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Torts

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TORTS

I. Products Liability

The Supreme Court of South Carolina moved this state into the mainstream of products liability law in *Mickle v. Blackmon*.[1] The court held that the manufacturer of an automobile has a duty of care in design to minimize the risk of death or serious injury to occupants of the car in the event of collision. The court, in this far-reaching decision, also held that the jury could find the manufacturer liable for damages resulting from defective material placed in the automobile thirteen years prior to the accident.

The plaintiff was injured in May, 1962, when the 1949 Ford in which she was riding collided with an automobile driven by Blackmon. She was impaled upon the gearshift lever, which penetrated her spine, about breast level, causing complete and permanent paralysis of her body below the point of injury. In this suit against Blackmon, Cherokee [Construction Company], Inc., and Ford Motor Co., the jury found actual damages against Cherokee of $468,000 and against Ford of $312,000, but the trial court granted Ford's motion for judgment *non obstante veredicto*.

In affirming the judgment against Cherokee,[2] the court held that the jury was justified in concluding that the risk created by Cherokee — that two automobiles would enter the intersection, each driver thinking that he had the right-of-way — was realized because of Cherokee's negligent failure to guard against it. The jury could also find a causal connection between such negligence and the plaintiff's injuries.

The most important aspect of this case concerns the reasoning used by the court in reversing the judgment for Ford. The court first had to decide whether the manufacturer owed a duty of care in design to minimize the risk of death or serious injury in case of collision.

1. 166 S.E.2d 173 (S.C. 1969). The case is carefully considered in Comment, *Products Liability — Duty of Care in Automobile Design — Fitness for Collision*, 21 S.C.L. Rev. 451 (1969).

2. Cherokee, Inc., a construction company, was widening Black Street and had removed the stop sign controlling traffic on Black. The Mickle automobile was traveling on Jones Street which the driver knew to be a through street. Blackmon, who was unfamiliar with the area and did not know that Jones Street was the favored highway, saw no stop sign. He proceeded into the intersection and the collision resulted.

The only two appellate decisions in which this issue has been decided reached opposite conclusions. The South Carolina court struck a major blow for the consumer, adopting the rationale of *Larsen v. General Motors Corp.*:[3]

> Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, all are foreseeable. Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. . . .[4]

Having established Ford's duty, the court held that the issue of Ford's negligence could be submitted to the jury under common law principles. The jury could reasonably find that Ford should have foreseen the danger in this gearshift lever knob, which defects in design caused to deteriorate upon exposure to sunlight and shatter upon impact with a hard object.

Ford contended that there was no defect in the knob when the automobile left the manufacturer's hands and that Ford was not liable for any injury caused by the deterioration of the knob after thirteen years' use. Mr. Justice Brailsford replied that neither a long-continued lapse of time nor any change in ownership was sufficient standing alone to defeat recovery when there

3. 391 F.2d 495 (8th Cir. 1968) (judgment for plaintiff); *cf.* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966) (judgment for defendant).
4. Mickle v. Blackmon, 166 S.E.2d 173, 186 (S.C. 1969) *quoting* Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968). *See also* Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959) and Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962) (cited by the court).

was clear evidence of an original defect in the product sold.[5] The supreme court, therefore, reversed Ford's judgment *non obstante veredicto* but remanded the case for a new trial because of several erroneous instructions concerning the duty of the manufacturer.[6]

A trend toward requiring greater care and responsibility from manufacturers is reflected in this decision. This case, by widening the scope of the manufacturer's duty, stands in the forefront of this movement.

