THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 02-CP-40-5305

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

-versus-

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DETERMINING THAT PARKS, AS A VOLUNTARILY INTOXICATED FIRST PARTY, IS BARRED FROM RECOVERY?

II. DID THE TRIAL COURT ERR IN FINDING THAT PARKS' CLAIM IS BARRED BY THE DOCTRINE OF COMPARATIVE NEGLIGENCE?

III. SHOULD SOUTH CAROLINA FOLLOW OTHER STATES WHICH HAVE DENIED RECOVERY FOR VOLUNTARILY INTOXICATED MINORS?

STATEMENT OF THE CASE

Appellant Linda Marcum, as Personal Representative of the Estate of Justin Parks ("Appellant"), filed a Summons and Complaint on October 29, 2002, naming Donald Bowden, Utility Service Agency, Inc. ("Utility Service"), Timothy Hensley, and Shealy Electrical Wholesalers, Inc. ("Shealy Electrical") as Defendants. Appellant's Complaint asserted two causes of action: (1) wrongful death, pursuant to S.C. Code Ann. § 15-51-10, *et. seq.* (1976), and (2) survivorship, pursuant to S.C. Code Ann. § 15-5-90 (1976). (R. pp. 15-20)

Mr. Bowden and Utility Service filed an Answer to the Complaint on November 21, 2002. Attorneys for Appellant and the named Defendants thereafter stipulated that the Complaint be dismissed without prejudice as to all claims against both Shealy Electrical and Mr. Hensley pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure.

On July 29, 2003, Appellant moved to amend her complaint to include Gloria Bowden as a Defendant in this action. Mrs. Bowden and Mr. Bowden are married. An Amended Summons and Complaint was filed on September 22, 2003, naming Mr. Bowden, Mrs. Bowden, and Utility Service (collectively "Respondents") as Defendants in this action. Respondents filed an Answer to Plaintiff's Amended Complaint on October 17, 2003. On January 9, 2004, Respondents moved for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

The Honorable James R. Barber, III, reviewed each party's Memorandum in support of its respective position and heard oral argument on February 27, 2004. The Court verbally granted Respondent's Motion for Summary Judgment at the hearing, and

entered an Order to that effect on March 26, 2004. Appellant served Notice of Appeal on May 17, 2004 and an Amended Notice of Appeal on June 17, 2004. On July 16, 2004, Appellant filed a Motion to Transfer the Case from the Court of Appeals to the Supreme Court pursuant to Rule 204(b), SCACR. This Court granted that Motion on August 19, 2004.

STATEMENT OF FACTS

Appellant is the Personal Representative of the Estate of her deceased son, Justin Michael Parks ("Parks"). Parks died in a single car accident that occurred while Parks was driving after having consumed alcohol. (R. pp. 15-20) Parks was born on February 8, 1982 and was, therefore, 19 years and 10 months old at the time of his death.

Utility Service is a North Carolina corporation that transacts business in Richland County, South Carolina, and employs Mr. Bowden. Mr. Bowden and Mrs. Bowden (collectively "the Bowdens") held a cookout at their residence during the late afternoon hours on December 15, 2001. Parks attended the cookout.

The Bowdens' cookout was for social and business promotional purposes. (R. p. 198, lines 2-11) The party was a family cookout for spouses and children. (R. p. 263, line 16 – p. 264, line 12) It was not, as Appellants describe, a wild party with binge drinking and free-flowing liquor. (R. p. 108, lines 5-14; R. p. 100, lines 5-22) No formal invitation was sent; Mr. Bowden simply gave a general invitation to a group of people he saw while at Shealy Electrical's office. Mr. Bowden also invited representatives of South Carolina Electric Cooperative Association. (R. p. 199, lines 7-21; R. p. 132, line 22 – p. 133, line 5) Parks attended the function only because he was an employee of Shealy Electrical. Parks was not otherwise a friend or social acquaintance of the Bowdens. (R.

