowed). To the extent the dissent would rely on commercial vendor liability cases as foreshadowing today's social host decision, we simply note that our most recent commercial vendor decision actually limited the server's liability. Tobias v. The Sports Club, 332 S.C. 90, 504 S.E.2d 318 (1998).

The only appellate decision which arguably permits the plaintiff the benefit of the newly-recognized, non-foreshadowed tort duty is McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997), but it is unclear whether the Court of Appeals found this new duty in the common law or in legislative enactments. McCormick may represent an aberration: it is certainly not our general rule.

Finally, the dissent's reliance on Aka v. Jefferson Hosp. Assoc., Inc., 42 S.W.3d 508 (Ark. 2001) is simply misplaced: in Aka the Arkansas Supreme Court did not recognize a new common law tort, but rather overruled its prior interpretation of a statutory term in light of subsequent legislation. This statutory interpretation precedent arguably conflicts with South Carolina's jurisprudence, see JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005), and is neither relevant nor persuasive.

granted summary judgment to the social host defendants, and reverse the Court of Appeals' decision in Barnes[3] which affirmed a jury verdict against the host defendants.

## FACTS

In light of our disposition of these two appeals, we engage in only a brief review of the facts.

### A. Marcum

The Bowdens hosted a late afternoon cookout at their home, inviting mostly business acquaintances. The decedent, aged 19, attended the party where alcoholic beverages were available to all guests. The decedent, who had consumed alcohol at the party, left with other guests. One of these guests detained the decedent at the guest's home in order to give the decedent time to "sober up." The decedent drove himself from this guest's home, and was killed in a one-car accident. At the time of his death, the decedent had a blood alcohol content of 0.291%.

Decedent's mother, as his personal representative, brought this wrongful death action against the Bowdens and the company hosting the party (Hosts) alleging they were negligent. The circuit court granted the Hosts' motion for summary judgment, holding that a social host was not liable to an underage person who is injured or killed after consuming alcoholic beverages provided by the host.

### B. Barnes

Barnes involves a third party claim against the defendant social host rather than a first party claim as advanced in Marcum. As in Marcum, the decedent was a nineteen-year-old guest at a business-related function. There was evidence that the decedent consumed alcohol provided by the Host at the

[3] Barnes v. Cohen Dry Wall, Inc., 357 S.C. 280, 546 S.E.2d 311 (Ct. App. 2003).

party. Again, like the underage drinker in Marcum, the decedent was not involved in an accident upon leaving the party, but rather traveled to several other locations before being involved in a two-car accident. This accident killed both the decedent and a passenger in the other car.

The passenger's personal representative (Barnes) sued both the Host and the estate of the underaged drinker in negligence. The jury returned a $750,000 verdict against both the Host and the decedent driver's estate, finding the decedent driver 80% responsible.

The Host appealed, contending as it had in the circuit court that it was not liable in tort to the third party killed by its underage guest. The Court of Appeals affirmed the jury verdict against the Host, finding two statutes which prohibit a social host from serving alcohol to persons under 21[4] created a duty running from the host to third parties. We granted certiorari to review this decision.

## ISSUE

> Does an adult social host who serves alcoholic beverages to an underage person owe a duty to that guest and/or a third party injured as a proximate result of the host's service of alcohol?

## ANALYSIS

It is within this Court's purview to change the common law. Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993). "[T]he common law changes when necessary to serve the needs of the people [and] [w]e have not hesitated to act in the past when it has become apparent that the public policy of this

[4] S.C. Code Ann. §§ 61-4-90 and 61-6-4070 (Supp. 2005).

State is offended by outdated rules of law." Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992).[5]

At present, a South Carolina social host incurs no liability to either first or third parties injured by an intoxicated adult guest. Garren v. Cummings & McCrady, Inc., 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986). In fact, a commercial host is liable only to third parties, and then only when he knowingly sells alcoholic beverages to an intoxicated person. Tobias v. Sports Club, Inc., 332 S.C. 90, 504 S.E.2d 318 (1998). In imposing this limited liability upon commercial hosts, the Court relied upon alcohol beverage control statutes to extend liability to third persons, and upon public policy concerns to deny recovery to the intoxicated adult patron.

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[5] In Russo, the Court abolished the tort of alienation of affections, and applied that ruling prospectively. In that opinion, the Court noted its ability to apply common law changes retroactively as well as prospectively. It would offend notions of fairness, however, to retroactively impose tort liability where previously there had been none, as would be the case here if we were to apply our new rule to these cases. This is especially so since the liability we create today arises from intentional conduct while these plaintiffs have contended only that these defendants were negligent. The dissent misapprehends the import of the use of the word "willful" in the complaints: the terms "willful" and "wanton" when pled in a negligence case are synonymous with "reckless," and import a greater degree of culpability than mere negligence. See, e.g., Suber v. Smith, 243 S.C. 458, 134 S.E.2d 404 (1964). Evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages. E.g., Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (1986). In order to permit these plaintiffs to take advantage of the rule we announce today, we would be required to order the circuit court to allow these plaintiffs to amend their complaints on remand, that is, assuming the plaintiffs could, consonant with Rule 11, SCRCP, plead an intentional tort. This ruling would compound the unfairness to these defendants, who, under the law as it then stood, committed no civil wrong when underage drinkers consumed alcohol at their parties.

In other commercial settings, South Carolina appellate courts have held that a statute criminalizing the sale of beer or wine to a person under the age of 21[6] and one providing regulatory penalties for the knowing sale to a person under 21[7] places a duty on a commercial vendor. A vendor who violates this duty and sells to a person under 21 may be liable to the unlawful purchaser, and to third parties harmed by the purchaser's consumption of the alcohol. Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991). In a different setting, our courts imposed third party liability on the holder of an on-premises sales and consumption license who violated an alcoholic beverage control regulation by permitting an underage person to consume alcoholic beverages on the holder's premises. Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994) *aff'd* 319 S.C. 469, 462 S.E.2d 861 (1995).

Simply stated, South Carolina courts have declined to impose a common law duty on social hosts who serve intoxicated adults, but have relied upon alcoholic beverage control statutes and regulations to impose liability, under limited circumstances, upon commercial hosts, vendors, and licensees. In deciding today whether to impose social host liability for service to underage guests, we keep these precedents in mind. We are also mindful that policy concerns militate against a rule which would hold a social host to a higher standard than that to which a commercial provider is held.

It is contended that we should impose social host liability for service to underage persons grounded upon two alcoholic beverage control statutes which impose criminal penalties, under certain circumstances, to persons who transfer or give alcoholic beverages to persons under the age of 21.[8] As explained below, we find the source of duty is the common law, not legislative enactments. Conversely, we are urged to treat underage drinkers as we do other adults, placing no liability upon the social host for torts

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[6] See S.C. Code Ann. § 61-4-50 (Supp. 2005).
[7] See S.C. Code Ann. § 61-4-580 (Supp. 2005).
[8] S.C. Code Ann. § 61-4-90 (Supp. 2005) (beer or wine); § 61-6-4070 (Supp. 2005) (alcoholic liquors).

committed by their intoxicated guests. See Garren, *supra*. We decline to accept this invitation.

In determining whether, as a matter of public policy, underage drinkers should be viewed differently from adult drinkers aged 21 and over, we are guided by the policy expressions found in our state constitution and statutes. The constitution provides that persons aged 18 to 20 "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." S. C. Const. art. XVII, § 14 (1976); see also S.C. Code Ann. § 15-1-320(a) (2005) (references to minors in state law deemed to mean persons under the age of 18 years except when laws relate to alcohol sales). While underage persons have full social and civil rights, we find the public policy of this State treats these individuals as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages. See Norton v. Opening Break, *supra*. Accordingly, we hold that adult social hosts who knowingly and intentionally serve, or cause to be served, alcoholic beverages to persons they know or should know to be between the ages of 18 and 20 may incur liability where, under the same circumstances, they are immune for service to persons aged at least 21 years old.

