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## Lydia v. Horton: You No Longer Have to Protect Me from Myself

Kayce H. McCall

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**LYDIA V. HORTON:  
YOU NO LONGER HAVE TO PROTECT  
ME FROM MYSELF**

I. INTRODUCTION

In the recent decision of *Lydia v. Horton*,<sup>1</sup> the Supreme Court of South Carolina recognized that the right to sue is not unlimited. Mitchell Lydia brought suit against Steve Horton after Horton allowed Lydia to drive Horton's car while Lydia was intoxicated. A subsequent single-car accident left Lydia a quadriplegic.<sup>2</sup> At the beginning of this suit the question of whether South Carolina recognizes a first-party negligent entrustment cause of action was an issue of first impression.<sup>3</sup> Although the court has addressed other similar issues, this case was the first time the court had to determine if an injured party could bring a lawsuit against a person who placed the instrument in the injured party's hands. The Supreme Court of South Carolina properly refused to protect voluntarily intoxicated drivers from themselves by holding that Lydia could not recover on a first-party negligent entrustment cause of action.<sup>4</sup>

This Note examines the first-party negligent entrustment cause of action and the possible ramifications of the *Lydia* decision. Part II explores the history and development of the tort of negligent entrustment and distinguishes between first- and third-party actions. Part III provides an in-depth discussion of the decision in *Lydia*, as well as the authorities used by the court of appeals and the supreme court to reach their decisions. Part III also addresses the public policy basis for *Lydia*. Finally, Part IV discusses the future ramifications of the *Lydia* decision.

II. HISTORY OF THE NEGLIGENT ENTRUSTMENT DOCTRINE

A. *Development of the Doctrine*

The doctrine of negligent entrustment can be traced back to the 1816 English case of *Dixon v. Bell*.<sup>5</sup> In *Dixon*, Bell instructed a ten-year-old girl, who was his servant, to fetch his loaded gun. Dixon's son was injured when the girl tampered

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1. 355 S.C. 36, 583 S.E.2d 750 (2003).

2. *Id.* at 37, 583 S.E.2d at 751.

3. *Id.* at 38, 583 S.E.2d at 751. South Carolina has long recognized third-party negligent entrustment claims. *See, e.g.*, *Howell v. Hairston*, 261 S.C. 292, 301, 199 S.E.2d 766, 770 (1973) (holding parents could be liable to a third party injured by an air rifle that the parents negligently entrusted to their son).

4. *See Lydia*, 355 S.C. at 43, 583 S.E.2d at 754.

5. 105 Eng. Rep. 1023 (K.B. 1816).

with the trigger and caused the gun to discharge.<sup>6</sup> The court imposed liability on the master, who owned the gun, because he knew of his servant's incompetency, yet entrusted her with a dangerous weapon.<sup>7</sup> "*Dixon* was one of the first cases which recognized that an owner who supplies a chattel to a child or someone likely to harm himself or another is liable to the injured person."<sup>8</sup> In the 1920s, courts began to extend the "negligent entrustment doctrine from bailment of guns to bailment of automobiles."<sup>9</sup> For example, in *Anderson v. Daniel*,<sup>10</sup> a father who allowed his sixteen-year-old son to drive his car was held liable for the injuries to a third person that resulted from his son's accident.<sup>11</sup> The expansion of the doctrine was easy to explain because the trustee was a minor. "As more cases developed, the close relationships such as master/servant or parent/child were not always required."<sup>12</sup>

In the late 1920s and early 1930s, courts began to impose liability on owners for entrusting their cars to incompetent, inexperienced, or habitual drunk drivers.<sup>13</sup> After many of these cases, the drafters of the Restatement (First) of Torts decided to include a section describing the law of negligent entrustment.<sup>14</sup> In 1965, the Restatement (Second) of Torts (which is still current today) adopted the negligent entrustment section with virtually no change from the First Restatement.<sup>15</sup> Once a cause of action was recognized, courts throughout the United States began to expand the doctrine of negligent entrustment.<sup>16</sup>

### B. *Negligent Entrustment in South Carolina*

In South Carolina, the tort of negligent entrustment is rooted in the case of *Howell v. Hairston*.<sup>17</sup> *Howell* stated that liability for injuries inflicted by a minor with a gun may be predicated on the fact that the parents permitted the minor to have the gun knowing the minor was of a reckless or malignant disposition.<sup>18</sup> Under the theory of negligent entrustment, South Carolina has recognized that "the owner or one in control of the vehicle and responsible for its use who is negligent

6. *Id.*

7. *Id.*

8. Daniel S. Whitebook, Note, *Who's Driving, Anyway?: The Status of Negligent Entrustment in Florida After Horne v. Vic Potamkin Chevrolet, Inc.*, 12 NOVA L. REV. 939, 951 (1998).

