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LAST CALL: THE SOUTH CAROLINA SUPREME COURT TURNS OUT THE LIGHTS ON FIRST-PARTY PLAINTIFFS' CAUSES OF ACTION AGAINST TAVERN* OWNERS

I. INTRODUCTION

In the early afternoon of May 3, 1989, Robert L. Tobias began a fateful drinking binge on a golf course in Columbia, South Carolina, and continued his consumption of alcohol at three different bars. While attempting to drive home, Tobias crossed the center line and hit another vehicle head on, killing one of its occupants and seriously injuring a second.[1] In April of 1992, Tobias and his wife sued the owners of the last two bars that served him alcoholic beverages the night of the crash,[2] claiming that the bartenders' negligence in serving the already intoxicated Tobias caused his injuries and his wife's loss of consortium.[3] The Tobiases based their claims on the bartenders' alleged violations of sections 61-5-30 and 61-9-410 of the Code of Laws of South Carolina ("Code").[4] However, though this cause of action was viable

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* This Comment uses the term "tavern" to refer generally to any bar or restaurant or other establishment that sells alcoholic beverages for on-premises consumption. "Tavern owner" as used in this Comment means the owner or owners of a tavern as well as managers, bartenders, and servers.

1. Tobias v. Sports Club, Inc., 323 S.C. 345, 347, 474 S.E.2d 450, 450-51 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998). Tobias was convicted for felony driving under the influence and "was sentenced to 3 years and $3,000. He served 7 months jail time followed by 11 months work restriction while living at home." Brief for Respondent at 11 n.9.

2. The second bar Tobias visited, The Sports Club, was later dismissed from the suit with prejudice. *See* Brief for Respondent at 2-3.

3. *See id.* at 2 n.3.

4. S.C. CODE ANN. §§ 61-5-30, -9-410 (Law. Co-op. 1976) (current versions at S.C. CODE ANN. §§ 61-4-580, -6-1800, -6-2220, -6-4710 (Law. Co-op. Supp. 1998)). Former section 61-9-410 provided, in pertinent part:

> No holder of a permit authorizing the sale of beer or wine or any servant, agent, or employee of the permittee shall knowingly do any of the following acts upon the licensed premises covered by the holder's permit:
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> ....
>
> (2) sell beer or wine to any person while the person is in an intoxicated condition;
>
> ....
>
> A violation of any of the foregoing provisions is a ground for the revocation or suspension of the holder's permit.

§ 61-9-410. Section 61-9-410 applied only to beer and wine, while § 61-5-30 applied to distilled

under *Christiansen v. Campbell*,[5] the defendants asserted the affirmative defenses of contributory negligence and assumption of the risk.[6] The jury returned a verdict for the defendants, and the South Carolina Court of Appeals affirmed.[7]

The Tobiases appealed to the South Carolina Supreme Court, which affirmed the court of appeals with a key modification.[8] While preserving a cause of action against taverns for *third* parties injured by someone who was served while intoxicated, the court adopted the position of the majority of American jurisdictions in holding that intoxicated patrons themselves, the *first*-party plaintiffs (including their families or estates), can no longer recover against taverns for their own injuries.[9] The court's holding altered the landscape of tavern liability in South Carolina and sent a clear message that the party is now over for patrons who drink to excess and later attempt to sue the serving tavern for their injuries.[10]

The supreme court's opinion in *Tobias* is brief and somewhat conclusory. Though the decision involves a number of important issues—including statutory interpretation, legislative intent, the doctrine of negligence per se, civil liability created by violation of a penal statute, civil

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spirits. It provided:

> It shall be unlawful for any person to possess or consume any alcoholic liquors upon any premises where such person has been forbidden to possess or consume alcoholic liquors by the owner, operator or person in charge of the premises.
>
> No person or establishment licensed to sell alcoholic beverages pursuant to this article shall sell such beverages to persons in an intoxicated condition and such sales shall be deemed violations of the provisions thereof and subject to the penalties contained herein.

§ 61-5-30.

5. 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985). *Christiansen* established a cause of action in favor of first-party plaintiffs (the intoxicated patrons themselves) against tavern owners. *See* discussion *infra* Part III.B.

6. The events which led to this action occurred before South Carolina's adoption of the doctrine of comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). Had the cause of action arisen after the adoption of comparative negligence, the plaintiff's contributory negligence and assumption of the risk would have been factors for the jury to consider in determining the parties' percentage of fault rather than affirmative defenses. *Nelson* merged the two doctrines into the law of comparative negligence, but they remained affirmative defenses at the time of the crash in *Tobias*.

7. Tobias v. Sports Club, Inc., 323 S.C. 345, 347, 356, 474 S.E.2d 450, 451, 456 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998).

8. Tobias v. Sports Club, Inc., 332 S.C. 90, 90, 504 S.E.2d 318, 318 (1998).

9. *See id.* at 92-93, 504 S.E.2d at 320.

10. The supreme court declined to rule on whether a tavern is subject to first-party liability for the negligent furnishing of alcohol to a minor, stating that it would leave that issue "for another day." *Id.* at 93, 504 S.E.2d at 320. For that reason, this Comment does not specifically address the issue of first-party liability as applied to minors.

duty in tort, and the regulation of alcohol generally—the opinion lacks the more thorough analysis found in prior decisions by appellate courts in South Carolina[11] and in other states.[12] Though its position is certainly clear, the court's failure to elaborate renders the opinion less credible and invites criticism.

This Comment discusses the issues raised by the supreme court in *Tobias* and compares the supreme court's new position to those taken in other jurisdictions. For perspective, this Comment includes a brief history of tavern or dram shop[13] liability in the United States, as well as a discussion of the history of tavern liability in South Carolina. Following an analysis of significant South Carolina case law, up to and including *Tobias*, this Comment argues that, despite the relatively brief and conclusory nature of its opinion, the supreme court reached the correct conclusion in *Tobias*.

II. HISTORICAL DEVELOPMENT OF TAVERN LIABILITY IN THE UNITED STATES

A. Common Law

At common law in American jurisdictions, neither a first-party patron nor a third party injured as a result of the patron's intoxication had a cause of action against a tavern because of the tavern's serving the already intoxicated patron.[14] Courts generally pointed to at least one of three reasons for denying recovery against the tavern as a matter of law: (1) the patron who drank the

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11. *See* Whitlaw v. Kroger Co., 306 S.C. 51, 53-55, 410 S.E.2d 251, 252-53 (1991); Norton v. Opening Break, Inc., 313 S.C. 508, 510-13, 443 S.E.2d 406, 407-09 (Ct. App. 1994), *aff'd*, 319 S.C. 469, 462 S.E.2d 861 (1995); Daley v. Ward, 303 S.C. 81, 83-87, 399 S.E.2d 13, 14-16 (Ct. App. 1990); Christiansen v. Campbell, 285 S.C. 164, 167-70, 328 S.E.2d 351, 354-55 (Ct. App. 1985).

12. *See* Noonan v. Galick, 112 A.2d 892, 894-95 (Conn. Super. Ct. 1955); Wright v. Moffitt, 437 A.2d 554, 555-59 (Del. 1981); Bertelmann v. Taas Assocs., 735 P.2d 930, 933-35 (Haw. 1987); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 347-49 (Miss. 1986); Smith v. 10th Inning, Inc., 551 N.E.2d 1296, 1297-99 (Ohio 1990); Ohio Cas. Ins. Co. v. Todd, 813 P.2d 508, 509-12 (Okla. 1991); Estate of Kelly v. Falin, 896 P.2d 1245, 1247-50 (Wash. 1995).

13. A dram shop is an establishment "where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying." Crowley v. Christensen, 137 U.S. 86, 91 (1890). In *Tobias*, the court of appeals distinguished between "dram shop acts" (those statutes which specifically provide for civil causes of action) and "penal or beverage control statutes" (those which provide for criminal or civil penalties against taverns, but which do not specifically permit civil lawsuits by injured parties). Tobias v. Sport's Club, Inc., 323 S.C. 345, 348-49, 474 S.E.2d 450, 451-52 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998). This Comment abides by that distinction. Thus, South Carolina does not actually have a "dram shop act." Tavern liability has instead been judicially created by allowing a civil cause of action in tort based on a tavern owner's violation of the penal or beverage control statutes. S.C. CODE ANN. §§ 61-4-580, -6-2220 (Law. Co-op. Supp. 1998).

