South Carolina Law Review

Volume 5 | Issue 3 Article 9

3-1953

# Recent Cases

# RECENT CASES

**TORTS — Foreseeability in Regard to Liability for Negligence.** Action was brought by a father as guardian *ad litem* to recover for personal injuries suffered by a minor child. The plaintiff child was struck in the eye by a spitball while a patron in the defendant's theatre. The spitball was thrown by a person unknown, causing a severe and permanent injury to the eye. The case was submitted by the trial court to a jury and they found for the defendant. On appeal, HELD, reversed; charge that proximate cause is one which produces injury as a natural and probable result of defendant's negligence and which otherwise interjects elements of foreseeability was improper and constituted prejudicial error. *Pfeifer et al v. Standard Gateway,* ..... Wis. ....., 55 N. W. 2d 29 (1952).

In determining the liability for negligence and proximate cause, the courts are in disagreement as to whether the test of foreseeability should be applied as a limitation. Many jurisdictions have held the view that the injury must be the natural and probable consequence of the negligent act and that some harm could have been foreseen as a result of the surrounding circumstances. *Milwaukee & St. P. Co. v. Kellogg,* 194 U. S. 469, 24 L. Ed. 256 (1877); *Wallace v. Jones,* 168 Va. 38, 190 S. E. 82 (1937); *Scott v. Greenville Pharmacy,* 212 S. C. 485, 48 S. E. 2d 324 (1949). In these jurisdictions that recognize foreseeability as a test, it is sufficient that the defendant should have anticipated that some harm might result from the wrongful act. *E. I. duPont de Memours & Co. v. Wright,* 146 F. 2d 765 (1945), *cert. denied,* 65 S. Ct. 1017, 324 U. S. 873, 89 L. Ed. 1426; *Atchison v. Texas & P. Ry. Co.,* 143 Tex. 466, 186 S. W. 2d 288 (1945); *Woody v. S. C. Power Co.,* 202 S. C. 73, 24 S. E. 2d 121 (1943). The result of the rule would permit a negligent person to be held responsible for an injury that occurred in such a way that it would be extraordinary from his standpoint, yet was a natural and probable result of his negligence, looking at it in retrospect. *Graney v. St. Louis I. M. & S. R. Co.,* 140 Mo. 89, 415 S. W. 246, 38 L. R. A. 633 (1896). The opposing view admits that while foreseeability may be proper in the consideration of negligence, it is wholly immaterial in the determination of the extent of liability, once negligence has been established. *Osborne v. Montgomery,* 203 Wis. 236, 234 N. W. 377 (1931). The basis of the view appears to be found in the celebrated case of *Palsgraf v. Long Island R. Co.,*

248 N. Y. 339, 341, 162 N. E. 99, 59 A. L. R. 1253 (1928): "[t]he question of liability is always anterior to the question of the measure of the consequences that go with the liability, and where there is no tort, there is no question of remote or proximate cause." The inconsistency between the two views has sometimes been attributed to the fact that the courts are not differentiating between negligence and proximate cause when applying the test of foreseeability. In considering the question of negligence, it is material to consider consequences that a prudent man might reasonably have anticipated in order to define the area in which there was a duty of care; but when negligence is established, it becomes immaterial to consider the foreseeability of the consequences of the act or omission in determining liability imposed by it. *Perkins v. Vermont Hydro-Electric Corporation,* 106 Vt. 367, 381, 177 A. 631 (1934); *Kildriff v. Kalenowski,* 136 Conn. 405, 71 A. 2d 593 (1950). To go one step further, foreseeability has no connection with causation. "Foreseeability is an element of liability, not causation." *United States Fidelity & G. Co. v. Verbergt,* 197 Wis. 542, 222 N. W. 799 (1929). Once the defendant has been found negligent he is thereafter liable for all the injurious consequences that flow from his act. *Perkins v. Hydro-Electric Corp., supra.* What injuries proceed in natural order sequence from the negligent act is to be determined from the circumstances of the case rather than whether the actor might reasonably have expected such a result from his negligence. *Beatty v. Dunn,* 193 Vt. 340, 154 A. 770 (1931). In eliminating the test of foreseeability once negligence has been established, what is left to check liability in cases where the negligent act set into motion a chain of events that caused harm to one at the remote end of the chain? The answer was affirmatively made in *Palsgraf v. Long Island R. Co., supra,* where the court intervened as a matter of law to preclude the plaintiff from recovery on grounds that the plaintiff was not within the foreseeable area of the risk created by the defendant's conduct and therefore was owed no duty by the defendant, declaring that to impose liability in this case upon the defendant would shock the conscience of society. Rules which operate to limit recovery must be decided by judicial policy and its limits are not to be confined by any formula capable of automatic application. *Osborne v. Montgomery, supra.* In accord with the last case is the *1948 Supplement of the Restatement of the Law of Torts,* found at comment e. of section 435(2) which states:

> It is impossible to state any definite rules by which it can

be determined that a particular result of the actor's negligent conduct is so highly extraordinary as to prevent the conduct from being a legal cause of that result. This is a matter for the judgment of the court, formulated after the event, and, therefore, with the knowledge of the effect that was produced.

The principal case stands for the proposition that the element of foreseeability has no bearing on the natural and probable consequences of the negligent act. Nor can it be said that foreseeability should operate as a limit to the consequences resulting therefrom. Instead, foreseeable consequence has its proper place only with the consideration of negligence. Thus there is a logical sequence of stepping-stones for the juries to be guided by, and the courts to direct, in their determination of negligence and the subsequent liabilities. Admittedly, the system is not foolproof. But it does do away with some of the hard and fast rules of liability which rested on nebulous legal terms. And, reiterating the view announced in *Osborne v. Montgomery, supra,* "Any rule which operates to limit liability for a wrongful act must be derived from judicial policy."

WILLIAM C. DAVIS, JR.

---

**TRIAL — Right to Dismiss a Counterclaim.** Plaintiff brought a suit against his wife, a non-resident, for divorce. The defendant submitted to the jurisdiction in person in order to defend against the action, and filed a counterclaim for alimony for herself and support of her minor child. After the case had been heard and submitted, but before decision, defendant moved for a voluntary nonsuit on the counterclaim. This motion was denied with the result that the plaintiff received his divorce and the defendant obtained a judgment for $75.00 a month for the support of the child. On appeal, affirmed. A counterclaim, being in the nature of a suit, can be dismissed at any time unless the adverse party would be deprived of some right which he acquired by virtue of its being brought. The plaintiff acquired the right to have the entire controversy decided once and for all in his own jurisdiction, and to be freed from possible future litigation. On re-hearing, HELD, reversed. Plaintiff cannot object to the dismissal of a counterclaim on the basis that it will prejudice him by forcing him to be faced with possible future litigation. *Breffeilh v. Breffeilh,* ..... La. ....., 60 So. 2d 457 (1952).

As a general rule, whether or not a dismissal should be granted

a plaintiff is in the sound discretion of the trial judge, who should take into consideration the rights of the parties and refuse it if prejudice would result to the defendant. *Palmer v. Delaware L. & W. R. Co.*, 222 Fed. 461 (N. D. N. Y. 1915); *Mitchell et al. v. Film Transit Co. et al.*, 194 Miss. 550, 13 So. 2d 154 (1943); *Romanus v. Briggs et al.*, 217 S. C. 77, 59 S. E. 2d 645 (1950). This rule works in converse and a defendant likewise can dismiss his counterclaim when no injury will result to the plaintiff by virtue of the dismissal. *Sensely v. The First National Life Ins. Co.*, 205 La. 61, 16 So. 2d 906 (1944); *Montgomery v. Karavas*, 45 N. M. 287, 114 P. 2d 776 (1941). In relation to dismissals, legal prejudice has been defined as prejudice which deprives a defendant of substantive rights of property, or concerns his defense which will not be available in a second suit, *In re Blue River Power Co.*, 116 Neb. 405, 217 N. W. 604 (1928), or deprives a defendant of substantial rights acquired during the proceedings, *Delahoyde v. Lovelace*, 39 N. M. 446, 49 P. 2d 253 (1935). Therefore, the mere possibility of future litigation as a result of a dismissal of the issue raised in a complaint is not legal prejudice of which a party can complain. *Pilot Life Ins. Co. v. Habis*, 90 F. 2d 842 (E. D. S. C. 1937); *Southern Cotton Oil Co. v. W. S. Breen & Co.*, 171 N. C. 51, 87 S. E. 938 (1916); *Stone v. Kaufman*, 88 W. Va. 588, 107 S. E. 295 (1921). This is true even though the dismissal of the issue may cause a party to later defend against the same action in a foreign jurisdiction. *Pilot Life Ins. Co. v. Habis, supra; Piedmont Hotel Co. v. A. E. Nettleton Co.*, 241 App. Div. 562, 272 N. Y. Supp. 573 (4th Dep't 1934).