9. *Id.*

10. 101 So. 498 (Miss. 1924).

11. *Id.* at 499–500.

12. Whitebook, *supra* note 8, at 951.

13. See, e.g., *Greeley v. Cunningham*, 165 A. 678, 679 (Conn. 1933) (imposing liability on an automobile owner who entrusted his car to a lady who was incompetent, inexperienced, and a reckless driver); *Crowell v. Duncan*, 134 S.E. 576, 577 (Va. 1926) (involving an adult son known to the father to have a habit of getting under the influence of intoxicants).

14. RESTATEMENT (FIRST) OF TORTS § 390 (1934).

15. RESTATEMENT (SECOND) OF TORTS § 390 (1965).

16. See Whitebook, *supra* note 8, at 952.

17. 261 S.C. 292, 199 S.E.2d 766 (1973).

18. *Id.* at 298, 199 S.E.2d at 769.

in entrusting it to another can be held liable for such negligent entrustment.”<sup>19</sup> There are several cases that discuss claims for negligent entrustment where the claim is based on the driver’s alleged impairment due to alcohol use. These cases consistently define the elements of this cause of action as:

(1) Knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking, (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated, and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver.<sup>20</sup>

### C. *Distinction Between First-Party and Third-Party Plaintiffs*

Before *Lydia v. Horton*,<sup>21</sup> South Carolina courts had never addressed whether an entrustee could sue an entrustor for negligent entrustment where the plaintiff’s impairment is the cause of his own injuries. A third-party claim differs from a first-party claim in that a third-party claim is based on foreseeability. In first-party claims, where one places himself in harms way, foreseeability is outweighed by the fact that the plaintiff is responsible for his own actions. Even though the court barred *Lydia*’s first-party claim, the negligent entrustment cause of action is still available to third parties, who are the intended beneficiaries of this theory.<sup>22</sup> The negligent entrustment doctrine “is founded in tort—the negligence of the owner in turning the incompetent loose on the public.”<sup>23</sup>

In *Tobias v. Sports Club, Inc.*,<sup>24</sup> a dram shop action, the Supreme Court of South Carolina established the legal principle that a court will protect the general public, but not the one who drinks alcoholic beverages, from the consequences of his own intoxication.<sup>25</sup>

19. *Am. Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981) (citations omitted).

20. *Lydia v. Horton*, 343 S.C. 376, 381, 540 S.E.2d 102, 105 (Ct. App. 2000); see, e.g., *Am. Mut. Fire Ins. Co.*, 275 S.C. at 621, 274 S.E.2d at 418 (reversing the trial court’s finding of liability because defendant lacked ownership and control of the car); *Jackson v. Price*, 288 S.C. 377, 382, 342 S.E.2d 628, 631 (Ct. App. 1986) (holding the entrustor liable because he knew that the entrustee had been drinking and still permitted him to drive); *McCallister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986) (rejecting the plaintiff’s claim of negligent entrustment because the record lacks evidence of the required knowledge to meet the test of liability).

21. 355 S.C. 36, 583 S.E.2d 750 (2003).

22. *Id.* at 42, 583 S.E.2d at 754.

23. *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. Ct. App. 1966).

24. 332 S.C. 90, 504 S.E.2d 318 (1998).

25. *Id.* at 92, 504 S.E.2d at 319–20.

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. [The court does] not believe that the owner will exercise this judgment and discretion less prudently if he risks a law suit only when the intoxicated person injures others.<sup>26</sup>

This rationale applies to vehicle owners just as it does to tavern owners.

### III. THE DECISION IN *LYDIA V. HORTON*

#### A. *Facts*

Steve Horton owned a 1973 Volkswagen automobile.<sup>27</sup> On April 27, 1995, Mitchell Lydia became intoxicated and was incompetent to operate a vehicle.<sup>28</sup> The complaint alleged that Horton either knew or should have known that Lydia was incompetent to operate the automobile, yet Horton entrusted its operation to him.<sup>29</sup> In his intoxicated condition, Lydia then drove Horton's car, lost control, and struck a tree. The collision rendered Lydia a quadriplegic.<sup>30</sup>