14. Daphne D. Sipes, *The Emergence of Civil Liability for Dispensing Alcohol: A Comparative Study*, 8 REV. LITIG. 1, 3 (1988); George B. Apter, Recent Development, Bertelmann v. Taas Associates*: Limits on Dram Shop Liability; Barring Recovery of Bar Patrons, Their Estates and Survivors*, 11 U. HAW. L. REV. 277, 280 (1989).

alcohol was a "strong and able-bodied man" deemed capable of his own care and safety;[15] (2) the proximate cause of the ensuing injury was the patron's consumption of the alcohol rather than the tavern's serving it;[16] (3) the patron's or third party's subsequent injury was not foreseeable given the separation in time and distance between the serving of the alcohol and the injury.[17]

B. Early Dram Shop Acts

The initial legislative abrogation of the common-law rule of tavern nonliability was Wisconsin's enactment of the first dram shop act in 1849.[18] This statute and others of its era urged moderation by imposing strict liability on tavern owners for injuries to third parties caused by intoxicated patrons the tavern had served.[19] However, state legislatures began to repeal many of the early dram shop acts with the end of Prohibition in 1933, and by 1978, only eighteen states still maintained dram shop acts. No state enacted a dram shop act from 1935 to 1978, when California did so.[20]

C. The Demise of Common-Law Nonliability

In the late 1950s, courts began reviewing and questioning the common-law rule of nonliability.[21] In 1959, two landmark decisions, *Waynick v. Chicago's Last Department Store*[22] and *Rappaport v. Nichols*,[23] abandoned the traditional nonliability approach and paved the way for other courts to do the same, ushering in a new era of liquor liability.

Waynick involved one death and several injuries resulting from a two-car collision in Michigan.[24] The driver at fault and his companion became

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15. Cruse v. Aden, 20 N.E. 73, 74 (Ill. 1889); Seibel v. Leach, 288 N.W. 774, 774 (Wis. 1939).

16. *See* Fleckner v. Dionne, 210 P.2d 530, 534 (Cal. Dist. Ct. App. 1949); State *ex rel.* Joyce v. Hatfield, 78 A.2d 754, 756 (Md. Ct. App. 1951); *Seibel*, 288 N.W. at 775; Shelli Inmon, Comment, Tomlinson v. Love's Country Stores, Inc.: *What Did the Court Really Do?*, 19 OKLA. CITY U. L. REV. 533, 534-35 (1994).

17. *See* Cowman v. Hansen, 92 N.W.2d 682, 686-87 (Iowa 1958).

18. *See* Julius F. Lang, Jr. & John J. McGrath, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1124 n.21 (1984). *But see* William Hurst, *The Dram Shop: Closing Pandora's Box*, 22 IND. L. REV. 487, 488 n.13 (1988) (concluding that it is unclear whether Wisconsin or Indiana enacted the first dram shop legislation); Richard B. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 176 (1958) (asserting that Maine enacted the first dram shop act in 1851).

19. *See* Lang & McGrath, *supra* note 18, at 1124.

20. *Id.* at 1125 & n.28.

21. *See, e.g.*, Schelin v. Goldberg, 146 A.2d 648, 652-53 (Pa. Super. Ct. 1958); *see also* Sipes, *supra* note 14, at 6 (commenting that courts began to review the no-liability rules).

22. 269 F.2d 322 (7th Cir. 1959).

23. 156 A.2d 1 (N.J. 1959).

24. *See Waynick*, 269 F.2d at 323.

intoxicated while in Illinois and evidently drank more liquor while in that condition at three different establishments before traveling across the state line and colliding with the plaintiffs' car.[25] Interestingly, both Michigan and Illinois had dram shop laws, but the court found that Michigan's statute probably did not apply because the liquor was sold in Illinois and that Illinois's statute did not apply because it had previously been held not to apply extraterritorially.[26] The court based its decision on Michigan's common law and concluded that the defendants' unlawful sales of liquor to the driver proximately caused the plaintiffs' injuries.[27] However, in its discussion of duty, the court maintained that the plaintiffs were "entitled to the protection given by § 131 of the Illinois Act."[28] This strange holding was likely attributable, in part, to the unusual, interstate fact situation, but it also seemingly reflected the court's desire to find for the plaintiffs on moral grounds. The court described the accident as "appalling"[29] and expressed concern that the plaintiffs' claim not be dismissed hastily because of a "vacuum" in the law.[30]

Rappaport involved another fatal car crash, this one caused by a minor who had been served, allegedly while noticeably intoxicated, at four different bars in Newark, New Jersey.[31] New Jersey had repealed its civil-damage law in 1934, but the court stated that "[t]he repealer left unimpaired the fundamental negligence principles which admittedly prevail in New Jersey and upon which the plaintiff grounds his common law claim."[32] The *Rappaport* court reviewed and criticized earlier decisions which held that furnishing alcohol to an intoxicated person did not proximately cause later injuries by that person or that those injuries were not foreseeable.[33] The court labeled as "unconvincing" the reasoning in *Cowman v. Hansen*,[34] in which the Iowa Supreme Court held that it was "not at all clear that [an intoxicated person] will naturally assault someone, drive a car and injure or kill another, or do some other tortious act."[35]

Ultimately, the *Rappaport* court decided that a tortfeasor should generally answer for "injuries which result in the ordinary course of events from his negligence . . . if his negligent conduct was a substantial factor in bringing about the injuries."[36] The court further stated that intervening causes "which were foreseeable or were normal incidents of the risk [of drinking]

25. *Id.* at 323-24.
26. *Id.* at 324.
27. *Id.* at 326.
28. *Id.* at 325-26.
29. *Id.* at 325.
30. *Id.* at 324-25.
31. *See* Rappaport v. Nichols, 156 A.2d 1, 3 (N.J. 1959).
32. *Id.* at 8.
33. *See id.* at 4-5.
34. 92 N.W.2d 682 (Iowa 1958); *see Rappaport*,156 A.2d at 5.
35. *Cowman*, 92 N.W.2d at 687.
36. *Rappaport*, 156 A.2d at 9.

would not relieve the tortfeasor of liability" and that questions of proximate and intervening cause ordinarily are factual determinations for the jury.[37] The court voted unanimously to reverse the trial court's grant of summary judgment in favor of the defendants.[38]

These decisions and others they spawned eventually prompted legislators to once again examine the issue of tavern liability, and in the late 1970s, states began passing new dram shop acts that either permitted or restricted civil actions.[39] By 1987, a civil cause of action existed in forty-one states.[40] Nineteen of those states had legislatively imposed liability for taverns, indicating that tavern liability was judicially created in a majority of those jurisdictions.[41] In the absence of a specific statutory provision providing for civil liability, courts have derived this liability either from common-law principles of negligence or, as in South Carolina, by implying a cause of action from violation of a penal or liquor-control statute that did not specifically provide for civil liability.[42]

D. The Distinction Between First-party and Third-party Plaintiffs

A distinction between first-party and third-party plaintiffs first arose in cases where courts were called upon to interpret pre-Prohibition dram shop statutes, long before the demise of the common-law rule of nonliability. For example, in *Malone v. Lambrecht*[43] the Michigan Supreme Court held that "one who is active in bringing about the intoxication may not recover for injuries resulting therefrom."[44] Michigan has uniformly held that the civil-damage provisions in its statute are "for the benefit and protection of innocent parties only."[45] In *Noonan v. Galick*[46] a Connecticut court recognized the same distinction:

> Had [the state legislature] desired to extend this remedy, unknown to the common law, to the intoxicated person himself, it would have done so in this statute. It is not hard to see why the legislature has not so provided

37. *Id.*
38. *Id.* at 10-11.
39. *See* Sipes, *supra* note 14, at 4.
40. El Chico Corp. v. Poole, 732 S.W.2d 306, 310 (Tex. 1987).
41. *Id.*; *see also* Apter, *supra* note 14, at 281 n.22 (stating that 19 jurisdictions had legislatively enacted dram shop liability by 1984).
42. *See* Christiansen v. Campbell, 285 S.C. 164, 168, 328 S.E.2d 351, 354 (1985).
43. 8 N.W.2d 910 (Mich. 1943).
44. *Id.* at 911.
45. *Id.*
46. 112 A.2d 892 (Conn. Super. Ct. 1955).