We next explain why the duty we impose today is founded upon our responsibility to adapt the common law to the realities of the modern world rather than predicated on the alcohol beverage control statutes criminalizing the transfer or gift of alcoholic beverages to persons less than 21 years of age. S.C. Code Ann. §§ 61-4-90; 61-6-4070.

While both S.C. Code Ann. § 61-4-90 and § 61-6-4070 begin with a general prohibition on the transfer of alcoholic beverages to persons under the age of 21, each goes on to provide a number of exceptions to the general rule. In brief, these exceptions allow a parent or spouse over the age of twenty-one to serve their underage child or spouse; permit the giving of alcohol in conjunction with a religious ceremony or purpose; and permit a student to "taste" an alcoholic beverage in conjunction with academic instruction. As other courts have explained, such exceptions logically require us to construe these 'giving' statutes to protect only the person under 21 who

consumes the alcohol, not the general public. E.g., Davis v. Billy's Can-Teena, Inc., 284 Or. 351, 587 P.2d 75 (Or. 1978) *superseded by statute* as stated in Gattman v. Favro, 306 Or. 11, 757 P.2d 402 (1988); Hostetler v. Ward, 41 Wash. App. 343, 704 P.2d 1193 (Wash. App. 1985). A holding that an adult social host is liable only to the underage drinker herself and not to any injured third party would contravene the public policy of this state, see Tobias, *supra*, yet a duty explicitly predicated on these statutes would logically permit us only that rule. We, therefore, find no civil cause of action is created by these statutes. Cf., Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 338 S.E.2d 155 (1985) (no civil cause of action under contributing to delinquency of minors statute or statute criminalizing sale of tobacco to minors).

Although we find no duty in the statutes, we do find in them support for our decision to extend the common law and impose liability on adult social hosts who knowingly and intentionally serve underage guests. In determining whether to adhere to our current common law rule that a social host owes no duty, we look to the numerous statutes prohibiting the furnishing of alcohol to persons under 21, and to other legislation governing driving under the influence. As Wisconsin Chief Justice Hallows said over 35 years ago in dissent,

> The time has arrived when this court should again exercise its inherent power as the guardian of the common law and [impose liability for service of alcohol].…[T]he common law in this state…has been to the contrary…but the basis upon which these cases were decided is sadly eroded by the shift from commingling alcohol and horses to commingling alcohol and horsepower.
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> Garcia v. Hargrove, 46 Wis. 2d 724, 737, 176 N.W.2d 566, 572 (1970).

Fourteen years after this dissent, Wisconsin adopted the Chief Justice's view. See Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

## CONCLUSION

Consonant with our duty to declare the common law, we hold that henceforth adult social hosts who knowingly and intentionally serve, or cause to be served, an alcoholic beverage to a person they know or should know is between the ages of 18 and 20 are liable to the person served, and to any other person, for damages proximately caused by the host's service of alcohol.

The order granting the Marcum defendants summary judgment is

**AFFIRMED**.

The decision of the Court of Appeals affirming the respondent's jury verdict against petitioner in Barnes is

**REVERSED**.

**MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J. concurring in part, dissenting in part in a separate opinion.**

**CHIEF JUSTICE TOAL**: I concur in part and respectfully dissent in part. Although I agree with the majority's adoption of the rule imposing limited social host liability, I would reverse and remand both cases and allow the parties to litigate their disputes under the rule adopted by the Court.

Generally, judicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Stated otherwise, prospective application is required when liability is created where formerly none existed. *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) (internal citations omitted). In applying our general rule, this Court and the court of appeals have made decisions "selectively prospective" by applying the rule to the case at bar and to all future cases. *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 400 n.8, 520 S.E.2d 142, 156 n.8 (1999) (explaining retroactive and prospective application of decisions); *see, e.g., Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225-26, 337 S.E.2d 213, 216 (1985) (holding "[o]ur modification of the termination at will doctrine, as set forth in this opinion, applies only to this case and to those causes of action arising after the filing of this opinion. . . ."); and *McCormick v. England*, 328 S.C. 627, 644, 494 S.E.2d 431, 439 (Ct. App. 1997) (recognizing the common law tort of breach of a physician's duty of confidentiality, and applying decision in this case and prospectively).[9]

[9] The majority incorrectly implies that this Court may only permit a party to benefit from the recognition of new tort liability where the imposition of the new tort liability was foreshadowed by previous decisions. However, assuming foreshadowing is required, I believe our pronouncement of limited first and third party social host liability was adequately foreshadowed by our extension of liability in the commercial context and the statutory laws criminalizing such behavior. *See* S.C. Code Ann § 61-4-90 (Supp. 2005) *and* § 61-6-4070 (Supp. 2005). *See also Norton v. Opening Break of Aiken , Inc.*, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994) *aff'd* 319 S.C. 469, 462 S.E.2d 861 (1995); *Witlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991).

Additionally, the majority incorrectly assumes that *Ludwick* and *McCormick* represent this Court's entire jurisprudence on the matter.

In my view, we should extend our decision to impose limited first and third party social host liability to the cases before us today and all future cases which arise after the filing of our opinion. Resolving the cases in this manner would, in my opinion, allow the plaintiffs the benefit of the change in the law which they induced without making our decision retroactive.

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However, this Court has often allowed the parties to an action which prompts a rule change to utilize the new rule. *See Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998) (holding that the abolition of assumption of risk as an "all or nothing" defense would be applied to the action in which that ruling was made and to all other causes of action that arose or accrued after date of opinion); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) (recognizing the new cause of action by plaintiff bystander for negligent infliction of emotional distress and applying the new rule to the case); *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (prospectively abolishing sovereign immunity and applying the new rule to the case before the court); *Fitzer v. Greater Greenville, S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 282 S.E.2d 230 (1981) (applying the new rule abrogating the doctrine of charitable immunity to the case which prompted the rule change); *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980) (abolishing the court-created parental immunity doctrine applicable to tort actions brought by unemancipated minors against their parents and applying the new rule to the case at hand and prospectively); *Brown v. Anderson County Hosp. Assoc.*, 268 S.C. 479, 234 S.E.2d 873 (1977) (modifying doctrine of charitable immunity, such that charitable hospitals are liable for heedless and reckless acts, and applying decision in this case and prospectively).

The majority points out that many of the aforementioned cases involve the abolition of an affirmative defense. While I agree that the abolition of an affirmative defense does not "create a new duty," such abolition *does impose liability* where previously none existed. *See McCall*, 285 S.C. at 246, 329 S.E.2d at 742 (acknowledging the creation of new tort liability).

The majority declines to extend its ruling to the instant cases because it would "offend notions of fairness . . . to retroactively impose tort liability where previously there had been none. . . ." In support of this holding, the majority relies upon the Court's decision in *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992). While the Court did not apply its decision abolishing the tort of alienation of affections in *Russo*, in my view, *Russo* is not the exclusive representation of how this Court and others handle cases where a judicial decision prompts a change in the law.[10] *See supra* note 1.

Although I do not think that the imposition of newly created tort liability is appropriate in all cases, in my view, to expect litigants to bear the burdens associated with effecting a needed change in the law without the expectation that they will receive the benefits of the change in the law is more offensive to our notions of fairness as well as crippling to our legal system.[11] *Cf. Aka v. Jefferson Hosp. Assoc., Inc.*, 42 S.W.3d 508, 519 (Ark.