#### B. *Procedural History in Lydia v. Horton*

Lydia brought a first-party negligent entrustment action against Horton.<sup>31</sup> In ruling on Horton's motion for summary judgment, the trial court concluded, as a matter of law, that Lydia's negligence exceeded that of Horton and granted Horton's motion.<sup>32</sup> The South Carolina Court of Appeals reversed, holding that the "entrustee may bring a first party cause of action for negligent entrustment against the entrustor of the vehicle."<sup>33</sup> The court of appeals held that Lydia's action was subject to the traditional defenses available in negligence claims.<sup>34</sup> Thus, if the plaintiff were negligent, his recovery would be reduced by the percentage of his negligence.<sup>35</sup> However, recovery would not be barred unless the plaintiff's negligence exceeded that of the defendant.<sup>36</sup> The Supreme Court of South Carolina reversed the court of appeals decision and held that an intoxicated adult may not

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

27. *Lydia v. Horton*, 343 S.C. 376, 379, 540 S.E.2d 102, 104 (Ct. App. 2000).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Lydia v. Horton*, 343 S.C. 376, 395, 540 S.E.2d 102, 113 (Ct. App. 2000).

34. *See id.* at 395-96, 540 S.E.2d at 113.

35. *See id.* at 394-96, 540 S.E.2d at 112-13.

36. *Id.* at 394, 395-96, 540 S.E.2d at 112.

recover on a first-party negligent entrustment action.<sup>37</sup>

### C. Basis of Court of Appeals Decision

The court of appeals adopted the “Restatement (Second) of Torts sections 308 and 390 as the appropriate standard for negligent entrustment.”<sup>38</sup> Section 308, entitled “Permitting Improper Persons to Use Things or Engage in Activities,” applies when an entrustor permits an trustee to use something “under the [entrustor’s] control.”<sup>39</sup> In order for the entrustment to be “negligent,” the plaintiff must show that the entrustor either knew or should have known that the trustee would use the thing in a way likely to harm others.<sup>40</sup> Comment b of section 308 indicates that this cause of action is most frequently used when the trustee is in a class such as young children or feeble-minded adults.<sup>41</sup> However, section 308 also applies where the trustee is not in such a class if the entrustor has reason to believe he or she will misuse the thing entrusted.<sup>42</sup>

Section 390 is entitled “Chattel for Use by Person Known to be Incompetent.”<sup>43</sup> By its terms it applies only to an incompetent trustee, defined as one “whom the supplier [of a chattel] knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others.”<sup>44</sup> Section 390, therefore, is a special application of the rule stated in section 308.<sup>45</sup> Section 308 broadly defines a negligent act, while section 390 explains the possible liability for the negligent act. The court of appeals read these two sections of the Restatement as extending the entrustor’s liability to the injured incompetent trustee, Lydia.

The court acknowledged that many South Carolina cases closely follow the logic of the Restatement.<sup>46</sup> The court of appeals further discussed several cases from other jurisdictions that rely in some manner upon the Restatement (Second) of Torts sections 308 and 390 in allowing a first-party cause of action for negligent entrustment.<sup>47</sup> In particular, the court adopted the following language from the Supreme Court of Colorado:

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37. *Lydia v. Horton*, 355 S.C. 36, 43, 583 S.E.2d 750, 754 (2003).

38. *Lydia v. Horton*, 343 S.C. 376, 385, 540 S.E.2d 102, 107 (Ct. App. 2000).

39. RESTATEMENT (SECOND) OF TORTS § 308 (1965).

40. *Id.*

41. *Id.* § 308 cmt. b.

42. *Id.*

43. *Id.* § 390.

44. *Id.*

45. RESTATEMENT (SECOND) OF TORTS § 390 cmt. b (1965).

46. *See Howell v. Hairston*, 261 S.C. 292, 296, 199 S.E.2d 766, 767–68 (1973); *Jackson v. Price*, 288 S.C. 377, 382, 342 S.E.2d 628, 631 (Ct. App. 1986); *McCallister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986).

47. *Lydia v. Horton*, 343 S.C. 376, 388–90, 540 S.E.2d 102, 109–10 (Ct. App. 2000); *see Keller v. Kiedinger*, 389 So.2d 129, 132 (Ala. 1980); *Meachum v. Faw*, 436 S.E.2d 141, 144 (N.C. Ct. App. 1993).