> if one contemplates the vast number of claims which would be urged by drunks if they were entitled to recover for every expense or injury that is the natural concomitant of intoxication.[47]

However, despite these holdings and others like them, some courts, in the wake of *Waynick* and *Rappaport*, effectively removed the distinction between first-party and third-party plaintiffs.[48] These courts apparently viewed the demise of the common-law rule of tavern nonliability as meaning that all injuries resulting from the negligent serving of alcohol to an intoxicated person could be remedied by an action against the serving tavern, regardless of whether a third party or the intoxicated patron suffered those injuries.

In jurisdictions that permitted a first-party cause of action, defendants generally argued that the plaintiff's contributory negligence should have barred recovery.[49] This argument has a long history[50] and was an attractive strategy for defendants, for if successfully asserted, it completely barred the plaintiff's recovery. Some courts surmounted this obstacle by finding that the duty of a tavern owner to an intoxicated patron attached despite the patron's self-damaging actions. For example, one court stated:

> The duty would be rendered meaningless to a large extent if a tavern keeper could avoid responsibility by claiming that it was the person's own fault if he drank too much. It is obvious that in the ordinary sense it is one's own fault if one gets drunk, but the postulation of the tavern owner's duty in such a situation assumes implicitly that there has been such fault on the part of the drinker and nevertheless imposes the protective duty.[51]

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47. *Id.* at 894.

48. *See* Galvin v. Jennings, 289 F.2d 15, 19 (3d Cir. 1961); Ramsey v. Anctil, 211 A.2d 900, 901 (N.H. 1965); Soronen v. Olde Milford Inn, 202 A.2d 208, 209-210 (N.J. Super. Ct. App. Div. 1964); Majors v. Brodhead Hotel, 205 A.2d 873, 875-76 (Pa. 1965).

49. In this author's view, this argument gets at the very heart of the debate surrounding first-party tavern liability cases. Though comparative negligence has now absorbed contributory negligence in nearly all jurisdictions, virtually eliminating contributory negligence as a total bar to recovery, the argument that the plaintiff in every case is the party more responsible than anyone else for his own injuries due to alcohol consumption is the general principle relied upon by most courts which have eliminated first-party causes of action.

50. *See, e.g.*, Bissell v. Starzinger, 83 N.W. 1065, 1066 (Iowa 1900).

51. *Soronen*, 202 A.2d at 210.

In jurisdictions where civil liability was based on the violation of a statute, courts could find support for disallowing the contributory negligence defense in the Restatement of Torts, which provided the following general rule:

> If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute.[52]

In *Majors v. Brodhead Hotel*[53] the defendant apparently did not assert contributory negligence, but the court, while affirming a judgment for the plaintiff, stated that defendants in tavern liability cases would not be foreclosed "from proving that the plaintiff was so intoxicated when defendant illegally served him that the accident would have occurred even if defendant had not illegally served him."[54] Together with *Galvin v. Jennings*,[55] *Soronen v. Olde Milford Inn*,[56] and *Ramsey v. Anctil*,[57] *Majors* marked the beginning of the most prosperous era for first-party plaintiffs in tavern liability cases.

Beginning with California in the late 1970s, state legislatures began to abrogate decisions allowing first parties to recover.[58] In other states, courts interpreted liquor control statutes as not providing causes of action in favor of intoxicated patrons for their own injuries.[59] In still other states, courts limited the holdings of earlier decisions, disallowing first-party actions while preserving third-party actions.[60] This trend reached the point where, in 1987, the Supreme Court of Hawaii could accurately state: "[T]he majority of jurisdictions that have passed on this issue . . . emphatically reject the

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52. RESTATEMENT OF TORTS § 483 (1934); *see Soronen*, 202 A.2d at 211; *Galvin*, 289 F.2d at 19.

53. 205 A.2d 873 (Pa. 1965).

54. *Id.* at 878.

55. 289 F.2d 15 (3d Cir. 1961).

56. 202 A.2d 208 (N.J. Super. Ct. App. Div. 1964).

57. 211 A.2d 900 (N.H. 1965).

58. *See* CAL. CIV. CODE § 1714 (West 1998); MO. ANN. STAT. § 537.053 (West 1988); S.D. CODIFIED LAWS § 35-11-1 (Michie 1992).

59. *See, e.g.*, Maples v. Chinese Palace, Inc., 389 So. 2d 120, 123-24 (Ala. 1980); Allen v. County of Westchester, 492 N.Y.S.2d 772, 775 (App. Div. 1985); Smith v. 10th Inning, Inc., 551 N.E.2d 1296, 1298-99 (Ohio 1990); Sager v. McClenden, 672 P.2d 697, 701 (Or. 1983).

60. *See, e.g.*, Wright v. Moffitt, 437 A.2d 554, 559 (Del. 1981) (limiting Taylor v. Ruiz, 394 A.2d 765 (Del. Super. Ct. 1978)); Bertelmann v. Taas Assocs., 735 P.2d 930, 933 (Haw. 1987) (limiting Ono v. Applegate, 612 P.2d 533 (Haw. 1980)); White v. HA, Inc., 782 P.2d 1125, 1132 (Wyo. 1989) (limiting McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983)).

contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol."[61] Under *Christiansen v. Campbell*,[62] South Carolina was not a member of that majority. It would retain the minority rule recognizing first-party causes of action until the supreme court decided *Tobias* in August of 1998.

III. HISTORY OF TAVERN LIABILITY IN SOUTH CAROLINA

A. Statutory History

The first South Carolina statute which specifically prohibited tavern owners and their employees from serving alcoholic beverages to intoxicated persons was enacted by the General Assembly in 1874.[63] The statute provided that a violation would be a misdemeanor and prescribed penalties of a fine and jail time. Interestingly, the statute also provided for civil liability, though only in a narrow set of circumstances. A family member or guardian of any "known intemperate person" could provide written notice to a tavern or liquor store owner of that individual's intemperance, and upon receipt of this notice, the owner and his employees were forbidden from serving alcohol to the intemperate person.[64] If, within three months of the notice, a person on notice served the intemperate individual and injury to person or property "occur[red] in consequence of such furnishing," the person or persons responsible for serving the alcohol to the intemperate person could be held severally liable.[65] In these cases, recovery could be had by "any one aggrieved," including a wife in her own name if she had provided the notice, "by an action instituted in any Court of this State having jurisdiction of civil actions."[66]

In 1893 the South Carolina General Assembly signaled the beginning of an era of strict state regulation and control of the sale and possession of alcoholic beverages by enacting a law which eliminated all sales except those

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61. *Bertelmann*, 735 P.2d at 933.

62. 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985).

63. Act of Mar. 19, 1874, No. 646, 1874 S.C. Acts 797. This Act was first codified with the adoption by the General Assembly of the General Statutes in 1882. S.C. GEN. STAT. § 1738 (1882). If there existed any specific prohibition against the sale of alcoholic beverages to an intoxicated person in South Carolina prior to 1874, it would have arisen by direct application of English law. This may well have been possible, as Act No. 203, enacted by the colonial General Assembly in 1703, provided that "for the better prevention, suppression and punishment of such vices as are commonly practised in . . . publick houses," law enforcement officials are empowered to execute "all laws, both statute and common, of the Kingdom of England, which have been provided and used and are now in force for or concerning the abuses and disorders of taverns, alehouses and victualling houses, and retailing any sort of strong liquors, whatsoever . . . ." Act of May 6, 1703, 1703 Act No. 203, *reprinted in* 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 198 (Thomas Cooper ed., 1837).

64. 1874 S.C. Acts 797.