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[10] Again, I believe the portion of the majority's rationale which relies on the concept of fairness is misguided. While I understand that fairness is an important consideration, I cannot envision that an extension of *potential* liability would amount to unfairness in the cases before us today. Arguably, tort liability involves a calculation of risks in evaluating whether to undertake a certain course of action. In the majority's view, extending our ruling to the cases before us today impermissibly adds another variable in the calculus. Stated otherwise, the majority might argue that the potential imposition of civil liability upon the defendants in these cases impermissibly increases their expected accident costs such that it would dramatically change the nature of their decision to serve alcohol at their events. In my view, this critically overstates the case. Although no civil liability existed for social hosts at the time of these incidents, I find it difficult to believe that the defendants were ignorant of any potential liability which could result from serving alcohol to underage drinkers in light of the existence of criminal statutes prohibiting such behavior and our expanding extension of liability in the commercial context.

[11] The majority also finds that the plaintiffs have contended only that the defendants were negligent. However, in my opinion, the complaints in these

2001) (concluding that "appellant's efforts to bring about a needed change in the law should not go unrewarded, because without such inducement change might not occur.") (internal citations omitted).[12] Additionally, I believe the majority's resolution of this case is profoundly impractical and based on hypertechnical analysis of citations that does not adequately provide a rationale for why past litigants have been able to pursue their cases while the litigants in these cases are denied similar relief.

For the foregoing reasons, I would reverse and remand these cases with instructions to retry them in accordance with our recognition of limited first and third party social host liability.

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cases actually allege both negligent and willful conduct. Because the plaintiffs' complaints allege an intentional tort, there is no impediment to remanding these cases to allow the parties to proceed under the new rule.

[12] The majority misapprehends the use of *Aka* in this dissent. Clearly, from the context and form of the citation, *Aka* is used to emphasize the rationale under which I find it both practical and just to extend our ruling today to the litigants in these cases, and not in support of the general concept of retroactive/prospective application of rules. However, for further clarification, I use *Aka* only to support the proposition that litigants should not be expected to bear the burdens associated with effecting a needed change in the law without the expectation that they will receive the benefits of the change in the law. Accordingly, my use of this case does not conflict with South Carolina's jurisprudence on the retroactive application of statutory changes in the law.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Petitioner,

v.

Michael Dunbar, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Lexington County
Rodney A. Peeples, Circuit Court Judge

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Opinion No. 26260
Heard January 18, 2007 – Filed February 5, 2007

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**DISMISSED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Donald V. Myers, of Lexington, for petitioner.

Appellate Defender Kathrine H. Hudgins, of Columbia, for respondent.

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**PER CURIAM:** We granted this petition for a writ of certiorari to review the Court of Appeals' opinion in State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004). After careful consideration, we now dismiss certiorari as improvidently granted.

**DISMISSED.**

**TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.**

# The Supreme Court of South Carolina

Laterrence Dunlap, Petitioner,

v.

State of South Carolina, Respondent.

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ORDER

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Petitioner seeks a writ of certiorari to review an order of the Court of Appeals denying his request for a writ of certiorari in this post-conviction relief (PCR) action. We deny the petition for a writ of certiorari.

Because this Court only recently began transferring PCR actions to the Court of Appeals, the first petitions for writs of certiorari to the Court of Appeals in PCR actions are now being filed with this Court. We take this opportunity to remind the Bar that petitions for writs of certiorari following a decision by the Court of Appeals in these actions are not required.

In appeals from criminal convictions **or post-conviction relief matters**, a litigant is not required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief*

*Cases,* 321 S.C. 563, 471 S.E.2d 454 (1990). Instead, when the claim has been presented to the Court of Appeals, and relief has been denied, the litigant is deemed to have exhausted all available state remedies. *Id.*

In addition, we have held that appellate counsel is not required to seek a writ of certiorari following the decision of the Court of Appeals in a criminal direct appeal because this would merely increase this Court's workload. *Douglas v. State***,** 369 S.C. 213, 631 S.E.2d 542 (2006). We extend this reasoning to PCR actions and hold appellate counsel is not required to seek certiorari from a decision of the Court of Appeals in a PCR action.

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

January 31, 2007

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Appellant,

v.

Arthur Franklin Smith, Respondent.

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Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

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Opinion No. 4202
Heard December 4, 2006 – Filed February 5, 2007

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**AFFIRMED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor I. McDuffie Stone, III, of Beaufort, for Appellant.

Acting Chief Attorney Joseph L. Savitz, III, Office of Appellate Defense, of Columbia, for Respondent.

**STILWELL, J.:** Arthur Franklin Smith was convicted of first degree criminal sexual conduct with a minor and sentenced to twenty years imprisonment. The trial judge granted Smith's new trial motion on the ground he was denied a fair trial, because the testimony of the victim, John Doe,[1] was corrupted and his free will potentially overridden by the coaching of Doe's aunt, Cynthia, during his testimony. The State appeals the grant of a new trial. We affirm.

## FACTS

Smith, Doe, and the rest of their immediate family moved to Bluffton from New York in the summer of 1998. After the move to South Carolina, Smith and Doe's mother were divorced. Doe was removed from his mother's care after he was discovered engaging in sexual behavior with the son of his mother's boyfriend. Doe underwent counseling, entered a sexual offender addiction program and was placed in Cynthia's custody.

Cynthia testified that she and Doe's teachers were alarmed by Doe's unusual behavior. Doe would urinate on the walls of his bathroom and bedroom and wipe his feces on the walls at school. Doe also exhibited violent behavior at home and became very difficult to control at school. Concerned by Doe's behavior, Cynthia enrolled him in counseling. Doe eventually revealed Smith's molestation of him during one of the counseling sessions.

Doe testified that Smith abused him when Doe was six or seven years old during visits to Smith's home. Smith warned Doe that if he revealed the abuse to anyone, Smith would "kill [Doe] or break [Doe's] bones." Doe described appalling sexual abuse and testified that such abuse occurred more than three times.

After Doe finished testifying, Smith, through his counsel, requested that the trial court remove Cynthia from the courtroom while Roe testified.

[1] We refer to the victim as John Doe and his older brother as Richard Roe to protect the identities of the minors involved.

Counsel stated: "I didn't object after [Cynthia] testified to [her] be[ing] in the courtroom. But it was apparent during [Doe]'s testimony that there were motions and mouth movement and things going back and forth between the witness and [Cynthia] and that was reported to me by individuals in the courtroom." Cynthia then voluntarily left the courtroom.

Doe's brother, Richard Roe, who was fifteen at the time of trial, testified in an in camera Lyle[2] hearing that he suffered similar abuse from Smith when he was six or seven years old. The abuse allegedly occurred several times when the family lived in New York, but stopped once the family moved to South Carolina.

After Roe finished testifying, Smith moved for a mistrial on the ground that Cynthia coached Doe during his testimony. The trial court denied the motion on the grounds that Smith's counsel knew or should have known of the coaching and did not make a contemporaneous objection so that corrective action could be taken. Smith renewed the motion for a mistrial at the conclusion of the State's case, and the trial court again denied the motion.

The trial court sent the case to the jury, which found Smith guilty. After sentencing, the issue of the extent of the aunt's coaching of Doe during his testimony was revisited.

After hearing testimony from court officials who witnessed Cynthia's alleged coaching of Doe, the trial court granted Smith's motion for a new trial. In doing so, the trial court concluded that: 1) Cynthia used body language and other non-verbal signals in an attempt to communicate with Doe; 2) this communication may have overridden Doe's free will; and 3) this behavior and the potential for corruption of Doe's testimony denied Smith his right to a fair trial. The State appeals.