[S]ection 390 provides a basis for resolving the issues of duty (whether a supplier of a chattel owes any obligation to a person incurring physical harm from the use of the chattel by the person to whom it is supplied) and the specific standard of care (the criteria for assessing reasonable care in light of apparent risk) in the context of supplying chattels for the use of others.<sup>48</sup>

Comment c of section 390 notes that an individual “who accepts and uses a chattel knowing that he is incompetent to use it safely . . . [will usually be in] such contributory fault as to bar recovery.”<sup>49</sup> However, the comment further states that if the person is in a class that is “recognized as [being] so incompetent” as not to be “responsible for their actions,” then the supplier may be liable for that person’s injuries.<sup>50</sup> Also, if the supplier knows that the person’s condition makes him incapable of exercising reasonable care, then the supplier may be responsible for self-inflicted harm.<sup>51</sup> The court of appeals found that section 390 of the Restatement establishes a framework for examining whether Horton owed Lydia a duty.<sup>52</sup>

The court of appeals acknowledged the decision in *Tobias v. Sports Club, Inc.*,<sup>53</sup> but distinguished it from *Lydia* because *Tobias* did not involve negligent entrustment.<sup>54</sup> The court of appeals justified its decision on the ground that negligent entrustment of a dangerous instrumentality is different from furnishing alcohol in violation of a statute.<sup>55</sup>

Jurisdictions throughout the country have recognized a first-party negligent entrustment cause of action. One particularly instructive case is *Keller v. Kiedinger*.<sup>56</sup> In an action against the entrustor of an automobile by the father of the trustee—a fourteen-year-old girl who died in a one-car accident caused by her own negligence—the Supreme Court of Alabama concluded that a bailee can maintain a cause of action against a bailor.<sup>57</sup> The *Keller* court stated that negligence on the part of the daughter was “not a necessary element of negligent entrustment”; rather, the entrustor’s liability rested solely on his own negligence.<sup>58</sup> However, in accordance with section 390, comment c, the court found that the daughter was contributorily negligent as a matter of law and that the plaintiff’s action was

48. *Casebolt v. Cowan*, 829 P.2d 352, 358 (Colo. 1992).

49. RESTATEMENT (SECOND) OF TORTS § 390 cmt. c (1965).

50. *Id.*

51. *Id.*

52. *See Lydia*, 343 S.C. at 376, 540 S.E.2d at 111.

53. 332 S.C. 90, 93, 504 S.E.2d 318, 320 (1998) (holding no first party cause of action is available to an intoxicated adult against a tavern owner under alcohol control statutes).

54. *Lydia*, 343 S.C. at 386, 540 S.E.2d at 108.

55. *Id.*

56. 389 So.2d 129 (Ala. 1980).

57. *Id.* at 130–32.

58. *Id.* at 132.

barred.<sup>59</sup>

In *Meachum v. Faw*,<sup>60</sup> the owner of the car entrusted his vehicle to an unlicensed sixteen-year-old girl who had consumed substantial amounts of mind-altering substances, leading to a wreck that resulted in her death.<sup>61</sup> Like the *Keller* court, in *Meachum* the North Carolina Court of Appeals held that a bailee may bring an action for negligent entrustment against the bailor, but that such an action may be defeated by the bailee's contributory negligence.<sup>62</sup> As a matter of law, the court determined that the plaintiff's claim was barred by the girl's contributory negligence.<sup>63</sup>

The courts in both *Keller* and *Meachum* held the trustee had a cause of action against the entrustor, but that the trustees were unable to recover because of their contributory negligence. In *Lydia*, the court of appeals pointed out that in states recognizing contributory negligence, a first-party negligent entrustment claim is a "self-defeating claim."<sup>64</sup> However, the court of appeals determined that those states following the comparative negligence rule, such as South Carolina, "seem to uniformly accept such a cause of action [being] brought by his injured trustee against an entrustor."<sup>65</sup>

The court of appeals in *Lydia* examined several cases in comparative negligence jurisdictions that allow first-party causes of action by trustees.<sup>66</sup> For example, in *Blake v. Moore*,<sup>67</sup> the plaintiff-trustee was seriously injured in an accident caused by his intoxicated operation of the defendant-entrustor's car.<sup>68</sup> The California Court of Appeals held that the trustee was entitled to a comparative fault trial that would "result in a weighing of defendant's fault in entrusting his car to plaintiff with knowledge of the intoxication, and the fault of plaintiff in drinking and then driving."<sup>69</sup> Relying on *Blake*, the court in *Gorday v. Faris*<sup>70</sup> applied the doctrine of negligent entrustment when the injured party was the trustee.<sup>71</sup> The case involved an accident where an intoxicated owner-passenger entrusted his car to his intoxicated friend.<sup>72</sup> The Florida court concluded, "We are persuaded, in view of the existence of the comparative negligence rule in Florida, that the liability for negligent entrustment under the circumstances . . . in this case must be

59. *Id.* at 133.

