South Carolina Law Review

Volume 20 | Issue 4 Article 11

1968

Torts

Michael W. Smith

TORTS

I. PHYSICAL HARM

A. *Proximate Cause*

"The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established."[1]

In *Stone v. Bethea*[2] the plaintiff was negligently injured by a third party who had stolen the defendant's car. The defendant had left the automobile parked in front of his laundry with the keys in the ignition. The plaintiff based his allegation on the unattended motor vehicles statute,[3] contending that the act of leaving the keys in the ignition allowed the thief to steal the car and thereby rendered the defendant liable.

In affirming a decision for the defendant, the court held that the statute was not applicable to vehicles parked on private property,[4] and turned its decision on the issue of proximate cause. The court found that the intervening criminal act of theft and the thief's own negligence were the proximate causes of the injury.[5] The defendant, the court concluded, could not have foreseen the intervening theft or the negligence of the thief.[6]

The holding of the court appears to have seriously impaired the applicability of the statute because the court stated that even if it had been decided that the defendant had breached the statute, the proximate cause issue would have demanded the same decision.

B. *Statutory Duty of Care*

The cases of *McCullough v. Gatch* and *Blackwell v. Gatch*[7] were consolidated and heard together on appeal. The plaintiffs ran into a cow belonging to the Palmetto State Hospital and sued the supervisor in charge of the state farm from which

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 282 (3d ed. 1964).
2. 161 S.E.2d 171 (S.C. 1968).
3. S.C. CODE ANN. § 46-491 (1962).
4. *See* Roberts v. Campbell, 157 S.E.2d 867 (S.C. 1967).
5. *See* Johnston v. Atlantic Coast Line R.R., 183 S.C. 126, 190 S.E. 459 (1937).
6. *See, e.g.*, Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312 (1967).
7. 161 S.E.2d 182 (S.C. 1968).

the animal had wandered. The plaintiffs offered no evidence except as to the immediate circumstances of the collision, but the trial court felt that the unexplained presence of the cows on the highway raised a jury issue of whether or not the defendant had breached the duty of care prescribed by a criminal statute dealing with domestic animals running at large.[8] The jury found for the plaintiffs.

Since the statute itself required that the responsible person must have willfully or negligently permitted the animal to run at large, the supreme court had no trouble finding a lack of evidence upon which to base the lower court decision. According to the court the statute did not impose an absolute duty to prevent the escape of livestock, and found that the facts, under the most favorable light, would not help the plaintiffs.

In the case of *Chilton v. City of Columbia*,[9] the deceased drowned when he fell into a water-filled hole, located on the extreme edge of an unimproved shoulder of a street. The action was based on a statutory provision allowing suit to be brought against any town or city when an injury to person or property resulted from the mismanagement of any public way under corporate control.[10]

In reversing the trial court and entering judgment for the defendant, the court held the statute not applicable. It was determined that a defect in a public way within the statutory meaning concerned a physical condition of the *improved* portion, or the existence of such a condition on or overhanging the right of way, making it dangerous for a traveler exercising due care.[11]

C. Duty of Care

In *Rogers v. Schypers*[12] the plaintiff was injured as she climbed a folding stairway. The plaintiff alleged negligence on the part of the defendant, a corporation engaged in the construction and selling of homes, and its president. The complaint basically stated that the stairway was installed by

8. S.C. CODE ANN. § 6-311 (1962).
9. 250 S.C. 132, 156 S.E.2d 419 (1967).
10. S.C. CODE ANN. § 47-70 (1962).
11. *Accord*, Stanley v. South Carolina State Highway Dep't, 249 S.C. 230, 153 S.E.2d 687 (1967) (emphasis added).
12. 161 S.E.2d 81 (S.C. 1968).

fastening it to the surrounding molding instead of properly and safely nailing it in place. The question, one of novel impression in South Carolina, was stated by the court to be: After title passes, is a builder-seller of new houses liable to the purchaser or his invitees for injuries sustained as a result of negligent construction, and is such builder-seller liable to such parties if he negligently or willfully fails to disclose such defects of which he knew or should have known?

In affirming the overruling of the defendant's demurrer, the court applied the rationale of *MacPherson v. Buick Motor Co.*,[13] and stated that a builder-vendor of new houses owes the same duty of care to purchasers as does the manufacturer of chattels, which, if negligently constructed, are reasonably certain to injure third persons.[14]

The deceased was killed, in *Way v. Seaboard Airline Railroad*,[15] when struck by one of the defendant's trains. It was found that at the time of the accident the deceased was a trespasser, having entered an area on the track which was prohibited from public travel. The court concluded, therefore, that the defendant owed the deceased only the duty of not willfully injuring him.[16] In response to the plaintiff's allegation that the train was traveling at an excessive rate of speed, the court found that the railroad owed a trespasser no duty to maintain any particular speed.[17]

D. Assumption of Risk

The plaintiff, in *Honea v. West Virginia Pulp & Paper Co.*,[18] was employed by a contractor who had been engaged to install new equipment in the defendant's building. While performing his job as a welder, he was injured by a work elevator used to transport materials between the various floors of the building. Suit was brought in federal district court and a verdict rendered for the defendant. Among the trial court's instructions to the jury was assumption of risk.