p. 201, lines 12-13.) Indeed, Parks rode to the function with his supervisor, Timothy "Rondeau" Hensley. (R. p. 133, lines 6-8) Alcohol was available to persons attending the cookout, and Utility Service reimbursed Mr. Bowden for the cost of food and drinks. (R. p. 298, line 19 - p. 299, line 2)

The cookout began around 4 o'clock in the afternoon. Mr. Bowden typically began these events around 3 or 4 o'clock because he did not want people to stay too late. He wanted people to "come over and have a good time, eat early and be gone." (R. p. 221, lines 8-18) As people arrived at the party, Mrs. Bowden would greet them and tell them where the food and drinks were located. (R. p. 266, lines 1-8, 16-18; R. p. 207, line 19 – p. 208, line 6) There were a variety of beverages available, including tea, soft drinks, lemonade and beer. The canned soft drinks and the beer were in a large tub on the deck. (R. p. 104, lines 20-24) A liquor cabinet in the kitchen was unlocked, but the liquor was not set out on the counter. (R. p. 218, lines 16-20) Mrs. Bowden worked inside the kitchen, and Mr. Bowden cooked the Beaufort stew, fried shrimp and hush puppies on the back deck. (R. p. 206, lines 22-23; R. p. 257, line 23 - p. 258, line 1) The food and beverages were located mostly on the deck during the event.

Parks arrived at the cookout around 4 or 5 o'clock, with the Hensleys. He spent most of his time at the party socializing with co-workers from Shealy, although he did make small talk with Mrs. Bowden. (R., p. 208, lines 14-17; R. p. 258, lines 2-18) The Bowdens thought that Parks was acting in a sober manner, and neither saw him take any Tequila shots or drink hard liquor of any kind. (R. p. 260, lines 9-25; R. p. 210, lines 4-9)

The Bowdens assumed that Parks was over the age of 21. Prior to the cookout, Mr. Bowden had met Parks approximately three times, including one or two lunches

attended by Parks and other employees of Shealy Electrical. (R. p. 201, lines 14-25) On some occasions while making a business visit to Shealy Electrical sales offices, Mr. Bowden overheard Parks talking about going drinking in Five Points and doing shots. (R. p. 205, line 20 - p. 206, line 10) Five Points is widely known as a popular bar/restaurant section of Columbia which is in close proximity to the University of South Carolina. On one other occasion, Mr. Bowden met Shealy Electrical employees after work at a bar. When Mr. Bowden walked inside, Parks was present and drinking beer at the bar with the other Shealy Electrical employees. (R. p. 204, lines 6-15; R. pp. 95-96, pp. 101-102; R. p. 124, lines 8-13) Based on the above events, Mr. Bowden believed Parks was at least 21 years of age. (R. p. 220, line 15; R. pp. 222-223) Mrs. Bowden also believed Parks was over 21 and testified he was probably similar in age to her own 25-year-old son. (R. p. 258; R. p. 143, lines 2-4) Although the Shealy Electrical employees at the party knew Parks' age, neither Parks' supervisor Hensley nor any other Shealy Electrical employee told the Bowdens that Parks was under the legal age to consume alcohol. (R. p. 222, line 22 - p. 223, line 3; R. p. 97, lines 4-6; R. p. 126, lines 16-22)

Appellant contends that Parks consumed several shots of Tequila at the cookout, "which was noticed by everyone." However, the deposition testimony clearly indicates that the only people to see Parks consume *any* hard liquor were those who knew he was under 21 - Jim Woods, Bert Walling, Tina Hensley, and Rondeau Hensley. (R. pp. 105, 108-109; R. p. 137, lines 16-19; R. p. 98, lines 4-11; R. p. 272, lines 18-19) None of these individuals told the Bowdens that Parks drank the Tequila, nor did they tell them

that Parks was under 21. The Bowdens did not see Parks consume Tequila or any other hard liquor. (R. p. 220, lines 5-10; R. p. 260, lines 17-18)

