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Torts

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TORTS

I. Physical Harms

A. *Charitable Immunity*

Decker v. Bishop of Charleston[1] involved an action brought for physical injuries sustained in a church owned by the defendant as corporation sole. The plaintiff conceded that in accordance with prior decisions[2] the Bishop, as a true charity, would have immunity from tort liability. He sought recovery, however, on the basis that (1) abandonment of the doctrine by many courts has evolved a new trend; (2) the doctrine was originated by judicial decision and therefore should be overruled by the judiciary; and (3) an exception to the general rule should be allowed to the extent of the defendant's liability insurance. Finding a great deal of continued adherence in other jurisdictions to the charitable immunity doctrine, the supreme court reaffirmed its past decisions, citing *Rogers v. Florence Printing Co.*:[3]

> It is often the function of the courts by their judgments to establish public policy where none on the subject exists. Once firmly rooted, such policy becomes in effect a rule of conduct or of property within the state. In the exercise of proper judicial self-restraint, the courts should leave it to the people, through their elected representatives in the General Assembly to say whether or not it should be revised or discarded.[4]

The court also held that procurement of liability insurance by a charitable organization did not create tort liability when the organization otherwise would be immune. In the absence of a South Carolina decision in point, the holding was based on the similar holdings in other jurisdictions.[5]

1. 247 S.C. 317, 147 S.E.2d 264 (1966).

2. In Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914), the court said that it would be against public policy to hold a charitable institution responsible for the negligence of its servants, selected with due care. *Accord,* Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948); Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).

3. 233 S.C. 567, 106 S.E.2d 258 (1958).

4. 247 S.C. 317, 325, 147 S.E.2d 264, 268 (1966).

5. See, *e.g.,* Annot., 25 A.L.R.2d 139 (1952). The court also recognized as persuasive authority: Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963) (Unemancipated child had no right of tort action against parent though the

B. *Procedure*

While operating a bus for a North Carolina corporation, Lonnie Downing was killed in a head-on collision with an automobile in South Carolina. In *Downing v. Ulmer*,[6] a wrongful death action was successfully maintained in the district court. As a result of this judgment and pursuant to North Carolina law,[7] Downing's employer and its insurance carrier petitioned the court for recovery of workmen's compensation paid to dependents of the deceased employee. Since plaintiff did not contest the issue, disbursement was made in accordance with the claim, but the court warned:

> Regardless of the manner in which such subrogation right or lien may be protected under North Carolina's procedure, the mode, time and manner in which employer and compensation insurer might assert in actions pending in this court its substantive right of subrogation against the defendant as a third party tort-feasor is a procedural matter to be determined by the Federal Rules of Civil Procedure and not by the local law of North Carolina.[8]

It was recognized, however, that the petitioners had such an interest in the subject matter of the litigation, that had they made a timely application to the court, under the Federal Rules of Civil Procedure[9] they could have intervened as a party plaintiff.

C. *Causation*

In *Conyers v. Stewart*[10] an action was brought for personal injuries sustained while riding as a passenger in defendant's automobile. Prior to the midday accident the automobile had been proceeding at a moderate speed along an undesignated country road bordered by woodlands and cultivated fields. As the parties approached the scene of the accident, they could see a farm tractor approximately 1,200 feet ahead, parked on the

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parent had liability insurance); and McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959) (Municipality did not wave its sovereign immunity by procuring a surety bond for its police department).

6. 253 F. Supp. 694 (D.S.C. 1966).
7. N.C. GEN. STAT. § 97-10.2 (1965).
8. 253 F. Supp. 694, 698 n.2 (D.S.C. 1966).
9. FED. R. CIV. P. 24(a).
10. 247 S.C. 403, 147 S.E.2d 640 (1966).

left side of the road and facing in the same direction they were traveling. Without changing speed or sounding her horn, the defendant attempted to pass to the right of the tractor. At that moment the tractor suddenly started a right turn into the roadway and thereby collided with the automobile. The circuit court directed a verdict in favor of the defendant. On appeal, the supreme court, in viewing the facts most favorable to plaintiff, considered that the tractor driver was likely to have been unaware of a traffic hazard and that the defendant failed to give the warning required by statute.[11] It held that the evidence was sufficient to raise a jury issue as to causative negligence of the defendant.[12]

D. *Joint Tort-feasors*

The declaratory judgment action in *Vance Trucking Co. v. Canal Ins. Co.*[13] arose when a truck crossed to the wrong side of the road and collided head-on with an automobile. The plaintiff had leased the truck and driver from the defendant Forrester Trucking Company. It was the contention of both parties and their insurers that the driver had acted as agent of the other at the time of the accident. After an examination of the surrounding circumstances,[14] the court found that by a common relationship the parties had utilized the truck and driver during the lease period so as to maximize the economic benefits for both. Basing liability upon the control of the agent's acts,[15] the court held that the driver had acted as agent for both parties.[16] Consequently, they were compelled to defend a pending wrongful death action as joint tort-feasors.

11. S.C. CODE ANN. §§ 46-581 to -82 (1962).

12. In the circuit court the defendant did not rely upon the guest statute, S.C. CODE ANN. § 46-801 (1962). Consequently the supreme court made no review of the circuit court's holding that the plaintiff was not a guest within the meaning of the statute.

13. 249 F. Supp. 33 (D.S.C. 1966).

14. Relying on Tate v. Claussen-Lawrence Constr. Co., 168 S.C. 481, 167 S.E. 826 (1933), the court said that in resolving this factual situation, consideration must be given to the continuing relationship as well as to the written lease. See also Hutson v. Herndon, 243 S.C. 257, 133 S.E.2d 753 (1963).