On appeal, plaintiff contended that such an instruction was error since the theory rested on contract and was not

13. 217 N.Y. 382, 111 N.E. 1050 (1916).
14. *See* Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966).
15. 270 F. Supp. 440 (D.S.C. 1967).
16. *See* Kershaw Motor Co. v. Southern Ry., 136 S.C. 377, 134 S.E. 377 (1926).
17. *Accord*, Ingle v. Clinchfield R.R., 162 Va. 131, 192 S.E. 782 (1937).
18. 380 F.2d 704 (4th Cir. 1967).

available in cases, such as the present one, where there was no master-servant relationship. In affirming the lower court, the appellate court held that, although the defense of assumption of risk had often been limited to cases in which a master-servant relationship existed, such relationship was not a prerequisite under South Carolina law. In South Carolina, the basis of the defense is not contract but consent, and is therefore available without a master-servant relationship.[19]

E. Last Clear Chance

In *Thomas v. Bruton*[20] the deceased, a minor, was killed as he jerked free from a playmate and his momentum carried him into the road and in front of the defendant's truck. The facts revealed that the defendant was driving in a manner lawfully required of him and could not have avoided the accident.

In holding for the defendant, the court rejected the plaintiff's allegation of "last clear chance," and stated that the sole negligence of the deceased caused the accident.[21] Since the doctrine of "last clear chance" would presuppose negligence on the part of the defendant, and there was none in this case, the doctrine was held not applicable.

In *Way v. Seaboard Airline Railroad*[22] in which there was evidence that the deceased had been drinking but had not been rendered helpless, the court again held that the doctrine of "last clear chance" was not applicable.[23]

In *Smith v. Blackwell*[24] the deceased was lying on a rural highway at night, dressed in tan clothing, when he was struck by the defendant's vehicle. The defendant testified that he thought the deceased was a brown bag or sack until it was too late to avoid the accident. Other witnesses testified that

19. *See* Baker v. Clark, 233 S.C. 20, 103 S.E.2d 395 (1958). *But see* Lawless v. Fraser, 244 S.C. 501, 137 S.E.2d 591 (1964); Cooper v. Mayers, 234 S.C. 491, 109 S.E.2d 12 (1959).
20. 270 F. Supp. 33 (D.S.C. 1967).
21. *See* S.C. CODE ANN. § 46-435 (1962) (Pedestrians must yield right of way to vehicular traffic when crossing anywhere other than at intersection or crosswalk); S.C. CODE ANN. § 46-433 (1962) (No pedestrian can suddenly leave curb and walk or run into path of vehicle). *See also* Carma v. Swindler, 228 S.C. 550, 91 S.E.2d 254 (1956).
22. 270 F. Supp. 440 (D.S.C. 1967).
23. *See generally* Jones v. Atlanta-Charlotte Air Line Ry., 218 S.C. 537, 63 S.E.2d 133 (1944).
24. 156 S.E.2d 867 (S.C. 1967).

they had passed the deceased and had identified him as a person, while one witness testified that he also had thought the deceased to have been a crocus sack.

In affirming a judgment for the plaintiff, the court concluded that although the deceased had been negligent in lying in the road, the jury could have found that the negligence of the deceased had become only a condition of the accident and did not combine and concur with the negligence of the defendant as the proximate cause of the injury.[25] The decision was reached by applying the formula of "last clear chance" and finding that if the defendant had the "last clear chance" to avoid the injury, and did not exercise it, only the defendant's conduct was the proximate cause of the injury. On the facts this result seems rather startling.

F. Self-Defense

The defendant, in *Silas v. Bowen*,[26] owned a parking lot. The plaintiff was a professional basketball player stationed at Fort Jackson. The plaintiff had a friend's automobile repaired on the defendant's parking lot by a third person who was not an employee of the defendant. When the car did not function properly, the plaintiff returned with friends and demanded that the defendant, who had had nothing to do with the repairs, fix the automobile. The defendant refused and asked the plaintiff to leave. The plaintiff cursed the defendant and grabbed his shoulder. The defendant reacted by reaching for a gun to frighten the plaintiff and accidently shot him in the foot. The plaintiff brought an action alleging assault and battery.