65. *Id.*

66. *Id.*

by state-licensed dispensaries to individuals for personal or family consumption.[67] This law effectively closed private liquor retailers and taverns (or at least drove them underground) and ended legal, on-premises consumption of alcohol. Complete prohibition of the sale of alcoholic beverages followed in 1909,[68] ten years before prohibition became federal law with the ratification of the Eighteenth Amendment to the United States Constitution.[69]

Concurrent with the repeal of federal prohibition,[70] the General Assembly lifted state prohibition, first in 1933 for low-alcohol malt beverages and wines,[71] then in 1935 for all brewed, fermented, and spiritous liquors.[72] Private retailing was again permitted, but on-premises consumption remained specifically banned.[73] Section 10 of the 1935 Act resuscitated the language from the 1874 statute forbidding sales to intoxicated persons.[74] The statute which eventually would become section 61-9-410 of the Code (now section 61-4-580), applying only to sales of beer and wine, was enacted in 1942.[75] On-premises consumption of alcoholic beverages was legalized in 1967,[76] and section 61-5-30 of the Code (now section 61-6-2220), forbidding sales of distilled liquor to intoxicated persons, was enacted in 1972.[77]

B. Case Law History

Despite their relatively long existence, none of these statutes prohibiting the sale of alcoholic beverages to intoxicated persons was addressed in any reported case until 1985, when *Christiansen v. Campbell*[78] became the first case in which a South Carolina appellate court ruled on whether a tavern owner's violation of the penal law prohibiting the sale of alcoholic beverages to intoxicated persons should give rise to a civil cause of action against the serving tavern. The plaintiff, Douglas Christiansen, had drunk a number of beers at Rosie's Hideaway, a bar in Charleston County owned by the defendant Rosaleen Forcier, who had continued to serve Christiansen after he became

67. Act of Dec. 23, 1893, No. 313, 1893 S.C. Acts 430, *repealed by* Act of Mar. 2, 1909, No. 42, 1909 S.C. Acts 60.
68. 1909 S.C. Acts 60.
69. U.S. CONST. amend. XVIII (repealed 1933).
70. U.S. CONST. amend. XXI.
71. Act of Apr. 14, 1933, No. 228, 1933 S.C. Acts 287, *repealed by* Act of June 20, 1967, No. 398, 1967 S.C. Acts 571.
72. Act of May 14, 1935, No. 232, 1935 S.C. Acts 325, *repealed by* 1967 S.C. Acts 571.
73. 1935 S.C. Acts at 332.
74. *Id.*
75. Act of Mar. 17, 1942, No. 748, 1942 S.C. Acts 1739.
76. 1967 S.C. Acts 571.
77. Act of Mar. 16, 1972, No. 1063, 1972 S.C. Acts 2213.
78. 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985).

intoxicated.[79] When he left the bar, Christiansen stepped into the street and was hit by the defendant Campbell, who did not appeal. In his claim against Forcier, Christiansen alleged that Forcier's negligence in serving him beer while he was intoxicated, in violation of section 61-9-410, proximately caused his injuries.[80]

The court stated that in determining whether civil liability should arise from a penal statute, "we look to see whether the statute is one designed to promote public safety, the complaining party is a member of the class the statute is intended to protect, and the party allegedly at fault is a person upon whom the statute imposes specific duties."[81] The court decided that "[o]ne reason the statute exists is to protect intoxicated persons from their own incompetence and helplessness. The statute represents the legislature's judgment that an intoxicated person is a menace to himself."[82] The court cited a Wyoming case and an overruled Arizona case as supporting this proposition.[83] It also cited cases from several states as holding that a penal statute like section 61-9-410 can give rise to a civil cause of action.[84] The court concluded that section 61-9-410 created a specific statutory duty for tavern owners not to serve intoxicated persons.[85]

The court also found support for its position in South Carolina case law. It cited *Harrison v. Berkley*,[86] an 1847 case in which a shopkeeper sold whiskey to a slave in violation of a statute prohibiting such sales. The slave died of exposure after drinking the whiskey, and the slave's owner sued the shopkeeper for damages.[87] The shopkeeper argued that the sale of the liquor did not proximately cause the slave's death, but the court affirmed a jury verdict for the plaintiff.[88] It held that the shopkeeper could have foreseen the slave's death as a natural consequence of the sale, and thus the question was properly submitted to the jury.[89] In *Christiansen* the court of appeals found the two cases to be similar because they both involved the question of whether a jury should decide if the plaintiff's injury was a natural and probable result of the unlawful sale.[90]

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79. *Id.* at 166, 328 S.E.2d at 353.

80. *Id.*

81. *Id.* at 167-68, 328 S.E.2d at 354.

82. *Id.* at 168, 328 S.E.2d at 354 (citation omitted).

83. *Id.* (citing Lewis v. Wolf, 596 P.2d 705 (Ariz. Ct. App. 1979), *overruled by* Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983)).

84. *Id.* at 168-69, 328 S.E.2d at 354-55.

85. *Id.* at 168, 328 S.E.2d at 354.

86. 32 S.C.L. (1 Strob.) 525 (1847); *see Christiansen*, 285 S.C. at 169, 328 S.E.2d at 355.

87. *Harrison*, 32 S.C.L. (1 Strob.) at 525-26.

88. *Id.* at 549, 551.

89. *See id.* at 550-51.

90. *See Christiansen*, 285 S.C. at 169, 328 S.E.2d at 355. The causation analysis set forth by the court of appeals in *Christiansen* was again employed by the same court the following year in *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 148, 352 S.E.2d 488,

Later in 1985 the supreme court gave notice that a private right of action, such as the one provided by the court of appeals in *Christiansen*, did not necessarily attach to every statute designed to protect the public. In *Whitworth v. Fast Fare Markets, Inc.*[91] two minors and their mother sued a store whose employees had repeatedly sold cigarettes to the minors in violation of penal statutes prohibiting such sales.[92] The plaintiffs alleged that the minors had become addicted to tobacco and, as a result, had damaged their mother's home, stolen money from her, and exhibited habitually disobedient behavior when denied cigarettes.[93] The trial court granted summary judgment, and the supreme court affirmed, holding that the penal statutes at issue were "primarily for the protection of the public and not for the protection of private rights."[94] In support of its position, the court quoted *American Jurisprudence*:[95] "[T]he general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability."[96]

In the 1986 case of *Garren v. Cummings & McCrady, Inc.*,[97] the court of appeals refused to create liability for social hosts.[98] The plaintiff sought to recover for personal injuries he suffered in a car accident caused by an intoxicated man who had driven across the center line. The man had become intoxicated at a party given by the defendant, Cummings & McCrady, Inc.[99] The suit was grounded in common-law negligence because no South Carolina statute provided for criminal penalties or civil liability for social hosts.[100] In finding no liability, the court of appeals noted that its holding accorded with the

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495 (Ct. App. 1986).

91. 289 S.C. 418, 338 S.E.2d 155 (1985).

92. *Id.* at 419-20, 338 S.E.2d at 155. Section 16-17-500 of the Code specifically prohibits sales of tobacco products minors, while section 16-17-490 makes it unlawful to cause or to encourage a minor to violate any law. *See* S.C. CODE ANN. §§ 16-17-490, -500 (Law. Co-op. 1976 & Supp. 1998).

93. *Whitworth*, 289 S.C. at 419-20, 338 S.E.2d at 155.

94. *Id.* at 421, 338 S.E.2d at 156.

95. *Id.* at 420, 338 S.E.2d at 156.

96. 73 AM. JUR. 2D *Statutes* § 432 (1974). Notably, had the court of appeals employed this reasoning in *Christiansen*, it could not have reached the result it did. Evidently the court believed some reason existed why the statutes violated in *Whitworth* were subject to this "general rule" of construction, while the statutes violated in *Christiansen*, which also did not "purport to establish civil liability," were not.

97. 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986).

98. *Id.* at 350-51, 345 S.E.2d at 510; *see also* Jon R. Erickson & Donna Harper Hamilton, Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013, 1015-17 (1983) (stating that dram shop acts are generally not applied to gratuitous providers of alcohol, including employers). The term "social host" refers to a gratuitous provider of alcohol who "receives no pecuniary gain for providing alcoholic beverages to his guest and will have to personally absorb the cost of insurance or other security." Lowe v. Rubin, 424 N.E.2d 710, 713 (Ill. App. Ct. 1981).

99. *Garren*, 289 S.C. at 349, 345 S.E.2d at 509.

100. *See id.* at 349, 351, 345 S.E.2d at 509-10.

