OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34

August 29, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

PETITION TO FILE PETITION FOR REHEARING OUT OF TIME

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2005-UP-502-The State v. Octavious M. Dowling
(Charleston, Judge Daniel F. Pieper)

2005-UP-503-The State v. Torry L. Flowers
(Florence, Judge Clifton Newman)

2005-UP-504-The State v. Stacy Bing #1
(Aiken, Judge James C. Williams, Jr.)

2005-UP-505-The State v. Stacy Bing #2
(Aiken, Judge James C. Williams, Jr.)

PETITIONS FOR REHEARING

3955-State v. D. Staten	Denied 08/26/05
3956-State v. Light	Pending
3967-State v. A. Zeigler	Denied 08/26/05
3982-LoPresti v. Burry	Pending
3983-State v. Young	Denied 08/26/05
3990-Cowburn v. Leventis	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Denied 08/26/05
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Denied 08/26/05
3998-Anderson v. Buonforte	Pending
3999-Roberts v. McNair Law Firm	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4001-Keith v. River Consulting	Pending

4003-State v. Munyon	Denied 08/26/05
4004-Historic Charleston v. Mallon	Denied 08/26/05
4005-Waters v. Southern Farm Bureau	Denied 08/26/05
4006-State v. Pinkard	Denied 08/26/05
4011-State v. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4018-Wellman v. Square D	Pending
4019-Longshore v. Saber	Pending
4020-Englert Inc. v. LeafGuard USA	Pending
4021-SCDSS v. Phillips	Pending
2005-UP-163-State v. L. Staten	Denied 08/26/05
2005-UP-188-State v. T. Zeigler	Denied 08/26/05
2005-UP-197-State v. Cowan	Pending
2005-UP-218-Kirchner v. Kirchner	Denied 08/26/05
2005-UP-222-State v. Rieb	Pending
2005-UP-256-State v. T. Edwards	Denied 08/26/05
2005-UP-269-State v. D. Woods	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-319-Powers v. Graham	Pending

2005-UP-334-Bush v. Pioneer Machinery	Denied 08/26/05
2005-UP-340-Hansson v. Scalise	Denied 08/26/05
2005-UP-342-Akbar v. State	Pending
2005-UP-345-State v. Cantrell	Denied 08/26/05
2005-UP-347-State v. Trotman	Pending
2005-UP-354-Fleshman v. Trilogy	Pending
2005-UP-359-State v. Benson	Pending
2005-UP-363-Hendricks v. Ragsdale	Denied 08/26/05
2005-UP-364-Lollis v. S&S Constr.	Denied 08/26/05
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-371-Cantrell v. Ashmore	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. Mathis	Pending
2005-UP-385-State v. A. Johnson	Denied 08/26/05
2005-UP-401-McClure v. Service Partners	Pending
2005-UP-411-Carolina First Bank v. I.G.W. T.	Denied 08/26/05
2005-UP-420-State v. Noel	Pending
2005-UP-422-Zepsa Const. v. Randazzo	Pending
2005-UP-424-Babb v. Scott	Denied 08/26/05
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-437-State v. A. Mack	Denied 08/26/05

2005-UP-451-SCDSS v. Wilburn (Miller)	Denied 08/26/05
2005-UP-453-Harris v. Palmetto Pediatric	Pending
2005-UP-456-Myers v. Myers	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-469-In the interest of S., Jackie	Pending
2005-UP-471-Whitworth v. Window World	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-474-State v. S. Hill	Pending
2005-UP-483-State v. A. Collins	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3724-State v. Pagan	Pending
3730-State v. Anderson	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Granted 08/25/05
3749-Goldston v. State Farm	Denied 08/18/05
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3758-Walsh v. Woods	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Denied 08/18/05

3767-Hunt v. S.C. Forestry Comm.	Denied 08/18/05
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3787-State v. Horton	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending

3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending

3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending

3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3943-Arnal v. Arnal	Pending
3947-Chassereau v. Global-Sun Pools	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3954-Nationwide Mutual Ins. v. Erwood	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore)	Pending
3978-State v. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending

3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-736-State v. Ward	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-148-Lawson v. Irby	Denied 08/18/05
2004-UP-149-Hook v. Bishop	Denied 08/16/05
2004-UP-219-State v. Brewer	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending

2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Denied 08/18/05
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending

2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending

2004-UP-617-Raysor v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-046-CCDSS v. Grant	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm’n	Pending

2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-149-Kosich v. Decker Industries, Inc.	Pending
2005-UP-155-CCDSS v. King	Pending
2005-UP-160-Smiley v. SCDHEC/OCRM	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-173-DiMarco v. DiMarco	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-200-Cooper v. Permanent General	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-224-Dallas et al. v. Todd et al.	Pending

2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-348-State v. L. Stokes	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Johnny W. Rabb, Jr., Respondent.

Opinion No. 26033
Submitted August 2, 2005 - Filed August 29, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Charles N. Pearman, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard and Jason B. Buffkin, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a ninety (90) day suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent pled guilty to one count of willful failure to file a state income tax return in violation of South Carolina Code Ann. § 12-54-44(B)(3) (2000). He was sentenced to either nine (9) months imprisonment or payment of a $1,000 fine and payment of $14,724 in restitution. Respondent represents he has paid the fine and restitution. Respondent acknowledges that the willful failure to file an income tax return is a serious crime as defined in Rule 2(aa), RLDE, Rule 413, SCACR.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. We grant respondent's request that the suspension be made retroactive to the date of his interim suspension.[1] Within fifteen days

[1] On June 23, 2005, respondent was placed on interim suspension. In the Matter of Rabb, 2005 WL 1523870 (June 23, 2005).

of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert J. Cantrell, Respondent.

Opinion No. 26034
Submitted August 2, 2005 - Filed August 29, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Charles W. Whiten, Jr., of Anderson, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a two year suspension from the practice of law. We accept the Agreement and impose a two year suspension from the practice of law. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

In or about October 2001, respondent was retained by Clients A and B to represent them in a bankruptcy proceeding. In March 2003, Clients A and B scheduled an appointment with respondent to sign documents related to their case. When Clients A and B arrived for their appointment, respondent informed them that, due to personal problems, their documents were not ready to be signed. Respondent asked the clients to return the following day. Clients A and B returned the following day and the documents were signed without further incident. Subsequent to signing the documents, there was a considerable period of time in which Clients A and B either failed to receive any information from respondent or were given incorrect information by respondent's staff.

By letter dated April 3, 2003, ODC notified respondent of the complaint Clients A and B had filed against him and the fifteen (15) day time period in which to file a response. After no response was received before the stated deadline, ODC sent an additional letter to respondent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Ultimately, respondent submitted a response. Respondent admits he was less than timely in communicating with the Attorney to Assist Disciplinary Counsel. Respondent concedes that, during this period, he was under significant stress from an ongoing custody action with his ex-wife and that he was resorting to an improper use of alcohol to cope with his problems.

