South Carolina Law Review

Volume 22 | Issue 4 Article 13

1970

Torts

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TORTS

I. Physical Injury to Person or Property

A. *Duty of Care*

In *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*[1] the plaintiff's cause of action was based on the alleged negligence of the defendant, a subcontractor, in failing to complete in a timely manner the installation of a roof to a new addition to plaintiff's store and in failing during the interim period to cover the openings in the unfinished roof. The complaint alleged that the defendant knew, or should have known, that, when it rained, water would pour through the openings, flood plaintiff's adjacent storeroom, and damage the room and any goods stored there. The trial court, granting a nonsuit, reasoned that the defendant's liability, if any, was to the primary contractor in contract, and that the defendant subcontractor owed no duty to the third-party plaintiff arising from a mere nonfeasance.[2] On appeal, the supreme court found, however, a duty, independent of contract, based on the common law duty to exercise due care in order not to injure or damage others. The court, avoiding the question of a subcontractor's liability to third parties for a nonfeasance, found instead an inferable misfeasance in the improper performance of the contract and held that liability "will attach if the act of omission of a duty owed another . . . is the direct, proximate and efficient cause of the injury."[3] This case lays a firm foundation in South Carolina for recovery in tort by an injured third party against a subcontractor who has breached his contract with the prime contractor.

The duty of care owed by a motorist in South Carolina to a child who is under adult supervision was defined in the case of *Tetterton v. Foggie.*[4] Here, the plaintiff, a minor, was injured by the defendant's moving automobile when the child jerked from the hand of his babysitter and darted into the side of the passing automobile.

1. 253 S.C. 537, 172 S.E.2d 120 (1970).
2. *See* Spiegler v. School Dist. of New Rochelle, 39 Misc. 2d 946, 242 N.Y.S.2d 430 (1963) (holding that a nonfeasance is not tortious as to a third party beneficiary).
3. Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 175, 195 S.E. 247, 251 (1938). *Accord,* Benedict v. Marks Shows, 178 S.C. 169, 182 S.E. 299 (1935).
4. 172 S.E.2d 369 (S.C. 1970).

In deciding this case, the court reiterated its position taken in *Herring v. Boyd*[5]: a motorist is held to a greater duty of vigilance and caution when in the presence of children than when in the presence of adults. However,

> [w]hen a child, who is under adult restraint, breaks away from such adult and darts into the path of a motorist who is observing the rules of the road with respect to speed, control, and who is maintaining a proper lookout, the resulting injury . . . is not actionable.[6]

The court reasoned that a prudent person could assume that an accompanying adult would guard against peril to the child and noted that a motorist is not an insurer of a child's safety. The court concluded, however, that whether the defendant had met the proper standard of care would depend on the facts of the individual case, which implies that the "reasonable prudent man" still defines the standard of conduct to which motorists will be held.[7]

In *Turner v. Sinclair Refining Co.*,[8] which involved a suit for personal injuries received by the plaintiff while loading his gasoline tanker at the defendant's petrol facility, the South Carolina Supreme Court restated and reaffirmed the nature of the duty owed by a property owner to a business invitee. The court held that due care must be exercised to keep the premises in a reasonably safe condition and, additionally, that a landowner must warn such a business invitee "of any latent perils."[9] In so holding, the court cited no specific authority and stated that none was required for this established rule. Noting, however, that the defendant was not an insurer of the plaintiff's safety, the court implied that liability for latent defects will lie only where the defect is known or reasonably discoverable; this is the majority view and is consonant with prior South Carolina decisions.[10]

5. 245 S.C. 284, 140 S.E.2d 246 (1965).
6. Tetterton v. Foggie, 172 S.E.2d 369, 372 (S.C. 1970). *See* Brown v. Liberty Mut. Ins. Co., 234 La. 860, 101 So. 2d 696 (1958).
7. Most jurisdictions demand that a driver exhibit extra caution when in the presence of children, but also recognize that a driver is not an insurer against their injury; therefore, having taken proper precautions, a driver will not be held liable for injuries that he could not have reasonably prevented. *See* 60A C.J.S. *Motor Vehicles* § 396(2) (1969).
8. 254 S.C. 36, 173 S.E.2d 356 (1970).
9. *Id.* at 42, 173 S.E.2d at 359.
10. Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580 (1962); Bolen v. Strange, 192 S.C. 284, 6 S.E.2d 46 (1939). This is the overwhelming majority opinion. *See* 65 C.J.S. *Negligence* § 63(46) (1969).