60. 436 S.E.2d 141 (N.C. Ct. App. 1993).

61. *Id.* at 142-43.

62. *Id.* at 145.

63. *Id.*

64. *Lydia v. Horton*, 343 S.C. 376, 392, 540 S.E.2d 102, 111 (Ct. App. 2000) (quoting *King v. Petefish*, 541 N.E.2d 847, 852 (Ill. App. Ct. 1989)).

65. *Id.*

66. *Id.* at 393, 540 S.E.2d at 111.

67. 208 Cal. Rptr. 703 (Ct. App. 1984).

68. *Id.* at 704.

69. *Id.* at 708.

70. 523 So. 2d 1215 (Fla. Dist. Ct. App. 1988).

71. *Id.* at 1218.

72. *Id.* at 1216.



determined by the trier of fact after a comparative fault trial.”<sup>73</sup>

In *Nelson v. Concrete Supply Co.*,<sup>74</sup> the Supreme Court of South Carolina determined that South Carolina should adopt a comparative negligence scheme rather than the existing contributory negligence system.<sup>75</sup> “For all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant.”<sup>76</sup> Because South Carolina follows the comparative negligence rule, the court of appeals in *Lydia* determined that the fact finder should compare the plaintiff’s negligence with that of the defendant.<sup>77</sup> Thus, the case was reversed and remanded for trial.<sup>78</sup>

#### D. Basis of Supreme Court Decision

While South Carolina has recognized the common law tort of negligent entrustment, its decisions have not been based on the Restatement (Second) of Torts. The supreme court pointed out that only one of the seven illustrations provided in section 390 of the Restatement “refers to a first party claim, and [the court did] not believe that a pure first party claim can be extrapolated from the illustration. The example involves a lessee/lessor relationship where a third-party is injured, which is not analogous to the facts of this case.”<sup>79</sup> Thus, the supreme court rejected the court of appeals’ adoption of sections 308 and 390 of the Restatement.<sup>80</sup>

South Carolina’s modified comparative negligence system dictates that a plaintiff be barred from recovery if his negligence outweighs the defendant’s.<sup>81</sup> The court in *Lydia* stated that it “cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself.”<sup>82</sup> *Lydia* admitted that he was unable to control the car and that his inability caused the accident.<sup>83</sup> The court agreed with the trial court’s finding that these admissions support the sole legal inference that *Lydia*’s negligence exceeded *Horton*’s. Although comparative negligence is generally a question for the jury, if the evidence points to only one conclusion—that the plaintiff’s negligence exceeded

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73. *Id.* at 1219.

74. 303 S.C. 243, 399 S.E.2d 783 (1991).

75. *Id.* at 244, 399 S.E.2d at 784.

76. *Id.* at 245, 399 S.E.2d at 784 (footnote omitted).

77. *Lydia v. Horton*, 343 S.C. 376, 396, 540 S.E.2d 102, 113 (Ct. App. 2000).

78. *Id.*

79. *Lydia v. Horton*, 355 S.C. 36, 39, 583 S.E.2d 750, 752 (2003) (footnote omitted).

80. *Id.* at 43, 583 S.E.2d at 754.

81. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991).

82. *Lydia*, 355 S.C. at 40, 583 S.E.2d at 752.

83. *See Lydia v. Horton*, 343 S.C. 376, 395, 540 S.E.2d 102, 112 (Ct. App. 2000).

fifty percent—then a direct verdict is warranted.<sup>84</sup> Thus, under South Carolina’s “modified comparative negligence system,” Lydia was barred from recovery on a “first party negligent entrustment cause of action.”<sup>85</sup>

The supreme court went further to state that “South Carolina’s public policy prohibits a first-party negligent entrustment action” even if “comparative negligence would not bar [the] claim.”<sup>86</sup> The supreme court rejected the court of appeals’ creation of a first-party cause of action under the theory of negligent entrustment of a vehicle to an intoxicated individual, holding it was in conflict with the public policy set forth in *Tobias v. Sports Club, Inc.*<sup>87</sup> The supreme court stated that “[t]he public policy considerations which govern our decision as to whether to allow civil suits based on negligent entrustment grow out of South Carolina’s regulation of the sale of alcohol.”<sup>88</sup>

In *Tobias*,<sup>89</sup> the supreme court expressly disallowed a first-party cause of action against tavern owners for violation of particular dram shop penal statutes, holding that “public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.”<sup>90</sup> In *Tobias*, a motorist and his wife sued a tavern owner under the dram shop statutes alleging liability for the motorist’s injuries sustained in operating a vehicle while intoxicated.<sup>91</sup> The *Tobias* court rejected first-party claims against the tavern owners, but preserved the claims of third parties.<sup>92</sup>