Matter II

Respondent was the plaintiff in a family court action. Respondent was present for the November 11, 2002 hearing during which the family court ordered both respondent and the defendant to submit to hair strand drug tests and to produce the results of the tests within ten (10) days. Respondent did not submit to his drug test until December 9, 2002, in violation of the court's order. The results of the

December 9, 2002 test noted respondent tested positive for cocaine. The defendant filed a rule to show cause. On June 20, 2003, the family court found respondent in willful contempt of the court's November 11, 2002 order by his failure to submit to a hair strand drug test within ten (10) days of the date of the order.

Matter III

On or about October 31, 2002, respondent filed a Chapter 13 bankruptcy action on behalf of a client. Subsequent to the filing, respondent took over representation of the client's ongoing worker's compensation case. On or about January 3, 2003, the bankruptcy trustee filed a Petition to Dismiss the bankruptcy action due to nonpayment.

On or about January 27, 2003, respondent assisted his client in obtaining a loan from the complainant in this matter. The loan was to be repaid through the proceeds of the worker's compensation action. Respondent submitted the loan application to the complainant on behalf of respondent and his client. Respondent failed to notify the complainant of the client's bankruptcy filing at the time he submitted the loan application. Although the client's bankruptcy action was ultimately dismissed, respondent actively assisted his client in obtaining a personal loan without making full disclosure of all relevant financial information.

Matter IV

On or about September 3, 2003, respondent was arrested and charged with trespass after notice. The homeowner, respondent's step-daughter, contacted law enforcement after respondent refused to leave her residence. When law enforcement arrived, respondent appeared intoxicated and repeated he was not going to leave. Despite several attempts by law enforcement to convince respondent to voluntarily leave the premises, including enlisting the aid of respondent's wife to persuade him to leave, respondent refused to leave. Leaving no alternative, respondent was placed under arrest and

transported to the detention center. Respondent represents he pled guilty to the offense of trespass and paid a small fine.

Matter V

In or about April 2003, respondent was retained to handle a bankruptcy claim. After a confirmation hearing in August 2003, respondent's clients began making payments to the trustee. The clients were assured that everything was in order, although respondent represents he informed the clients that the trustee had recommended that certain changes be made to the Chapter 13 plan. Respondent admits there was a breakdown in communications between himself and his clients and that he failed to ensure that his clients had a complete and full understanding of their case.

Matter VI

In or around 2001, respondent represented a client in a domestic action. The client resided in North Carolina. Respondent made an appearance on behalf of the client at a hearing in North Carolina. At the time of the hearing, respondent was not licensed to practice law in North Carolina.

Matter VII

Aware that ODC was investigating his conduct, respondent removed several file cabinets containing numerous client files from his office and stored them at his residence. After respondent was placed on interim suspension,[1] the attorney to protect respondent's clients' interests (APCI) contacted respondent to take possession of his client files. Initially, respondent did not turn over the client files stored at his residence. When the APCI discovered that respondent may have been keeping client files at his residence, the APCI informed respondent he

[1] On September 23, 2003, respondent was placed on interim suspension. In the Matter of Cantrell, 360 S.C. 325, 600 S.E.2d 902 (2003).

must immediately turn over all client files. Respondent provided several excuses why he could not produce the files until a later date. Eventually, respondent provided the APCI with the additional client files. Upon information and belief, respondent provided all client files in his possession to the APCI.

Respondent represents that a significant factor during the period of time of his misconduct was his very contentious divorce and custody action with his first wife. Respondent represents that before and/or during this marital discord, he hired an employee as his paralegal and office manager.[2] Respondent admits he allowed this employee to control every aspect of his law office, including but not limited to, relinquishing authority to make decisions regarding the representation of his clients.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(2) (it shall be a ground for discipline for a lawyer to engage in conduct in violation of the applicable rules of professional conduct of another jurisdiction), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to willfully violate a valid court order issued by a court of this state). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall promptly

[2] This employee became respondent's second wife.

deliver property that third party is entitled to receive); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 3.4 (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 4.1 (in the course of representing a client, a lawyer shall not fail to disclosed a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client); Rule 5.5 (lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction); Rule 8.1 (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(c) (it shall be professional misconduct for a lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law. During the suspension, respondent shall continue to participate in any counseling and/or treatment recommended by his psychologist. Respondent's psychologist shall submit quarterly evaluations of respondent's progress to ODC throughout the duration of the suspension. In addition, if respondent seeks reinstatement to the practice of law, he shall submit a report from his psychologist to ODC which addresses his mental fitness to resume the practice of law. This report shall be submitted to ODC at least sixty (60) days prior to filing any petition for reinstatement. Respondent's request that the suspension be applied retroactively to the date of his interim suspension is denied. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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 J. Bowden, and Utility Service Agency, Inc. Respondents.

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

Opinion No. 26035
Heard May 4, 2005 - Filed August 29, 2005

REVERSED

Robert L. Widener and Celeste T. Jones, of McNair Law Firm, P.A., of Columbia, and Gayla S. L. McSwain, of McNair Law Firm, P.A., of Greenville, for appellant.

Eric G. Fosmire, of Collins & Lacy, P.C., of Columbia; Karl S. Brehmer and J. Austin Hood, of Brown & Brehmer, of Columbia, for respondents.

JUSTICE MOORE: The trial court granted respondents' motion for summary judgment in appellant's wrongful death action. In this case, we are asked to determine whether a social host should be subject to liability when the host has provided alcohol to a person less than 21 years of age and that person is subsequently injured or dies.

FACTS

Linda Marcum, as Personal Representative of the estate of Justin Michael Parks (Parks),[1] brought this wrongful death action that arose from a one-car accident in which her son was killed. Parks, who was 19 years old, had consumed alcohol before the accident and, at the time of his death, had a blood alcohol content of 0.291%. An expert witness testified Parks' blood alcohol content indicated he was seriously intoxicated and that he would have been visibly drunk, have trouble walking, and have slurred speech.

Prior to the accident, Parks attended a cookout held at the home of respondents, Donald and Gloria Bowden (hereinafter "the Bowdens"). The cookout was held for social and business promotional purposes. Mr. Bowden gave a general invitation to the cookout to a group of people he saw while at Shealy Electrical's office.

Parks, who was employed by Shealy Electrical, rode to the cookout with his supervisor, Timothy Hensley (Mr. Hensley). At the party, the Bowdens placed soft drinks and beer in a "washtub" on the deck and expected their guests to help themselves to the beverage of their choice. Respondent Utility Service Agency, Inc. reimbursed Mr. Bowden for the cost of food and drinks, including liquor. The Bowdens did not take any precautions to ensure those who were drinking alcohol were over 21 years of age. No one from Shealy Electrical informed the Bowdens that Parks was under 21 and could not legally drink alcohol. Mr. Bowden assumed Parks was at least 21 years old because of his employment, because he had seen

[1]When referring to appellant, the name "Parks" will be used.

him drinking at a bar before, and because he had overheard him in Shealy Electrical's office talking about drinking shots in bars.[2]

At the cookout, Parks drank beer and several tequila shots. Jim Woods, a co-worker of Parks who did not know Parks' age, asked Parks what he was doing after seeing him take at least three shots of tequila within ten minutes. Parks replied he was "just trying to get a buzz." Mr. Bowden did not remember seeing Parks drink but he assumed he was drinking.