"weight of authority" and the "general common law view": [101] "The proper remedy for a third party injured as a result of the guest's intoxication is to sue the guest who injured him. If an additional remedy is to be provided against the host, it should be done by the legislature, not the courts . . . ."[102] The court distinguished *Christiansen* in three ways: First, in *Garren*, the alcohol had been provided gratuitously rather than sold; second, the provider was a social host rather than a commercial licensee; and third, no statutory violation had occurred.[103]

The court of appeals made important, clarifying additions to the body of South Carolina case law addressing duty and foreseeability, respectively, with its decisions in *Rayfield v. South Carolina Department of Corrections*[104] in 1988, and *Crolley v. Hutchins*[105] in 1989. Though *Rayfield* did not involve alcoholic beverages, the case is relevant in analyzing tavern liability cases because of its treatment of the special duty of care to others which a statute can, but does not always, create. The case is also important because the supreme court in *Tobias* must necessarily have considered *Rayfield*'s two-part test when it abolished the first-party cause of action in tavern liability cases. The *Rayfield* court set forth this two-part test to determine whether a statute creates a duty of care by a defendant. In order to establish such a duty, the plaintiff must show:

> (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that [the plaintiff] is a member of the class of persons the statute is intended to protect.
>
> If the plaintiff makes this showing, he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence *per se*.[106]

In *Crolley*, another case involving a statutory violation, the court stated that no liability exists where the injury complained of is not reasonably foreseeable,

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101. *Id.* at 349-50, 345 S.E.2d at 509-10.
102. *Id.* at 350, 345 S.E.2d at 510.
103. *See id.* at 351, 345 S.E.2d at 510.
104. 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988).
105. 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989).
106. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914-15.

and the law does not require one to foresee unpredictable events or those "which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred."[107] Like *Rayfield*, *Crolley* likely played a role in the development of South Carolina tavern liability jurisprudence because the supreme court undoubtedly considered the foreseeability analysis in *Crolley*, and that of the cases upon which that decision rested, in deciding *Tobias*.[108]

At any rate, though *Christiansen* established a first-party cause of action in tavern liability cases, the opinion did not specifically address whether a *third*-party cause of action would lie against the violator. However, the *Christiansen* court hinted how it would decide that issue with the following language: "Section 61-9-410 clearly promotes *public* safety. . . . Indeed, a purpose in prohibiting a vendor from selling beer to one who is already intoxicated is to prevent the person from becoming even more intoxicated *so that he is not a greater risk when he leaves the bar*."[109] By pointing to the statute's public safety function, and by including language that implies concern about risk to society in general rather than only risk to the intoxicated patron himself,[110] the *Christiansen* court foreshadowed its treatment of third-party tavern liability cases.

In 1990, the court of appeals's decision in *Jamison v. Pantry, Inc.*[111] indicated that a third-party cause of action arising from a violation of the Alcoholic Beverage Control Act was available, though the existence of that cause of action was not an issue in the case.[112] In fact, the parties apparently assumed the cause of action's existence as is evident from the defendant's failure to assert the nonexistence of a third-party cause of action as a defense at trial.[113] Neither party addressed the issue on appeal. The statutory violation involved in *Jamison* was the sale of beer to a minor.[114]

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107. 300 S.C. at 357, 387 S.E.2d at 717 (citation omitted).

108. One of the most difficult obstacles for a court that chooses to abolish first-party claims against tavern owners while maintaining a cause of action in favor of third parties is the argument that an injury to an intoxicated patron is just as foreseeable as an injury to a third party. Arguably, an injury to the first party, the intoxicated patron, is even *more* likely and foreseeable because the intoxicated patron could be hurt two ways—in a one-vehicle crash or by crashing into a second vehicle.

109. Christiansen v. Campbell, 285 S.C. 164, 168, 328 S.E.2d 351, 354 (Ct. App. 1985) (emphasis added).

110. *Id.*

111. 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990).

112. *Id.* at 448 n.6, 392 S.E.2d at 477 n.6.

113. *Id.*

114. As noted above, because *Tobias* declined to address the issue of whether a cause of action exists for first-party minors, that issue is not addressed at length in this Comment. However, two other cases decided after *Jamison* and involving minors, *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991), and *Norton v. Opening Break, 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), provide insight as to whether the supreme court will create a cause of action in favor of first-party minors based on

Daley v. Ward,[115] decided in 1990, presented the court of appeals with an opportunity to address yet another critical issue in the tavern liability puzzle: a bartender's or server's responsibility to know when a patron is intoxicated and must be refused service. On June 22, 1986, John William Ward, III spent four or five hours drinking nine twelve-ounce cans of beer at The Windjammer, a bar on the Isle of Palms in Charleston County, South Carolina. Fifteen or twenty minutes after leaving the bar, Ward rear-ended a car driven by the plaintiff Mary C. Daley.[116] Testimony of police officers and a police videotape indicated that Ward was intoxicated at the time of the crash, and Ward testified that he did not recall drinking anywhere other than The Windjammer that evening. The two bartenders on duty both testified that they did not remember Ward, that the bar's policy was not to serve anyone who appeared intoxicated, that they would have refused to serve anyone in Ward's condition as revealed by the police videotape, and that they did not knowingly serve any intoxicated person that day.[117]

Daley sued Ward and The Windjammer. The jury returned a verdict finding The Windjammer not liable.[118] In appealing that verdict, Daley assigned error to the trial judge's refusal to read the jury her requested instruction, taken from a North Carolina case, stating that a plaintiff must show that the "Defendant's patron was intoxicated" and that the Defendant "knew *or should have known* the patron was in an intoxicated condition at the time he or she was

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violations of sections 61-4-90, 61-4-580(1), or 61-6-4070 of the Code. *See* S.C. CODE ANN. §§ 61-4-90, -4-580(1), -6-4070 (Law. Co-op. Supp. 1998) (prohibiting the sale or transfer of alcoholic beverages to a minor).

Significantly, while deciding that the class intended for protection under the statutes did not necessarily include all persons to whom the minor might in turn give or sell the alcohol, the *Whitlaw* court did state that "[t]he statutes in this case are *designed to prevent harm to the minor who purchased the alcohol* and to members of the public harmed by the minor's consumption of that alcohol." *Whitlaw*, 306 S.C. at 54-55, 410 S.E.2d at 253 (emphasis added). In light of this language, the supreme court's statement in *Tobias* that "[w]e leave for another day the issue whether we will recognize a first party action brought by a minor," Tobias v. Sports Club, Inc., 332 S.C. 90, 93, 504 S.E.2d 318, 320 (1998), can be interpreted two ways: Either this language in *Tobias* undermines the persuasiveness of the dictum in *Whitlaw* while forecasting full consideration of this issue upon the presentation of an appropriate case; or the *Whitlaw* dictum indicates that the court has already decided that first-party minors are among those intended to be protected, and the *Tobias* language simply indicates that the court is waiting for a case on point in order to clarify the law.

The court repeated the *Whitlaw* dictum in *Norton*: "[A] rule forbidding a licensee . . . to facilitate consumption of alcohol by a minor is designed to protect both the minor who consumes the alcohol and those members of the public likely to be harmed by the minor's consumption of that alcohol." *Norton*, 313 S.C. at 512, 443 S.E.2d at 408-09. *Whitlaw* and *Norton* both quoted the *Rayfield* two-part test for determining when a duty is created by a statute. *See Whitlaw*, 306 S.C. at 53, 410 S.E.2d at 252; *Norton*, 313 S.C. at 511, 443 S.E.2d at 408.

115. 303 S.C. 81, 399 S.E.2d 13 (Ct. App. 1990).

116. *Id.* at 83, 399 S.E.2d at 14.

117. *Id.*

118. *Id.*

served."[119] The trial judge instead instructed the jury by reading section 61-9-410(2)[120] of the Code verbatim.[121] The court of appeals found the instruction to be proper because Daley had cited no controlling authority for a charge containing the language "knew or should have known."[122]

Daley posited on appeal that she was entitled to the requested charge based on the 1943 case of *Feldman v. South Carolina Tax Commission*.[123] The statute involved in *Feldman* was similar to section 61-9-410 and also contained the term "knowingly."[124] Though it ruled against Daley on this point, the court acknowledged that she "may have been entitled to a charge based on *Feldman*" had she requested it at trial.[125] The court quoted the supreme court's construction of the term in *Feldman* and concluded that *Feldman* provided authority for an instruction "which injects a 'reasonable person' standard into the definition of 'knowingly'...."[126] Nonetheless, the court of appeals reversed the circuit court on another ground. During its deliberations, the jury sent a written question to the trial judge: "If as a jury we feel that the bartenders at the Windjammer did not knowingly sell Mr. Ward alcoholic beverages when he was intoxicated, do we need to consider the bartenders' negligence?"[127] The trial judge answered the jury with the following instruction: "If you were to find that the Defendants did not knowingly sell alcoholic beverages to a person who was intoxicated, then by so finding you will have found that there was no legal duty that was breached. Therefore, there was no negligence."[128] The court of appeals held that this response "took from the province of the jury the issue of whether the bartenders negligently served alcoholic beverages to a person who, by his appearance or otherwise, would lead a prudent man to believe that

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119. *Id.* at 85, 399 S.E.2d at 15 (emphasis added).