Woods testified that, just before he left the cookout, he saw Parks take three shots of Tequila. (R. pp. 105, 108-109) Woods approached Parks and asked him what he was doing, and Parks responded, "'I'm just trying to catch a buzz.'" (R. p. 105, lines 11-14.) Nonetheless, Woods never told either the Bowdens or Rondeau Hensley what he had seen. (R. p. 106, lines 6-8, p. 107, lines 1-3, 8-10) Woods said Parks appeared fine and that there were no signs apparent that Parks was intoxicated. (R. p. 109) In fact, nearly everyone who testified indicated that Parks did not appear to be intoxicated, nor did anyone else at the party appear to be intoxicated, with the possible exception of Rondeau Hensley. (R. p. 262, line 24 – p. 263, line 8; R. p. 110, lines 19-24; R. p. 99, lines 23-25) Mrs. Hensley testified that she assumed that Parks was intoxicated because she had seen him consuming alcohol, but that he was not staggering about or having difficulty navigating the stairs. (R. p. 274, line 23 – p. 275, line 13)

Parks left the party with the Hensleys. Contrary to Appellant's recitation of the facts in her Appellant's Brief, the Bowdens know how Parks left their house. Mrs. Bowden walked Parks and the Hensleys to the Hensleys' car and watched them get in and drive away. (R. p. 262, lines 10-15) Mrs. Hensley was driving and Parks was in the back seat with the Hensleys' child. (Id.) Mrs. Bowden testified that Parks appeared to be fine as they went down the steps in front of her house and out to the car. (R. p. 261, lines 8-18.) Parks even hugged her and thanked her for a pleasant evening. (Id.) Mr. Bowden did not walk Parks and the Hensleys to the car, but he was able to observe them through the window as he was cleaning up. (R. p. 211, line 10 – p. 213, line 8.) He also testified

that Parks appeared to be fine and that Parks left as a passenger in the Hensleys' vehicle. (Id.)

The Hensleys drove Parks to their home, which was where Parks had left his own car earlier that day. Once they arrived at the Hensley residence, Mr. Hensley was concerned that Parks may be intoxicated. (R. pp. 144-146, 149) He sent Parks out the workshop behind the house to sober up. (Id.) He joined Parks a short time later after putting his child to bed. (Id.) Mr. Hensley testified that Parks drank at least one and possibly two mini bottles of liquor at the Hensleys' home, in the presence of Mr. Hensley. (R. pp. 147-148.) Parks then left to attend another party. (R. pp. 15-20, para. 16, 17; R. pp. 147-148) Hensley tried to prevent Parks from leaving, but Parks became abusive and aggressive. (R. pp. 150-151, 153) Hensley relented and allowed Parks to leave. (R. p. 152) Parks traveled approximately two miles from the Hensley residence before he was involved in a single car accident. Parks was the only person in his car. He appeared to have died instantaneously. The coroner's report determined the cause of death to be multiple head trauma. (R. p. 312) A blood alcohol analysis revealed that Parks' blood alcohol content measured 0.29. (Id.)

STANDARD OF REVIEW

A court will grant a moving party's motion for summary judgment when there exists no genuine issue of material fact, and that party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, the court must search

the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989). The fact that there is a factual dispute is not enough to preclude summary judgment; the issue must be one which the defendant is entitled to litigate. (Id.)

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 553 S.E.2d 795 (Ct. App. 1999). In reviewing a grant of summary judgment on appeal, an appellate court will apply the same standard of review as the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

ARGUMENTS

I. Parks' estate is barred from recovery because Parks was a voluntarily intoxicated first party.

"South Carolina does not recognize a 'first party' cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of S.C. Code Ann. §§ [61-6-2220 and/or 61-4-580(2) (Supp. 1997)]." Tobias v. Sports Club, Inc., 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1998). Sections 61-6-2220 and 61-4-580(2) prohibit a tavern owner from serving alcohol to an intoxicated patron. Such a patron cannot bring suit, himself, against a tavern owner because "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his *own conduct*." Tobias, 332 S.C. at 92, 504 S.E.2d at 320 (emphasis added).