Mr. Hensley and the Bowdens testified that, upon leaving the party to ride home with the Hensleys, Parks did not have trouble walking and his speech was not slurred. Mrs. Bowden testified that when Parks left, he hugged her and thanked her for allowing him to come to the cookout. She felt his condition was fine. However, Mrs. Hensley, who drove Mr. Hensley and Parks from the party to their house, testified that when Parks left the party, he was walking fine, but his speech was slurred. Mrs. Hensley did not consume any alcohol that night.

Once arriving to the Hensley home, Mr. Hensley detained Parks because he wanted Parks to sober up before going to another party. He stated he did not serve Parks alcohol; however, Parks attempted to drink one minibottle, which Mr. Hensley poured out after Parks had taken one sip. As soon as Mr. Hensley poured the first minibottle out, Parks pulled another minibottle out of his pocket and drank it down at once. Parks continued to attempt to leave, but Mr. Hensley continued to delay him because he did not want Parks to drive. Finally, Mr. Hensley did not feel he could further prevent Parks from driving away and Parks left.[3]

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[2]Mrs. Bowden testified in her deposition that when she read about Parks' death in the paper, Mr. Bowden told her it could not be the Parks that had attended the party because he was sure Parks was older than 19 years of age.

[3]Mr. Hensley had heard Parks would drink excessively and then drive, even though other people would try to take his keys away from him. Parks' roommate and the roommate's brother confirmed Parks drank excessively

Before trial on Parks' wrongful death action, respondents' motion for summary judgment was granted. The court found Parks' first-party action was precluded because he was a voluntarily intoxicated first party and was an adult for all other purposes and was prevented from consuming alcohol only by statutory authority. The court also found Parks' negligence exceeded that of respondents because he voluntarily became intoxicated and none of the defendants knew he was under 21 years of age.

ISSUES

I. Did the trial court err by finding an underage person possesses full social and civil rights?

II. Do underage persons, injured as a result of being provided alcohol, have a first-party claim against the social hosts who provide them alcohol?

III. Did the trial court err by finding Parks is barred from recovery pursuant to the doctrine of comparative negligence?

DISCUSSION

Scope of Review

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most

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and would drive drunk. The roommate stated he would often have to argue with Parks to get the keys from him and that, one time, he had tackled Parks to the ground for the keys.

favorable to the nonmoving party. *Id.*

I

Parks argues the trial court erred by finding he was not a legal minor and was not under a legal disability. The court based its finding on the following constitutional provision:

> 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.

S.C. Const. Art. XVII, § 14. The court stated this provision allows for the restriction of the sale of alcoholic beverages to persons under age 21, but it does not remove legal rights and responsibilities from persons between the ages of 18 and 21, nor does it deem those persons disabled. The court concluded Parks possessed full social and civil rights.

While persons aged 18 to 20 are deemed minors for purposes of the laws regarding alcoholic beverages, those persons are not minors in other respects. *See* S.C. Code Ann. § 15-1-320(a) (2005) (all references to minors in law of this State shall be deemed to mean persons under age of eighteen years except in laws relating to sale of alcoholic beverages). *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) (while drinkers aged eighteen to twenty are *sui juris* in all other respects, meaning they are legally presumed to have adult mental and judgmental capacity, and need less protection from harming themselves than younger drinkers, their drinking still poses a high risk of harm to others). Accordingly, the trial court did not err by finding Parks possessed full social and civil rights.

II

The overriding issue in this case is whether a social host should be subject to liability when the host has provided alcohol to a person less than 21 years of age and that person is subsequently injured or dies.

Background of South Carolina Case Law

In the commercial vendor setting, we have held there is no first-party cause of action against a tavern owner by an intoxicated adult predicated on a statutory violation. Tobias v. Sports Club, Inc., 332 S.C. 90, 504 S.E.2d 318 (1998). In Tobias, we stated the right of injured third parties to maintain a negligence suit against a tavern owner based upon statutory violations is retained and we also stated that "[w]e leave for another day the issue whether we will recognize a first-party action brought by a minor." *See also* Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991) (statutory prohibitions against selling alcohol to underage person creates private right of action if third-party plaintiff can establish negligence *per se* and causation); 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) (alcoholic beverage licensee had duty not to allow persons less than 21 years of age to possess or consume alcohol on its premises; duty runs to third parties who could be injured by intoxicated underage drivers).

In the social host setting, the appellate courts of this state have stated that a social host is not liable at common law for service of alcohol to an intoxicated adult who subsequently injures a third party. *See* Carson v. Adgar, 326 S.C. 212, 219, n.4, 486 S.E.2d 3, 6, n.4 (1997); Garren v. Cummings & McCrady, Inc., 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986).[4]

[4]The Court of Appeals, however, has found a question of negligence was presented where an adult, as a fraternity pledge, was pressured to consume excessive amounts of alcohol by the fraternity. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). The Ballou case was distinguishable from Garren on the basis Ballou was pressured to consume an excessive amount of alcohol and he was abandoned after being found unconscious and unresponsive.

The question whether an underage person may recover for injuries he sustained after being "served or furnished" alcohol by a social host has not been answered in this state.

Applicable South Carolina Statutory Law

South Carolina Code Ann. § 61-4-90 (Supp. 2004) provides:

> It is unlawful for a person to transfer or give to a person under the age of twenty-one years for the purpose of consumption beer or wine at any place in the State. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days. A person found guilty of a violation of Section 61-6-4070[5] and this section may not be sentenced under both sections for the same offense.
>
> The provisions of this section do not apply to a spouse over the age of twenty-one giving beer or wine to his spouse under the age of twenty-one in their home; to a parent or guardian over the age of twenty-one giving beer or wine to his children or wards under the age of twenty-one in their home; or to a person giving beer or wine to another person under the age of twenty-one in conjunction with a religious ceremony or purpose if the beer or wine was lawfully purchased.

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[5]S.C. Code Ann. § 61-6-4070 (Supp. 2004) is the statute dealing with the transfer of alcoholic liquors to a person under the age of twenty-one years. The wording of the statute is the same as § 61-4-90.

> The provisions of this section do not apply to a person who gives, serves, or permits to be served any beer, ale, porter, wine, or other similar malt or fermented beverage to a student under the age of twenty-one [and above the age of eighteen] if [the alcoholic beverage is to be used in the classroom setting.]

There is no statute in South Carolina regarding civil liability for a person who sells or gives alcohol to an underage person.

Persuasive Authority

The question of whether a social host should be civilly liable for "serving or furnishing" alcohol to an underage person has been addressed in other states with varying results.

Some courts have found that any change in the law governing alcohol-related liability should only be made by the state legislature. *See, e.g.*, Wakulich v. Mraz, 785 N.E.2d 843 (Ill. 2003) (judicial restraint in this area is appropriate and any decision to expand civil liability of social hosts should be made by legislature); Reeder v. Daniel, 61 S.W.3d 359 (Tex. 2001) (Texas court has deferred to Legislature and declined to recognize social-host liability for serving guests from ages eighteen to twenty and for guests under age eighteen). At least one court has not imposed liability based on a specific statute stating that a person who provides alcohol to another is not civilly liable for any resulting damages. *See, e.g.*, Chokwak v. Worley, 912 P.2d 1248 (Alaska 1996) (statute conferring upon "person who provides alcoholic beverages" to another civil immunity from liability for injuries resulting from intoxication of that person encompasses social hosts who provide alcohol to minors).