The Louisiana Supreme Court, even though following civil law and citing no cases from common law jurisdictions, reached their result by essentially the same reasoning outlined by the cases above. The view taken by the court on the first appeal formed the basis for a dissent on the rehearing. While the dissenting view is not without logic in that it is a hardship for a party to be forced to defend later an action which he is presently prepared to defend, there seem to be no authorities which hold that the possibility of another suit resulting should be taken into consideration by the court in passing on a motion for dismissal.

THOMAS KEMMERLIN, JR.

**CONTRACTS: Does Forbearance Alone Constitute Sufficient Consideration?** A fire insurance policy covering certain personal property which plaintiff vendee had purchased from the original insured vendor was transferred by the defendant insurance company to the plaintiff. A fire destroyed the property and the defendant promised to pay $2,500 to the plaintiff if he would forbear bringing suit on the policy for a reasonable time. The plaintiff without making any return promise delayed taking any action until the present case which was brought on the defendant's failure to pay the $2,500 promised for forbearance. The defendant contended that forbearance alone did not constitute sufficient consideration. The Circuit Court rendered judgment for the plaintiff. On appeal, HELD: affirmed. Actual forbearance to prosecute a claim upon request by the defendant when one has a right to sue, is sufficient consideration to support a promise on the part of another to pay claim even though there was no promise to forbear. *Hartford Fire Insurance Company v. Clark,* ..... Ala. .....; 61 So. 2d 19 (1952).

The instant case is in agreement with the general rule that forbearance is sufficient consideration to support a request to forbear even though there was no promise to forbear. *Walton Water Company v. Village of Walton,* 228 N. Y. 46, 143 N. E. 786 (1924). The rule is based upon the theory that a unilateral contract is created between the parties thereby making a promise to forbear unnecessary. Williston on CONTRACTS Sec. 136. However, mere forbearance by a party having a legal claim without a request for forbearance does not constitute consideration. *Wine Packing Corporation of California v. Voss,* 37 Cal. App. 2d 528, 100 P. 2d 325 (1940). Also under the unilateral theory it was held in *Moayon v. Moayon,* 114 Ky. 855, 72 S. W. 33 (1903), that where a wife had prepared a valid petition for divorce and in consequence thereof was living apart from her husband, her forgiving him and resumption of her relation as wife was sufficient consideration for his promise to convey property to his children. In *Stokes v. Edwards,* 230 N. C. 306, 52 S. E. 797 (1949), recovery was allowed a plaintiff who had exercised forbearance in bringing a suit against the defendants for breach of warranty after the defendants had promised recompense if the plaintiff would forbear. A similar holding was made in *National Refining Company v. McDowell,* ..... Mo. ....., 201 S. W. 2d 342, (1947), in which the court held that the plaintiff's furnishing of further goods to a corporation on credit and forbearing to sue for amounts past due constituted sufficient acceptance of an offer to