The South Carolina Supreme Court has recently extended the public policy precluding a person from bringing suit for first party injuries to the area of negligent

entrustment in the case of Lydia v. Horton, 355 S.C. 36, 583 S.E.2d 750 (2003). In Lydia, the plaintiff, who was admittedly intoxicated, borrowed the defendant's car and then drove and wrecked the car in a single vehicle accident which rendered him a quadriplegic. The plaintiff sought damages against the defendant for negligent entrustment. The Court held that both comparative negligence and public policy prohibited the plaintiff from recovering against the defendant. Using the reasoning of Tobias as a foundation for its holding, the Supreme Court stated:

> The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor. Lydia, 355 S.C. at 42, 583 S.E. 2d at 754 (emphasis added).

The reasoning in both Tobias and Lydia illustrates the Supreme Court's affirmance of the public policy in South Carolina that intoxicated persons are held personally responsible for their own decisions while the persons who may contribute to their impaired state (e.g. tavern owner or entrustor) are shielded from liability.

South Carolina only recognizes a cause of action against a social host for serving alcohol to underage individuals under third party liability. Third party liability is clearly distinguished from an attempted first party liability claim like in the present case. The Court of Appeals recently highlighted this distinction in Barnes v. Cohen Dry Wall, 357 S.C. 280, 592 S.E.2d 311 (Ct. App. 2003), by specifically referencing the Tobias case and noting "that our alcohol control statutes do not create a first party cause of action . . . but that they do permit a third party action." 357 S.C. at 285, 592 S.E.2d at 313 to n. 8

(emphasis in original). Nonetheless, Appellant cites to Whitlaw v. The Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991) in an attempt to create a cause of action for first party liability where none exists. The Appellant's reference to Whitlaw is misplaced. Like Barnes, Whitlaw involves a third party claim only.

Parks intended to become intoxicated on the night of the cookout and his subsequent automobile wreck. First, the testimony of persons who knew Parks shows that he had a history of both binge and social drinking. Parks had been familiar with drinking alcohol since at least high school. (R. p. 289, lines 1-5; R. p. 10, lines 10-13) While working at Shealy Electrical, Parks would arrive hung-over following late nights of heavy drinking. (R. p. 168, lines 6-14) Furthermore, Parks would brag to his co-workers and others about his drinking habits. (R. p. 96) "He would let you [know] he could consume a lot, he and his friends went out a lot." (R. p. 168, lines 16-18) Parks' roommate at the time of the accident, Christopher A. Greer, testified that their apartment was a place where people would go hangout, drink, and socialize all the time. (R. p. 287, lines 19-24, top of page) Greer and Parks would tailgate at Carolina football games together and drink alcohol as well. (R. p. 288, lines 1-3) He and Parks would regularly go to the Five-Points area and drink alcohol. (R. pp. 281-283) While at the bars and at Darren Greer's house (Christopher Greer's brother), Parks would order and take shots of liquor. (Id.; R. p. 295, line 19 - p. 296, line 4, top of page) Both Christopher and Darren Greer have seen Parks drink to the point of throwing up. (R. p. 288, lines 4-7; R. p. 293, lines 17-19, top of page) Simply stated, "[Parks] liked to drink." (R. p. 285, line 19; R. p. 172, lines 21-22)

Second, the undisputed facts of this case show that Parks, himself, chose to consume the alcohol at the cookout. Parks intended to become intoxicated. The Bowdens had finger foods, soft drinks, and beer set up for their guests on the deck outside. No one was forced to consume alcohol at the party. The party was for both business and social purposes. (R. p. 108, lines 5-14; R. p. 198, lines 2-11) Jim Woods testified that, just before he left the cookout, he saw Parks take three shots of tequila. (R. p. 105, 108-109) Woods approached Parks and asked him what he was doing, and Parks responded, "I'm just trying to catch a buzz." (R. p. 105, lines 11-14) Woods never told either the Bowdens or Rondeau Hensley what he had seen. (R. p. 106, lines 6-8, p. 107, lines 1-3, 8-10) Nonetheless, Woods testified that Parks appeared fine and that there were no signs apparent that Parks was intoxicated. (R. p. 109) No person reported to the Bowdens that Parks was intoxicated. No person informed the Bowdens that Parks was underage for purposes of alcohol consumption.