"Most of the courts that have found a social host potentially liable for the alcohol-related injuries or death of a minor to whom he or she furnished alcohol have done so on the basis that the host violated a state statute providing that the sale or gift of alcohol to a minor is a criminal misdemeanor," such as S.C. Code Ann. § 61-4-90. Diane Schmauder Kane,

Annotation, *Social Host's Liability for Death or Injuries Incurred by Person to Whom Alcohol was Served*, 54 A.L.R.5th 313 (1997). The Annotation explains that "[t]he rationale of these courts has been that the violation of such a penal statute constitutes either evidence of negligence or negligence *per se* on the part of the alcohol provider." *See* Hansen v. Friend, 824 P.2d 483 (Wash. 1992) (statute making it criminal act for "any person" to give liquor to minor imposes duty of care on social hosts not to serve liquor to minors); Longstreth v. Gensel, 377 N.W.2d 804 (Mich. 1985) (social host liability imposed based on statute stating person who knowingly furnishes liquor to person less than 21 years of age or fails to make diligent inquiry regarding person's age is guilty of misdemeanor); Congini by Congini v. Portersville Valve Company, 470 A.2d 515 (Pa. 1983) (social host negligent *per se* in serving alcohol to point of intoxication to person less than 21 years of age). *But see* Hickingbotham v. Burke, 662 A.2d 297 (N.H. 1995) (statute barring licensee, salesperson, or "any other person" from providing alcohol to underage person did not grant civil right of action on which guest could base personal injury claim against hosts; however, underage person who is injured as result of social host's service of alcohol may maintain action against host based on reckless service of alcohol).

From a perusal of persuasive authority, we find no clear statement of a majority rule on this issue.

Public Policy Arguments in Favor of Finding a Duty

One public policy argument in favor of finding a social host liable for furnishing alcohol to an underage guest who subsequently injures himself is the basic goal of deterring the consumption of alcohol by underage persons. *See* Batten by Batten v. Bobo, 528 A.2d 572 (N.J. Super. 1986) (New Jersey has recognized a clearly-stated policy that it opposes drinking by minors; acknowledging minor's cause of action against social host who violates law by providing minor with alcoholic beverages would have deterrent effect Legislature desires). If social hosts are aware they can potentially be found liable for the injuries sustained by an underage guest, then social hosts will be more vigilant about who is consuming alcohol at their social gatherings. A vigilant host would greatly decrease the ability of an underage person to

consume alcohol at a social gathering.

Another policy reason for imposing a duty to protect underage persons from the effects of alcohol is that minors, as a class, are incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol. *Cf.* Norton v. Opening Break of Aiken, Inc., *supra* (purpose of alcoholic beverage regulation is to prevent consumption of alcohol by youthful drinkers so as to protect them from their own immature judgment). *See* Busby v. Quail Creek Golf and Country Club, 885 P.2d 1326 (Okla. 1994) (states which have recognized the imposition of the duty to protect minors from alcohol's effects on *commercial vendors* have generally concluded that minors as a class are incompetent by reason of youth and inexperience to deal responsibly with the effects of alcohol); Congini by Congini v. Portersville Valve Company, 470 A.2d 515 (Pa. 1983) (Pennsylvania legislature has made judgment that persons under twenty-one years of age are incompetent to handle alcohol); Richard Smith, Note, *A Comparative Analysis of Dramshop Liability and a Proposal for a Uniform Legislation*, 25 J. Corp. L. 553, 560 (2000) (Congress and the legislatures of all fifty states have decided that, as a class, persons under the age of twenty-one are not mature enough to consume alcohol responsibly).

Analysis and Conclusion

After reviewing the above authority and public policy arguments, we conclude that social host liability should be imposed in the first-party underage person claim situation. This is consistent with our holding in Tobias. While Tobias involved a commercial vendor, we recognized that underage persons should be treated differently than adults who become intoxicated and injure themselves. Further, this decision is consistent with the purpose behind sections 61-4-90 and 61-6-4070, which make it unlawful for a person to transfer or give alcohol to a person under twenty-one years of age. Those statutes are designed to prevent harm to the minor who purchased the alcohol. *See also* Whitlaw v. Kroger Co., *supra* (statutes involving unlawfulness of selling alcohol to person less than twenty-one years of age are designed to prevent harm to underage person who purchased the alcohol).

Additionally, Parks meets the test to determine when a duty created by a statute will support an action for negligence. Under Whitlaw v. Kroger Co., *supra*, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. Clearly, the essential purpose of statutes prohibiting a person from giving or transferring alcohol to an underage person is to protect the underage person from harm, including injuries sustained or death, after imbibing alcohol provided by such person. Parks, therefore, meets the first requirement. He also meets the second requirement because he is less than twenty-one years of age and he is a member of the class sought to be protected by §§ 61-4-90 and 61-6-4070.

In conclusion, finding a duty on the part of a social host in this situation is a natural progression of our case law. The imposition of liability is based on the fact that the host violated state statutes providing that the transfer or gift of alcohol to an underage person is a criminal misdemeanor. A finding of social host liability is supported by other jurisdictions and is supported by public policy arguments regarding the incompetency and immaturity of minors and the effort to deter minors from consuming alcohol.

Although we impose a duty on social hosts that previously did not exist, minor plaintiffs are still required to prove their social hosts breached that duty and that the hosts' alleged breach caused the minor's injuries. If Parks can show that the Bowdens breached their duty to him by violating the statute, then he will have established negligence *per se*. *See* Whitlaw v. Kroger Co., *supra* (once plaintiff shows statute created duty to plaintiff and that defendant breached that duty by violating statute, then plaintiff has established negligence *per se*). However, Parks will then still have to establish a causal connection between the Bowdens' alleged negligence and his death. Whitlaw, *supra* (once he has shown negligence *per se*, plaintiff must then show causal connection between defendant's negligence and plaintiff's injury before plaintiff is entitled to damages; violation of statute is not conclusive of liability); Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324 (1948) (violation of statute, while negligence *per se*, does not support recovery of damages because violation was not proximate cause of

injury); Steele v. Rogers, 306 S.C. 546, 413 S.E.2d 329 (Ct. App. 1992) (sale of alcoholic beverages to minor does not render vendor strictly liable for every ensuing act; even if sale constitutes negligence *per se*, plaintiff must still show causal connection between defendant's negligence and his own injury to recover damages).

III

Parks argues the trial court erred by finding he is barred from recovery because he was voluntarily intoxicated and his negligence exceeded that, if any, of the Bowdens.

Under South Carolina's doctrine of comparative negligence, a plaintiff may recover damages only if his own negligence is not greater than that of the defendant. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). Ordinarily, comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. *Id.* In a comparative negligence case, the trial court should determine judgment as a matter of law only if the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent. *Id.*

Comparative negligence principles are applicable in the social host liability setting. Finding a social host negligent *per se* for serving alcohol to a minor and finding the social host may be liable for injuries proximately resulting from the minor's intoxication does not end the inquiry. There still exists the factor that the minor plaintiff was not simply an unwitting third party to the actor's negligence. Congini by Congini v. Portersville Valve Co., 470 A.2d 515, 518 (Penn. 1983). Although "an eighteen-year-old minor may state a cause of action against an adult social host who has knowingly served him intoxicants, the social host in turn may assert as a defense the minor's [comparative] negligence." *Id.* *See also* Batten by Batten v. Bobo, 528 A.2d 572 (N.J. Super. 1986) (intoxicated minor guest's comparative negligence can properly be considered by jury in action against social host who provided cause of intoxication).