120. S.C. CODE ANN. § 61-9-410(2) (Law. Co-op. 1976) (current version at S.C. CODE ANN. § 61-4-580 (Law. Co-op. Supp. 1998)).

121. *Daley*, 303 S.C. at 85, 399 S.E.2d at 15.

122. *Id.*

123. 203 S.C. 49, 26 S.E.2d 22 (1943).

124. *See id.* at 53, 26 S.E.2d at 24. The statute provided that "[n]o retail dealer shall knowingly sell, offer for sale, barter, or exchange any alcoholic liquors to any person when drunk or intoxicated, nor to a minor, nor to any insane person, and upon violation of any of these provisions, upon conviction, shall suffer the penalties hereinafter provided." *Id.*

125. *Daley*, 303 S.C. at 86, 399 S.E.2d at 15.

126. *Id.* In *Feldman* the supreme court held:

> Within the meaning of the term "knowingly," as used in this statute, if the clerk knew that the [purchaser] was a minor or had such information, from his appearance or otherwise, as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring knowledge of that fact home to him, then the sale was made knowingly.

Feldman, 203 S.C. at 56, 26 S.E.2d at 25; *see Daley*, 303 S.C. at 86, 399 S.E.2d at 15.

127. *Daley*, 303 S.C. at 86, 399 S.E.2d at 16.

128. *Id.*

person was intoxicated."[129]

Daley's curious result is at apparent odds with the plain meaning of section 61-9-410(2) and is strangely inconsistent with the supreme court's prior construction of "knowingly." The trial judge's answer did not take the issue of the bartenders' negligence from the jury. The jury's written question indicated that it had in fact focused squarely on that very issue. That issue was whether the bartenders *knowingly* served an intoxicated person. Even without the benefit of an illuminating instruction, as might have been permitted under *Feldman*, the jury still managed to discern the crux of the matter based on the clear language of section 61-9-410(2). Even more importantly, the content of the jury's question implied that the jurors had already arrived at a consensus on that question of fact, apparently having determined that the bartenders had not knowingly served an intoxicated person. Consequently, the court of appeals should have held the trial judge's answer to be either a correct statement of the law or, at worst, harmless error.

A smaller but nonetheless significant issue in *Daley* was whether a third-party cause of action arises under the holding of *Christiansen*. The court of appeals upheld the trial court's denial of Ward's and The Windjammer's motions for directed verdict that *Christiansen* allowed only first-party, and not third-party, causes of action.[130] Citing *Jamison*, the court held that "the purpose of the statute is to protect not only the individual served in violation of the statute, but also the public at large, from the possible adverse consequences."[131]

Against the foregoing backdrop of tavern liability jurisprudence, the court of appeals heard arguments in *Tobias*.

IV. ANALYSIS OF *TOBIAS V. SPORTS CLUB, INC.*

A. The Court of Appeals's Opinion

The court of appeals's decision in *Tobias* was noteworthy because, though it did not overrule *Christiansen*, it critically weakened the first-party cause of action by allowing the defendant to assert the affirmative defenses of contributory negligence and assumption of the risk.[132] The parties' arguments in the court of appeals provide a good starting point for a policy analysis of the court's position.

As noted above, *Christiansen* presented the court of appeals with an issue of first impression as to whether a civil cause of action arises from a violation of a statute controlling alcoholic beverages. Consequently, Forcier, the defendant in *Christiansen*, logically argued on appeal that the pleadings

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129. *Id.* at 87, 399 S.E.2d at 16.

130. *See id.* at 84, 399 S.E.2d at 14-15.

131. *Id.* at 84, 399 S.E.2d at 15.

132. *See* Tobias v. Sports Club, Inc., 323 S.C. 345, 356, 474 S.E.2d 450, 456 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998).

failed to state a claim.[133] In *Tobias* the defendants were no doubt aware that *Daley* and other cases had reiterated *Christiansen*'s holding that the legislature intended a first-party cause of action for intoxicated patrons.[134] In addition, *Tobias* presented facts that were no stronger than those presented in *Daley*, which had resulted in a reversal of a defense verdict.[135] Given these factors, the defendants understandably recognized the need for a new theory. The defendants' strategy was not to dispute only the fact that anyone at Mallard's knowingly served Tobias while intoxicated (the approach of the *Daley* defendants), but also to emphasize the prominent role Tobias played in creating his own misfortune.[136] In so doing, the defendants managed to create a first impression case in that it was the first time a South Carolina appellate court had been called upon to decide whether a defendant in a tavern liability case could assert the affirmative defenses of contributory negligence and assumption of the risk against an intoxicated patron.[137]

In allowing the defenses, the court of appeals noted that "foreclosing a tavern owner from showing that its breach of duty did not contribute to the plaintiff's injuries or that the plaintiff's negligence was greater than that of the defendant 'would clearly be contrary to traditional tort principles.'"[138] The court also recognized that it would be "difficult to conceive of a fact situation more compelling on the issue of contributory negligence."[139] In his concurring opinion, Judge Goolsby argued that by allowing these affirmative defenses, the court effectively abrogated the legislative intent embodied in the statutes at issue.[140] The majority responded to this argument by pointing out that the statutes' penal effect remained and by noting that its decision facilitated "the legislative purpose of deterring drunk driving and punishing tavern owners who serve obviously intoxicated persons . . . without absolving the inebriate of responsibility for his actions."[141] The court stated that two of the three jurisdictions cited by the concurrence as not permitting the defense of contributory negligence had since allowed proof of the plaintiff's fault under

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133. Christiansen v. Campbell, 285 S.C. 164, 166-67, 328 S.E.2d 351, 353 (Ct. App. 1985).

134. Despite these confirmations, none of these three cases involved a first-party cause of action, so the statements were dicta. In addition, *Whitlaw* and *Norton* involved intoxicated minors rather than intoxicated adults. *See supra* note 114.

135. *See supra* notes 115-31 and accompanying text.

136. *See* Brief for Respondent at 12-13.

137. *See Tobias*, 323 S.C. at 346-47, 474 S.E.2d at 450-51.

138. *Id.* at 354, 474 S.E.2d at 455 (quoting Lyons v. Nasby, 770 P.2d 1250, 1259 (Colo. 1989)). The reference to the tavern owner not contributing to the plaintiff's injuries is reminiscent of the position sanctioned by the court in *Majors v. Brodhead Hotel*, 205 A.2d 873, 878 (Pa. 1965), that defendants should be permitted to prove that "the plaintiff was so intoxicated when [the] defendant illegally served him that the accident would have occurred even if the defendant had not illegally served him." *Id.*

139. *Tobias*, 323 S.C. at 354, 474 S.E.2d at 455.

140. *See id.* at 359, 474 S.E.2d at 457 (Goolsby, J., concurring).

141. *Id* at 355, 474 S.E.2d at 455.

a comparative negligence regime and also noted that a majority of jurisdictions that had considered the issue "limit the inebriated patron's ability to sue the tavern owner for the consequences of the patron's voluntary intoxication."[142]

In the last paragraph of its opinion, the court concisely summarized the policy- and morality-based argument that had become a hallmark of opinions eliminating first-party causes of action in tavern liability cases:

> In our view, a rule which allows an intoxicated individual to hold a tavern owner liable without regard to his own actions in continuing to consume alcohol promotes irresponsibility and rewards drunk driving. "Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism."[143]

Though the court of appeals in *Tobias* may apparently have departed substantially from the policy position it had taken in *Christiansen*, no South Carolina appellate court, at the time *Christiansen* was decided, had considered a tavern's liability since *Harrison v. Berkley*[144] in 1847. Thus, whether any cause of action existed in favor of either a third party or an intoxicated patron was unsettled. The position taken by the court in *Christiansen* was consistent with the holdings of other jurisdictions where third-party plaintiffs had persuaded courts to abandon the common-law rule of nonliability. The influence of these arguments over the *Christiansen* court is evidenced by the tavern liability cases the court cited—all were third-party cases.[145]

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142. *Id* at 355-56, 474 S.E.2d at 455-56.