II. PROXIMATE CAUSE

In *Roumillat v. Keller*[7] the Supreme Court of South Carolina showed its recent tendency to use the "but for" rule in connection with proximate cause, although such a rule is more appropriate to causation-in-fact than to proximate cause. The plaintiff was injured when the defendant Selvey's automobile drove into the opposing lane of traffic and struck the automobile driven by the defendant Keller, which then traveled 105 yards before striking head-on the automobile in which the plaintiff was a passenger.[8] Keller's speed was not the proximate cause of the collision with the Selvey automobile. However, the court held that there was sufficient evidence for the jury to find that but for its excessive speed Keller's automobile could have been so controlled in a distance of 105 yards as to avoid the collision. The facts supported the inference, apparently drawn by the jury, that the momentum generated by the unlawful speed deprived Keller of the ability to control his vehicle in a reasonable manner.[9]

The court in *Zorn v. Crawford*[10] again dealt with proximate cause, using the "but for" rule as its guiding principle. Diane Zorn, age 15, was killed when the automobile in which she was riding collided with one driven by Sanders.[11] The court found

5. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 667 (3rd ed. 1964). *See also* Pryor v. Lee C. Moore Corp., 262 F.2d 673 (10th Cir. 1958) (cited by the court).
6. 166 S.E.2d at 191-93.
7. 167 S.E.2d 425 (S.C. 1969).
8. At the time of the accident, Keller was driving on the proper side of the median strip at 60-65 miles per hour in a 45 mile per hour zone.
9. The plaintiff successfully relied upon the principle that a motorist has the duty to exercise due care to control his vehicle even though it was wrongfully set in motion by the impact of another vehicle. *See* 2 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 105.8, at 322 (3rd ed. 1965).
10. 165 S.E.2d 640 (S.C. 1969).
11. The collision occurred when Sanders suddenly veered into the path of the oncoming Zorn vehicle in order to avoid colliding with the rear of

that the evidence supported a finding of negligence on the part of Crawford's employee, driving a tractor without lights or improperly lighted in violation of Section 46-512 of the South Carolina Code. It was therefore reasonably inferable that, but for the failure of the defendant and his employee to have proper lights, the driver of the vehicle approaching from the rear could have ascertained the tractor's presence on the highway in time to have avoided the collision.[12] Such nonobservance of the statute by the defendant was properly considered a proximate cause of the death of plaintiff's intestate, because the accident was of the type intended to be prevented by observance of the statute.[13] Despite finding that the defendant's statutory violation was negligence *per se* and the proximate cause of the accident, the court remanded the case since the $250,000 awarded was excessive.

In *Fowler v. Coastal Coca-Cola Bottling Co.*,[14] a three-year old child complained of stomach pains three or four minutes after drinking from a newly opened bottle of Coca-Cola. A foreign substance was discovered in the same bottle one and one-half hours later. The child was ill during the night and was taken to the doctor the next morning.[15] The hospital pathologist who examined the bottle determined that it contained a form of yeast.[16]

In reversing a jury verdict in favor of the plaintiff, the court stated that although a violation of the Pure Food and Drug Act, Sections 32-1511 to -1525 of the 1962 Code, is negligence *per se*,[17] it would not support a recovery for damages unless such violation proximately caused the injury.[18] Where, as in this case, the cause of plaintiff's injury may as reasonably be attributed to an act for which the defendant is not liable as

defendant Crawford's improperly lighted farm tractor. The court noted that the fact that the negligence of Sanders may have contributed to the collision did not relieve Crawford of liability if his negligence was a concurring proximate cause of the accident.

12. 165 S.E.2d at 643.

13. Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737 (1946).

14. 167 S.E.2d 572 (S.C. 1969).

15. Dr. Howard Smith testified that at the time in question, there was a rash of virus attacks among children in the community. He said that a virus was the most likely cause of the child's illness.

16. The pathologist testified that where a bottle of Coca-Cola had been opened sixteen hours before, any sugar solution therein would support a growth of yeast and that from what he had observed the yeast could have developed between the time the bottle was opened and the time he examined it.

17. Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641 (1940).

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

to one for which he is liable, the plaintiff has failed to carry the burden of establishing that his injury was proximately caused by the defendant's negligence.[19]

The decision in *Gossett v. Burnett*[20] is important because the Supreme Court of South Carolina has placed itself in a position to answer, for the first time, the question: "[T]o what extent, if any, and under what circumstances may a party, who wrongfully sets off a false emergency alarm, be held liable for injury or damage caused to a third person by acts of one responding to the false alarm."[21]

The supreme court, in reversing the trial court, which had sustained the defendant bank's demurrer to the complaint,[22] stated that the issue of whether the conduct of the driver of the police car was foreseeable by the bank could be decided only in light of the evidence produced at trial.