In the instant case, the trial court found, as a matter of law, that Parks'

comparative negligence outweighed the Bowdens' alleged negligence. He based this ruling on the facts that Parks was "voluntarily intoxicated" and that the Bowdens were not aware that Parks was underage. We disagree with these findings. A jury should decide the comparative negligence of the parties because there is conflicting evidence. *See* Cunningham ex rel. Grice v. Helping Hands, Inc., *supra* (summary judgment appropriate only if no genuine issue of material fact); Bloom v. Ravoira, *supra* (in comparative negligence case, trial court should determine judgment as matter of law only if sole reasonable inference which may be drawn from evidence is that plaintiff's negligence exceeded fifty percent).

We take this opportunity to distinguish our decision in Lydia v. Horton, 355 S.C. 36, 583 S.E.2d 750 (2003). In Lydia, we held an intoxicated adult plaintiff (Lydia) could not recover on a first-party negligent entrustment cause of action against another adult (Horton) who had allowed Lydia to drive his car. We stated Lydia's admission that he was "appreciably impaired" and that he lost control of the vehicle supported only one conclusion, that Lydia's negligence exceeded Horton's.

The trial court relied on Lydia in the instant case and stated the only conclusion that can be drawn from the facts is that Parks' negligence exceeded that of the Bowdens due to Parks' admission he was intoxicated and that he later "got into his car and drove away in a highly intoxicated state."

We find the instant case distinguishable from Lydia. Parks was underage at the time of the accident and our General Assembly has deemed those persons less than twenty-one years of age to be incompetent to make decisions regarding the consumption of alcohol. Unlike the situation in Lydia, it is possible that a social host could be more than fifty percent negligent when an underage guest has become intoxicated and subsequently injures himself. Therefore, we reverse the trial court's finding that Parks is barred from recovery based on comparative negligence.

CONCLUSION

We find the trial court did not err by finding Parks, as a nineteen-year-old, possessed full social and civil rights. However, although Parks was an adult for other purposes, he was considered a minor under the alcoholic beverage statutes. We further find that a social host is subject to liability when that host has provided alcohol to an underage person who is subsequently injured or dies as a result of being provided that alcohol. Finally, we find comparative negligence principles applicable in the social host setting. Therefore, the decision of the trial court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
Clifton Newman, Circuit Court Judge

Opinion No. 26036
Heard May 18, 2005 - Filed August 29, 2005

AFFIRMED

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

George J. Kefalos, of Charleston, for Respondent.

JUSTICE PLEICONES: We granted certiorari to consider a Court of Appeals' decision imposing liability on a social host for damages to an individual killed when a nineteen-year-old guest who had consumed alcohol provided by the host caused an automobile accident. Barnes v. Cohen Dry Wall, Inc., 357 S.C. 280, 592 S.E.2d 311 (Ct. App. 2003). The sole issue is whether we will impose third party liability on a social host who knowingly and intentionally serves alcohol to guests aged eighteen, nineteen, and twenty, that is, persons who are minors for purposes of alcoholic beverage control laws. Following our decision to impose first party liability on social hosts under these circumstances, see Marcum v. Bowden, Op. No. 26035 (S.C. Sup. Ct. filed August 29, 2005) Shearouse Adv. Sh. No. 34, we affirm.

FACTS

Orin Feagin was a nineteen-year-old employee of petitioner Cohen Dry Wall, Inc. (Company) when he attended the Company's 1998 Christmas party. There was evidence that, despite Company's pre-party warning that Feagin would not be served at the party and its attempt to enforce this decision at the party, Feagin in fact consumed Company-supplied alcohol while there. Although Feagin exited the party with a group of people including a designated driver, he drove himself to his girlfriend's place of employment, then drove to his girlfriend's mother's home, and finally returned to visit his girlfriend. After leaving his girlfriend's work for the second time Feagin was involved in a two-car accident, which killed him and the passenger in the other car.

The passenger's personal representative (Respondent) sued both Company and Feagin's estate, and the estate cross-claimed against Company alleging negligence per se and gross negligence. The jury returned a verdict for Company on this cross-claim. The jury returned a $750,000 verdict for actual damages against Company and Feagin's estate, finding Company 20%

responsible and Feagin 80% responsible.[1] On Company's post-trial motion, the judge ordered an off-set against the verdict to the extent of Feagin's liability insurance.

On appeal, the Court of Appeals held that the purpose of statutes[2] prohibiting a social host from serving alcohol to persons under 21 is to prevent harm to the minor, and to the members of the public harmed by the minor's alcohol consumption. Barnes v. Cohen Dry Wall, Inc., *supra*. We affirm.

ISSUE

Whether the Court of Appeals erred in finding that social hosts who knowingly and intentionally serve alcoholic beverages to a guest aged eighteen to twenty owe a duty to a third party injured or killed by the guest in an alcohol-related accident?

ANALYSIS

In Marcum v. Bowden, *supra*, we held that social hosts may be liable to a guest under twenty-one who suffered an alcohol-related injury or death after consuming alcoholic beverages knowingly and intentionally provided by the host. We based our decision both on our conclusion that S.C. Code Ann. §§ 61-4-90 and –4070 (Supp. 2004) create a private cause of action in favor of such a guest, and on public policy grounds. We find the same considerations compel our decision today to extend liability to third parties.

In Whitlaw v. Kroger, 306 S.C. 51, 410 S.E.2d 251 (1991), we held that the purpose of alcoholic beverage control statutes prohibiting the sale of alcoholic beverages to persons under the age of twenty-one was to protect

[1] The jury also awarded Respondent $1.4 million in punitive damages against Feagin's estate only. Neither this award nor the cross-claim are challenged on appeal or certiorari.

[2] See S.C. Code Ann. §§ 61-4-90 and 61-4-4070 (Supp. 2004).

persons harmed by the minors who consumed the alcohol, as well as the minors themselves. In Marcum v. Bowden, we held that the statutes prohibiting the transfer or giving of alcoholic beverages to minors were enacted for the benefit of those minors. We hold today that §§ 61-4-90 and –4070 were also enacted for the protection of members of the public from harm done by persons under twenty-one who have consumed alcohol in violation of the statutes.[3]

In South Carolina, persons under twenty-one "are incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol." Id. Imposing liability on social hosts encourages them to "be more vigilant about who is consuming alcohol at their social gatherings," Id., and thus promotes our public policy which prohibits the use of alcohol by incompetent and inexperienced youth. We find that this policy is served by the extension of social host liability to third parties injured or killed in an alcohol-related accident by a guest under twenty-one years of age who has consumed alcohol knowingly and intentionally provided to him by the host. Before the injured person can recover damages from the social host, he must present evidence not only that the host knowingly and intentionally provided the minor with alcoholic beverages, but must also establish a causal connection between the alcohol consumption and his injuries. Marcum v. Bowden, *supra*.