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[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

## DISCUSSION

### Appealability

Our case law makes clear that in order for the State to appeal the grant of a motion for a new trial, the error of the trial judge in granting the motion must be predicated on an error of law. See State v. DesChamps, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923) ("[W]here the grant of a new trial in a criminal cause is predicated wholly upon error of law, we think an appeal by the State will lie."); See also State v. Johnson, 363 S.C. 184, 189, 610 S.E.2d 305, 307 (Ct. App. 2005) ("The State may appeal the grant of a new trial when it appears it is based 'wholly upon an error of law.'") (quoting State v. Dasher 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982)). The State contends that there is no evidence in the record to support the trial judge's finding that Cynthia's coaching actually affected Doe's testimony resulting in prejudice to Smith. They rely on Doe's testimony during re-direct examination that his responses were his own.[3] At oral argument, the State asserted that this complete lack of evidence made the judge's grant of a new trial rise to the level of an abuse of discretion and error of law. However, the trial judge appears to have based his decision to grant a new trial on the factual findings that Cynthia made the impermissible gestures to Doe during his testimony and that there was a likelihood he was improperly influenced. While there are lingering questions regarding its appealability, this issue presents at least a mixed question of law and fact, and we elect to address it on the merits.

### Law/Analysis

Examining the issue on the merits, we must first consider our scope of review. "[T]he grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). "An abuse of discretion occurs when a trial court's decision is unsupported

[3] Doe was not examined during the post-trial hearing as by then he and Roe had returned to their home out of state.

by the evidence or controlled by an error of law." State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 129 (Ct. App. 2005).

The State argues there was no evidence in the record to support a finding that Doe's testimony was influenced by Cynthia's coaching. We disagree. All parties acknowledge that Cynthia acted inappropriately making mouthing words to Doe and shaking her head during his testimony. The trial judge was in a better position than we are to determine whether Doe may have been influenced by the coaching. He was present in the courtroom to view the visual relationship between the relevant participants during the testimony and was able to observe Doe's demeanor and hear his responses. See State v. Squires, 248 S.C. 239, 246, 149 S.E.2d 601, 604 (1966) (deferring to "[t]he trial judge, who was in position to know and observe all of the circumstances" and conclude an argument was not prejudicial); Collins v. Collins, 283 S.C. 526, 529, 324 S.E.2d 82, 84 (Ct. App. 1984) ("[T]he trial judge, who observes the witnesses and is in a better position to judge their demeanor and veracity, is given broad discretion."). The trial judge also observed Cynthia and heard the testimony of the witnesses who saw her inappropriate gestures during Doe's testimony. There was evidence in the record to support the judge's decision, so that the granting of a new trial was not an abuse of discretion.

Additionally, we are not persuaded by the State's argument that Smith waived his right to request a mistrial when he failed to contemporaneously object to the coaching. First, it is not clear from the record that the coaching was apparent to Smith's counsel during Doe's cross-examination. The trial judge acknowledges in the record that he himself did not see the coaching when it first occurred. It appears that Smith brought the misconduct to the court's attention as soon as the extent of the coaching was revealed. The trial judge did initially determine that Smith waived any objection. However, the judge only had a portion of the relevant information before him and did not have the luxury of time, as do appellate courts, to weigh and ponder the question. As trial judges are often required to do, he had to make a ruling on the spot. When that initial decision was made, he did not have the benefit of the testimony at the hearing from witnesses who were in a better position to see what had transpired between Doe and Cynthia. Once privy to this

additional information, the judge became convinced that the chance of prejudice to Smith was much greater than he initially thought. Surely, under such circumstances, a judge has the latitude to change his mind about a prior ruling. Just as a judge retains the power to change a ruling on a motion in limine based on developments at trial, a judge has the prerogative to change his mind with respect to a ruling when reflection and information convince him that his prior ruling was incorrect. See State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 842 (1988) (stating a ruling on a motion in limine is subject to change based on events at trial). In the instant case, the judge heard additional evidence, considered the matter, and concluded that his prior ruling regarding waiver was not proper under these circumstances.

It is notable that the trial judge did not direct a verdict in Smith's favor or exonerate him in any way. This decision means that Smith will be tried again, and Doe's testimony in that case will be "uncoached" and free of any impermissible influence.

For all the foregoing reasons the decision of the trial court is

**AFFIRMED.**

**SHORT, J., concurs.**

**GOOLSBY, J., dissents in a separate opinion.**

**GOOLSBY, J. (dissenting):** I would reverse the order granting Smith a new trial and for that reason I respectfully dissent.

John Doe, Smith's son, testified that Smith abused him when Doe was six or seven years old during visits to Smith's home. During Doe's testimony, several people in the courtroom observed Doe's aunt, Cynthia, mouthing words and shaking her head up and down and side to side, seemingly in response to the questions Doe was asked.

After Doe finished testifying, Smith made a motion for the trial court to remove Cynthia from the courtroom before Richard Roe, Doe's brother,

testified. Smith argued, based on information from other individuals in the courtroom, of inappropriate "motions and mouth movement and things going back and forth" between Cynthia and Doe that occurred during Doe's testimony.

Cynthia left the courtroom voluntarily. Smith did not use this opportunity to advance any further arguments on the coaching issue or move for a mistrial. Smith received the relief he sought in the motion; the removal of Cynthia from the courtroom.[4] As a result, Smith's motion to remove Cynthia from the courtroom did not preserve the coaching issue for further review.

Roe, who was fifteen at the time of trial, testified in an in camera Lyle[5] hearing that he suffered similar abuse from Smith. Following Roe's testimony, Smith moved for a mistrial on the ground that Cynthia coached Doe during Doe's testimony.[6] One of Smith's attorneys explained to the trial court:

> I believe I saw [Doe] looking in the direction of his aunt to seek an answer. It was not until I finished with his questioning that I sat down that I was informed by co[-]counsel and other members of the court, all in the courtroom, that that, in fact, was the magnitude of what was taking place.

Smith waited until after Roe finished testifying before requesting a mistrial.

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[4] See Bowman v. Bowman, 357 S.C. 146, 160, 591 S.E.2d 654, 661 (Ct. App. 2004) (citations omitted) ("[A] party cannot complain when it receives the relief for which it has asked.").

[5] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

[6] See State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.").

The trial court ruled that Smith waived the issue because his attorneys knew of Cynthia's conduct during Doe's testimony but did not request a mistrial or immediately raise the issue and allow the court the chance to take appropriate action.[7] Smith renewed his motion for a mistrial at the conclusion of the State's case and again at the close of evidence. The trial court denied the motions.

After his conviction and sentencing, Smith moved for a new trial. Smith presented testimony from court officials who witnessed Cynthia's alleged coaching of Doe. One of the witnesses, Stephanie Smart, testified that she observed Cynthia attempting to coach Doe during his testimony and brought it to the attention of one of Smith's attorneys during Doe's testimony. As pointed out earlier, Smith did not request a mistrial until after Roe's testimony, even despite being informed of Cynthia's misconduct during Doe's testimony.

The trial court granted Smith's motion for a new trial. In doing so, the trial court made the following findings of fact: 1) Cynthia used body language and other non-verbal signals in an attempt to communicate with Doe; 2) this communication may have overridden Doe's free will; and 3) this behavior and the potential for corruption of Doe's testimony denied Smith his right to a fair trial.

Having ruled that Smith waived the coaching issue during trial and absent a contemporaneous objection by Smith's counsel, I believe the trial court erred by granting Smith's motion for a new trial on the same issue.[8] I would reverse the order granting Smith a new trial and reinstate his sentence.

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[7] See State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) (noting that an appellant must object at his first opportunity to preserve an issue for appellate review).

