South Carolina Law Review

Volume 8 | Issue 1 Article 24

Fall 1955

Torts

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South Carolina

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While the Supreme Court handled the usual crop of automobile negligence cases in the year, seven cases involving fraud and deceit dominated the decisions in the field of torts. Apparently the decisions contained no novel holdings, but some emphasis was added to the previously-announced rule that an action may be based upon a fraudulent promise to perform a future act.

For convenience this section is divided into fraud cases, negligence cases, and miscellaneous tort decisions.

Fraud

Generally fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. The Supreme Court in two decisions this year, *Weatherford v. Home Finance Co.*[1] and *Thomas & Howard Co. v. Fowler,*[2] has reaffirmed the "exception or limitation to the effect that fraud may be based on promises made with an intention not to perform the same", first stated by Justice Cothran in *Palmetto Bank & Trust Co. v. Grimsley.*[3]

In both decisions the court was faced with the inevitable clash with the parol evidence rule which arises when a party asserts promises were made but not reduced to writing. In *Thomas & Howard* the circuit court held the alleged promises tended to vary the terms of the mortgage and could not therefore form the basis for fraud, but the Supreme Court reversed. In *Weatherford* the court held that the question whether plaintiff, who could not read, was overreached by defendant in drawing the contract not in accordance with the promises was properly submitted to the jury. In *Palmetto Bank* Justice Cothran had said, "if these promises were made to induce the execution of the mortgage, with the concealed purpose to disregard them, the 'Parol Evidence Rule' cuts no figure." Many jurisdictions have found it wiser to adhere strictly to the parol evidence rule,[4] perhaps because it is easier and more certain; but this exception

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1. 225 S.C. 313, 82 S.E. 2d 196 (1954).
2. 225 S.C. 354, 82 S.E. 2d 454 (1954).
3. 134 S.C. 493, 133 S.E. 437, 51 A.L.R. 42 (1926).
4. 125 A.L.R. 879; Page v. Pilot Life Ins. Co., 192 S.C. 59, 5 S.E. 2d 454 (1939).

is firmly established here, and makes another factual question for the jury.

In another fraud case, *Tallevast v. Herzog*,[5] the court restated the rule of *J. B. Colt Co. v. Britt*,[6] that whether a party had the right in the circumstances to rely upon representations made by another is a question of fact for the jury if there is evidence of fraud.

Arnold v. Life Insurance Co. of Georgia[7] was probably the most unusual of the fraud cases. The insurer was held not liable on the policy because the insured had falsely stated in her application that she had not been a patient in a hospital or sanitarium, when she had in fact been a patient in the State Hospital. The court did not find it necessary, therefore, to pass on the contention that the policy was void from its inception by reason of the fact that it had been procured by her husband with the intent to murder her later — which he did do. The court did hold however that the insured could not escape the consequence of her fraud on the ground that she was a minor. The simple reason is that the minor's option is to affirm or disaffirm his contract in toto, and he cannot disaffirm one part and seek to enforce the remainder.[8]

Only *Gause v. Jones*[9] of the remaining cases involving fraud is of note. There the court held that a counterclaim for libel is a valid defense to an action for fraud under Section 10-705 of the Code,[10] where the counterclaim was based upon a denial of the fraudulent act alleged by the complaint.

Negligence

While the court again denied the doctrine of Res Ipsa Loquitur applies in this State in *Hicklin v. Jeff Hunt Machinery Co.*,[11] that doctrine becomes progressively more difficult to distinguish from the rule which the court now frankly denominates "our rule of circumstantial evidence," in *Turner v. Wilson*.[12] The rule was also applied during the past year in *Browder v. Southern Railway*.[13]

The *Browder* case occasions little comment, as it was another case of the intoxicated licensee who uses a railway roadbed for his last earthly resting place; and it is a legitimate heir of *Woodward v.*

5. 225 S.C. 563, 83 S.E. 2d 204 (1954).
6. 129 S.C. 226, 123 S.E. 845 (1924).
7. 226 S.C. 60, 83 S.E. 2d 553 (1954).
8. Dickert v. Aetna Life Ins. Co., 176 S.C. 476, 180 S.E. 462 (1935).
9. 85 S.E. 2d 402 (S.C. 1955).
10. Code of Laws of South Carolina, 1952 § 10-705.
11. 85 S.E. 2d 739 (S. C. 1955).
12. 86 S.E. 2d 867 (S.C. 1955).
13. 226 S.C. 26, 83 S.E. 2d 455 (1954).

Southern Railway.[14] However, in the *Hicklin* case actionable negligence was found from the conclusion that a sheave (which killed plaintiff's intestate) could not have come loose from a bulldozer unless defendant was negligent in some manner in inspecting or securing same. In the *Turner* case, the evidence was styled "wholly circumstantial" by the court when plaintiff became ill after eating and the circumstances pointed to a deviled egg sandwich made by defendant. Of course the latter was a Pure Food Act[15] case, and the violation makes out a prima facie case; but the reader of these decisions will be hard put to distinguish our rule of circumstantial evidence from the classic definitions of res ipsa loquitur.[16]

Damages — In *Hall v. Walters*[17] the court found no difficulty in upholding a verdict for $1,000 actual, and $25,000 punitive damages in an assault and battery action against a labor union, an unincorporated association of some 1,600 members; observing that "on a per capita basis the burden of payment will not be heavy." The court's comments and cases cited indicate clearly that it will not depart from its now firmly established rule that it will not disturb verdicts unless there is a real showing of prejudice, passion, or improper motive. Mere argument that a verdict is too large does not meet the requirement. It must be so excessive as to "shock the conscience" of the court.