guarantee payments of the corporation's account. The *Restatement of Contracts* Sec. 76, is in accord with the rule that forbearance alone when given for a request to forbear constitutes sufficient consideration. However, some states, including South Carolina, hold that forbearance alone is not sufficient consideration. These states hold that a promise to forbear must be given to support a request to forbear. This is upheld under the theory that the nature of the contract is such that it must be bilateral. Thus in *Shaw v. Philbrick,* 129 Me. 259, 151 A. 423 (1930), it was stated that both the promise to forbear and actual forbearance must be present to constitute consideration. And as was pointed out in *Thomas v. Croft,* 1 Strob. 40 (S. C. 1846), consideration is the promise to forbear followed by the actual forbearance. This requirement is again stated in *Duncan and Shumate v. Heller,* 13 S. C. 94 (1879) which held that a written offer to guarantee the debt of another in consideration of forbearance to the principal debtor is not a complete contract, nor binding on the guarantor until actual notice of acceptance is given to him, even though forbearance is thereafter granted. In the guaranty cases in South Carolina there is the requirement that notice of acceptance be given to the guarantor whether the consideration is extension of credit (although it need not be direct, immediate or personal) or forbearance. In the former situation, unilateral in nature, notice is nevertheless required in order to afford protection to the guarantor. *Greene v. Brown,* 128 S. C. 91, 121 S. E. 597 (1923). In the latter case — forbearance — there must be notice not only for the same purpose but because there is the necessity of a return promise to forbear, which requires communication to the offeror.

It seems therefore that we have two schools of thought pertaining to the instant case. Both views are amply expressed in numerous cases and there seems to be no great objection to either. The main point to be remembered is that South Carolina adheres to the bilateral theory.

JESSE J. GUIN, JR.

---

**ELECTIONS: — Jurisdiction of Court Involving Recount of Primary Elections.** Proceedings were instituted in the Martin Circuit Court for a contest and recount of a primary election for nomination on the Democratic ticket for the office of representative in the Indiana

General Assembly. This was an original action by the State, on the relation of Gramelspacher, for writs of mandate and prohibition arising out of the assumption of jurisdiction by the Martin Circuit Court for said primary election contest and appointment of commissioners to recount votes cast in Martin County. HELD: dissolving temporary writ and denying permanent writ, that the legislature may confer on courts jurisdiction of recounts and contests involving nominations in primary elections of candidates for members of the legislature without violating constitutional provisions that each house of the legislature shall judge its own members' elections, qualifications and returns. *State ex rel. Gramelspacher v. Martin Circuit Court et al.,* ..... Ind. ....., 107 N. E. 2d 666 (1952) (3 to 2 decision).

Article Four, Sec. 10 of the *Indiana Constitution* provides in part: "Each House, when assembled, shall . . . judge the elections, qualifications, and returns of its own members." The Indiana Election Code, Acts 1945, c. 208, art. 27, Burns' 1949 Repl., authorizes a recount of votes cast in the primary election for the nomination of a representative in the General Assembly, and it confers jurisdiction upon the courts. The constitutions of most states contain provisions that each house of the legislature shall be the judge of the election qualifications of its own members. (Article III, Section 11, South Carolina State Constitution, 1895). It is a well settled rule that such provision vests the legislature with sole and exclusive power and deprives the court of jurisdiction. *Rainey v. Taylor,* 166 Ga. 476, 143 S. E. 383 (1928); *Anderson v. Blackwell,* 168 S. C. 137, 167 S. E. 30 (1932); *In re Hunt,* 15 N. J. Misc. 331, 191 A. 437 (1937); *State ex rel. Ainsworth v. District Court of 4th Judicial District,* 107 Mont. 370, 36 P. 2d 5 (1939). The conflict in the decisions is whether the constitutional or statutory provisions relating to elections apply to primary elections. In *United States v. Gradwell,* 243 U. S. 476, 61 L. Ed. 857 (1917), the Court, proceeding upon the theory that primaries are merely substitutes for party caucuses or conventions, said that primaries were not within the limitations and safeguards of the state constitutions reliant to elections generally. A contrary rule is based upon the theory that the right to choose candidates for public office whose names shall appear on the official ballot is as valuable as the right to vote. *Wilkinson v. Henry,* 211 Ala. 254, 128 So. 362 (1930). This rule gains support in some states where primary nomination is tantamount to election. *Kelso v. Cook,* 184 Ind. 173, 110 N. E. 987 (1916). Therefore, the question evolves as to the construction given to the term "primary