143. *Id.* at 356, 474 S.E.2d at 456 (quoting Estate of Kelly v. Falin, 896 P.2d 1245, 1250 (Wash. 1995)).

144. 32 S.C.L. (1 Strob.) 525, 551 (1847) (holding a shopkeeper liable to a slave owner for having caused a slave's death by selling liquor to the slave in violation of a statute prohibiting such sales).

145. *See* Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Lewis v. Wolf, 596 P.2d 705 (Ariz. Ct. App. 1979), *overruled by* Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983); Taylor v. Ruiz, 394 A.2d 765 (Del. Super. Ct. 1978); Ono v. Applegate, 612 P.2d 533 (Haw. 1980); Alegria v. Payonk, 619 P.2d 135 (Idaho 1980); Hutchens v. Hankins, 303 S.E.2d 584 (N.C. Ct. App. 1983); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983). The preceding cases were all third-party cases, though some included dicta implying that the same remedy might be available for first-party intoxicated patrons. However, the *Christiansen* court did cite to Joel E. Smith, Annotation, *Liability of Persons Furnishing Intoxicating Liquor for Injury to or Death of Consumer, Outside Coverage of Civil Damage Acts*, 98 A.L.R.3d 1230 (1980). *See* Christiansen v. Campbell, 285 S.C. 164, 169, 328 S.E.2d 351, 355 (Ct. App. 1985). The annotation features an extensive survey of first-party tavern liability cases.

If South Carolina had recognized third-party causes of action at the time of the *Christiansen* appeal, the court's analysis might have focused on the distinction between first-party and third-party plaintiffs. Instead, the court of appeals relied on *Harrison*, a factually dissimilar case in significant respects, and primarily addressed the issue of causation, a key weakness in the common-law rule of nonliability. The court's citation of four third-party cases and no first-party cases indicates that it likely focused on the arguments advocating an end to the common-law rule of nonliability while apparently declining to consider the important distinction between the two classes of plaintiffs. The arguments addressing causation, foreseeability, and duty are compelling when advanced in cases involving injuries to innocent third parties,[146] but other policy concerns compete when the plaintiff is an intoxicated patron.[147]

The court of appeals's opinion in *Tobias* does not discount the often repeated arguments made in the context of advocating an end to the nonliability rule. It simply reflects a view, held in a majority of jurisdictions by then, that allowing intoxicated patrons to shift the entire cost of their own injuries is unwise as a policy matter. The court also undoubtedly recognized that, because contributory negligence and assumption of the risk are unavailable in cases where the plaintiff is a third party, its decision did not affect the viability of third-party actions. Thus, a significant deterrent against tavern owners and employees serving intoxicated patrons remained, while at the same time, a

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146. *See Ontiveros*, 667 P.2d at 207 ("The statistics . . . indicate a frightful toll—25,000 deaths and 650,000 injuries each year in motor vehicle accidents in which alcohol is a contributing cause."); Meade v. Freeman, 462 P.2d 54, 65 (Idaho 1969) (Prather, J., dissenting) ("I perceive no difference [between] the sale of further intoxicants to one already drunk . . . [and] the sale of firearms to minors or incompetents . . . ."); Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d 550, 553 (Pa. 1964) ("To serve an intoxicated person more liquor is to light the fuse."); *McClellan*, 666 P.2d at 415 ("[The non-liability rule] places us all at more peril, because there is no effective deterrent to keep liquor vendors from selling liquor to minors or to intoxicated persons . . . . Perhaps the threat of civil liability or increased insurance premiums will serve to make liquor vendors more careful.").

147. As one court stated:

> As a matter of public policy, we have premised the duty of commercial vendors on the need to protect *innocent bystanders* from intoxicated patrons, and on the need to protect *minors*. These public policy concerns are not present when intoxicated adults injure themselves.
>
> A rule that allows an intoxicated adult to hold a commercial vendor liable fosters irresponsibility and rewards drunk driving. Rather than deterring drunk driving, excessive drinking, and the callow and imprudent behavior of intoxicated adults, such a rule would actually compensate patrons who drink beyond obvious intoxication.

Estate of Kelly, 896 P.2d at 1249-50 (citations and footnote omitted).

corresponding deterrent against patrons' abuse of alcohol was strengthened.[148]

B. The Supreme Court's Opinion

As noted above, the court of appeals's opinion in *Tobias* effectively overruled *Christiansen* by allowing contributory negligence and assumption of the risk as affirmative defenses. But the supreme court removed all doubt as to the status of first-party causes of action by explicitly overruling *Christiansen*:

> The Court of Appeals . . . held that another of the statutory purposes was to protect the intoxicated person from his own incompetence and helplessness, and therefore concluded the intoxicated patron himself was entitled to bring a negligence suit for a statutory violation. We disagree, and now hold that public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.[149]

However, though stating that it based its decision on "public policy," the court offered little insight into that policy. The court neither provided any analysis of the issues nor addressed adverse policy arguments. In the paragraph following its overruling of *Christiansen*, the court offered only this brief explanation:

> Imposing liability on a tavern owner for continuing to serve an intoxicated person who later injures others serves public policy by imposing upon the tavern owner a duty to use judgment and discretion. We do not believe that the owner will exercise this judgment and discretion less prudently if he risks a law suit only when the intoxicated

148. Lang and McGrath made the unsupported and somewhat speculative assertion that by eliminating the intoxicated patron's cause of action, "the deterrent effect of a liability statute is at least partially thwarted, since certain furnishers of alcohol may be willing to take the chance that third parties will not be injured." Lang & McGrath, *supra* note 18, at 1185 n.335. This statement typifies an often repeated but probably unrealistic perception of the bar and restaurant business. It seems to envision a situation where tavern employees are tempted to "risk" serving intoxicated patrons. This view fails to recognize the common-sense notion that servers or bartenders typically have little or no monetary or other incentive to serve more drinks to an intoxicated patron.

149. Tobias v. Sports Club, Inc., 332 S.C. 90, 92, 504 S.E.2d 318, 319-20 (1998).

> person injures others. The decision to refuse to serve alcoholic beverages, beer or wine to an intoxicated patron will be unaffected by our decision today.[150]

The court further noted that it was following only the majority rule and that it was leaving open the question of whether it would recognize a first-party action brought by a minor.[151]

Though the court's authoritative-sounding statement about the effect of its opinion on tavern owners' decisions might well be true, it is lamentably conclusory. The court cited ten opinions from other jurisdictions which had eliminated first-party causes of action,[152] and most contain a much more thorough policy analysis. The brief nature of the court's opinion renders it less credible and subjects it to criticism for its lack of substantive discussion because, though the court presumably undertook a thorough review of the many cases and commentaries addressing first-party causes of action,[153] one can only speculate as to the court's beliefs about the best policy arguments in favor of eliminating first-party causes of action or the weaknesses it perceived in the contrary arguments.

The supreme court's opinion may have reflected a view that reading a first-party cause of action into a statute controlling the sale of alcohol construed the statute too liberally. Courts in other jurisdictions, including some cited by the supreme court in *Tobias*, pointed out that nothing prevents state legislatures from specifically establishing a cause of action in favor of intoxicated patrons if they so intend.[154] By narrowing its reading of sections 61-5-30 and 61-9-410 of the Code, perhaps the supreme court, without expressly saying so, handed the ball to the South Carolina General Assembly. Its holding in *Tobias* may mean that no first-party causes of action exist in tavern liability cases absent legislative enactment.

The supreme court's opinion also indicates that the court was troubled, as had been the court of appeals and courts in other jurisdictions, by the idea of creating a rule which would apparently reward a party clearly undeserving of any such reward. The problem is that every first-party tavern liability case

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150. *Id.* at 92, 504 S.E.2d at 320.

151. *See id.* at 91, 93, 504 S.E.2d at 319, 320.

152. *See id.* at 93, 504 S.E.2d at 320.

153. *See* THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 131 (1978) ("[J]udges often study secondary authority or opinions of other courts to find reasons for announcing a rule in the case at hand.")