In upholding the defendant's plea of self defense, the court held that when one is on his own property he does not have to retreat. The court also held that while abusive words alone will not allow the use of a deadly weapon, fear of bodily harm does warrant such action.[27] Furthermore, when the defendant asked the plaintiff to leave, the plaintiff became

25. *See* Jones v. Atlanta-Charlotte Air Line Ry., 218 S.C. 537, 63 S.E.2d 133 (1944).
26. 277 F. Supp. 314 (D.S.C. 1967).
27. *See* City of Gaffney v. Putnam, 197 S.C. 237, 15 S.E.2d 130 (1941). *See also* State v. Self, 225 S.C. 267, 82 S.E.2d 63 (1954). The court stated that in considering whether one is in reasonable fear of bodily harm, the difference in the physical size of the parties may be considered.

a trespasser and the defendant could exhibit whatever force necessary to remove the plaintiff.[28]

G. Contributory Negligence

In *Brave v. Blakely*[29] the plaintiff stopped his car on the side of the road at night, failing either to display cautionary lights or to give any warning. Subsequently, defendant McCants ran into the plaintiff, and thereafter defendant Blakely ran into defendant McCants. Defendant McCants counterclaimed against the plaintiff and filed a cross-complaint against defendant Blakely. The trial court rendered judgment in favor of McCants against both parties.

The trial court found that McCants had been momentarily blinded by oncoming lights. Whether or not one who proceeds under such conditions is negligent is a question for the jury.[30] The supreme court therefore affirmed the decision against the plaintiff in favor of McCants. It further held that Blakely was following too closely behind McCants, thereby making Blakely liable for injuries sustained by McCants.

In *Simmons v. Atlantic Coast Line Railroad,*[31] the defendant admitted that the statutory signals[32] were not given before its train ran into the deceased at a crossing. The defendant, however, alleged that the plaintiff, a fifteen year old girl, should be denied recovery on the basis of her gross or willful negligence.[33] The facts showed that the deceased, while aware of the crossing, was not "familiar" with it, nor was she driving at an excessive speed at the time of the accident. There was also evidence of a coal truck loading near the scene, but there was no evidence that it interferred with the deceased's view.

The trial court would not find as a matter of law that the deceased had been contributorily negligent, and submitted the issue of contributory gross or willful negligence to the jury. In affirming the decision the supreme court stated that the party alleging contributory negligence has the burden of

28. Shramek v. Walker, 153 S.C. 88, 149 S.E. 331 (1929).
29. 157 S.E.2d 726 (S.C. 1967).
30. *See* Beverly v. Saruis, 246 S.C. 470, 144 S.E.2d 220 (1965).
31. 157 S.E.2d 726 (S.C. 1967).
32. S.C. CODE ANN. § 58-743 (1962).
33. S.C. CODE ANN. § 58-1004 (1962).

proving it. Failure to do so affirmatively results in the presumption that the plaintiff exercised ordinary care,[34] and the defendant is not entitled to a directed verdict. It is presumed, moreover, that in the absence of proof to the contrary, a person is exercising due care while traveling and is depending on the proper functioning of the statutory warning signals required of railroads.[35]

In *Rowe v. Frick*[36] the plaintiff was injured when he ran across a highway and into the side of the defendant's automobile. The plaintiff claimed that the defendant could not assert the defense of contributory negligence because the plaintiff was nine (9) years of age and therefore did not have the requisite capacity to be contributorily negligent.

In affirming for the defendant, the court stated that while the presumption is that a child between the ages of seven (7) and fourteen (14) does not have the capacity of judgment and discretion to render him contributorily negligent, such presumption may be rebutted by evidence of capacity.[37] The court noted that the father and mother of the child had testified that the child did know how to cross the highway properly. Therefore, evidence of capacity had been established sufficiently to send the issue of contributory negligence to the jury.

The court, in *Dixon v. Weir Fuel Company*,[38] held that the deceased driver was contributorily negligent in driving while intoxicated and that the deceased passenger was contributorily negligent in riding with a driver, knowing the driver was intoxicated.

II. PERSONAL TORTS

A. Slander and Libel

In an action brought before a board of arbitrators, one Corbin was representing a group of insurance companies against another group. Each group submitted their facts and arguments to the board in the form of letters. Corbin brought

34. Thornton v. Seaboard Air Line Ry., 98 S.C. 248, 82 S.E. 433 (1914).
35. Thompson v. Southern Ry., 208 S.C. 49, 37 S.E.2d 278 (1946).
36. 159 S.E.2d 47 (S.C. 1968).
37. *See* Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942).
38. 160 S.E.2d 194 (S.C. 1968).

this action alleging that the letter presented to the board by the defendant had libeled him in his capacity as an attorney and adjuster. While admitting that the libelous words were qualifiedly privileged, the plaintiff asserted that the defendant had gone beyond the immunity afforded by a qualified privilege.