15. See Edwards v. Rogers, 120 F. Supp. 499 (E.D.S.C. 1954); Hutson v. Herndon, *supra* note 14; Brownlee v. Charleston Motor Express Co., 189 S.C. 204, 200 S.E. 819 (1939).

16. See, *e.g.*, Jackson v. Blue, 152 F.2d 67 (4th Cir. 1945); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946).

E. *Duty of Care*

In *Humphries v. McCrory-McLellan Stores Corp.*[17] the plaintiff fell when she caught the spiked heel of her shoe in a hole at the entrance of the defendant's store. The hole, which was described as "round, no more than a penny's width across," was for the purpose of receiving a bolt from the door when it was lowered into a locking position. Recognizing the general rule in South Carolina,[18] which requires that storekeepers exercise ordinary care toward their customers, the court vacated the plaintiff's jury award and dismissed the cause of action. It stated:

> [The hole's] design and installation were specified by the building's architects many years before the plaintiff's mishap. It is too small to appear dangerous. . . .
>
> Moreover, the plaintiff's heel was over three inches in height, with a slim shaft tapering to a base hardly a half-inch in diameter. A seamless or unbroken step or floor surface would be necessary to assure the wearer entire security. Common experience and observation teach how impracticable and unreasonable it would be to insist upon such exactness in providing ingress and egress into and from business premises. The obligation of ordinary care does not require it.[19]

The case is interesting because a dissenting judge felt that the ultimate question should not have been converted from one of fact to one of law.[20] He asserted that the store owner knew or should have known of the changes in prescribed feminine fashion and therefore was required to exercise reasonable care in protecting against special hazards.

McGee v. Colonial Pipeline Co.,[21] involving an action brought for property damage, was decided only with respect to the

17. 358 F.2d 901 (4th Cir. 1966).

18. A storekeeper is under a duty to use ordinary care in maintaining exits, adits and public spaces of his premises in a reasonably safe condition for the use of his customers, but he does not insure their safety. See Baker v. Clark, 233 S.C. 20, 103 S.E.2d 395 (1958); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957). He is also under a duty to warn of hidden danger or unsafe conditions of which he knows or in the exercise of reasonable supervision or inspection should know. See Baker v. Clark, *supra;* Bolen v. Strange, 192 S.C. 284, 6 S.E.2d 466 (1939).

19. Humphries v. McCrory-McLellan Stores Corp., 358 F.2d 901, 902 (4th Cir. 1966).

20. *Id.* at 902 (dissenting opinion).

21. 247 S.C. 413, 147 S.E.2d 645 (1966).

defendant Hess Oil and Chemical Corporation. The action was based on the fact that Hess allowed a highly flammable liquid to escape from its premises into a stream which eventually flowed near plaintiff's property and emitted a strong odor of gasoline. In considering the question of negligence, the court agreed that the storage, handling or other use of a potentially dangerous product required a degree of care commensurate with the danger, but it reversed the circuit court's judgment in favor of plaintiff because he had failed to show damage to his property.

The case of *Kapuschinsky v. United States*[22] was an action brought under the Federal Tort Claims Act.[23] The plaintiff, a newborn infant in the United States Naval Hospital at Charleston, South Carolina, was placed in a nursery for premature babies. Shortly prior to this time, Karen Kreb, an inexperienced Wave, had been assigned to work in that nursery without any preliminary physical examination. Four days after birth, plaintiff became critically ill and after extensive tests the disabling illness was shown to be a result of "hospital staph." A laboratory test run on throat cultures taken from the nursery personnel produced Karen Kreb as a carrier of staphylococcus. The defendant argued that its duty of care should be "measured by the degree of care, skill and diligence customarily exercised by hospitals generally in the community."[24] In this respect it was shown that a majority of local hospitals did not require preliminary examination of nursery personnel though knowing full well the possible consequences that might result in the absence of such tests. After circumventing the charitable immunity defense,[25] the court found that it was the hospital's duty to give the plaintiff that reasonable care and attention which her known physical and mental condition required;[26] that as a premature baby she was entitled to the highest possible

22. 248 F. Supp. 732 (D.S.C. 1966).

23. 28 U.S.C. § 1346 (1964).

24. Kapuschinsky v. United States, 248 F. Supp. 732, 743 (D.S.C. 1966) as quoted from Garfield Memorial Hosp. v. Marsal, 204 F.2d 721, 725 (1953).

25. After establishing the hospital to be a private profit-making institution, the court as required by 28 U.S.C. § 1346(b) (1964) looked to the law of the place where the alleged negligence occurred for a determination of liability. As a result of the charitable immunities doctrine in South Carolina, there existed no South Carolina cases directly in point, but liability was found on the basis of general law. See, *e.g.*, Annot., 96 A.L.R.2d 1205.

26. See 26 AM. JUR. *Hospitals and Asylums* § 14 (1940).

degree of care.[27] Quoting from Dean Prosser, that "it may be negligence . . . to proceed in conscious ignorance in the face of an obvious risk,"[28] the court, though applying the "community standard" test, concluded that the defendant had breached the standard of care owed to the plaintiff.[29]

F. *Statutory Standards of Care*

Buriss v. Texaco, Inc.[30] concerned a loss of plaintiff's feed mill by fire. The defendant, who operated a storage facility situate in the city of Anderson, spilled between 75 and 115 gallons of gasoline while transferring it from a railroad tank car to the Texaco premises. The spilled gasoline entered a drainage ditch on the defendant's property and through a downhill maze of interconnected ditches was eventually discharged under plaintiff's mill. When fire broke out in one of the ditches, it spread rapidly to the mill and consumed it. Prior to this event, the city had enacted an ordinance[31] which required that separator boxes be maintained at the intersection of all public ditches where flammable liquids might enter. The court found the provisions of this ordinance applicable to the situation and held that Texaco was negligent per se in failing to comply with the law.[32]

G. *Res Ipsa Loquitur*

During this survey period, several cases have reaffirmed the well established rule that res ipsa loquitur does not apply in South Carolina. The cases are noteworthy as examples of situations in which actionable negligence had to be established without the aid of this doctrine.