154. *See, e.g.*, Noonan v. Galick, 112 A.2d 892, 894 (Conn. Super. Ct. 1955) ("Had [the legislature] desired to extend this remedy, unknown to the common law, to the intoxicated person himself, it would have done so . . . ."); Wright v. Moffitt, 437 A.2d 554, 556 (Del. 1981) ("[I]n our view, the General Assembly is in a far better position than this Court to gather the empirical data and to make the fact finding necessary to determine what the public policy should be as to a Dram Shop law, and the scope of any such law.").

involves a plaintiff who must necessarily stipulate to having been negligent and to having violated a penal law[155] and, in order to recover damages, must allege that the tavern owner also was negligent and also violated a penal law. In contrast, the tavern owner need not stipulate to these transgressions and, in fact, may have committed neither. The tavern owner's conduct is a question of fact, and the burden of proof rests with the plaintiff. Even so, allowing this type of blame-shifting seems counterproductive.[156] Such a rule also seems directly at odds with general notions of personal responsibility. As the supreme court stated in *State v. Vaughn*:[157]

> [V]oluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific. Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go unpunished but would also transgress the principle of personal accountability which is the bedrock of all law. "The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be

155. Even if the plaintiffs were injured in some way other than by driving under the influence, their public intoxication alone would likely violate section 16-17-530 of the Code, which states: "Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition . . . shall be deemed guilty of a misdemeanor . . . ." S.C. CODE ANN. § 16-17-530 (Law. Co-op. 1976).

156. As one court stated:

> [P]ermitting the intoxicated patron a cause of action in this context would simply send the wrong message to all our citizens, because such a message would essentially state that a patron who has purchased alcoholic beverages from a permit holder may drink such alcohol with unbridled, unfettered impunity and with full knowledge that the permit holder will be ultimately responsible for any harm caused by the patron's intoxication.

Smith v. 10th Inning, Inc., 551 N.E.2d 1296, 1298 (Ohio 1990).

157. 268 S.C. 119, 232 S.E.2d 328 (1977).

> apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences." [158]

V. RESPONSE TO ARGUMENTS IN FAVOR OF FIRST-PARTY TAVERN LIABILITY

The reasons most frequently advanced for expanding the liability of taverns are that commercial vendors "(1) can purchase extensive liability insurance to bear [the cost of injuries to patrons]; (2) can most equitably spread the cost of insurance by increasing the prices of alcoholic beverages; (3) have expertise in judging whether a [patron] is intoxicated; and (4) can most directly control its patrons' consumption of alcoholic beverages."[159]

Like other arguments in favor of expanding tavern liability, the enterprise liability or "deep pockets" argument is much more appealing in the context of ending the common-law rule of nonliability in order to compensate injuries to innocent third parties. Moreover, "commercial general-liability insurance policies insuring business establishments which sell or distribute alcoholic beverages as part or all of their business [often] contain a specific exclusion from coverage for alcohol sold in violation of statutes regulating the sale of alcoholic beverages to minors and intoxicated persons."[160] Given that such a statutory violation is a required element of an intoxicated patron's case, a liability policy containing such an exception would not cover the serving tavern. In contrast, the intoxicated patron's insurance policy presumably would not exclude coverage for injuries resulting from the patron's own negligent acts.

The argument that tavern employees are skilled at identifying patrons' intoxication levels and are best positioned to prevent intoxicated patrons from continuing to drink fails to recognize two basic realities. First, an intoxicated patron who wishes to keep drinking has an incentive to hide his intoxication from tavern employees, and experienced drinkers are often skilled at concealing their intoxication.[161] Second, *patrons*, not tavern employees or

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158. *Id.* at 125-26, 232 S.E.2d at 330-31 (quoting 22 C.J.S. *Criminal Law* § 66 (1961)) (alteration in original).

159. Suzette M. Nanovic, Note, *Comparative Negligence and Dram Shop Laws: Does* Buckley v. Pirolo *Sound Last Call for Holding New Jersey Liquor Vendors Liable for the Torts of Intoxicated Persons?*, 62 NOTRE DAME L. REV. 238, 252 (1987) (footnote omitted); *accord* Erickson & Hamilton, Comment, *supra* note 98, at 1015.

160. *See* 9 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 132:56 (1997).

161. "[T]he experienced, older drinker often has the ability to 'pull himself together' when under observation and to hide the signs of his true condition." Commonwealth v. Brooks, 319 N.E.2d 901, 904 (Mass. 1974) (quoting RICHARD E. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 9.02 (3d ed. 1971); *see also* Powell v. Texas, 392 U.S. 514, 527 (1968) (stating at the time that an estimated four million alcoholics existed in the United States and that a "very large

anyone else, are best positioned to know how much they have had to drink and when they are approaching or have reached intoxication.

At certain times in some establishments, a bartender or server may be capable of watching particular patrons closely enough to know how much they have consumed or notice outward signs of intoxication. Programs such as TAM (Techniques in Alcohol Management) and TIPS (Training for Intervention Procedures), which teach bar and restaurant employees how to spot and handle intoxicated patrons, provide an invaluable public service. Participation in such a program should be a prerequisite for licensing.[162] But increasing the already substantial burden on tavern owners to ensure that no one gets drunk at their taverns,[163] when a certain percentage of patrons will inevitably go to taverns to do exactly that, goes too far.[164] Tavern patrons who want to get drunk will get drunk and, while doing so, will often conceal their intoxication level from tavern employees so as not to be "cut off."

Another argument for first-party causes of action is that allowing intoxicated patrons to sue serving taverns would reduce drunk driving. Allowing first-party lawsuits increases theoretically the incentive for tavern employees to behave responsibly. This argument is also misguided. The problem with this reasoning is that the purported increased incentive for tavern employees to behave responsibly greatly reduces the incentive for patrons to behave responsibly.

VI. CONCLUSION

Despite its brevity, the supreme court's opinion in *Tobias v. Sports Club, Inc.*,[165] logically succeeded the opinion of the court of appeals. The supreme court implicitly agreed with the policy rationale that led the court of appeals to allow contributory negligence and assumption of the risk as affirmative defenses—that individual responsibility and personal accountability should be favored over dependency and paternalism.

Opponents of first-party causes of action must concede that injuries to intoxicated patrons are as foreseeable as injuries to third parties and that

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percentage" of them "possess the means to keep their drinking problems secret").

162. *See* WASH. REV. CODE ANN. § 66.20.320 (West Supp. 1999) (mandating that the state's alcoholic beverage control board regulate "a required alcohol server education program").

163. Given the potential of criminal penalties and the risk of lawsuits by third parties, one might say that tavern owners already are charged with the responsibility to ensure that no one gets drunk at their taverns.

164. Realizing that its employees were unable to observe carefully the intoxication levels of all of its patrons during busy periods, one Ohio tavern hired a private security firm to perform the task. *See* Julia A. Harden, Comment, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?* 48 OHIO ST. L.J. 227, 240 & n.130 (1987). While this solution is commendable, it would not be feasible for many taverns. Measures such as these should not be required as "the cost of doing business" in order to protect against lawsuits by intoxicated patrons.

165. 332 S.C. 90, 504 S.E.2d 318 (1998).

statutes controlling alcoholic beverages impose a duty on bartenders and servers not to serve intoxicated patrons, regardless of whom those statutes are intended to protect. Apparently recognizing these considerations, the supreme court did not address foreseeability or duty, but focused instead on the central role intoxicated patrons play in causing their own injuries. If the supreme court had simply denied certiorari to the *Tobias* plaintiffs, lower courts would presumably decide future first-party tavern liability cases under the law of comparative negligence, with the jury apportioning fault between the intoxicated patron and the serving tavern. However, by eliminating first-party causes of action, the supreme court has effectively held that adult patrons who voluntarily drink beyond the point of intoxication are, as a matter of law in every case, at least fifty-one percent at fault.

The supreme court's holding reflects the court's belief that criminal penalties and the risk of third-party actions maintain the existing incentive for responsible behavior by tavern owners, while the elimination of first-party actions would increase the incentive for responsible behavior by patrons. Because the rule established by the court is based on solid policy considerations, and because the rule properly distributes the incentive to control irresponsible drinking between the tavern owner and the tavern patron, the supreme court achieved the best possible resolution of the first-party tavern liability issue. In sum, despite its lack of published reasoning, the supreme court correctly decided *Tobias*.

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