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RECENT CASES

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BAILMENTS—Presumptions and Burden of Proof—There has been considerable discussion of the *Kelly v. Capitol Motors, Inc.*[1] case in South Carolina, particularly in connection with the burden of proof and presumptions arising in bailment cases. The rule in South Carolina as established in the leading case of *Fleischman, Morris & Co. v. Southern Ry.*[2] is, ". . . that the bailor must prove delivery to the bailee and his refusal to return as required by the contract of bailment. The burden is then on the bailee to prove that he has not converted the property, and this he may do by showing its loss and the manner of its loss; but by the manner of loss is meant not only the isolated fact of destruction by fire, or loss by theft or otherwise, but the circumstances connected with the origin of the fire or other cause of loss or injury as far as known to the bailee and the precautions taken to prevent the loss or injury."

This rule has been refined and followed in South Carolina. The immediately previous case of *Gilland v. Peter's Dry Cleaning Co.*[3] held that where the plaintiff introduced evidence showing the delivery of a coat to the defendant in good condition and that it was subsequently returned in a discolored condition, a *prima facie* case had been established; and if the defendant wishes to contend that he had used due care, evidence to that effect should have been offered, and that the magistrate's judgment for the plaintiff was proper.

In the present case,[4] it appeared that the appellant operated an automobile sales and repairs garage on the lower floor of a two-story building, the top floor being occupied by a bowling alley. A fire started in the bowling alley which consumed the entire building. The respondent's car, which had been delivered to the appellant for repairs, was destroyed along with several others which could not be removed. In the trial court at the close of all the testimony, the appellant

1. 204 S. C. 304, 28 S. E. (2d) 836 (1944).
2. 76 S. C. 237, 56 S. E. 974, 9 L.R.A. (N.S.) 519 (1906).
3. 195 S. C. 417, 11 S. E. (2d) 857 (1940).
4. See Note 1, *supra.*

made a motion for a directed verdict. This motion was refused and the jury gave judgment for the plaintiff. In the Supreme Court, the findings of the lower court were reversed and judgment entered for the appellant. The Supreme Court adopted and based their decision on the following two considerations: (1) "The record must warrant a reasonable inference of negligence upon the part of the bailee." The court decided, here, that no inference existed other than that due care had been exercised on the part of the bailee, and that the trial Judge committed a reversible error in refusing to direct a verdict for the defendant. (2) "The record must warrant a reasonable finding that such negligence upon the part of the bailee was a proximate, direct and immediate cause of the loss or damage." This, it would seem, would provide a much sounder basis for making a decision in this case. See the very noteworthy opinion of Mr. Associate Stukes, dissenting.

Even if we may disagree with the conclusions as found in the present case, it would appear that a definite effort was made to apply the rule as established in the leading case of *Fleischman, Morris & Co. v. Southern Ry.*, supra, and prescribed in *Gilland v. Peter's Dry Cleaning Co.*, supra.

It has been said that the principles embraced in the doctrine of *res ipsa loquitur* apply in South Carolina, in spite of the many statements of South Carolina courts that the doctrine, in name, does not apply. It is beyond the scope and intention of this case note to present anything like a complete discussion of this issue, even if limited to bailment cases. The following comments are made with respect to the rule in bailment cases as set out above.

The doctrine of *res ipsa loquitur* may be invoked, in almost all jurisdictions where the circumstances proved point merely to the physical cause of the occurrence, without having any tendency to indicate some fault of omission or commission on the part of the defendant. The doctrine is applicable to the fact of negligence only in order to make out a *prima facie* case of negligence. The *res ipsa loquitur* rule has been said to be a qualification rather than an exception to the general rule of evidence that negligence must be affirmatively proved in that it relates to the mode, rather than the burden, of establishing negligence. The circumstances must indicate superior knowledge or opportunity for explanation on the

party charged. The fact or circumstance accompanying an injury may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant. What is this presumption arising under the doctrine? In most jurisdiction the presumption is a mere equipoise in evidence, which takes the place of evidence as affecting the burden of proceeding with the case. *The doctrine does not have the effect of shifting the burden of proof,* in that all the defendant need do is produce exculpating evidence of equal weight. While many cases seem to indicate that the burden of proof does shift, nevertheless, upon close examination it is discovered that this is not the actual holding of these cases, but rather, a loose and unguarded use of the term "burden of proof". It should be noted that the plaintiff must assume the burden of establishing negligence by a preponderance of the evidence. If a satisfactory explanation is offered by the defendant, the plaintiff must rebut it by evidence of negligence or lose his case.[5]