In a concurring opinion, Mr. Justice Littlejohn stated that the court should provide some guidance for the court which must try the case. He felt that one should not be held liable if there is nothing more than simple negligence, but one who intentionally gives a false alarm has, through his own misconduct, set the stage and should be held accountable for all injuries proximately caused by his action. The demurrer, therefore, should have been overruled; willfulness was alleged against the bank.

III. RES IPSA LOQUITUR IN SOUTH CAROLINA?

In *Jones v. Dague*[23] the court used a principle very similar to *res ipsa loquitur* to support a finding of recklessness.[24] Indeed

19. Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845 (1968).
20. 164 S.E.2d 578 (S.C. 1968).
21. *Id.* at 579.
22. The plaintiff alleged that the defendant bank negligently and willfully set off a false burglar alarm. The defendant Lewis, a policeman, was sent to answer the alarm and collided with the vehicle driven by Burnett, which caused Lewis' vehicle to collide with a vehicle driven by McAllister, knocking the McAllister vehicle into the stationary automobile occupied by the plaintiff. The complaint further alleged that Lewis was negligent in running a red light and failing to warn of his intention to do so. The defendant bank demurred, on the grounds that its act of setting off the false alarm was not the proximate cause of the plaintiff's injury, and that such was caused by the intervening and superseding acts of the defendants Lewis and Burnett, which the bank could not reasonably have foreseen.
23. 166 S.E.2d 99 (S.C. 1969).
24. A car owned by one defendant and being driven by his seventeen-year-old son, also a defendant, went off the road onto the right shoulder of a long sweeping curve to the left. After traveling 228 feet, the driver abruptly turned to the left to get back onto the pavement, but the automobile turned over, causing the death of the plaintiff's fifteen-year-old daughter who was a passenger in the car.

the principle is so similar that one wonders why the court continues to deny that *res ipsa loquitur* is a part of the law of South Carolina.[25] In affirming the judgment for the plaintiff, the court held that, although there was no direct evidence of negligence, circumstantial evidence justified the inference that the accident was due to the driver's recklessness in approaching the curve at an excessive rate of speed and without having the automobile under proper control.

The court also held, with respect to the driver's alleged inexperience, that the standard of care by which the conduct of the driver was to be judged was that of a reasonably prudent man under the same or similar circumstances.[26] This standard applies in South Carolina regardless of the driver's experience in operating the automobile, and regardless of whether the question is one of ordinary negligence or of recklessness under the Guest Statute.[27] The jury, therefore, was correctly instructed that the driver is not excused from liability for injuries caused by him as a result of his inexperience.[28]

The court rejected the view that the mere failure of the deceased to use seat belts constituted negligence or a failure to minimize damages. No evidence indicated that the failure of the deceased to fasten the seat belt contributed in any way to the occurrence of the accident, nor was it shown that she would not have been injured in the same manner if the seat belt had been fastened.[29]

In *Brown v. Ford Motor Co.*[30] the plaintiffs relied solely on the theory of *res ipsa loquitur*. The car in which they were riding went out of control and crashed into a bridge. The plaintiffs alleged that the accident and the resulting injuries and damages were due to the malfunctioning of a defective steering mechanism installed negligently and in violation of the defen-

25. The dissenting opinion of Acting Associate Justice Weatherford in Orr v. Saylor, — S.E.2d — (S.C. 1969), decided after the end of the survey period, examines this issue in detail.
26. The defendant had cited the principle, applied in several jurisdictions, that the extent of the motorist's duty to his guest is to exercise only such skill and judgment as he possesses. *See* Annot., 43 A.L.R.2d 1155 (1955); 5D BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 213.46 (3rd ed. 1966); 60 C.J.S. *Motor Vehicles* § 402 (1969).
27. S.C. CODE ANN. § 46-801 (1962).
28. *See* 5D BLASHFIELD, AUTOMOBILE LAW AND PRACTICE §§ 103.1 and 103.2, (3rd ed. 1965). 60 C.J.S. *Motor Vehicles* § 264 (1949).
29. *See* Annot., 15 A.L.R.3d 1428 (1967).
30. 287 F. Supp. 906 (D.S.C. 1968).