In *Chaney v. Burgess*[33] the defendant was launching a boat when his automobile and trailer became stuck in mud adjacent

27. See St. Lukes Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952).

28. Kapuschinsky v. United States, 248 F. Supp. 732, 747 n.17 (D.S.C. 1966).

29. The district court, relying on the case of Bessinger v. Deloach, 230 S.C. 1, 94 S.E.2d 3 (1956) found that South Carolina courts would apply the "community standard" test; its holding, therefore, was based on the fact that one local hospital required the tests even though the others did not. In justification of this position and in further observation of South Carolina law, it commented that in South Carolina, the "community" does not seem to be "necessarily restricted to the geographical area in proximity to the alleged tortfeasor, but would extend to other locales similarly situated." Kapuschinsky v. United States, 248 F. Supp. 732, 743-4 (D.S.C. 1966).

30. 361 F.2d 169 (4th Cir. 1965).

31. ANDERSON, S.C., CODE § 15.406d (1955).

32. *Accord,* Lindler v. Southern Ry., 84 S.C. 536, 66 S.E. 995 (1910).

33. 246 S.C. 261, 143 S.E.2d 521 (1965).

to a lake. Upon being asked for assistance, the plaintiff gratuitously volunteered the use of his tractor and services. While he braked the tractor, the defendant looped a chain around the tractor hitch and secured both ends to the trailer in such a manner that pull would result in a vertical and horizontal force. On the defendant's signal, the plaintiff started the tractor forward at which time the lower chain became unfastened. The sudden unbalanced force caused the tractor to tilt back and as a result the plaintiff was thrown to the ground and injured. It was held that the facts, tested in the light of common experience, made out a prima facie case that the defendant's negligence was the proximate cause of the plaintiff's injury.

Crider v. Infinger Transp. Co.[34] involved an action brought for property damages. It had its origin when the defendant's tanker truck, containing liquid asphalt at 375 degrees, was negligently struck by an automobile and overturned. To clear the highway the tanker was righted as quickly as possible, causing a large quantity of the hot asphalt to escape from the tanker and flow onto the plaintiff's land damaging it and killing some livestock. The plaintiff's witness admitted that, considering the condition of the tanker and the asphalt, to turn the tanker right side up was all that could be done under the circumstances. The court, in granting the defendant's motion for a directed verdict, stated that persons using a highway must exercise ordinary care to avoid injury to the owners of abutting property but are not liable for injuries caused to such owners as a consequence of a lawful and non-negligent use of the highway.[35]

In the cases of *Kapuschinsky v. United States*[36] and *Burris v. Texaco, Inc.*,[37] which are considered respectively under *Duty of Care* and *Statutory Standards of Care*, the plaintiffs recovered on the basis of circumstantial evidence. As was pointed out, "the legal burden upon the plaintiff does not become more onerous because the evidence is circumstantial, though the 'burden of persuasion' is necessarily more difficult."[38]

34. 248 S.C. 10, 148 S.E.2d 732 (1966).
35. See 25 AM. JUR. *Highways* § 224 (1940).
36. 248 F. Supp. 732 (D.S.C. 1966).
37. 361 F.2d 169 (4th Cir. 1965).
38. 248 F. Supp. 732, 743 (D.S.C. 1966).

H. *Contributory Negligence*

The question of contributory negligence has been litigated in a number of cases. They have held that:

Plaintiff's conduct contributed as a proximate cause when:

(1) Blinded by the morning sun under similar conditions previously experienced, the plaintiff continued to drive her automobile along a familiar street until she collided with the defendant's automobile parked in violation of a city ordinance. *Edwards v. Bloom.*[39]

(2) Driving a truck on a familiar highway, the plaintiff attempted to pass a school bus at an intersection in violation of a passing statute[40] and when the bus turned left without signaling, a collision ensued.[41] *Grainger v. Nationwide Mut. Ins. Co.*[42]

Plaintiff's contributory negligence was a proper jury question when:

(1) Prior to colliding with the defendant's truck, the plaintiff, with an unobstructed view, was driving her automobile and looking ahead but failed to see the truck as it entered the highway in violation of the yield-the-right-of-way statute.[43] *Clawson v. City of Sumter.*[44]

(2) To avoid interference of lights from what appeared to be the defendant's automobile approaching in the proper lane, the driver of the plaintiff's automobile looked to the right shoulder and as a result collided with the defendant's automobile parked on the wrong side of the highway. *Beverly v. Sarvis.*[45]

(3) On a rainy night, a Negro pedestrian, who had violated a highway crossing statute,[46] was struck by the de-

39. 246 S.C. 346, 143 S.E.2d 614 (1965).
40. S.C. CODE ANN. § 46-388(2) (1962).
41. The action was brought pursuant to S.C. CODE ANN. § 21-840(1)(c) (1962).
42. 247 S.C. 293, 147 S.E.2d 262 (1966).
43. S.C. CODE ANN. § 46-423 (1962).
44. 247 S.C. 499, 148 S.E.2d 350 (1966).
45. 246 S.C. 470, 144 S.E.2d 220 (1965).
46. S.C. CODE ANN. § 46-435 (1962).