Furthermore, Parks had previously consumed alcohol and then driven while in a state where he should not have driven. (R. p. 281, lines 5-7; R. p. 293, lines 20-23) Parks would drink a lot of alcohol, and yet would still want to drive. When his friends would attempt to take his keys away from him, he did not want to give up his keys, and they would have difficulty seizing them from him. (R. p. 293, line 24 (top)– p. 293, line 9 (bottom)) On one occasion, Christopher Greer tried to take Parks' car keys away from him so he would not drive in an intoxicated state, but Greer had to tackle him on the ground in order to do so. (R. p. 290, lines 2-4) However, none of these facts were known by nor made known to the Respondents.

Parks is a "first party" who became voluntarily intoxicated. He was experienced with alcohol and there was no indication to the Bowdens that he was not 21 years old. Based on the reasoning prevalent in both Tobias and Lydia, this Court should affirm that the law precludes a first party action by a voluntarily intoxicated 19-year-old, especially since he is an adult for all other purposes and is only prevented from alcohol consumption by statutory authority.

Appellant's "public policy" argument is misplaced. She contends that, because the General Assembly has determined that it is illegal for adults to provide alcoholic beverages to persons under the age of 21 and that it is illegal for persons under 21 to consume alcohol, persons under 21 are not competent to make decisions regarding alcohol and, therefore, they cannot be "voluntarily" intoxicated and cannot be held responsible for any decisions they make regarding the consumption of alcohol. This argument is without merit. The existence of a statute prohibiting an act does not mean the person prohibited from acting is "incompetent" for purposes of the act. There certainly was no indication to Appellants that Parks was in any way incompetent or incapable of making appropriate adult decisions.

By way of example, an unlicensed driver is not "incompetent" to make decisions regarding whether he should drive, even though the General Assembly has passed a statute making it illegal for him to drive. S.C. Code Ann. § 56-1-20 (Supp. 2003). He may "voluntarily" choose to break the law and drive without a license. Similarly, an individual who is almost 20 years old is perfectly capable of knowing what the law is regarding his consumption of alcohol, and he is perfectly capable of deciding whether or not he will break that law, knowing what the consequences might be. Parks was certainly

aware that the legal drinking age is 21 years. The record clearly shows that Parks' intoxication was voluntary, and, based on the reasoning in both Tobias and Lydia, this Court should find that he is precluded from recovering damages which were caused by his own voluntary intoxication.

II. Parks' claim is barred by the doctrine of comparative negligence.

a. Though he was underage for alcohol consumption, Parks was an adult under South Carolina law.

The South Carolina Constitution, Article XVII, Section 14 states:

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

Under the plain language of the South Carolina Constitution, Parks was an adult, capable of making his own decisions and accepting responsibility for his own actions. Appellant attempts to carve out a blanket exception that individuals under 21 suffer from numerous "disabilities" imposed by law. She points to other provisions in the South Carolina Constitution and the South Carolina Code of Laws in an attempt to show that Parks was "disabled" within the meaning of Article XVII, Section 14 because he could not serve as a Representative, Senator, Governor, campus police officer, foster parent, etc. (Appellant's Initial Brief, pp. 7-9.) Clearly, if the meaning of "disabled" encompassed the inability to do all of the things Appellant has listed, no one under the age of 21 could be considered a legal adult, and the 18 year old age limit in Article XVII, Section 14 would be rendered meaningless.