[8] See State v. Groome, 274 S.C. 189, 192, 262 S.E.2d 31, 32 (1980) ("Failure to contemporaneously object to the questions now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.");

McElveen v. Ferre, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989) (upholding the trial court's denial of a motion for a new trial where the error was not preserved); see also Idaho v. Higgins, 836 P.2d 536, 550 (Idaho 1992) (holding the trial court had no basis to grant a new trial where the issue was not properly preserved during the trial); Louisiana v. Marcotte, 817 So. 2d 1245, 1250 (La. Ct. App. 2002) ("In our opinion, a motion for new trial does not preserve or revive an issue not properly and timely raised by objection. This is true because, by the time a new-trial motion is made, the trial court has lost its best opportunity to correct the error at issue."); Schacher v. Dunne, 820 P.2d 865, 867 (Or. Ct. App. 1991) ("An error that is not preserved cannot properly form the basis for a motion for a new trial."); Carlson Mining Co. v. Titan Coal Co., 494 A.2d 1127 (Pa. Super. Ct. 1985) (noting a trial court may only award a new trial on questions that are preserved); 66 C.J.S. New Trial § 17 (1998) ("Although there is some authority to the contrary, generally matters not properly pleaded, or put in issue, or preserved, may not be raised on a motion for a new trial.").

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Carl Vernon Kelly, Appellant.

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Appeal From Charleston County
Paul M. Burch, Circuit Court Judge

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Opinion No. 4203
Submitted January 1, 2007 – Filed February 5, 2007

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**AFFIRMED**

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Appellate Defender Aileen P. Clare, Office of the Attorney General, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

**WILLIAMS, J.:** Carl Kelly appeals the circuit court's decision not to grant a mistrial and not to issue an Allen[1] charge after a juror retracted her guilty verdicts during jury polling. We affirm.

## FACTS

Carl Kelly stood trial before a jury on charges of assault and battery with intent to kill, armed robbery, first-degree burglary, and kidnapping. At the close of trial, the jury informed the judge they had reached a unanimous verdict of guilty on each charge. After the jury read the verdict, the defense requested the jury be polled.

Upon polling, eleven of the jurors reported that their verdicts were guilty. One juror, however, reported that she was "not comfortable" with the verdict. The trial judge then said:

> The [c]ourt fully understands that a juror certainly has been put in a position where you're not comfortable with what you do. I'm not comfortable many times in my job up here. I understand that. But I need—if you don't mind, if you would, I need you to respond to the question: Is this still your verdict?

The juror then responded "I really don't know. I can't . . . (shaking her head side to side) no."

The trial judge then sent the jury back to the jury room to continue deliberations "to see if [they could not] reach a verdict." Kelly's defense attorneys then made an objection to the court's statement, which they called a *de facto* Allen charge. They also made a motion for a mistrial and requested

[1] Allen v. United States, 164 U.S. 492 (1896).

a full Allen charge. Nearly two hours later, the jury returned with a guilty verdict on each charge. This verdict survived a jury polling.

## LAW AND ANALYSIS

Kelly argues the court erred by failing to declare a mistrial or alternatively by failing to issue a full Allen charge after the juror retracted her guilty verdicts during jury polling. We disagree.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000). A mistrial should be declared only when absolutely necessary. Id. at 63, 530 S.E.2d at 628. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

The trial judge must be satisfied that the verdict is unanimous and must conduct a jury poll at the request of either party. State v. Linder, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). "Polling is a practice whereby the court determines from the jurors individually whether they assented [to] and still assent to the verdict." Id. at 308, 278 S.E.2d at 338. "If it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed." State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 576 (1995). A judge has a duty to urge the jury to reach a verdict, but he may not coerce them. Id. at 316, 460 S.E2d at 575.

In criminal cases, this Court sits to review errors of law only. State v. Staten, 364 S.C. 7, 15, 610 S.E.2d 823, 827 (Ct. App. 2005). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). "The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal." Id. at 195-96, 624 S.E.2d at 445.

In this case, when the juror stated she was not comfortable and ultimately not in agreement with the verdicts, the trial judge sent the jury back into the deliberation room to see if they could arrive at a unanimous verdict. It was within the trial judge's discretion to either grant a mistrial or send the jury back for deliberations. The juror did not indicate that she was coerced into voting for a guilty verdict, nor did she indicate that the jury was hopelessly deadlocked. Therefore, declaring a mistrial was not an absolute necessity, and no prejudice resulted from sending the jury back for more deliberations.

Here, the judge followed the same procedure affirmed by the Supreme Court in State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979). In Roper, one juror indicated she had her doubts about the verdict. After questioning that juror, the trial judge sent the jury back in for more deliberations with the instruction that any verdict must be unanimous. The Supreme Court ruled that the judge's instructions were courteous and expeditious and were not coercive.

Likewise, the questions asked in State v. Singleton, 319 S.C. 312, 315-16, 460 S.E.2d 573, 575-76 (1995) were found to be appropriate "to ensure that the juror did not misunderstand the verdict and to confirm that the verdict was unanimous." In Singleton, when asked if the guilty verdict was still his verdict, the juror answered "no." The judge then said: "Go back in your jury room to continue your deliberations. I'm told this was a unanimous verdict. Is this your verdict?" The juror then answered: "It is now." Singleton, at 315, 460 S.E.2d at 575.

A comparison of the instructions in the case at bar to the proper instructions in Roper and Singleton shows that the instructions given in this case were noncoercive and did not prejudice Kelly's case.

Kelly also argues the trial court erred in failing to issue a full Allen charge after the juror retracted her guilty verdict. An Allen charge, also known as a "Dynamite" or "Hammer" charge, is to be used when the jury has expressed a deadlock and cannot come to a unanimous conclusion. See Allen v. United States, 164 U.S. 492 (1896). There is no case law requiring or

suggesting that an Allen charge be given when a juror retracts her verdict during polling and this Court will not impose such a requirement.

Accordingly, the trial court's decision is

**AFFIRMED.**[2]

**HEARN C.J., and KITTREDGE, J., concur.**

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Stella Sue Roland, Steven Roland, Charles Wright, Patricia Wright, Sea Turtles, LLC, Woods Brown, Jeanne Brown, Lois Glander, Jean King, Michael King, Joseph Lucas, Diane Lucas, Robert Boineau and Avian Golf Investments, LLC, and Lawrence Ridgeway, Respondents,

v.

Heritage Litchfield, Inc., Heritage Communities, Inc., and Build Star Corporation, Appellants,

and Build Star Corporation,Third Party Plaintiff,

v.

Right Way Construction, Inc., Donovan Brothers Roofing and Restoration, Inc., and Sam's Drywall, Third Party Defendants.

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Appeal from Georgetown County
Benjamin H. Culbertson, Special Circuit Court Judge

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Opinion No. 4204
Heard December 7, 2006 – Filed February 5, 2007

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**AFFIRMED**

Eric G. Fosmire and Andrew N. Cole, both of Columbia, for Appellants.

John W. Davidson and William D. Britt, both of Columbia and Saul Gliserman, of Charleston, for Respondents.

**HEARN, C.J.:** Respondents, the owners of eleven condominiums in the Avian Forest development, sued Heritage Litchfield, Inc., Heritage Communities, Inc., and Build Star Corporation (collectively Appellants)[1] for numerous causes of action after discovering mold in the firewall area of the condominiums. The trial court granted Respondents' motion for partial summary judgment as to liability. Appellants appeal, arguing (1) issues of material fact exist with regard to both the extent of the mold problem and its causation, and (2) Respondents do not own the common areas where the mold was found. We affirm.

## FACTS

Avian Forest is a condominium development in the Litchfield Beach area. The development has numerous buildings, each of which are two stories tall and contain four condominiums. The buildings are divided such that two condominiums are on the ground floor, and two are on the second floor. A firewall separates each individual condominium.

[1] Heritage Litchfield, Inc. was the main developer of Avian Forest, and Build Star Corporation was the general contractor for the buildings. Both Heritage Litchfield and Build Star are wholly owned by Heritage Communities, Inc.

The first buildings erected in the development were buildings 19, 20, and 21, all of which were built during roughly the same time period, beginning in the Spring of 1999. Eleven of the twelve units in these buildings were sold to the Respondents in late 1999. The twelfth unit never sold.