The issue, one of novel impression in South Carolina, concerned the extent to which the doctrine of privilege applied in cases before a board of arbitration.

The court stated, in *Corbin v. Washington Fire & Insurance Co.*,[39] that although the general rule of absolute immunity has normally been afforded only to judicial and legislative proceedings and acts of state,[40] an arbitration is an exception.[41] The court based its conclusion on public policy, stating that an arbitration is quasi-judicial and is favored by the law.[42] The arbitration proceedings, therefore, as well as the arbitrators themselves, should be clothed with an absolute immunity. The court continued that only in cases where it was determined that the libelous statement was not relevant to the proceedings would there be an action for damages.[43]

In *Oswalt v. State Record Co.*[44] the plaintiff, a police officer, had chased a speed violater who, during the chase, had an accident in which two people were killed.

The defendant newspaper published an editorial criticising the action of the police in their pursuit tactics and named the plaintiff in referring to this specific instance.

The court stated that the article came within the tort doctrine of "fair comment."[45] The newspaper, therefore, had a qualified privilege as a matter of law to discuss the actions of the defendant within the confines of his public office. The

39. 208 F. Supp. 393 (D.S.C. 1968).
40. Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951).
41. Other exceptions have also been made. *See, e.g.*, Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948) (suit against an executor alleging defamation in a will which had been filed); State v. Drake, 122 S.C. 350, 115 S.E. 297 (1922) (alleged defamation arising from a letter written to rebut charges made in a fraternal organization).
42. *See* Bishop v. Valley Falls Mfg. Co., 78 S.C. 312, 58 S.E. 939 (1907).
43. McKesson & Robbins, Inc. v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945).
44. 158 S.E.2d 204 (S.C. 1967).
45. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 110, at 812-16 (3d ed. 1964).

court concluded that an action for damages would lie only if the criticism was not honest and fair or was made with actual malice.[46] Furthermore, the court held that under the constitutional restriction instituted by *New York Times Co. v. Sullivan*,[47] a "public official" cannot be awarded, by a state court, damages arising from defamatory statements concerning his office unless the official can show actual malice. In the present case the plaintiff offered no proof of actual malice.

B. Malicious Prosecution

In *White v. Coleman*,[48] our court restated the general rule that to sustain successfully an action for malicious prosecution, the plaintiff must show that the action instituted against him was malicious, without probable cause, and that the action terminated in favor of the plaintiff.[49] In applying these principles, the test of probable cause is one of reasonableness.

Where a solicitor had advised the defendant to bring a particular action[50] and where the grand jury returned a "true bill," the test of reasonableness had been met and probable cause established. Therefore, the plaintiff failed to establish one of the necessary elements of malicious prosecution.

C. Fraud

In *Davis v. Upton*[51] the defendant had accepted a $900.00 deposit from the plaintiff toward the construction of a house. The defendant had stated that he would arrange for the plaintiff's financing and that if the construction or the financing could not be arranged, the deposit would be returned. When financing was not arranged and the defendant refused to return the deposit, an action for fraud and deceit was instituted.

46. Cartwright v. Herald Publishing Co., 220 S.C. 492, 68 S.E.2d 415 (1951).
47. 376 U.S. 255 (1964).
48. 277 F. Supp. 292 (D.S.C. 1967).
49. *See* Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961). *See also* Harrelson v. Johnson, 119 S.C. 59, 111 S.E. 882 (1921). This case stated that the entry of a *nolle prosequi* by a solicitor is sufficient "termination" of an action to support a charge of malicious prosecution.
50. Prosser v. Parson, 245 S.C. 493, 141 S.E.2d 342 (1965).
51. 157 S.E.2d 567 (S.C. 1967).

In affirming a non-suit against the plaintiff, the court, after stating the general requirements for maintaining a fraud and deceit action,[52] held that the fraud must relate to an existing or pre-existing fact before the action will lie. An exception occurs when one promises to do a certain thing and at the time of the promise has no intention of carrying it out.[53] Here, the facts did not show a false intention on the part of the defendant at the time of the making of the contract, and the mere breach of a contract does not, in and of itself, constitute fraud.[54]

MICHAEL W. SMITH

52. *See* Parks v. Morris Homes Corp., 245 S.C. 461, 141 S.E.2d 129 (1965). *See also* Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959).
53. Thomas & Howard Co. v. Fowler, 225 S.C. 354, 82 S.E.2d 454 (1954).
54. *See generally* Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959).