Parks was not a Representative. He did not serve as Governor. He was not a campus police officer, foster parent, hearing aid specialist, lottery ticket retailer, or any of the other numerous professions Appellant has listed in an attempt to cloud the issue of competency. Any potential "disability" relating to these fields, or any others, is not relevant to the issue at hand, to wit: the fact that the South Carolina Constitution specifically states that persons over the age of 18 are legal adults. However the General Assembly has the discretion to pass laws and "may" restrict the sale of alcohol to person under the age of 21. Parks was by all accounts a competent adult, and his voluntary consumption of alcohol should not excuse him from comparative negligence. In fact, numerous South Carolina cases find that persons over the age of 14 are subject to contributory/comparative negligence. See Jones ex rel. Castor v. Carter, 336 S.C. 110, 518 S.E.2d 619 (Ct. App. 1999); Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982); accord Burch v. Uokuni Int'l, Inc., 192 Ga. App. 861, 386 S.E.2d 889 (Ga. App. 1989) (interpreting a Ga. statute and concluding the age of majority starts at age 18). Under South Carolina law, Parks was an adult and is subject to the doctrine of comparative negligence.

b. Parks' negligence exceeded the negligence, if any, of the Bowdens.

In South Carolina, a plaintiff may only recover damages if his own negligence is no greater than that of the defendant. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). "In a comparative negligence case, the trial court should ... determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." Id. In discussing the issue of comparative fault in Lydia v. Horton, supra, the Supreme Court reasoned:

"We cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself ... Lydia's admission that he was 'appreciably impaired' and that he lost control of the vehicle supports only one conclusion, that Lydia's negligence exceeded [the defendant's]." Lydia, 355 S.C. at 38-42, 583 S.E. 2d at 752-53.

The only conclusion to be drawn from the facts of this case, like the facts in Lydia, is that Parks' negligence exceeded that of the Respondents. In Lydia, the Supreme Court came to this conclusion based on two facts: (1) Plaintiff's admission that he was "appreciably impaired," and (2) Plaintiff's admission that he lost control of the vehicle. Parks' Complaint clearly admits that he was "intoxicated" (R. p. 15-20, paras. 16-17), which is like the plaintiff in Lydia who was "appreciably impaired." The Complaint also states that, while at his supervisor's home approximately one hour after the Bowdens' cookout, Parks "got into his car and drove away in a highly intoxicated state." (Id. at para. 16.) Therefore, Parks admits that he was drunk *while driving his own car.* Because Parks' accident involved only himself and no other party, it was clearly Parks who lost control of the vehicle, like the plaintiff in Lydia. Parks chose to drive despite Hensley's efforts to stop him. Under the reasoning in Lydia, the only inference that can be drawn from the facts of this case as they were pled by the Appellant herself is Parks' negligence exceeded that of the Respondents.

Assuming *arguendo* that the Bowdens had a statutory duty to protect Parks from himself and that somehow they violated that duty, Parks had statutory duties of his own. He had the duty to refrain from consuming alcohol because he knew he was under the age of 21, and he had the duty not to drink and drive. Appellant admits Parks violated both of

those duties. It was the breach of these duties, specifically Parks' duty not to drink and drive, that were the immediate and proximate cause of Parks' death.

The Bowdens' negligence, if any, could not exceed that of Parks. No one told the Bowdens that Parks was under the age of 21; in fact they believed he was over 21. (R. pp. 222-223; R. pp. 265-267; R. p. 97, lines 4-6; R. p. 126, lines 14-22, p. 143, lines 2-4) In any event, all the witnesses who saw Parks at the Bowdens' cookout that day testified that he did not appear intoxicated while at the cookout. (R. p. 241, lines 8-24; R. p. 261, lines 11-18; R. p. 99, line 23 - p. 100, line 6; R. p. 140, line 18 - p. 141, line 18; and R. p. 109) For example, Mrs. Bowden testified in her deposition that just before Parks left the cookout, he thanked her, hugged her, and walked down a four to five-step staircase. At that time, Parks "seemed just fine ... [he] seemed to be walking fine." (R. p. 261, lines 6-18) Although Mr. Woods testified that he saw Parks take shots of tequila, he stated that there was nothing unusual about Parks' state and saw nothing physical that would make him or others think Parks was intoxicated. (R. p. 105 lines 2-8.) Even if Parks had appeared intoxicated, he was not driving when he left the Bowdens' home. (R. p. 262, lines 10-15) In fact, there is no evidence that:

1) The Bowdens knew Parks would be driving later that evening;

2) Utility Service knew Parks would be driving later that evening; or

3) The Bowdens knew anything other than the fact that Parks left their home in the safety of the Hensleys' car as a passenger.

c. The Bowdens' negligence, if any, could not exceed that of both Parks and the Hensleys.