The *Lydia* court found that the public policy evident in *Tobias* was equally controlling.<sup>93</sup> In South Carolina, intoxicated adults should be held responsible for their own conduct. Just as *Tobias* barred recovery against parties who provide alcoholic beverages, *Lydia* likewise barred recovery against parties who entrust a motor vehicle.<sup>94</sup> While third parties may recover from the negligent entrustor, the plaintiff, a voluntarily intoxicated adult, may not shift the blame for his own injury to someone else.<sup>95</sup>

The supreme court justifiably restricted suit for negligent entrustment to third parties. The court of appeals’ decision, following the precedents of California and

84. *Creech v. South Carolina Wildlife & Marine Res. Dep’t*, 328 S.C. 24, 33, 491 S.E.2d 571, 575 (1997).

85. *Lydia*, 355 S.C. at 40, 583 S.E.2d at 752.

86. *Id.* at 41, 583 S.E.2d at 753.

87. *Id.* at 42, 583 S.E.2d at 754.

88. *Id.* at 41, 583 S.E.2d at 753.

89. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998) (overruling *Christiansen v. Campbell*, 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985), which held that a bar owner’s violation of the penal statute forbidding service to intoxicated persons could support a civil suit against the bar for injuries caused by the intoxicated patron).

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

91. *Tobias v. Sports Club, Inc.*, 323 S.C. 345, 347, 474 S.E.2d 450, 451 (Ct. App. 1996).

92. *Tobias*, 332 S.C. at 93, 504 S.E.2d at 320.

93. *Lydia v. Horton*, 355 S.C. 36, 42, 583 S.E.2d 750, 754 (2003).

94. *Id.* at 42–43, 583 S.E.2d at 754.

95. *Id.* at 42, 583 S.E.2d at 754.

Florida, among other jurisdictions, was misplaced. The supreme court was correct not to allow South Carolina to join these states in their erosion of the principle of personal accountability.<sup>96</sup>

The supreme court's logic in deciding *Lydia* is supported by long-standing precedent. In 1886, the court held that voluntary intoxication is not a defense to excuse wrongful conduct.<sup>97</sup> Also, the state supreme court in *Vaughn* stated:

[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 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."<sup>98</sup>

Other jurisdictions have followed reasoning similar to that in *Vaughn*. For instance, a Florida District Court of Appeal concluded that a plaintiff cannot shield himself from responsibility for his own negligence with his voluntary intoxication.<sup>99</sup> The Maryland Court of Appeals reiterated that "[h]uman beings, drunk or sober, are responsible for their own torts."<sup>100</sup> The California Court of Appeals reasoned that "self-police provides the primary defense against the evils of intoxication and outside police plays only a secondary role."<sup>101</sup> Thus, the person with primary responsibility, the one who voluntarily consumed alcohol, "is not excused . . . by a

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96. See *State v. Vaughn*, 268 S.C. 119, 126, 232 S.E.2d 328, 331 (1977) (explaining that the judge erred in basing the jury instructions on the assumption that the rule in South Carolina is that voluntary intoxication may negate responsibility for certain wrongful actions).

97. *State v. Bundy*, 24 S.C. 440, 441 (1886).

98. *Vaughn*, 268 S.C. at 125–26, 232 S.E.2d at 330–31 (1977) (quoting 22 C.J.S. *Criminal Law* § 66 (1961)).

99. *Reed v. Black Caesar's Forge Gourmet Rest., Inc.*, 165 So. 2d 787, 788 (Fla. Dist. Ct. App. 1964) (concluding that "the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing liquor, or delivering the ignition keys and possession of the automobile").

100. *State v. Hatfield*, 78 A.2d 754, 756 (Md. Ct. App. 1951).

101. *Kindt v. Kauffman*, 129 Cal. Rptr. 603, 606–07 (Ct. App. 1976) (italics removed).

failure of secondary policing.”<sup>102</sup> If our court system were to allow an intoxicated person to recover for injuries caused by his over-indulgence of alcohol, it would most likely “encourage, rather than discourage, such over-indulgence.”<sup>103</sup> The California Court of Appeals noted that “[g]overnmental paternalism protecting people from their own conscious folly fosters individual irresponsibility and is normally to be discouraged. To go yet another step and allow monetary recovery to one who knowingly becomes intoxicated and thereby injures himself is in our view morally indefensible.”<sup>104</sup> Compensating a victim whose behavior contributed to the accident violates the idea of individual responsibility and fosters an entitlement mentality. The Supreme Court of South Carolina was correct in reinforcing the prudent policy of *Tobias*—“public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.”<sup>105</sup>