fendant's automobile shortly after moving to the edge of the proper shoulder.[47] *Johnson v. Finney.*[48]

(4) The plaintiff saw the defendant's eastbound truck approaching on the highway some 500 to 600 feet away. She drove her automobile from a driveway onto the highway making a left turn to the west at which time the truck collided with her in the westbound lane. *Gambrell v. Russell Transfer Co.*[49]

(5) Chased by an armed assailant, the plaintiff, a seventeen-year-old boy, was seeking help when he ran into the street and was struck by the defendant's automobile. *Young v. Livingston.*[50]

Plaintiff's sole negligence caused the injury when:

(1) As a paying guest, a seventy-eight-year-old woman, who had experienced falls at home and had used the doorway of her motel room on three prior occasions, was injured in a fall while stepping from the threshold of the room in broad daylight to a discernable colored brick step riser which was free from shadows and foreign matter. *Wainwright v. Thomas.*[51]

(2) On a clear day at an unobstructed railroad crossing with flashing red lights and automatic bells, the plaintiff disregarded a passenger's warning and drove his automobile onto the path of an oncoming train where it stalled. The train, which gave statutory warning but which was slightly exceeding the municipal speed limit, struck the automobile causing it to strike and injure the plaintiff who had left the automobile but had chosen to remain nearby. *Graham v. Seaboard Air Line R.R.*[52]

I. *Comparative Negligence*

In *Graham*[53] the railroad crossing case above, the district court recognized that under common law principles, the plain-

47. As required by S.C. CODE ANN. § 46-436 (1962).
48. 246 S.C. 366, 143 S.E.2d 722 (1965).
49. 247 S.C. 49, 145 S.E.2d 432 (1965).
50. 247 S.C. 385, 147 S.E.2d 624 (1966).
51. 250 F. Supp. 963 (D.S.C. 1966).
52. 250 F. Supp. 566 (D.S.C. 1966).
53. Graham v. Seaboard Air Line R.R., 250 F. Supp. 566 (D.S.C. 1966).

tiff's simple negligence would preclude recovery from a defendant guilty of a comparable degree of negligence; that likewise, gross negligence, recklessness, willfulness and wantonness, bar recovery when by the same "yardstick" it is established as a defense. Accordingly, it was found that the gross negligence of the plaintiff, as measured against the non-contributing simple negligence of the defendant, was the proximate cause of the plaintiff's injury.

J. Imputation of Driver's Negligence to Passenger

Though the plaintiff and two other men shared equally in the proceeds from a construction contract and as a result had a common purpose in getting to and from the job site, it was held in *Spradley v. Houser*[54] that the negligent operation of the automobile by one of the parties would not be imputed to the plaintiff in an action for personal injuries sustained in a head-on collision with the defendant. From *Indemnity Ins. Co. of No. America v. Odom*,[55] a case involving a similar factual situation, the court quoted that:

> While there doubtless was a common purpose on the part of all of these employees, the [plaintiff] . . . certainly had no voice in the control of [the automobile] . . . nor did he have an equal right with this driver to direct and govern its movements, which is an essential requirement of the doctrine of common enterprise.[56]

Russell v. Seaboard Air Line R.R.[57] was an action brought for the wrongful death of Eula Mae Baker who was killed on a return trip from Myrtle Beach in her own automobile driven by her son Winifred into the path of the defendant's train. In reversing a jury verdict favorable to the plaintiff, the court found as a matter of law that the negligence of the son was imputed to his mother under the principles of respondeat superior. A dissenting judge[58] found the evidence to be susceptible of the inference

> [T]hat Mrs. Baker simply entrusted the automobile to her son Clifton . . . for the purpose of accomplishing his return

54. 247 S.C. 208, 146 S.E.2d 621 (1966).
55. 237 S.C. 167, 116 S.E.2d 22 (1960).
56. 247 S.C. 208, 212, 146 S.E.2d 621, 623 (1966).
57. 246 S.C. 516, 144 S.E.2d 799 (1965).
58. *Id.* at 527, 144 S.E.2d at 804 (dissenting opinion).

> to Myrtle Beach [Air Force Base]. And that he, having arrived at his destination, relinquished the same to his brother for the purpose of completing the mission or purpose . . . by returning it [home]. . . . That Mrs. Baker, no doubt, desired to accommodate her adult son, enjoyed his company on the trip, and of course desired to return home, are matters which were purely incidental to the main purpose of the trip. . . .[59]

In accord with the weight of general authority,[60] the dissent concluded that return of the automobile following the son's personal use was "not a service being rendered for the owner so as to constitute the driver the servant of the owner. The fact that the owner may receive some incidental benefit from or in connection with the trip does not alter the relationship."[61]

K. *Sudden Emergency*

Grier, a passenger in the defendant's automobile, was injured when the brakes suddenly failed and the automobile struck a tree. In *Grier v. Cornelius*,[62] the plaintiff-passenger sought reversal of an unfavorable jury verdict on the basis that the circuit court had inconsistently charged (1) the sudden emergency doctrine[63] and (2) that violation of the brake statute[64] was negligence per se. The brakes of the automobile had been repaired approximately thirty days prior to the accident and on the morning thereof, the defendant had braked several times with no apparent difficulty. The supreme court affirmed the judgment and giving the statute[65] a reasonable construction,[66] held:

> We have never adopted such a strict position that would make the owner or operator of a motor vehicle an insurer against any and all defects in the vehicle's equipment. We

59. *Id.* at 529, 144 S.E.2d at 805-06 (dissenting opinion).