During the construction of these first three buildings, it is undisputed that the firewalls were erected prior to the roofs. Gwyn Hardister, the president of Heritage Litchfield, testified the firewalls were rained on while they were unprotected by a roof. Tommy Hooks, the assistant project manager, also testified that before the roof was built, "moisture had accumulated in those walls and sometime thereafter we saw the signs of mold . . . . Mold was evident in those firewalls."

In March of 2000, a plumbing leak in building 19 led to the discovery of mold on the common firewall between the units. Appellants hired a mold remediation and investigation company, whose investigator determined that the mold had toxic characteristics and was present in the firewalls of all three buildings. The investigator informed Hardister about the mold problem, who in turn advised Respondents not to live in their condominiums.

Respondents filed causes of action against Appellants, alleging breach of the implied warranty of habitability, breach of the implied warranty of workmanlike service, breach of express warranty, and negligence. Appellants answered, and both sides filed motions for partial summary judgment. Respondents sought summary judgment as to liability, and Appellants sought summary judgment as to Respondents' standing to allege any injury to the common elements of the buildings. The trial court granted Respondents' motion and denied Appellants' motion. This appeal followed.

## STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [the appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). The appellate court therefore reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Id. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial and cannot simply rest on mere allegations or denials contained in the pleadings. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005).

## LAW/ANALYSIS

Appellants argue summary judgment should have been denied because there are material facts in dispute with regard to causation and the nature and extent of the mold problem. We disagree.

During the summary judgment hearing, Respondents presented numerous depositions wherein agents of the Appellants admitted the mold was caused by the firewalls' exposure during rainy weather. Appellants argue there is a question of fact regarding how much mold was caused by the firewalls exposure during construction and how much mold was caused by other factors, such as the Respondents' failure to properly maintain their air conditioning systems. However, no evidence was presented to the trial court suggesting Respondents contributed to their mold problem, nor was there any evidence suggesting that anything other than the saturation of the firewalls during construction caused the mold in all three buildings. Because mere allegations of comparative negligence are not sufficient to raise an issue of material fact, we find summary judgment was proper with regard to causation. See Miller, 365 S.C. at 220, 616 S.E.2d at 730 (explaining that once the moving party meets its initial burden, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial and cannot simply rest on mere allegations or denials contained in the pleadings).

In addition to their argument regarding causation, Appellants also contend the extent of the mold problem is in dispute. Specifically, they argue there is a question of fact regarding the habitability of the condominiums because two of the unit owners rented their units and there was no evidence in the record that the renters complained of the units' conditions. Additionally, Appellants point out there was testimony that the mold was not dangerous "as long as you don't disturb it, meaning open walls so that the mold is airborne." After a careful review of the record, we find no issue of material fact with regard to the habitability of the units.

While two of the Respondents did indeed rent their units, they ceased renting them once they learned of the mold problem. Furthermore, the "habitability" of a dwelling does not turn on whether a person actually lives there; rather habitability is defined as the "[t]he condition of a building in which inhabitants can live free of serious defects that might harm health and safety . . . ." Black's Law Dictionary (8th ed. 2004). Here, the only evidence in the record showed Respondents' units were unsafe due to the toxic mold found between the walls. Gwyn Hardister, the president of Heritage Communities, testified that he contacted Phoenix EnviroCorp to identify whether a mold problem existed in the units. From that investigation, Hardister learned there were high levels of toxic mold in the air samples tested. Hardister told the owners about the mold and advised them not to live in their units. Although Appellants attempt to isolate one line of Hardister's testimony in which he said "as long as you don't disturb [the mold], meaning open walls so that the mold is airborne, it's not dangerous" to support their contention there is an issue of material fact, we find this statement, when read in context, does not preclude summary judgment. Later in Hardister's testimony, he explained the mold could be "disturbed" simply by occupying the units because fluctuations in the humidity, temperature, and air pressure of the units could produce higher levels of the mold. Because neither Hardister's testimony nor the rental of the units raise an issue of material fact regarding the units' habitability, summary judgment was appropriate.

Next, Appellants argue the trial court erred in granting summary judgment as to liability because the area impacted by mold is a common area belonging to the homeowners' association, not Respondents. We disagree.

The Master Deed of the Avian Forest Development specifically states:

> [E]ach UNIT shall be conveyed and treated as an individual property capable of independent use and fee simple ownership, and **the Owner or Owners of each UNIT shall own**, as an appurtenance to the ownership of each said UNIT, **an undivided interest in the COMMON ELEMENTS** . . . .

(emphasis added). Furthermore, neither the Master Deed nor the By-Laws of the Avian Forest Homeowners' Association grants the homeowners' association an ownership interest in the common elements. We therefore find no question of material fact exists regarding ownership of the common elements which would preclude summary judgment as to liability.

## CONCLUSION

Based on the foregoing, the order of the trial court granting partial summary judgment with regard to liability is

**AFFIRMED.**

**BEATTY and SHORT, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Ernest Bartlett Altman, Respondent,

v.

Vicky Griffith, Appellant.

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Appeal From Charleston County
Marion D. Myers, Family Court Judge

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Opinion No. 4205
Heard December 5, 2006 – Filed February 5, 2007

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**AFFIRMED**

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Donald Bruce Clark, Robert Rosen, both of Charleston and J. Mark Taylor, of West Columbia, for Appellant.

D. Mark Stokes, of North Charleston and John Graham Altman, III, of Hanahan, for Respondent.

**KITTREDGE, J.:** This is an appeal from a family court order awarding custody of the parties' minor child to Ernest Bartlett Altman (Father). Vicky Griffith (Mother) appeals.[1] We affirm.

## I.

We are aware of our right to conduct a de novo review in an appeal from the family court and find facts in accordance with our own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). With respect to custody determinations, however, this court and our supreme court have consistently shown deference to family court judges in electing between fit parents. In the case before us, although both parents were burdened with "shortcomings," there is no challenge to the finding of fitness. For obvious and compelling reasons, as an appellate court, we are reticent to substitute our judgment on the custody determination between fit parents for that of the family court judge.

Our deference to the family court's findings is especially warranted here, for the ultimate determination rests primarily on the trial judge's assessment of witness demeanor and credibility. In gauging between fit parents as to who would better serve the best interests and welfare of the child in a custodial setting, the family court judge is in a superior position to appellate judges who are left only to review the cold record. For this reason, custody determinations largely rest in the sound discretion of the family court judge. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996) ("[T]he appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court."); Brown v. Brown, 362 S.C. 85, 89, 606 S.E.2d 785, 787 (Ct. App. 2004) (same); Shirley v. Shirley, 342 S.C. 324, 330-31, 536 S.E.2d 427, 230 (Ct. App. 2000) ("Custody decisions are matters left largely to the discretion of the [family]

[1] Appellate counsel did not represent Mother at trial.

court."); Paparella v. Paparella, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000) (noting appellate courts should be reluctant to supplant the trial court's evaluation of witness credibility regarding child custody). Indeed, our supreme court has held "[w]hen both parties are fit and proper to have child custody, the trial judge must make the election." Jones v. Ard, 265 S.C. 423, 426, 219 S.E.2d 358, 359-60 (1975).

This deferential scope of review is consistent with the general approach to accord respect to a family court judge's factual findings, as reflected in the following often cited principle: "Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Lanier v. Lanier, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005) (citing Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981)). "[W]here there is disputed evidence, the appellate court may adhere to the findings of the family court." Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003).

## II.

Mother and Father met in the spring of 1998 and began living together soon thereafter. The couple never married. Mother and Father had a rocky relationship almost from the beginning. Mother gave birth to the parties' son on May 27, 1999. The birth of their child did little to solidify the tumultuous relationship between the couple. Regrettably, in the parties' acrimonious relationship, each parent used the child as leverage against the other. The couple experienced many separations and attempts at reconciliation.