CONCLUSION

The decision of the Court of Appeals holding that a social host may be liable to a third party injured by an underage guest who has consumed alcohol provided by the host is

[3] It would be unusual at best were we to find that the young person who consumed the beverages could maintain a suit against the host but deny relief to an innocent third party harmed by that minor. Cf., Tobias v. Sports Club Inc., 332 S.C. 90, 504 S.E.2d 318 (1998) (statutes prohibiting sale of alcohol by tavern owner to intoxicated person create third party but not first party liability).

AFFIRMED.

MOORE, A.C.J., WALLER, BURNETT, JJ., and Acting Justice James W. Johnson, Jr., concur.

The Supreme Court of South Carolina

In the Matter of Jeffrey T. Spell, Respondent.

ORDER

On August 10, 2005, respondent was indicted for violation of 18 U.S.C. § 371 (2000). The indictment alleges that, from approximately January 2002 through January 2004, respondent conspired with others to defraud and obtain money from mortgage companies and others "by means of false and fraudulent pretenses, representations and promises, and during such period, did execute such scheme and artifice and, in so doing, did transmit and cause to be transmitted in interstate commerce, by means of wire communication, certain electronic writings and signals, and it was further foreseeable that money would be sent by means of wire communication in interstate commerce, in violation of Title 18, United States Code, Section 1343."

Because he has been charged with a serious crime, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a) and (b), RLDE,

Rule 413, SCACR. In addition, ODC requests the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the suspension and the appointment of an attorney to protect his clients' interests.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that William Bobo, Jr., Esquire is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Bobo shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Bobo may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals

from the account(s) and shall further serve as notice to the bank or other financial institution that William Bobo, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that William Bobo, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Bobo's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina

August 24, 2004

The Supreme Court of South Carolina

In the Matter of James
Archie Patrick, III, Respondent.

ORDER

On or about May 5, 2005, respondent was charged by information with two (2) counts of Assault with a Weapon (Felony) and one (1) count each of Partner/Family Member Assault (Misdemeanor), Intimidation (Felony), and Tampering with Witnesses and Informants (Felony). The information was issued in Yellowstone County, Montana.

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, because he has been charged with a serious crime. Respondent has not filed a return.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina

August 26, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Widdicombe, Respondent,

v.

Rachel P. Tucker-Cales f/k/a DuPree, Appellant.

Appeal From Charleston County
Judy C. Bridges, Family Court Judge
Frances P. Segars-Andrews, Family Court Judge
Jocelyn B. Cate, Family Court Judge

Opinion No. 4022
Submitted June 1, 2005 – Filed August 29, 2005

AFFIRMED

Rachel Putnam Tucker-Cales, of Mt. Pleasant, Pro Se, for Appellant.

Paul B. Ferrara, III, of Summerville, for Respondent.

WILLIAMS, J.: Rachel P. Tucker-Cales (Mother) appeals the family court's denial of her motion for relief from judgment. We affirm.[1]

FACTS

This child custody case has a tortured procedural history. On December 15, 1995, the family court approved a settlement agreement between Robert Widdicombe (Father) and Mother, which addressed the custody of their minor child, a son born October 22, 1993. The settlement agreement provided that Mother would have custody and Father would have standard visitation. It also provided that neither party could take the child out of the jurisdiction without providing the other party 60 days' notice.

On August 22, 2000, Father, who had remarried and moved to Illinois, filed a summons and complaint in South Carolina seeking custody of his son. The complaint alleged, among other things, that Mother moved numerous times without notifying Father. The complaint also alleged that Mother's last known address was in South Carolina, but her present whereabouts were unknown.

In an affidavit attached to the complaint, Father recounted his longstanding hardships in locating and communicating with Mother and his son. He claimed he knew Mother and child were living in North Carolina, but for several years the only dependable way to get in touch with Mother was to withhold her support payments until she phoned. In 1998, according to Father, Mother dropped the child off at his home, claiming she would return the following morning. Mother did not return for two and a half weeks, and the child's maternal grandmother eventually picked him up. From 1998 to 2000, Father learned several disturbing facts regarding Mother and his son, including allegations that Mother was on probation for passing fraudulent checks and was involved in an abusive bigamous marriage. He became increasingly concerned when, in June 2000, Mother's probation officer notified him that Mother's whereabouts were unknown. Father then received a telephone call from the child's maternal grandmother informing

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

him that Mother was living with her in South Carolina and he should send the child support payments there. A safety check performed by local police on August 2, 2000, confirmed that Mother and the child were in fact residing at the grandmother's home. Shortly thereafter, Father learned from Mother's probation officer that Mother was back in North Carolina and the child was not enrolled in school. The maternal grandmother continued to claim that Mother and the child were in South Carolina. On August 16, however, Father learned with certainty that Mother and the child were in a shelter in North Carolina and that the child was hungry and sick. Shelter records indicate Mother moved into the shelter on August 3, 2000, one day after the police performed the safety check. School records from North Carolina indicate the child was enrolled for ten days in August of 2000.

From August 17 to August 31, 2000, Father left a series of voice mail messages on the maternal grandmother's answering machine. These messages indicate Father left Illinois and traveled to South Carolina to appear before the South Carolina family court.

On August 28, 2000, the family court issued an ex parte order granting Father immediate legal and physical custody of the child. This order was based on allegations in Father's affidavit discussed above. He picked up the child from a North Carolina day care center promptly after obtaining emergency custody and returned to Illinois.

Mother filed an answer and counterclaim to Father's motion for emergency relief in the South Carolina family court on November 11, 2000. Mother stated she moved to North Carolina in 1998 and returned to South Carolina in August 2000. Shortly thereafter, she moved back to North Carolina into a battered women's shelter. Importantly, Mother asserted that, despite her many relocations, the South Carolina family court had jurisdiction because she was a resident of Charleston County, South Carolina, and had been so for over one year. She admitted Father's allegations of being in a bigamous marriage, being investigated by social services in North Carolina, and being on probation for writing fraudulent checks. Mother demanded a hearing and sought full custody of the child.

On February 15, 2001, the family court issued a consent order granting temporary custody to Father.[2] On August 1, 2001, the family court struck the case from the active roster pursuant to the 270-day rule, leaving the temporary order in effect. On August 15, counsel for Father submitted an order restoring the case to the active roster, but the court did not sign the order. On November 27, Mother filed a motion to dismiss the case for lack of personal and subject matter jurisdiction due to the fact that neither the child nor either parent was a resident of South Carolina on the date of the ex parte order. Mother then filed a motion to relieve counsel on the alleged grounds that her attorney knowingly made false statements in documents filed with the court and entered into consent orders without consulting with her.

The family court denied Mother's motion to dismiss, concluding that South Carolina has exclusive, continuing jurisdiction based on the 1995 custody order and Mother's residency in this state for more than one year. The family court also noted that no litigation was pending in any other state regarding custody of the child. Additionally, the family court denied Mother's motion to change custody because exigent circumstances did not exist warranting a change in custody. The order provided that the temporary consent order of February 15, 2001 was to remain in effect.