60. See Annot., 51 A.L.R.2d 10, 21-27 (1957).

61. 246 S.C. 516, 530, 144 S.E.2d 799, 806 (1965) (dissenting opinion).

62. 247 S.C. 521, 148 S.E.2d 338 (1966).

63. The court noted that the trial court judge prefaced his charge by instructing the jury "that a person who is suddenly and unexpectedly confronted with a perilous situation or emergency must not have brought the emergency about by his own negligence." *Id.* at 536, 148 S.E.2d at 345.

64. S.C. CODE ANN. § 46-561 (1962).

65. *Ibid.*

66. See also Spencer v. Kirby, 234 S.C. 59, 106 S.E.2d 883 (1959).

> do not think that the Legislature intended the equipment statute to impose liability without fault or make the owner or operator of an automobile an absolute insurer of his brakes. In view of our decisions, a violation of the brake statute is negligence as a matter of law. However, the mere failure of brakes is not a violation of the brake statute as a matter of law.[67]

In *Young v. Livingston*,[68] which is briefly discussed under *Contributory Negligence* and further discussed under *Last Clear Chance*, the circuit court charged:

> [O]n the question of contributory negligence, if you believe from the evidence that the plaintiff was confronted with a sudden peril not arising from his own faults, then he may act in the manner which the emergency seems to require for the purpose of avoiding injury to himself without being guilty of contributory negligence, provided he acted as one of his age and of his capacity, discretion, knowledge and experience would ordinarily have acted under the circumstances.[69]

In rejecting the argument that the charge eliminated the defense of contributory negligence, the supreme court said that it was simply illustrative of the adage that "the facts make the law."

In *Barton v. Griffith*,[70] a case concerned primarily with damages, the district court said that a motorist is not the insurer of children and though a child, under South Carolina law, cannot be guilty of contributory negligence,[71] when he enters the highway suddenly and without warning of his presence, a defendant is not necessarily guilty of actionable negligence for striking him with his automobile.

L. *Last Clear Chance*

In *Young v. Livingston*[72] the defendant, who was driving south in the east lane of a one-way street, was stopped at a traffic light. From that point he had an unobstructed view of

67. 247 S.C. 521, 530-31, 148 S.E.2d 338, 342 (1966).
68. 247 S.C. 385, 147 S.E.2d 624 (1966).
69. *Id.* at 392, 147 S.E.2d at 627.
70. 253 F. Supp. 774 (D.S.C. 1966).
71. See Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918).
72. 247 S.C. 385, 147 S.E.2d 624 (1966).

the plaintiff ahead as he fled from the western curb diagonally across the street. It was also clearly visible that as he ran, the plaintiff was looking over his shoulder at his assailant who was in hot pursuit. When the light changed, the defendant proceeded without altering his course or doing anything except to apply his brakes at the last moment prior to striking plaintiff at a point 120 feet from where he had been waiting for the light. In dismissing the defendant's objections as being without merit, the supreme court ruled that the facts warranted a charge by the circuit court of the well-settled rule that:

> A plaintiff who is guilty of contributory negligence may nevertheless recover if the defendant had the last clear chance to avoid the accident by the exercise of due care, if he realizes, or should have realized that the plaintiff was inattentive or unaware of the danger.[73]

M. *Proximate Cause*

Appealing from an adverse jury verdict, the plaintiff in *Pioneer Mfg. Co. v. Carolina Equip. Rentals, Inc.*[74] contended that the rule of implied warranty of fitness should apply to bailment transactions as a matter of law. The claim was predicated upon a lease agreement by which the plaintiff had leased one of the defendant's trucks. The truck, loaded with the plaintiff's products, had departed from Camden, South Carolina, for an Alabama destination, but while enroute in Georgia, the driver discovered that the rear door had opened causing a large amount of the cargo to be lost along the highway. Recognizing that there had been no previous opportunity in South Carolina to apply the rule of implied fitness to this type of bailment transaction, the court said:

> Assuming the soundness, within certain limitations, of the general rule of law[75] relied upon by plaintiff, we are still cited to no authority which supports the ultimate contention of the plaintiff that it was entitled to judgment, as a matter of law, on the evidence disclosed by the record. . . . [T]he most that could be said of the evidence here is that a jury

73. *Id.* at 391, 147 S.E.2d at 626.
74. 247 S.C. 452, 148 S.E.2d 48 (1966).
75. See 8 C.J.S. *Bailments* § 25a (1962); 8 AM. JUR. 2d *Bailments* § 143 (1963).

issue was presented as to whether the damages sustained by the plaintiff were proximately caused by any breach of such implied warranty on the part of the defendant.[76]

Evidence showed that broken latch plates had allowed the door to open, but the only evidence which tended to show that the break was caused by a defect in the plates or by the fault of the defendant was the testimony that "It just looked like they had worn in two."