election." One view is that a primary is an election only in the qualified sense that it is moulded on the plan of an election, but for purposes of selecting candidates of a political party, with right in no one else to participate therein. *People v. Emerson,* 333 Ill. 696, 165 N. E. 217 (1929). The legislature, under this view may vest in the courts jurisdiction to hear and decide contests arising out of primary elections since they are for the purpose of merely making nominations. *Leu v. Montgomery,* 31 N. D. 1, 148 N. W. 662 (1914). It may be seen that the term primary election may vary within the same jurisdiction as to its construction in regard to such constitutional provisions. *MacDonald v. Neuner,* 5 Cal. App. 2d 751, 43 P. 2d 813 (1935). It was held where the term "election" was used without qualification in law requiring proceeding for correction of error, that it included primary, special and general elections. *In re Brewley,* 245 N. Y. S. 105 (1930). The case of *State v. Hirsch,* 125 Ind. 207, 24 N. E. 1062 (1890), suggests that this may be the case in Indiana by saying that where the statute uses the words "any elections" it is meant to include primaries, and otherwise they were distinguished by use of "general election" and "primary election."

It is submitted that the majority opinion in this case is correct and that the result is right under the law of Indiana. In a state where there are two or more effective political parties, nomination cannot be considered election. The issue at hand was not one of qualification or of election, but rather it was a question of the right to appear on the ballot of an election as the nominee of a political party. The dissent relies upon the case of *Lucas v. McAfee,* 217 Ind. 534, 29 N. E. 2d 403 (1940). However, this case cannot be considered as controlling since the issue there was the prohibition of the trial court from ruling on the qualifications of a candidate. It is concluded that the Indiana Statute providing for proceeding in the court for recount in a primary election is not unconstitutional.

TERRELL L. GLENN.

---

**WORKMEN'S COMPENSATION — Right to Sue Co-Employee.** Plaintiff brought suit against a co-employee, subject to Workmen's Compensation Act, for burns and injury received by the plaintiff when the boom of a crane operated by co-employee, a foreman, contacted a high voltage electric line on the employer's premises as a result of the alleged negligence of the co-employee. The lower court entered an order permitting the plaintiff to proceed with the action

under the Declaratory Judgment Act. On appeal, HELD, reversed, with one judge dissenting. An employee, subject with his employer to the provisions of the Workmen's Compensation Act of this State, whose injury arises out of and in the course of his employment, cannot maintain an action at common law against his co-employee, whose negligence caused the injury. *Nolan v. Daley,* ..... S. C. ....., 73 S. E. 2d 449 (1952).

Under most Workmen's Compensation Statutes, immunity to common law suit is extended only to the employer. *Stulginski v. Czanskas,* 125 Conn. 293, 5 A. 2d 10 (1939); *Vindrine v. Solieau,* (La. App.) 38 S. 2d 77 (1948); *Rehn v. Bingaman,* 151 Neb. 196, 36 N. W. 2d 856 (1949); *Tawney v. Kirkhart,* 130 W. Va. 550, 44 S. E. 2d 634 (1947). Fellow workmen who are under the Workmen's Compensation Act are generally treated as "third persons," and an action at common law may be maintained against a co-worker for injury caused by his negligence. *Stulginski v. Czanskas, supra.* A "third party" action is entirely independent of and unrelated to workmen's compensation proceedings. *Broome County v. Binghamton Taxicab Company,* 75 N. Y. S. 2d 423 (1947). Under a statute not abrogating an employee's common law right of action against "third persons," a "third person" includes any person other than the employer or those whom the statute makes an employer, and thus includes fellow-employees. *Rehn v. Bingaman, supra.* The court said in *Churchill v. Stephens,* 91 N. J. L. 195, 102 A. 657 (1917), "We see no reason for attributing to the words 'third person' any other meaning than the usual one. It must mean, as indeed the subsequent language of the section makes perfectly plain, a person other than the employer or employee." And in *Kimbro v. Holladay,* ..... La. App. ....., 154 So. 369 (1934), the court said, "There is no contractual relation between the two employees and no reason, we can see, for exempting one employee from liability for his torts causing damage to another employee." The fact that a truck driver's employer is a workmen's compensation subscriber does not protect the driver from liability for the death of a co-employee in a railroad crossing collision resulting from the driver's negligence, *Tawney v. Kirkhart, supra.* "We can perceive nothing in sound reasoning that would entitle a co-employee to gratuitous protection for his own misconduct." *Tawney v. Kirkhart, supra,* overruling *Hinkelman v. Steel Corporation,* 114 W. Va. 269, 171 S. E. 538 (1933), where a physician, employed by an employer who subscribed to workmen's compensation, was relieved of liability from