Father regularly used marijuana. He even publicly advocated marijuana use, and he ran a business that catered to the marijuana-smoking crowd under the guise of a "music store." The business distributed drug related paraphernalia, such as pipes commonly used to smoke marijuana. Mother regularly used marijuana and alcohol, even when pregnant with the parties' child. Mother also took prescribed antidepressants and tranquilizers, including Paxil, Zoloft, Tranxene, and Valium.

In October 2002, Mother and Father permanently separated. At that time Mother took the child and moved in with her parents. In an effort to see the child, Father called and wrote Mother "on a regular basis," but Mother avoided him. Rather than permit Father to see his son, Mother "directed [Father] to speak to my attorney." Father was denied any contact with his son until he filed this action in January 2003.

In February 2003, the family court issued a temporary order granting temporary custody of the child to the maternal and paternal grandparents "with visitation extended to the mother and father at times agreeable to the respective grandparents." The temporary order further noted "great concerns" with both parents.

## III.

Judge Marion D. Myers presided over the final hearing. Following a lengthy trial (August 30, 2004 through September 8, 2004), the learned and experienced family court judge found both parents fit and awarded custody to Father. There is no challenge to the finding of fitness.

Contested custody cases often bring out the worst in parents. This case was no exception, as each parent relished the opportunity to disparage the other. Each parent gave the other plenty of ammunition, which Judge Myers charitably described as their "shortcomings." As noted, the parents used the child as a pawn in their conflicts. They also used illegal drugs. The evidence additionally revealed Mother's unmistakable tendency to be self-absorbed and self-pitying. The picture of both parties improved during the pendency of the litigation. Judge Myers' finding of fitness reflects his view that the improvement is genuine, as opposed to judicially motivated posturing.

After carefully weighing the evidence, Judge Myers found that despite the parents' "shortcomings," neither parent "can <u>now</u> be deemed to be an unfit parent and neither party's love for this child is in doubt." (emphasis in original). Judge Myers considered the "totality of the circumstances" and

concluded: (1) "the child in the long run would benefit more from being in father's custody than mother's"; (2) "the father would provide the child with the best and probably the only opportunity to have a good relationship with both of the child's parents and their families"; and (3) "from my own observation of the demeanor and attitude of the parents that the father appears to have a stronger focus on the daily welfare and care of the child than does the mother." We find ample support in the record for these findings.

## IV.

Mother contends the family court erred in failing to impose on Father the burden of demonstrating a "change of circumstances" and in admitting Dr. Elizabeth Baker Gibbs' opinion testimony. Mother additionally challenges the findings favoring the custody award to Father, essentially complaining about the family court's failure to give weight to Mother's take on the evidence.

### A.

Mother contends this is a "change of circumstances" case in light of section 20-7-953(B) of the South Carolina Code (1985). Consequently, Mother claims the family court erred by evaluating the evidence based on the "totality of the circumstances." We disagree.

We first note that this issue is not preserved. Even assuming Mother asserted this argument to the family court, Judge Myers did not address the issue in the final order, and no motion for reconsideration was filed.[2] "Where

[2] In an apparent attempt to circumvent our issue preservation rules, Mother now argues the family court lacked subject matter jurisdiction because Father did not expressly invoke section 20-7-953(B) as the basis for his custody claim. See, e.g., Town of Hilton Head Island v. Godwin, 370 S.C. 221, __, 634 S.E.2d 59, 60-61 (Ct. App. 2006) ("The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court."). We disagree.

a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved." Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 58 (2d ed. 2002) (citing S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001)). We address the issue, however, because "procedural rules are subservient to the court's duty to zealously guard the rights of minors." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000).

Mother's specific contention is that a statute concerning paternity, section 20-7-953(B), imposes on Father the burden of showing a substantial change of circumstances to gain custody. Section 20-7-953(B) provides:

> Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child. If paternity has been acknowledged or adjudicated, the father may petition the court for rights of visitation or custody in a proceeding before the court apart from an action to establish paternity.

The issue as framed by Mother presents the following question: when parents are not married, does the law mandate a change of circumstances burden on every father who seeks custody? The answer is "no." We find nothing in the language of the statute (which is found in the subarticle titled "Determination of Paternity") suggesting the result advocated by Mother.

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Subject matter jurisdiction is the power of a court to hear cases in the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). The family court has jurisdiction over custody disputes. S.C. Code Ann. § 20-7-420 (1985 & Supp. 2005). Moreover, the gravamen of Mother's argument is not the jurisdiction of the family court to hear a custody case, but the failure of the family court to impose a change of circumstances burden on Father. Subject matter jurisdiction and application of a burden of proof (to a claim within the court's jurisdiction) are different concepts.

See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). In giving a father the right to petition the family court for custody, the statute makes no mention of a change of circumstances burden. This plain reading of the statute is in accord with the general legal principle that the imposition of a change of circumstances burden applies when a parent seeks to alter a prior custody order. See Latimer v. Farmer, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004) (holding that when a previous order addressing the issue of custody exists, a showing of changed circumstances is required for a court to grant a *change* in custody).

Another legal principle in line with our holding today is the established rule in South Carolina that "in custody matters, the father and mother are in parity as to entitlement to the custody of a child." Brown v. Brown, 362 S.C. 85, 91, 606 S.E.2d 785, 788 (Ct. App. 2004). "[T]here is no preference given to the father or mother in regard to the custody of the child[;] [t]he parents stand in perfect equipoise as the custody analysis begins." Id. We additionally note that Mother and Father were living together when their child was born, and there was never any question as to paternity. The family court in this case was presented with an initial custody determination. In an initial custody determination, the parents are on equal footing.

We hold the family court properly determined custody based on the "totality of the circumstances." "The paramount and controlling factor in every custody dispute is the best interests of the children." Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 191, 612 S.E.2d 707, 711 (Ct. App. 2005); see also Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996) ("The welfare and best interests of the child are paramount in custody disputes."). In making initial custody decisions "the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." Wheeler v. Gill, 307 S.C. 94, 99, 413 S.E.2d 860, 865 (Ct. App. 1992) (quoting Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)).

**B.**

Mother next asserts the family court erred in admitting much of Dr. Elizabeth Baker Gibbs' opinion testimony. We disagree.

At trial, evidence was presented about an investigation by the South Carolina Department of Social Services (DSS) concerning alleged abuse of the child. On May 3, 2004, after the child spent a weekend with Father, the maternal grandmother, Johanna Garner, noticed bruising on the child and took him to the doctor. Dr. Meghan Geils examined the child and filed a report with DSS, although she acknowledged she lacked extensive training in child abuse matters and also candidly admitted she was not "able to determine the cause of the bruises." Garner emphasized that she was "concerned" about the child, even though Dr. Geils reported the child "wasn't upset" and seemed like "[j]ust a normal little boy."

This scenario repeated itself on May 17 when Garner brought the child to Dr. Geils' office. Garner expressed the "same concerns." Dr. Geils observed a bruise but further noted the child was "happy" and "fine." When asked what she did "as a result of that visit," Dr. Geils responded, "I didn't do anything. The grandmother . . . had already taken pictures and had already re-notified DSS that there was another abuse."

DSS investigated the abuse allegations against Father and determined the allegations were "unfounded."

Confronted with the abuse allegations (but prior to the "unfounded" determination by DSS), Father took the child to the Carolina Medical Assessment Center. Dr. Elizabeth Baker Gibbs is the Medical Director of the Carolina Medical Assessment Center. The Center provides numerous child related services, including forensic medical services for victims of child abuse. Dr. Gibbs examined the child and interviewed the parents and Garner.