Mother filed a motion to reconsider on January 22, 2002, arguing again that because neither of the parents nor the child lived in South Carolina at the time Father's action was filed, the family court lacked subject matter jurisdiction. After a hearing, the family court denied the motion to reconsider. The family court found that Mother submitted herself to the family court's jurisdiction, and the case had continued without objection from Mother for over a year before she filed the motion to dismiss. Father was awarded $562.50 in attorney's fees.

Mother appealed to this court. On November 18, 2002, Father's motion to dismiss the appeal was granted on the ground that the appeal was

[2] In January of 2004, Father filed a petition to enroll this order in Illinois to establish Illinois as the proper forum to seek modification of custody.

interlocutory. Mother's subsequent writs of prohibition and mandamus were dismissed in June 2003.

On January 6, 2004, Mother filed an expedited motion for relief from judgment in the family court, again alleging the case was void ab initio for lack of subject matter jurisdiction. The family court denied Mother's motion, finding that no final order had yet been issued in the case, and further found that the motion was not timely brought within the one-year statute of limitations. The family court reaffirmed that it had jurisdiction and awarded Father $775 in attorney's fees.

Mother then filed a motion to reconsider, limiting her request to only two issues: (1) whether the family court had jurisdiction at the commencement of the case; and (2) whether the family court failed to consider all the factors required by law in awarding attorney's fees in that it did not consider her financial condition. Mother alleged in her supporting affidavit that she moved to North Carolina in 1998 and was still living there when Father's complaint was filed. The family court denied Wife's motion on March 11, 2004. This appeal follows.

STANDARD OF REVIEW

On appeal from the family court, this court has authority to determine facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). This court, however, is not required to disregard the family court's findings, nor should we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999); Smith v. Smith, 327 S.C. 448, 453, 486 S.E.2d 516, 519 (Ct. App. 1997).

LAW/ANALYSIS

I. Interlocutory Appeal

We must first address Father's argument that this court lacks jurisdiction because the orders appealed from are interlocutory. We disagree.

Section 14-3-330 of the South Carolina Code (1976 & Supp. 2004) sets forth the requirements for appellate jurisdiction and reads as follows:

> [Appellate courts] shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . . .

Matters involving the custody of one's child certainly constitute a "substantial right" as contemplated in the South Carolina statute. See Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (holding that parenting is a fundamental constitutional right and due process is mandatory when such a right is jeopardized). Much of the delay in receiving a final custody hearing can be attributed to Mother's failure to request that the case be restored to the active roster or file a new case seeking modification of custody. Nevertheless, the record reveals that although the emergency order temporarily changing custody, the temporary consent order, and the subsequent motion rulings are not true final orders, they are certainly being treated as such by the family court. The family court's order of January 15, 2002, reads, "[t]he prior Temporary Order of the Court of February 15, 2001 . . . not modified herein shall remain in full force and effect." Although the family court's January 6, 2004, order denied relief under Rule 60, SCRCP, on the basis that there was no final order in the case, it noted that the case had been stricken from the active roster for over three years and reflected no intention to have the case restored.

Under the unique factual circumstances of the present case, we conclude the family court orders have the practical effect of a final order affecting Mother's substantial rights.[3] In any event, the issues raised by Mother on appeal have been the subject of much contention in this case. They will inevitably be raised to the family court again in the future and, because they have been fully briefed by the parties, we find that it would be in the interest of judicial economy to decide the matters now. See Southern Bell Tel. and Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue on appeal in the interests of judicial economy). Accordingly, we move on to the merits of Mother's appeal.

II. Subject Matter Jurisdiction

Mother's argument on appeal, as well as before the family court in several of her prior motion hearings, is that the South Carolina family court lacked subject matter jurisdiction to order the emergency change in custody. Specifically, she contends that the South Carolina did not have continuing jurisdiction under the provisions of the controlling Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to 830 (1985) ("UCCJA") and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988) ("PKPA"). We disagree.

The two statutes in question govern the subject matter jurisdiction of state courts to rule in interstate custody disputes. See, e.g., Foley v. Foley, 576 S.E.2d 383, 385 (N.C. Ct. App. 2003); In re Jorgensen, 627 N.W.2d 550, 554 (Iowa 2001). Because the PKPA is federal legislation, its provisions will govern any conflict between it and the UCCJA (South Carolina's jurisdictional statute for interstate custody decrees). See Schwartz v. Schwartz, 311 S.C. 303, 307-308, 428 S.E.2d 748, 750-51 (Ct. App. 1993); Marks v. Marks, 281 S.C. 316, 320-21, 315 S.E.2d 158, 160-61 (Ct. App. 1984).

[3] Father's motion to dismiss this appeal based on its interlocutory nature was recently denied on similar grounds.

The provisions of the PKPA applicable to the present case are contained in subsection (d) of 28 U.S.C. § 1738A, which deals with continuing jurisdiction and reads as follows:

> (d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Subsection (c)(1), mentioned in the quote above, requires that the family court maintain jurisdiction under its own state law. Therefore, "[s]ubsection (d) basically sets forth three criteria, all of which must be met, for a court to retain [continuing] jurisdiction" under the PKPA. Dahlen v. Dahlen, 393 N.W.2d 765, 768 (N.D. 1986). The three criteria are 1) that the original custody determination was entered consistently with the provisions of the PKPA; 2) that the court maintain jurisdiction under its own state law (in South Carolina, the UCCJA); and 3) that the state remains the residence of the child or of any contestant. See id.

In the present case, the first criterion is undisputed. The child and both parties to the action were South Carolina residents at the time of the initial custody decree and, suffice it to say, the jurisdictional requirements of both the PKPA and the UCCJA were certainly satisfied at that time.

The second requirement, that jurisdiction under South Carolina law be maintained, is a more complex matter. In 1981, South Carolina adopted the UCCJA as its governing law in interstate custody disputes. See S.C. Code Ann. §§ 20-7-782 to 830 (1985). The applicable portion of the UCCJA regarding jurisdiction reads as follows:

> (a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . .

S.C. Code Ann. § 20-7-788 (1985).

The purpose of the UCCJA is to prevent conflicting custody decrees between different states. See Kirylik v. Kirylik, 292 S.C. 475, 477, 357 S.E.2d 449, 450 (1987). To this end, much deference is given to the jurisdiction of the state that initially rules on a custody matter. "Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law." Knoth v. Knoth, 297 S.C. 460, 463, 377 S.E.2d 340, 342 (1989). Once a custody decree has been entered, the decree state has exclusive continuing jurisdiction, which is not necessarily affected by a child's residence in another state. Id. at 464, 377 S.E.2d at 342-43. Accordingly, the UCCJA's jurisdictional language quoted above has been interpreted broadly when a state seeks to exercise continuing jurisdiction over a pre-existing custody decree. A court may exercise continuing jurisdiction under this subsection when "there are sufficient contacts with the child and his parent(s) to justify legitimate state interest in the outcome of the dispute, and if sufficient evidence is available to enable the court to make a fair determination of custody based upon the best interest of the child." Cullen v. Prescott, 302 S.C. 201, 206, 394 S.E.2d 722, 725 (Ct. App. 1990).