Even assuming the Bowdens were negligent, their negligence could not exceed that of both Parks *and* the Hensleys. While Parks appeared sober as he left the Bowdens, his perceived sobriety changed on the way from the Bowdens' to the Hensleys' house. Then, after arriving at the Hensleys' house, Parks drank one or possibly two or more mini bottles of liquor. Parks drank more alcohol in the presence of Rondeau Hensley. Mr. Hensley admitted that he knew Parks was not 21, he knew Parks was leaving for another party, and he knew Parks was in a hyper, non-sober state of mind, yet Hensley allowed Parks to drive away from his house. Parks knowingly and voluntarily consumed alcohol, but decided to drive despite being cautioned not to do so. Even assuming the Bowdens owed Parks a duty not to serve him alcohol, Parks had a duty to exercise ordinary care for his own safety. Even assuming the Bowdens owed Parks a duty not to serve him alcohol at their own cookout, they had no control over Parks' subsequent drinking at the Hensley's house. Any negligence on the part of the Bowdens is overshadowed and does not exceed the negligence of both Mr. Hensley and Parks.

III. South Carolina should officially adopt the rule of law to deny recovery for voluntarily intoxicated minors like the State of Georgia.

Georgia courts have addressed the issue of whether a minor may pursue a first party action. In three Dram Shop cases in the last decade, the Georgia courts refused to recognize first party actions by underage legal adults (18-20) and legal minors (under 18). In Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985), abrogated by OCGA § 51-1-40, the Georgia Supreme Court first held that a provider of alcoholic beverages cannot be held liable to an intoxicated minor for injuries sustained by the minor as a result of such

consumption. In Burch, 192 Ga. App. 861, 386 S.E.2d 889 (Ga. App. 1989), the Court extended Sutter to include a business. In Burch, a father sought to recover damages from the tavern owner based on Ga. Code §51-1-18(a), which states that a parent shall have a right of action against a person who furnishes alcohol to his underage child for the child's use without the parent's permission. The Georgia Court of Appeals interpreted the legislature's use of "underage child" to mean under the age of majority: age 18, not age 21. Finally, in Steedley v. Huntley's Jiffy Stores, Inc., 209 Ga. App. 23, 432 S.E.2d 625 (Ga. App. 1993), the court held that a seventeen year-old minor was precluded from bringing a first party cause of action against a convenience store that sold him alcohol before he was involved in an automobile accident. Affirming the lower court's summary judgment order, the Court of Appeals held:

> Steedley's action against these defendants is foreclosed, since a consumer of alcohol, *even an underage consumer*, may not recover from the provider of that alcohol for injuries resulting from the consumption of the alcohol.

Steedly, 209 Ga. App. 23 – 4, 432 S.E.2d at 626 (emphasis added).

Based on the reasoning prevalent in both Tobias and Lydia, South Carolina should follow Georgia's lead in precluding a first party action by a 19-year-old voluntarily intoxicated person, especially since he is an adult for all other purposes.

CONCLUSION

Parks was a voluntarily intoxicated first party whose death resulted from his own intoxication and, therefore, his claim should be barred based upon the Court's holdings in Tobias and Lydia. Additionally, even when construing all the evidence in the light most favorable to the Plaintiff, the evidence shows that Justin Parks' negligence exceeded that of Defendants, if any, and he is barred from recovery under the doctrine of comparative

negligence. The Circuit Court Order Granting Summary Judgment was not in error and should be affirmed by this Honorable Court.

Respectfully Submitted,

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Columbia, South Carolina

February 21, 2005

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 02-CP-40-5305

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

-versus-

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

CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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