In Corpus Juris Secundum[6] the following statement is given with respect to bailment cases: "The rule adopted in other and the more modern decisions is that proof of loss or injury establishes a sufficient prima facie case against the bailee to put him on his defense; and hence, where chattels are delivered to a bailee in good condition and are returned in damaged state, or are lost or not returned at all, the law presumes the bailee's negligence or other fault to be the cause, and cast on the bailee the burden of showing that the loss was due to other causes consistent with due care on his part, this rule being regarded as an application of the principal of *res ipsa loquitur* and if the bailee does not sustain such burden the bailor becomes entitled as a matter of law to a verdict in his favor." To support this there is cited the South Carolina case of *Marlow v. Conway Iron Works.*[7] This case merely reiterates the South Carolina bailment rule as set forth above.

It would seem that the South Carolina rule on bailment cases employs the *res ipsa loquitur* principle or one at least closely analogous. In South Carolina, the bailor must prove delivery of goods and that they were either not returned or

5. 38 A. J. 1007.
6. 8 C. J. S. 342.
7. 130 S. C. 256, 125 S. E. 569 (1923).

returned in a damaged condition. The bailor has then established a *prima facie* case and it becomes the duty of the bailee to go forward with the evidence. After such a *prima facie* case is made however, if the bailee goes forward with the evidence which remains uncontradicted, from which evidence no inference can reasonably be drawn other than that he had exercised due care, a motion for a directed verdict in favor of the defendant is properly granted. Although the presumption of negligence, said to exist in *res ipsa loquitur* cases, does not exist under the South Carolina rule, the results are achieved identically in theory and application. It was pointed out in *Wardlaw v. South Carolina R. Co.* (1858)[8] that the omission to prove what a party should at all times be prepared to establish may well raise a presumption against him. It should be apparent that the principles of the *res ipsa loquitur* doctrine have been employed in the South Carolina rule in bailment cases unless we wish to be linguistically naive.

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8. 11 Rich. Law 337, 45 S. C. Law 337 (1858).

NEGLIGENCE — Application of the Doctrine of "Last Clear Chance" in South Carolina.—The recent case of *Scott v. Greenville Pharmacy Inc.*[1] stirs again the dubious position of the South Carolina Courts on the applicability of the Last Clear Chance Doctrine. Previous to the decision of this case, the Supreme Court of South Carolina had made but two mentions of this doctrine. In the celebrated case of *Spillers v. Griffin*,[2] the court in sustaining the defendant's exception to the trial court's charge ruled: "His Honor charged that, even though the plaintiff was negligent, yet if the defendant's servant saw the plaintiff in time to avoid the collision, the plaintiff might still recover. That is the doctrine of the 'last clear chance', and is not the law in this state." The only other

1. Scott v. Greenville Pharmacy, Inc., 212 S. C. 485, 48 S. E. (2d) 324 (1948).

2. Spillers v. Griffin, 109 S. C. 78, 95 S. E. 133 (1918), L.R.A. 1918D, 1193 (1918).

mention of this doctrine was in the case of *Blackwell v. First National Bank of Columbia*[3] in which the Court adopted and reaffirmed the above quoted section from the case of *Spillers v. Griffin, supra.*

The court in the principal case, without overruling the case of *Spillers v. Griffin, supra,* invoked expressly the doctrine of the Last Clear Chance to the aid of the defendant, and adopted the principle as stated in Restatement, Torts, Sec. 480 (1934):

> "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if but only if, the defendant (a) knew of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff".

The plaintiff's intestate in the principal case brought her action under S. C. Code, Section 411, (1942), as wife of the deceased to recover for his wrongful death. The complaint alleged that the deceased in the latter part of 1945, suffering from a cold which later developed into flu, sought from the defendant some drug which would "ease his nervousness and promote sleep." In response to his request he was sold barbiturate capsules in a box container, without a label of any kind, and such was sold without a doctor's prescription as is required by S. C. Code, Section 5128-25 (1942). It was further alleged that such sales were made to the deceased periodically thereafter under the same conditions for a period of about a year preceding his death. It was alleged that the barbiturate preparation in question is a habit forming drug; that deceased was not advised of its nature, and that as a result of his taking the capsules he became habituated to the use of the drug, in consequence of which he deteriorated mentally and physically to such an extent that while under the influence of the drug he committed suicide. The de-

3. Blackwell v. First National Bank of Columbia, 185 S. C. 427, 194 S. E. 339 (1937).

fendant's demurrer to the complaint was sustained, the court pointing out that on the face of the complaint the plaintiff has averred showing contributory negligence in that before he became an addict, he continued in his purchases of the drug. The court after describing the Last Clear Chance Doctrine as "sound law", denied the application to the benefit of plaintiff in that there was no allegation that the plaintiff was no longer a free agent incapable of controlling his own conduct.