Tilley v. Delta Airlines, Inc.[77] involved an action for personal injury brought against the defendant United States under the Federal Tort Claims Act.[78] The plaintiff was aboard a Delta aircraft which, under the control of a local tower employee of the Federal Aviation Agency, was proceeding to a take-off position on the runway. At the same time, a Sabena aircraft continued down the runway and, as it drew dangerously near the taxiing Delta, the controller excitedly directed the Delta pilot to clear the runway immediately 180 degrees to the left. To make this maneuver, the pilot applied power to his engines causing the front wheel of the craft to leave the paved runway. The plaintiff's back was injured in the ensuing sudden stop. It was held that violation of the Air Traffic Control Procedure Regulations[79] by the United States was the proximate cause of the injury. The pilot's act, which was in accordance with the controller's emergency instructions, was not such an intervening act as would relieve the government of liability.[80]

N. *Manufacturer's Liability*

More than half a century ago *MacPherson v. Buick Motor Co.*[81] established an exception to the general rule which required privity before there could be a recovery against a manufacturer for injuries sustained in using his products. In regard to remote purchasers, *MacPherson* dispensed with the privity requirement

76. 247 S.C. 452, 456, 148 S.E.2d 48, 49-50 (1966).
77. 249 F. Supp. 696 (D.S.C. 1966).
78. 28 U.S.C. §§ 1346(b), 2402 (1964).
79. § 422.5 provides:
Between a departing aircraft waiting take-off clearance and arriving aircraft, sufficient separation, established by holding the departing aircraft short of the runway, so that: The arriving aircraft will not pass over or in close proximity to the departing aircraft.
80. See Medlin v. United States, 244 F. Supp. 403 (W.D.S.C. 1965).
81. 217 N.Y. 382, 111 N.E. 1050 (1916).

and allowed recovery if the defective product, when put to use, was imminently dangerous. This widely accepted rule was recognized in South Carolina in the cases of *Odom v. Ford Motor Co.*[82] and *Beasley v. Ford Motor Co.*[83]

Over the years many jurisdictions have broadened *MacPherson* to allow recovery for injuries, within limitations, by persons other than remote purchasers.[84] *Salladin v. Tellis*[85] raised this issue for the first time in South Carolina. The action was for the wrongful death of the plaintiff's intestate who, as a workman, was electrocuted while installing light fixtures in defendant Tellis' store. The complaint charged the defendant Universal Manufacturing Corporation, who had manufactured the fixtures' electrical components, with negligence in furnishing the defective parts to the fabricator knowing that they would be installed in a building and could cause serious bodily harm. Universal demurred to the complaint on the ground that there was no privity between it and the decedent. In affirming the circuit court's order overruling the demurrer, the supreme court said that the broadened rule "appears to be supported by sound reason and the weight of modern authority" and "it is not opposed by any prior decision of this court." As a legal basis for overruling the demurrer, the court quoted from the *Restatement of Torts:*[86]

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.[87]

O. *Invitees*

In *Pleasant v. Mathias*[88] a demurrer had been overruled by the circuit court in an action brought by the plaintiff for injuries

82. 230 S.C. 320, 95 S.E.2d 601 (1956).
83. 237 S.C. 506, 117 S.E.2d 863 (1961).
84. See Annot., 74 A.L.R.2d 1111 (1960).
85. 247 S.C. 267, 146 S.E.2d 875 (1966).
86. RESTATEMENT SECOND, TORTS § 395 (1965).
87. 247 S.C. 267, 271, 146 S.E.2d 875, 877 (1966).
88. 247 S.C. 124, 145 S.E.2d 680 (1965).

received while repairing a glass door to the defendants' shop. On appeal, the defendants sought to support their demurrer by arguing that (1) the services were performed gratuitously, which classified the plaintiff as an invitee to whom the duty of care was discharged when warning was given of the door's condition, and (2) the plaintiff had assumed the risk. The supreme court stated that "while the question is a close one . . . for the purpose of consideration of the demurrer, it cannot be said that the plaintiff was merely an invitee. His sole purpose for going upon the premises was to perform a service for the defendants at the request of the defendants." Without actually deciding on the existence of a master and servant relationship, the court reviewed the status of the relationship in regard to the question of compensation:

> Although it is unquestionably one of the indicia of a contract of employment creating a master servant relation, the receipt of a stated wage is not essential to create, nor does it necessarily establish the existence of, such a relation; the relationship may exist although the servant neither expects or is entitled to any compensation.[89]

Steinmeyer v. Marine Hotel Corp.[90] was distinguished from the present case, and reversal of the circuit court on the defendants' second argument was also refused. A demurrer will not ordinarily be sustained on the grounds of assumption of risk since it is an affirmative defense and a question for the jury.

II. INDIGNITIES

A. *Malicious Prosecution*

By a 3-to-2 decision, the court in *Parrott v. Plowden Motor Co.*[91] held that the defendant had probable cause for prosecuting the plaintiff, which under the general rule[92] barred recovery in

89. *Id.* at 127, 145 S.E.2d at 682 as quoted from 56 C.J.S. *Master and Servant* § 2e (1948). See also Tucker v. Buffalo Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907); Jackson v. Southern Ry., 73 S.C. 557, 54 S.E. 231 (1904).

90. 142 S.C. 358, 140 S.E. 695 (1927). In *Steinmeyer,* a demurrer was sustained on the grounds of assumption of risk as the only reasonable inference. The cases were found to be clearly distinguishable on their facts.

91. 246 S.C. 318, 143 S.E.2d 607 (1965).