dant's warranties. However, there was no evidence of Ford's negligence, except the very fact of the accident.[31]

In granting the defendants' motions for summary judgment,[32] the court noted that although South Carolina law generally upholds "the liability of a car manufacturer for injuries sustained as a result of a defect in the car's installed mechanism or construction, a plaintiff's right of recovery may not rest on the presumption arising from the mere accident itself or any doctrine of *res ipsa loquitur*."[33] The right of recovery must be based upon proof, either direct or circumstantial, that there was a defect and that it was reasonably probable that such defect was the cause of the injuries. Here the record was devoid of any specification of a defect in the apparatus alleged to be defective. Therefore the proof of the defect and its causal relation to the accident amounted to mere speculation and thus would not, as a matter of law, support the cause of action.

IV. MALPRACTICE

In *Steeves v. United States*,[34] Robert Steeves, eleven years of age, was taken to the Air Force Dispensary on July 21 complaining of stomach pains. After tests one Dr. Mullins diagnosed his condition as possible appendicitis, and he was taken to the Naval Hospital. During the next twenty-four hours there he was seen by two doctors, one an intern, who did not think that his condition was serious. These two refused to consult with other doctors concerning their difference of opinion with Dr. Mullins. On July 22, Dr. Mullins had Robert admitted to the dispensary for more tests, and at 11:00 p.m., Dr. Edwards diagnosed possible acute appendicitis and sent him to the emergency room with instructions to keep his appendix from rupturing. After several delays he was finally put to bed at the hospital at 2:10 a.m. with an observation of possible appendicitis. Sur-

31. The testimony established that the car was eleven months old and had been driven 16,000 miles. It had not been examined following the wreck. Its steering mechanism was never examined. None of plaintiff's three expert witnesses had seen the car or examined its steering mechanism. They testified that at least twenty things could have caused the malfunctioning but affirmed the impossibility of identifying the cause precisely.

32. "[I]ssues of negligence are ordinarily not susceptible of summary adjudication, but when the moving party clearly establishes that there is no genuine issue of material fact, a summary judgment may be rendered." 287 F. Supp. at 909, *quoting* Berry v. Atlantic Coast Line R.R., 273 F.2d 572 (4th Cir. 1960).

33. 287 F. Supp. at 910 (footnotes omitted).

34. 294 F. Supp. 446 (D.S.C. 1968).

gery began at 10:28 a.m. on July 23, and the appendix was found ruptured. As a result of complications stemming from the rupture, the plaintiff's medical expert expressed the opinion, with which the court agreed, that the boy had suffered a 5% impairment of the whole person.

The court stated that a doctor is bound to use reasonable care in the treatment of patients and the rendering of professional services, but he must only possess and exercise that degree of skill which is ordinarily possessed and exercised by members of the profession who are in good standing in the general neighborhood.[35] In light of certain established medical principles,[36] the court, without a jury, held that in light of Dr. Mullins' diagnosis the failure on the part of the other doctors to seek consultations and the failure to keep the plaintiff for observation was a breech of good medical practice, negligence, and the proximate cause of the rupture of the plaintiff's appendix and resulting damage. Judgment was for the plaintiff.

V. SLIPS AND FALLS

In this day of the self-service market and department store, the plaintiff who has slipped on something in the aisle must bear a very heavy burden of proof in order to recover for his injuries.

In *Pennington v. Zayre Corp.*[37] the plaintiff fell injuring herself in the defendant's store when her foot slipped on a transparent plastic bag.[38] The court, in affirming the trial court's

35. *See* Price v. Neyland, 320 F.2d 674 (D.C. Cir. 1963) (cited by the court).