Pursuant to the broad deference given to the state that initially enters a custody decree, we conclude South Carolina properly asserted continuing jurisdiction under the UCCJA in the present matter. South Carolina issued the original decree and Mother's last known address at the time Father filed for emergency relief was in this state. Mother stipulated in her counterclaim, filed soon after the emergency change in custody and before any issue as to

the court's subject matter jurisdiction arose, that she was a resident of South Carolina. See 24A Am. Jur. 2d Divorce and Separation § 984 (2004) (stating that a party accepts a state's jurisdiction under the UCCJA by bringing a modification action in that state). Both Mother and the child's maternal grandmother made continual assertions to Father that the grandmother's South Carolina home was the proper address at which to contact the child at the time Father filed his complaint. Furthermore, no other state sought to exercise jurisdiction in this matter; thus there are no conflicting orders from different states, the problem the UCCJA was established to remedy. Accordingly, we find sufficient contacts between the child, Mother, and South Carolina to justify this state's interest in the outcome of the dispute. Although Mother had significant contacts with North Carolina, Father presented sufficient evidence for the South Carolina family court to fairly render a judgment regarding the child's custody. Because we find that the South Carolina family court had continuing jurisdiction under the UCCJA, the PKPA's second requirement for continuing jurisdiction is satisfied.

It is the PKPA's third requirement for continuing jurisdiction, however, that is by far the most contested issue in this case. Unlike the UCCJA, the PKPA expressly states that at least the child or one of the contestants must remain a resident of the decree state for that state to properly exercise continuing jurisdiction.[4] Mother contends that because, at the time of filing, Father was a resident of Illinois and she and the child were in North Carolina, where the pair had lived sporadically since 1998, the South Carolina family court lacked subject matter jurisdiction to order an emergency change in custody. Again, we disagree.

Throughout the PKPA, initial jurisdictional requirements are discussed in terms of the child's "home state." The term "home state" is defined in the statute as "the state in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months . . . ." 28 U.S.C. § 1738A(b)(4) (1988). This

[4] As previously stated, when the provisions of the PKPA and the UCCJA conflict, the PKPA controls under the Supremacy Clause of the United States Constitution. See Schwartz, 311 S.C. at 307-308, 428 S.E.2d at 750-51.

language provides a court with clear standards governing its jurisdiction over a custody dispute in which there is no previous custody decree. Such is not the case when courts seek to assert continuing jurisdiction over a pre-existing custody decree. Rather than employing the expressly defined term of "home state" that is used throughout the statute, the PKPA sets forth a requirement of "residence," a term left undefined in the statute, when discussing a court's continuing jurisdiction over custody matters. Because "residence" is not defined in the statute, the determination of whether a decree state has lost its continuing jurisdiction generally turns on the question of the parties' or child's domicile. Child Custody: When Does State that Issued Previous Custody Determination Have Continuing Jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, 83 A.L.R.4th 742 (2004).

In these matters, domicile is determined by an analysis similar to that required for diversity jurisdiction in federal courts, which involves a determination of intent. Id. "Domicile is the place of one's true, fixed, and permanent home and principal establishment, to which one has the intention of returning after an absence therefrom." 32A Am. Jur. 2d Federal Courts § 746 (2004). "The question of a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case. The act and intent as to domicile, not the duration of the residence, are the determining factors." Ferguson v. Employers Mut. Cas. Co. 254 S.C. 235, 238-39, 174 S.E.2d 768, 769 (1970). Generally speaking, a determination of residence or domicile by a trial court will not be overturned on appeal unless there is no evidence to support it. See King v. Moore, 224 S.C. 400, 404, 79 S.E.2d 460, 462 (1953).

In the present case, the question of Mother and child's residence is muddled at best. However, for many of the same reasons asserted in the UCCJA analysis above, we conclude Mother was a resident of South Carolina at the time Father filed his complaint. Mother first raised the issue of residency over a year after the case's commencement. At that point, the family court needed only to look to Mother's prior pleadings, filed shortly after the emergency change in custody, for her own assertions that she was "a resident of Charleston County, South Carolina where she has lived for over

one (1) year;" thus, she stated, the family court had "jurisdiction of this matter by virtue of its continuing and exclusive jurisdiction."[5] Although Mother and child were actually staying in a North Carolina shelter at the time, Mother and the maternal grandmother made several assertions to Father that they intended the grandmother's South Carolina home to be the address through which to contact her. The most recent contact with the Mother and child, a safety check performed by local police, confirmed that the pair was living in South Carolina. Though this is a difficult issue, there is certainly evidence in the record supporting the conclusion that Mother intended South Carolina to be her state of residency at the time the emergency action was filed. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) ("[An] appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.") (quoting Rule 220(c), SCACR).

Moreover, several state courts have applied the doctrine of unclean hands to jurisdiction under the PKPA and UCCJA. See, e.g., Sams v. Boston, 384 S.E.2d 151, 159-62 (W. Va. 1989). Because the purpose of the acts is to deter the unlawful removal of children to other jurisdictions, courts have held that a decree state remains the "home state" for purposes of the PKPA and the UCCJA for a reasonable period of time when the child has been concealed in another state by one of the parents. See, e.g., id. We see no reason not to apply a similar analysis to the determination of "residency" under the PKPA. The original custody order required Mother to provide 60 day's notice before taking the child out of the jurisdiction. The record indicates that no such notice was provided; therefore, the child's location out of state at the time of filing directly violated a South Carolina court order. Because Mother's behavior closely resembles the conduct the act was

[5] Although Mother's attorney filed these pleadings without her signature, a party is generally bound by stipulations made by their counsel. See Sadighi v. Dagnighfekr, 66 F. Supp. 2d 752, 761 (D.S.C. 1999) (citing Hall v. Benefit Ass'n of Ry. Employees, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932)) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial.").

intended to prevent, we will not consider her sudden move to North Carolina on the eve of filing, without notice to Father, a change of residence under the PKPA.

Because we conclude Mother was a resident of South Carolina at the time Father filed his complaint, the PKPA's third requirement for continuing jurisdiction is satisfied. The South Carolina family court, therefore, had jurisdiction to order the emergency change in custody.

III. Attorney's Fees

Mother next argues the family court erred in awarding attorney's fees in that it failed to consider her financial condition in determining the award. We disagree.

An award of attorney's fees is within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. See Bowen v. Bowen, 327 S.C. 561, 563, 490 S.E.2d 271, 272 (Ct. App. 1997). In determining whether to award attorney's fees, the family court should consider each party's ability to pay his or her own fees, the beneficial results obtained, the parties' respective financial conditions, and the effect of the fee on the parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining a reasonable amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court is required to make an independent evaluation of each of the Glasscock factors. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). If it does so, the family court's award will be affirmed as long as there is sufficient evidence in the record supporting each factor. Id.

The family court expressly considered each of the Glasscock factors. It specifically found, in reviewing Mother's motion to reconsider, that she

failed to provide the court with evidence of her financial situation on the issue of attorney's fees. Thus, we find no abuse of discretion in the award. See Henggeler v. Hanson, 333 S.C. 598, 605, 510 S.E.2d 722, 726 (Ct. App. 1998) (finding no abuse of discretion in awarding attorney's fees when the family court considered the Glasscock factors).

For the foregoing reasons, the family court's denial of Mother's motion is

AFFIRMED.

ANDERSON, and STILWELL, JJ., concur.