Public policy does not protect an intoxicated adult from the results of his own intoxication. This principle apparently does not apply to a minor, nor to an alcoholic who is incapable of self-control. Although South Carolina has not directly addressed this issue, it might find the reasoning of a California Court of Appeals decision in a dram shop action persuasive:

Are [w]e not . . . concerned with a minor, nor with an alcoholic who suffers from an irresistible and pathological urge to drink excessively. Such a person may, in fact, be physically ill and incapable of self-control . . . . We are concerned with an adult plaintiff who became drunk because he desired and intended that result.<sup>106</sup>

To allow recovery in favor of one who has voluntarily consumed alcohol and proceeded to get behind the wheel of a car with full knowledge of its possible or probable results is contrary to good public policy.

102. *Id.*

103. *Nolan v. Morelli*, 226 A.2d 383, 387 (Conn. 1967) (discussing policy considerations in a dram shop action where the furnisher of alcohol was not held liable for the intoxicated purchaser’s injuries).

104. *Kindt*, 129 Cal. Rptr. at 610 (citations omitted).

105. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 92, 504 S.E.2d 318, 320 (1998). This policy is consistent with the public policy established by the South Carolina Legislature in enacting a workers’ compensation statute, which bars compensation for injuries sustained by an intoxicated employee. This is an exception to the general principle that fault has no bearing upon an employee’s right to recover worker’s compensation benefits. *See* S.C. CODE ANN. § 42-9-60 (Law. Co-op. 1976). *See also* *Spoone v. Newsome Chevrolet-Buick*, 309 S.C. 432, 432–33, 424 S.E.2d 489, 489 (1992) (denying workers’ compensation benefits to an employee whose injuries were proximately caused by intoxication).

106. *Kindt*, 129 Cal. Rptr. at 608 (citations omitted).

#### IV. POTENTIAL RAMIFICATIONS OF THE SUPREME COURT'S DECISION

Primarily, it is the function of the legislature to establish the public policy of South Carolina.<sup>107</sup> However, in *Lydia*, the supreme court, not the legislature, defined South Carolina public policy. Occasionally, the factual events of lawsuits create an opportunity for courts to establish policy in legal areas where no legislation exists. Thus, in these situations, it is left to the courts to declare the public policy of the state.<sup>108</sup> Once the court has established a public policy, "it becomes the law of the state, and is as binding as a legislative enactment."<sup>109</sup>

Public policy is often an elusive term to define, and it may vary with the habits and wants of a people.<sup>110</sup> The meaning of public policy "has been left loose and free of definition, in the same manner as fraud."<sup>111</sup> In determining the public policy of a state and its application, the court should consider "the constitution, laws, and judicial decisions of that state, and as well the applicable principles of the common law."<sup>112</sup>

Public policy is defined broadly as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."<sup>113</sup> The Supreme Court of Ohio characterized public policy as:

[T]he community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.<sup>114</sup>

Public policy is also defined as the public good; it is "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good."<sup>115</sup>

In *Lydia*, the state supreme court decided to enunciate public policy in tort law *sua sponte*. Although the court in the past has used public policy decisions to

107. See, e.g., *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) (noting "[p]rimarily it is for the lawmakers to determine the public policy of the state").

108. See *Landgraver v. Emanuel Lutheran Charity Bd.*, 280 P.2d 301, 302 (Or. 1955) (discussing the concept of public policy when determining whether charitable organizations should be immune to tort liability).

109. *Id.*

110. *Steele v. Drummond*, 275 U.S. 199, 205 (1927).

111. *Id.*

112. *Twin City Pipe Line Co.*, 283 U.S. at 357.

113. BLACK'S LAW DICTIONARY 1245 (7th ed. 1999).

114. *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney*, 115 N.E. 505, 507 (Ohio 1916).

115. *Lilly v. Comm'r*, 14 T.C. 1066, 1079 (1950).

expand individuals' rights,<sup>116</sup> here the court, in a case of first impression, used public policy to restrict these rights. In contrast, in *Boone v. Boone*<sup>117</sup> the court used public policy to broaden an individual's right to recovery.<sup>118</sup> In *Boone*, a wife sued her husband to recover for personal injuries she suffered in a car accident while riding in a car driven by her husband.<sup>119</sup> The court explained that had the parties not been married, the wife would have had a cause of action against her husband, and it stated that "[i]t is the public policy of our State to provide married persons with the same legal rights and remedies possessed by unmarried persons."<sup>120</sup> Thus, the common law doctrine of interspousal immunity contravenes the public policy of South Carolina.<sup>121</sup> In abolishing this immunity, the court established public policy that expanded available liability in tort by providing a personal injury action against one's own spouse.