92. To maintain an action for malicious prosecution, plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant;

the action for malicious prosecution. Prior to the defendant's action against him, the plaintiff had traded a truck to the defendant and had represented to him that the title was lost but the truck was "paid for in full." A forthcoming duplicate title from the highway department listed an unsatisfied mortgage held by Floyd Motor Company who subsequently verified that the plaintiff owed an outstanding balance. Denying any such balance on several occasions, the plaintiff assured the defendant that the matter would be taken care of. The defendant, advised by a magistrate that he was entitled to a warrant,[93] subsequently instituted the prosecution which terminated in the plaintiff's favor. The majority stated that "the prosecutor is free from damage if there be probable cause for the accusation made,"[94] and that:

> By probable cause is meant the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged. . . .[95] Although malice may be inferred from want of probable cause, a want of probable cause cannot be inferred from any degree of malice.[96]

The evidence revealed that the defendant suspected an existing mixup between the plaintiff and Floyd Motor Company. In view of this, the dissenting judges[97] felt that the defendant should have reasonably concluded that the plaintiff, a man of honest reputation, had not wilfully and knowingly breached any statute.[98] They would have reached a contrary result since:

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(3) termination of such proceeding in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage.

Gibson v. Brown, 245 S.C. 547, 141 S.E.2d 653 (1965); Parrott v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965); *accord,* Prosser v. Parsons, 245 S.C. 493, 141 S.E.2d 342 (1965).

93. S.C. CODE ANN. § 45-157 (1962) makes it a misdemeanor to sell or dispose of any personal property on which any mortgage or other lien exists, without the written consent of the mortgagee or lienee.

94. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). See also Hogg v. Pinckney, 16 S.C. 387 (1880); Fulmer v. Harmon, 3 Strob. 576 (S.C. 1849); 6 S.C.L.Q. 375-76 (1954).

95. *Ibid.* See also Brown v. Bailey, 215 S.C. 175, 54 S.E.2d 769 (1949).

96. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965).

97. *Id.* at 323, 143 S.E.2d at 609 (dissenting opinion).

98. The dissent said it was inferable that plaintiff was charged with violation of S.C. CODE ANN. § 45-4 (1962) instead of § 45-157, *supra* note 93. § 45-4 provides:

> According to the generally accepted view, probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. . . . The prosecutor must not only actually believe in the guilt of the accused, but the belief must also exist in the defendant's mind at the time of the proceeding. . . .[99]
>
> The failure of a person who has received information tending to show the commission of a crime to make such further inquiry or investigation as an ordinary prudent man would have made in the same circumstances, before instituting a proceeding, renders him liable for proceeding without probable cause.[100]

The dissent found the facts warranted the possible inference that the defendant simply became impatient with the plaintiff's disposition of the Floyd situation, and without resorting to any readily available civil remedy, used prosecution to force the matter.

B. *Slander*

The slander action in *Davis v. Niederhof*[101] was based on a statement made by the plaintiff's former employer acting as head of the South Carolina wood procurement division for the defendant West Virginia Pulp and Paper Company. Prior to the action, the plaintiff had been employed as a manager of one of the company's woodyards and had been charged with scaling (measuring) the amount of wood received at the yard. He was fired when his scaling figures began to reflect a large and unexplained variance with similar measurements made as the wood was received at the company's plant. In a subsequent meeting of all the company's woodyard managers, the defendant said: "We are having trouble at Lake City. It looks like another Darlington

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> Any person who shall willfully and knowingly sell and convey any real or personal property on which any lien exists without first giving notice of such lien to the purchaser of such real or personal property shall be deemed guilty of a misdemeanor. . . .

99. Parrott v. Plowden Motor Co., 246 S.C. 318, 329, 143 S.E.2d 607, 612 (1965) (dissenting opinion) as quoted from 34 AM. JUR. *Malicious Prosecution* § 49 (1941).

100. *Id.* at 329, 143 S.E.2d at 612 quoting from 34 AM. JUR. *Malicious Prosecution* § 51 (1941).

101. 246 S.C. 192, 143 S.E.2d 367 (1965).

situation, only there is a shortage of scale not inventory." Most of the attendant employees knew of the Darlington shortage and of the plaintiff's discharge from his Lake City job under suspicion. On the basis of this statement, they had concluded that the plaintiff was dishonest. In answering the defendant's contention that: (1) the statement was not slanderous, and (2) it was made on a privileged occasion and in good faith, the court summarized[102] the pertinent law:

> It is well settled that a crime need not be charged *eo nomine* for the words to be actionable. . . .[103] It is only necessary that the words should, of themselves, or by reference to extraneous circumstances, be capable of the offensive meaning attributed to them.[104]
>
> [T]he alleged slanderous words used must be given their ordinary popular meaning, and if they are susceptible of two meanings, one slanderous and the other innocent, it must be left to the jury to determine from all of the circumstances attending the publication, in what sense the defendant used them.[105] In such a case, the testimony of persons who heard the words uttered as to the sense in which they understood them is admissible....[106] [T]he protection of a qualifiedly privileged occasion extends only to a proper exercise of the privilege.[107]
>
> Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected. And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though he acted in good faith.[108]

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102. Davis v. Niederhof, 246 S.C. 192, 196-200, 143 S.E.2d 367, 369-71 (1965).

103. Porter v. News & Courier Co., 237 S.C. 102, 108, 115 S.E.2d 656, 658-59 (1960).

104. Williamson v. Askin & Marine Co., 138 S.C. 47, 53, 136 S.E. 21, 23 (1926).

105. Nettles v. MacMillan Petroleum Corp., 210 S.C. 200, 205, 42 S.E.2d 57, 59 (1947).

106. Davis v. Niederhof, 246 S.C. 192, 197, 143 S.E.2d 367, 369 (1965).

107. *Id.* at 199, 143 S.E.2d at 370-71.

108. Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951).

In affirming a circuit court judgment in favor of the plaintiff, the supreme court agreed that the question had been properly submitted to the jury.