Father presented Dr. Gibbs as an expert witness "on whether the child was a victim of abuse and neglect." The family court, without objection,

qualified Dr. Gibbs as an expert. Dr. Gibbs testified the bruises and abrasions on the child were "non-specific." Dr. Gibbs specifically stated the child's "lesions were non-specific which would be lesions that we would commonly find on him[,] especially an active child his age."[3] The child informed Dr. Gibbs that he had fallen off a chair at Garner's house. It was Dr. Gibbs' opinion that the child had not been abused.

As part of her evaluation, Dr. Gibbs spoke with Father, Mother, and Garner. According to Dr. Gibbs:

> From the first time I talked with [Father], his focus was really almost entirely based around [the child]. . . . When I talked to [Mother], her focus was around the effect all of this was having on her; not the effect that this was having on [the child] . . . . We tried several different techniques and we were unable to get [Mother] to shift her focus to a child-focus perspective.

Mother did not object to the foregoing testimony and, consequently, she may not now assign error to its admission and consideration by the family court. Failure to object when evidence is offered constitutes a waiver of the right to object, and the issue may not then be raised for the first time on appeal. Crawford v. Crawford, 321 S.C. 511, 514, 469 S.E.2d 622, 624 (Ct. App. 1996). Mother only objected when Dr. Gibbs was asked how long it would take for Mother to learn to be more child-focused. The family court found the testimony within Dr. Gibbs' expertise and overruled Mother's objection. Thereafter, Dr. Gibbs opined:

> Either way, my concern is that the conflict is going to continue which can be very damaging to children. I would be concerned that if [Mother] has the primary care and control, that the conflict will continue at the

[3] Dr. Gibbs used the term "lesions" to describe bruises, scratches and "anything on the skin that is what we're looking for."

> current level or maybe even more so. If [Father] had primary care and control, I do see him more motivated in decreasing the conflict.

We find no merit to Mother's challenge to Dr. Gibbs' testimony. Rule 702, SCRE, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Generally, "[w]hether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters resting largely in the discretion of the trial judge." Prince v. Ass'n Petroleum Carriers, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974). "A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

The record indicates Dr. Gibbs has impressive credentials in dealing with dysfunctional families and possesses specialized knowledge in forensic medicine in evaluating allegations of child abuse. Dr. Gibbs' knowledge, skill, experience, training, *and* education clearly satisfy the requirements of Rule 702. We conclude the family court did not abuse its discretion in admitting Dr. Gibbs' so-called "expanded" testimony. It is our judgment that Mother's tardy objection to Dr. Gibbs' testimony goes more to the weight of the evidence than its admissibility.

Furthermore, we would be hard-pressed to characterize any error in admitting Dr. Gibbs's "expanded" testimony as amounting to reversible error. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both error and resulting prejudice. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997). As pointed out by Mother, the family court relied in part on Dr. Gibbs' testimony in awarding custody to Father. Yet the record contains other evidence of Mother's focus on herself.

For example, Mother kept a journal (admitted without objection) in 2002 as a result of a self-help book, Self Matters, written by Dr. Phil McGraw. Examples of Mother's journal entries include: "I over-exaggerate things to create drama and appear to be the victim in most situations"; "I lack basic coping skills and have used alcohol and/or drugs as a way to anesthetize"; "I can be unpleasant and resentful when I don't get my way"; and "I'm the victim," a statement Mother underlined three times. Based on the journal entries, Mother admitted on cross-examination that she has "general feelings of being taken advantage of, lied to, gossiped about, [and] used and abused."

We cite this example not to disparage Mother in any way. As noted by Judge Myers, Mother has made laudable strides during the pendency of this custody suit. Judge Myers found that Mother is now a fit parent. We cite this evidence only to illustrate that Dr. Gibbs' testimony is certainly not the only evidence tending to establish that Mother tends to be self-absorbed and self-pitying. We view Dr. Gibbs' opinion about Mother's focus on self as cumulative to other evidence in the record.

**C.**

We turn finally to Mother's broad challenge that the best interests of the child dictate she be awarded custody. In essence, Mother assigns error to the adverse findings against her and the more positive findings in favor of Father. Mother, of course, views the evidence in a different light than determined by the family court.

We categorically reject the suggestion that the record does not support the finding that Mother has difficulty putting the child's needs first. When the parents separated for the last time, Mother prevented Father from visiting the child for several months. There was no valid reason to prevent Father from having *any* contact with his son. Under these circumstances, Mother's mandate that Father contact her attorney cannot reasonably be construed as a viable response to accommodate visitation. Mother's journal entries and her

own testimony further buttress the family court's finding.[4]

We additionally find support in the record for the finding that the "mother's and her family's repeated unfounded accusations and unfounded charges against the father have contributed greatly to their bad relationship and inability to communicate with each other." Their bogus allegations that Father committed child abuse is one example. Another example is Mother's complaint to law enforcement, which resulted in a charge against Father for assault with intent to kill. This unfounded charge arose from an incident on August 22, 2003, when Mother claimed Father tried to kill her with his car.[5] The charge was dismissed at a preliminary hearing. The Solicitor apparently refused to pursue a direct indictment against Father. Father had the record of his arrest expunged. Our review of the evidence is in line with the family court's finding. We find no abuse of discretion.

Judge Myers found Father "appears to have a stronger focus on the daily welfare and care of this child than does the mother." This finding is tied to Judge Myers' additional finding that Father "is committed to supporting the child's relationship with his mother notwithstanding his questionable conduct and judgment at times in other areas." Judge Myers further noted that Father has a teenage daughter with whom he has "a very close [and] loving relationship." Given the posture of the case, Mother understandably seeks to cast the evidence in a much more negative light

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[4] It is fair to say, however, that Mother does not have the self-centered market cornered. The child's guardian ad litem, Graham Hawkins, had substantial contact with the parents. Mr. Hawkins observed that *both* parents used the child as a pawn in their feud. Both parents have "exposed" the child "to quite a lot of conflict between" them.

[5] At trial, Mother merely stated that Father "accelerated the car at me." Mother in hindsight recast the incident as less serious. Yet law enforcement charged Father with assault with intent to kill based on information from Mother and Garner. When Father was arraigned at a bond hearing the morning after his arrest, the press and Mother appeared. Mother informed the magistrate she was afraid of Father. She subsequently wrote the magistrate, claiming she was "scared to death" of Father.

toward Father. We readily acknowledge that Father's side of the ledger has "shortcomings," a fact which did not escape Judge Myers. We decline, however, to recast the evidence so that the scales tip in favor of Mother.

Judge Myers was presented with a difficult decision between fit parents. In our firm judgment, the record supports the view that the child's best interest is served by an award of custody to Father. We certainly cannot say that the award of custody to the Father amounts to an abuse of discretion.

There is no single factor that controls in a custody dispute, for the analysis is necessarily a fact-driven inquiry covering the totality of the circumstances. Woodall, 322 S.C. at 11, 471 S.E.2d at 157 (holding that "when determining to whom custody shall be awarded . . . all of the circumstances of the particular case, and all relevant factors must be taken into consideration"). Judge Myers thoughtfully and thoroughly considered the totality of the circumstances.

## V.

Contested custody cases present difficult decisions for family court judges. In situations where there is a striking difference in the fitness of one parent over another, the issue of custody is often resolved short of litigation. Litigation seems to follow those cases where an arguably close question is presented. This is such a case. Mother's excellent counsel have forcefully advanced the evidence in a light most favorable to her. Judge Myers was keenly aware of the parties' respective positions and "shortcomings," and the record manifests his recognition of the importance of the decision before him. While the law reflects deference to a family court judge in deciding between fit parents, we, too, have an important responsibility to ensure that a custody award does not amount to an abuse of discretion. We have canvassed the record and carefully considered the arguments presented on appeal. We find ample support for Judge Myers' findings and his decision to award custody to Father.

**AFFIRMED.**

**STILWELL, J., and CURETON, A.J., concur.**