Another instance when the court established public policy that expanded tort law in South Carolina is *Fitzer v. Greater Greenville S.C. YMCA*,<sup>122</sup> which abolished the doctrine of charitable immunity.<sup>123</sup> In this case, Fitzer, a camper at a YMCA camp, brought a personal injury action against YMCA after he was injured by another camper.<sup>124</sup> YMCA argued that the doctrine of charitable immunity barred Fitzer's claim.<sup>125</sup> Although previous cases, such as *Lindler v. Columbia Hospital of Richland County*,<sup>126</sup> held that it is against public policy to hold a charitable institution liable,<sup>127</sup> "[p]ublic policy is a dynamic not static concept, and what is valid in the past is not necessarily a valid policy today."<sup>128</sup> The court cited *Geiger v. Sampson Methodist-Episcopal Church of Minneapolis*<sup>129</sup> for its rationale in abolishing the doctrine of charitable immunity: "Men and corporations alike are required to be just before being charitable . . . . We do not think it would be good public policy to relieve them from liability for torts or negligence."<sup>130</sup> In *Fitzer*, the court established public policy that extended tort litigation in allowing a cause of action against charitable institutions.

*Lydia*, which can be construed as an extension of *Tobias*, appears to be one of the few times when the court has restricted an expansive tort field based on public policy grounds. Because of the significance of public policy, *Lydia* should not be

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116. See, e.g., *Boone v. Boone*, 345 S.C. 8, 546 S.E.2d 191 (2001).

117. *Id.*

118. See *id.* at 10, 546 S.E.2d at 191–92.

119. *Id.*

120. *Id.* at 14, 546 S.E.2d at 194.

121. *Id.* at 15, 546 S.E.2d at 194.

122. 277 S.C. 1, 282 S.E.2d 230 (1981).

123. *Id.* at 4, 282 S.E.2d at 231–32.

124. *Id.* at 2, 282 S.E.2d at 230.

125. *Id.*

126. 98 S.C. 25, 81 S.E. 512 (1914).

127. *Id.* at 28, 81 S.E. at 513.

128. *Fitzer*, 277 S.C. at 3, 282 S.E.2d at 231.

129. 219 N.W. 463 (Minn. 1928).

130. *Id.* at 465.

limited to its facts. Public policy requires that if a person's injuries result from becoming voluntarily intoxicated, the person should be held accountable. It was first applied to first-party injuries in *Tobias*, a dram shop action, and subsequently applied in *Lydia*, a negligent entrustment action. This policy also could be extended to other scenarios in which a person is injured as a result of placing himself in harms way while voluntarily intoxicated.<sup>131</sup>

In *Tobias*, Chief Justice Finney clearly stated the public policy of our state. Undoubtedly, defendants will cite both *Lydia* and *Tobias* to urge the trial courts to enforce greater personal responsibility and dismiss cases in which public policy prohibits a first-party cause of action.

## V. CONCLUSION

In *Lydia*, the Supreme Court of South Carolina recognized that certain public policy considerations may restrict the right to sue. The court held that it is against state public policy to allow a person to sue someone because the defendant did not protect the person from himself. The extension of the negligent entrustment doctrine to first-party causes of action would lead to an unnecessary flood of litigation.

If the supreme court had denied certiorari, lower courts presumably would decide future first-party negligent entrustment cases under the law of comparative negligence, with the jury and its emotions determining the fault between the intoxicated driver and the car owner. However, by eliminating first-party causes of action, the supreme court has effectively held that those who voluntarily drink beyond the point of intoxication and get behind the wheel are, as a matter of law in every case, at least fifty-one percent at fault.

The court's elimination of first-party actions will encourage personal autonomy and responsibility rather than dependency and paternalism. Because the rule established by the court is based on public policy considerations, and because the rule properly distributes the incentive to control irresponsible drinking between the entrustor and the trustee, the Supreme Court of South Carolina properly resolved the first-party negligent entrustment liability issue.

*Kayce H. McCall*

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131. If this public policy was expanded to other self-inflicted torts not involving voluntary intoxication, such as a claim by someone who spilled hot coffee on himself, it could potentially limit the scope of South Carolina's comparative fault scheme. However, this discussion is outside the scope of this Note.