As authority for the principles embodied in the Last Clear Chance Doctrine, the court cites the case of *Seay v. Southern Railway-Carolina Division.*[4] The court did not deny the plaintiff his recovery despite his own negligence and stated the rule thusly:

> " * * * when the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, *and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effect and prevent injuring him,* there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such case the want of ordinary care on the part of the injured person is held not a judicial cause (*i.e.*, a proximate cause) of his injury, but only a condition of its occurrence."

It is of note that in the case of *Seay v. Southern Railway-Carolina Division, supra,* no mention is made of the Last Clear Chance Doctrine although the principles set out in that case are analogous to that doctrine. The case turned on the well recognized rule of contributory negligence that in order for the negligence of the plaintiff to bar his recovery, his negligence must be a or the proximate cause of the injury.

To the same effect is the case of *Fletcher v. South Carolina & G. E. R. Co.*,[5] in which the court approved the following charge to the jury:

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4. Seay v. Southern Railway—Carolina Division, 205 S. C. 162, 31 S. E. (2nd) 133 (1943).

5. Fletcher v. South Carolina & G. E. R. Co., 57 S. C. 205, 35 S. E. 513 (1900).

> "That should the jury believe that Clark Ely, the driver of the wagon, was negligent in driving upon the railroad track without having used proper efforts to discern the approach of the train, yet if the engineer of the train did see him in a position of peril and danger, or could have seen him by the exercise of due diligence, it was the duty of said engineer to use reasonable and practicable means to stop the train or prevent injury; and if he failed to do so, and from such failure the injury occurred, the defendant would be liable."

This too was explained by the proximate cause theory.

In the old case of *Colin v. City Council of Charleston*,[6] the court had this to say:

> "That where one has himself contributed to the cause of the damage of which he complains he cannot recover against another who also contributed to the same cause."

This was however qualified by the following remark:

> " * * * but this may be understood of the proximate and not any remote or collateral cause."

There seems to be no dispute among the text writers that the old English case of *Davies v. Mann*[7] pioneered the doctrine of the Last Clear Chance, yet it would appear that it merely defined the law of contributory negligence. The court in that case granted relief to the plaintiff for the loss of his donkey caused by the defendant's negligence in driving his team of horses into the donkey, notwithstanding the plaintiff's negligence in leaving the poor animal fettered in the highway, the court saying,

> " * * * the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that if it was caused by the fault of the defendant's servant in driving too fast, or which is the same thing at a

6. Colin v. City Council of Charleston, 15 Rich. Law 201 (S. C. 1868).
7. Davies v. Mann, 10 M & W 546, 152 English Reprints 588, 17 Eng. Rul. Cas. 190 (1842).

smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action".

It is interesting to note that despite the fact that South Carolina in the case of *Spillers v. Griffin, supra,* has expressly repudiated the Last Clear Chance Doctrine, it has in the case of *Gunter v. Graniteville Manufacturing Co.*,[8] also cited with approval the pioneering *Davies v. Mann, supra.*

As to the applicability of the Last Clear Chance Doctrine in this country, the various states may be divided into three categories, *viz.*, (1) those states that apply the doctrine but declare it to be merely an application of the proximate cause theory,[9] (2) those states that apply the doctrine and declare it to be a distinct and separate principle of law, allowing recovery despite contributory negligence,[10] and (3) those states that repudiate the doctrine altogether.[11]

South Carolina, it would seem by the decision in the case of *Spillers v. Griffin,* supra, is placed in the third category; but from exhaustive research of the authorities in this State, and from the indorsement of the Last Clear Chance Doctrine in the principal case, it appears that South Carolina has placed herself along with the states adopting what would seem to be the most logical view, *i.e.*, that the doctrine is recognized, but that it is merely an application of the proximate cause theory.

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8. Gunter v. Graniteville Manufacturing Co., 15 S. C. 443, ... S. E. ..... (1881).

9. See Smith v. Norfolk & S. R. Co., 114 N. C. 728, 19 S. E. 863, 25 L.R.A. 287 (1894).

10. See West v. Gillette, 95 Ohio St. 305, 116 N. E. 521 (1917).

11. See Bushman v. Calumet & S. C. R. Co., 214 Ill. App. 435 (1919).