In *Joiner v. Fort*[18] the court restated its holding in *Jeffords v. Florence County*[19] that payment of hospital and medical expenses by insurance or receipt of benefits under accident policies does not affect or lessen the amount recoverable from the party responsible for the injury.

Fourth Circuit Judge Soper commented upon the "unique practice" of South Carolina courts in permitting the jury to apportion damages among joint tort-feasors in *Atlantic Coast Line v. Robertson;*[20] an interesting case in which the court upheld the validity of an agree-

14. 90 S.C. 262, 73 S.E. 79 (1911).
15. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 32-1511 *et seq.*
16. *Cf.* Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815, Ann. Cas. 1914 D 905 (1913), perhaps the leading American Decision: In the absence of any explanation, negligence may fairly be *inferred* "where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened." See also 38 Am. Jur. 989, Neg. § 295.
17. 85 S.E. 2d 729 (S.C. 1955).
18. 226 S.C. 249, 84 S.E. 2d 719 (1954).
19. 165 S.C. 15, 162 S.E. 574, 81 A.L.R. 313 (1932).
20. 214 F. 2d 746 (1954).

ment by one tort-feasor to indemnify the other for loss due to negligence.

Invitees — In *Joiner v. Fort*[21] and *Richards v. A. & P.*[22] the court again confirmed the right of invitees to have a safe passage provided for them. In the *Joiner* case a heating contractor was held liable after leaving a vent open in the church floor and plaintiff injured herself stepping into the opening. The court stated that the contractor could reasonably expect the church to be visited during week days as well as Sunday. In the *Richards* case leaving boxes in the aisle over which plaintiff fell backward made a jury question on negligence. If such hazards are to be left, the invitee must be warned of their presence.

Liability of Electrical Cooperatives — Our Supreme Court and the Court of Appeals for the Fourth Circuit concurred in a finding, in separate cases,[23] that electrical cooperatives are neither municipal corporations nor charitable corporations under the laws of this State, and are liable for damages for their torts as are other public service corporations.

Miscellaneous Decisions

Act of God — In *Belue v. City of Greenville*[24] the city failed in its reliance upon the defense that damage from a rainstorm was an "act of God," because the city had made changes in the curbs and gutters altering the natural flow of water. The court pointed out that under the settled cases in this State an act of God must be the sole cause of the injury to avail as a defense.

Attachment — The court seems to have cleared away many doubts about the rights of parties in attachment actions in *Trawick v. One 1952 International Pickup,*[25] an unusually succinct opinion. It may be summarized as follows: (1) Party damaged in an automobile accident may proceed *in rem, in personam,* or both. (2) The vehicle's owner, if not made a party, may intervene and set up his rights to the vehicle. (3) The right to intervene is, however, discretionary with the court. (4) The plaintiff has the right to choose how he will proceed and cannot be compelled to allege a cause of action against the intervening owner. (5) The intervention is to

21. 226 S.C. 249, 84 S.E. 2d 719 (1954).
22. 226 S.C. 119, 83 S.E. 2d 917 (1954).
23. Byrd v. Blue Ridge Electrical Coop., 215 F. 2d 542 (1954). Bush v. Aiken Electric Coop., 85 S.E. 2d 716 (S.C. 1955).
24. 226 S.C. 192, 84 S.E. 2d 631 (1954).
25. 85 S.E. 2d 729 (S.C. 1955).

protect the interest of the intervenor and does not alter the right of the plaintiff to complete his action *in rem* in the county of attachment nor permit the intervenor to change the venue.

Conspiracy — In *Hall v. Walters*[26] an action based upon a conspiracy to prevent plaintiff (and other non-union employees) from working in a mill, alleging that the conspiracy was consummated by assault and battery, the court adopted the majority rule from other jurisdictions that an unincorporated union and some or all of its members may be joined as conspirators to support the action.

Duress — Little progress was made by one of the litigants in *Thomas & Howard v. Fowler*[27] in relying upon a claim of duress. Mortgagee brought claim and delivery and the mortgagor defended (among other grounds) upon the ground that the mortgage had been obtained by duress, in that the mortgagee's agent was alleged to have said he "would go to Spartanburg and have them closed up" and that they signed the mortgage rather than be forced out of business. The court said this "was nothing more than a threat that unless secured, plaintiff would resort to legal proceedings to collect its account. This does not constitute duress."

The other decisions in the field of Torts in the past year were routine automobile damage suits; but the attorney who has an automobile suit involving minor passengers will find profitable reading in *Bolt v. Gibson*.[28] In an opinion by Circuit Judge J. Frank Eatmon, acting associate justice, the court seems almost to have ruled out contributory negligence for minor passengers under 14, for both the reason that they are presumed not to know how to drive a car under license statutes,[29] and they cannot under the "common sense" view have joint or equal control over the vehicle with parent or adult.

26. 225 S.C. 321, 82 S.E. 2d 275 (1954).
27. 225 S.C. 354, 82 S.E. 2d 454 (1954).
28. 225 S.C. 538, 83 S.E. 2d 191 (1954).
29. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 46-181.