malpractice in treating an employee of such employer. The remedies and procedure provided by the Workmen's Compensation Act for cases within its terms are exclusive. *Cummings v. McCoy,* 192 S. C. 469, 7 S. E. 2d 222 (1940). "Our conclusion is that the Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no further." *Griffith v. Raven Red Ash Coal Co., Inc.,* 179 Va. 790, 20 S. E. 2d 530 (1942). And the California Supreme Court held that while under the California Labor Code the employer's sole liability for the employee's injury is workmen's compensation, and the exclusive remedy therefor is an application to the Industrial Accident Commission, the character of the act itself is not *damnum absque injuria* or otherwise inherently nonactionable. *Baugh v. Rogers,* et al., 24 Cal. 2d 200, 148 P. 2d 633 (1944). The fact that an employee's remedies against his employer under the Act are exclusive, is no bar to a common law action as between co-employees. *Kimbro v. Holladay, supra.* The right of the injured employee to sue a "third person" depends upon whether the latter is subject to the act. *Botthof v. Fenske,* 280 Ill. App. 362 (1935). The president of a corporation is included in the immunity provision of the compensation act which provides that while compensation insurance remains in force, the employer or "those conducting his business" shall only be liable to the extent and manner specified. *Warner v. Leder,* 234 N. C. 727, 69 S. E. 2d 6 (1952). A superintendent-manager has been held not to be a "third person" as to an injured employee, *Perry v. Beverage et al.,* 121 Wash. 652, 214 P. 146 (1923); and a corporate employer's treasurer-plant superintendent is included in the immunity provision of the act, *Essick v. City of Lexington,* 232 N. C. 200, 60 S. E. 2d 106 (1950); as is an agent of a corporation. *Bass v. Ingold et al.,* 232 N. C. 295, 60 S. E. 2d 114 (1950). Also a foreman of a common employer was held not to be a "third party" as to an injured employee, *Rosenberger v. L'Archer,* 31 N. E. 2d 700 (Ohio 1936); and a co-employee or fellow servant is subject to the immunity provision of the Act. *Feitig v. Chalkley,* 185 Va. 96, 38 S. E. 2d 73 (1946). The principal case is in accord with *Feitig v. Chalkley, supra.*

Under most Workmen's Compensation Acts, in which there is no immunity provision, the majority view is that a co-employee is not immune from a common law action by an injured employee. However, in those states which have an immunity clause, the weight of authority is that a co-employee is immune from a common law action by the injured employee. In those cases decided under the

immunity provision, all have held that a co-employee is immune from common law suit, with the exception of two. In those two cases the immunity provision was not raised. It should be noted, however, that under the immunity provision only one case has held that a co-employee is immune from a common law action by a fellow employee where both of the employees were doing menial labor and were of the same rank. All of the other cases decided under the immunity provision are cases in which the defendant was acting in a supervisory capacity over the plaintiff. The holding of the Supreme Court in the principal case is in accord with the only case decided under the immunity provision where the co-employees were not acting in a supervisory capacity. The court further stated that it was immaterial that the defendant was a foreman, rather than a fellow servant, for both are included in that quoted phrase of the immunity provision, "those conducting his business." The court could have turned its decision on the fact that the defendant was a foreman who was conducting his employer's business, thereby leaving the question of whether a fellow servant was included in the immunity provision unanswered. But it chose to disregard any distinction between a foreman and a fellow servant in so far as they were included in the immunity provision, and thereby possibly prevented further litigation on the subject.

E. LEE MORGAN, JR.