36. A child is owed a greater duty of care by a hospital than is an adult. Kapuschinsky v. United States, 248 F. Supp. 732 (D.S.C. 1966). When appendicitis is suspected, the only adequate remedy is surgery; and, because of the consequences of a rupture, it is dangerous to delay. It is, therefore, better to remove a sound appendix than to delay and allow rupture and gangrene. Rogers v. United States, 216 F. Supp. 1 (S.D. Ohio, 1963), *aff'd* 334 F.2d 931 (6th Cir. 1964). A greater degree of diligence, as the circumstances permit, is imposed upon a doctor in making a diagnosis where other competent doctors have previously made a positive diagnosis in direct conflict with that of the doctor in question. 41 AM. JUR. *Physicians and Surgeons* § 92, at 210 (1942).

37. 165 S.E.2d 695 (S.C. 1969).

38. It has long been recognized in South Carolina that a merchant is not the insurer of the safety of his customers but must use ordinary care to keep the premises in reasonably safe condition. Gilliland v. Pierce Motor Co., 235 S.C. 268, 111 S.E.2d 521 (1959); Anderson v. Belk-Robinson Co., 192 S.C. 132, 5 S.E.2d 732 (1939). To prove negligence the plaintiff is required to show either that the material causing the fall was placed on the floor through an agency of the store or that the merchant had actual or constructive notice

decision to grant the defendant's motion for an involuntary nonsuit, felt that there was no evidence that the bags were on the floor at any time prior to the fall and therefore no proof that the bag had been there sufficiently long for the merchant to be negligent in failing to discover it.

Wimberly v. Winn-Dixie Greenville, Inc.,[39] was based on facts similar to those in *Pennington*.[40] In reversing a judgment for the plaintiff, the court held that no evidence reasonably tended to prove that the rice was on the floor at any particular time prior to the actual fall, and that the jury could not speculate that the rice had been on the floor for such a length of time that the defendant was negligent in failing to discover and remove it.

Mr. Justice Bussey, dissenting, noted that negligence could be proved by circumstantial evidence and that constructive notice could rarely be proved otherwise. He felt the question should have been whether the jury could reasonably infer that the defendant, by exercise of reasonable diligence, should have known of the rice on the floor.[41]

In *Joye v. A & P*,[42] the court reversed a judgment for the plaintiff who slipped on a banana, on the grounds of insufficient evidence[43] to present a jury question as to constructive notice.

The principles applied in these three cases were formulated in an era of small stores, closely supervised by their proprietors. The modern supermarket, by contrast, is invariably either self-

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of the presence of the material on the floor and failed to remove it. "Constructive notice may be proved by showing that the material had been on the floor sufficiently long that the defendant was negligent in failing to discover and remove it." Pennington v. Zayre Corp., 165 S.E.2d 695, 696 (S.C. 1969), *citing* Hunter v. Dixie Homes Stores, 232 S.C. 139, 101 S.E.2d 262 (1957).

39. 165 S.E.2d 627 (S.C. 1969).

40. The plaintiff slipped on rice on the floor of the defendant's store. The floor had been swept at 8:00 a.m., and the fall occurred between 10:00 a.m. and 11:00 a.m. There had been many customers in the store before the plaintiff's fall. Several employees stated that they had seen no rice on the floor prior to the fall, but the store had a variegated floor, upon which rice would be difficult to detect.

41. It appeared to Justice Bussey from the evidence that the rice was not dropped only a moment before the fall by another customer. He felt that a reasonable inference from the evidence was that no other customers were in the store during the whole time that the plaintiff was there. 165 S.E.2d at 630-31.

42. 405 F.2d 464 (4th Cir. 1968).

43. The evidence shows that the floor had not been swept for perhaps thirty-five minutes before the plaintiff's fall and that no one saw the banana peel before the fall. The peel was described as being dark brown in color, having dirt and sand on it.

service or minimally staffed with sales personnel. The customer thus is often the only person handling the merchandise until he checks out of the store.

This change in merchandising technique seems to call for a reconsideration of the law in this area, given the plaintiff's difficulty in establishing constructive notice. Imposing a more stringent duty of inspection on the merchant, thus easing the plaintiff's burden of proof, might well be in order.

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