The court held in *Mason v. S. S. Kresge Co.*[109] that the order refusing a motion which would have required plaintiff to allege the verbatim words complained of in a slander action "deprived the defendant of no substantial right and [was] . . . not appealable before final judgment."

C. *Invasion of Privacy*

The alleged tort in *Shorter v. Retail Credit Co.*,[110] which presented an issue of first impression to the South Carolina Supreme Court, occurred when the defendant's agent ignored "keep out" signs and went to the plaintiff's residence where he courteously and politely asked Mrs. Shorter questions concerning her age, her husband's occupation and salary, the number of children, the age of the house and whether the house was insured against fire and theft by the plaintiffs. The agent, who clearly identified himself as a representative of the defendant, received no information concerning the husband's salary. Recovery was sought on the basis that the defendant had no legitimate motive for obtaining the information which was described by the defendant as routine information for an insuring client. After a review of the facts, the court found that the disclosure concerning insurance was the only basis on which recovery might be possible under existing South Carolina law. It said, however, that "neither the type of publicity nor the subject matter" was a violation of the right of privacy defined in South Carolina as: (1) the unwarranted appropriation or exploitation of one's personality, or (2) the publicizing of one's private affairs with which the public has no legitimate concern, or (3) the wrongful intrusion into one's private activities, in such a manner as to cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[111] In recognition that some jurisdic-

109. 247 S.C. 144, 146 S.E.2d 158 (1966).

110. 251 F. Supp. 329 (D.S.C. 1966).

111. Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966); *accord,* Meetz v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). Though not considered in this situation, some writers would add "placing of plaintiff in a false light in the public eye" as a fourth violation to the right of privacy. See PROSSER, TORTS § 112 (3d ed. 1964).

tions[112] allow recovery as a "right to be left alone" the court said:

> When a plaintiff bases an action for invasion of privacy on "intrusion" alone, bringing forth no evidence of publication on the part of the defendant, it is incumbent upon him to show a blatant and shocking disregard of his rights by the defendant, and serious mental or physical injury or humiliation to himself resulting therefrom. As has been constantly pointed out, the conduct must outrage one of ordinary sensibilities and the hypersensitive person may not recover for actions which are merely rude or inconsiderate.[113]

Consequently, it held that although the plaintiffs were not "left alone" in the most literal sense, the qualified right of privacy which the law protects was not violated.

III. COMMERCIAL HARMS

A. *Wrongful Conversion*

Rimer v. State Farm Mut. Auto. Ins. Co.[114] held in an action for wrongful conversion that the devotion of personal time, employment of counsel and other costs of litigation in pursuit of such action, are not proper subjects on which a recovery may be based.[115]

As a parent case, *Layton v. Flowers*[116] involved a default judgment against Flowers, the former owner of the converted automobile in *Rimer* above, for his negligence in causing an automobile collision. After the collision the Flowers' automobile

112. See, *e.g.*, Pinkerton Nat'l Detective Agency v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. App. 1956).

113. Shorter v. Retail Credit Co., 251 F. Supp. 329, 332 (D.S.C. 1966).

114. 248 S.C. 18, 148 S.E.2d 742 (1966).

115. The court stated:

> Where the rights, or asserted rights, of parties are in conflict, it is inevitable that each party desiring to protect his rights must give time and attention to that end. To do so is not generally an element of damage, although it may be in some situations where loss of earnings is involved, which is not the case here.
>
> Nor do recoverage damages include the expense of employing counsel, except when so provided by contract or statute, which is not the case here.

Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966).

116. 243 S.C. 421, 134 S.E.2d 247 (1964).

was seized by a credit company and sold to a motor company for its fair market value. Considerable repairs and improvements were made on the automobile which was eventually purchased from a dealer by Rimer and further improved. By this time the value of the automobile exceeded the amount which State Farm had paid to its insured Layton in satisfying the Flowers' judgment, and it therefore sought to obtain a collision lien[117] on it. Rimer intervened the plea of a bona fide purchaser for value without notice but was overruled on the authority of *Tate v. Brazier*[118] which held that an innocent third party purchaser without notice will not cut off this lien as established by the legislature. Enforcement of the lien, however, was allowed only to the extent of the fair market value of the automobile before any repairs had been made.

B. *Wrongful Discharge*

In *Burris v. Electro Motive Mfg. Co.*[119] the circuit court had sustained a demurrer to the complaint on the grounds that: (1) it failed to state a cause of action; (2) showed a defect in plaintiff's parties; and (3) showed that under the Labor Management Relations Act,[120] the National Labor Relations Board preempted the court of its jurisdiction. The action was originally brought pursuant to the South Carolina Right to Work Law,[121] but on appeal the plaintiff argued that the defendant's false accusation in regard to her union activity as set out in the complaint would support a cause of action for slander. Finding no allegation of the required publication,[122] the court held that the complaint failed to state a cause of action for slander. It stated that "since the holding of the circuit court to the effect that the state court had no jurisdiction of the subject of the action is unchallenged by any meritorious exception, that holding stands as law of the case, rendering it unnecessary for this court to consider or decide the other questions raised and discussed on the appeal."[123]

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117. S.C. CODE ANN. § 45-551 (1962).
118. 115 S.C. 283, 105 S.E. 413 (1920).
119. 247 S.C. 579, 148 S.E.2d 687 (1966).
120. 29 U.S.C. § 141 (1952).
121. S.C. CODE ANN. §§ 40-46 to -46.8 (1962).
122. See Riley v. Askin & Marine Co., 134 S.C. 198, 132 S.E. 584 (1926).
123. 247 S.C. 579, 583, 148 S.E.2d 687, 688 (1966).