B. *Contributory Negligence and Assumption of Risk*

Turner v. Sinclair Refining Co.[11] also involved questions of plaintiff's contributory negligence and assumption of risk. The plaintiff was injured while working upon the defendant's slippery, self-service petrol platform. Considering both questions as a single issue, the court noted that assumption of a known risk associated with one's endeavor is not dispositive of any question of liability unless that risk was the proximate cause of the injury. Furthermore, the defendant must show that any contributory negligence on the part of the plaintiff was characterized by "willfulness" before such contributory negligence will bar the plaintiff's recovery[12]; simple contributory negligence is thus no defense.[13] Both the issues of proximate cause and willfulness were held to be jury questions.

In *Varner v. Ballenger Paving Co.*[14] the court adopted language from *Trantham v. Gillioz*,[15] in ordering a directed verdict against a plaintiff grievously injured in a collision with a dump truck parked at dusk along an uncompleted but accessible stretch of super-highway. Quoting a statement from *Trantham* concerning travel on a road obviously under construction, the court said:

> Under such conditions the traveler must use and exercise his faculties to see and discover and to so manage his automobile that he may, by the exercise of care commensurate with the circumstances, avoid any dangers and difficulties which he might encounter . . . . He must proceed with caution. And the duty to use such care extends not only to the avoidance of particular dangers which are known or apparent, but also to the anticipation and discovery of such obstructions as may be discovered by the exercise of due care.[16]

In directing the verdict, the court took note of the undisputed testimony of eyewitnesses that the plaintiff's car was traveling at

11. 254 S.C. 36, 173 S.E.2d 356 (1970).
12. Wilfulness was defined by the court as the "conscious failure to use due care." *Id.* at 44, 173 S.E.2d at 360.
13. *Accord,* Dawson v. South Carolina Power Co., 220 S.C. 26, 66 S.E.2d 322 (1951); Marks v. I.M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943). Simple contributory negligence, which is merely a lack of due care, ceases to be a defense when the injury complained of is shown to have been done willfully and purposely or where it results from such gross negligence as would imply wantonness or recklessness.
14. 173 S.E.2d 789 (S.C. 1970).
15. 348 S.W.2d 737 (Mo. 1961).
16. *Id.* at 741-42.

an excessive rate of speed and that other motorists had been able to identify the obstruction and pass without difficulty. By so ruling, the court requires that persons who would travel on uncompleted stretches of road assume the risk of dangers created by construction activities.[17]

C. *Burden of Proof: Res Ipsa Loquitur*

In *Orr v. Saylor*[18] the plaintiff was denied recovery for injuries received when she stepped from her automobile which defendant's agent had parked over a grease pit in their filling station, walked to the front of the car, and then slipped on accumulated grease and fell into the pit. There were no witnesses to testify for the plaintiff other than herself; therefore, the court ordered a directed verdict for the defendants upon a finding that the plaintiff had failed to support her allegations of negligence. Missing from the testimony was any evidence of where the grease had come from, how much was there, how long it had been there, and whether or not the defendant could have discovered and removed it through the exercise of due care.

In a vigorous dissent an acting associate justice, pointing to the evidential hardships faced by plaintiffs in similar situations, argued the desirability of South Carolina's adopting the doctrine of *res ipsa loquitur*. The majority, taking note of this dissent, indicated a willingness to re-examine its position regarding *res ipsa loquitur*, but only in a "factually appropriate" case wherein the issue is briefed by counsel.[19] Though just what constitutes a "factually appropriate" case was not defined, a not unfavorable attitude on the part of the court toward this rule of evidence is clear.

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17. *See also* Taylor v. South Carolina State Hwy. Dep't, 242 S.C. 171, 130 S.E.2d 418 (1963), where the court held that there was no inference of any negligence of the defendant where a motor grader, on the road but in plain view, was struck by plaintiff. This appears to be in accord with the rule in most other jurisdictions that only ordinary care is required of drivers in keeping a proper lookout, but that the driver is bound to take notice of potential dangers if there is something to put him on his guard. See 60 C.J.S. *Motor Vehicles* §§ 201(5), 201(7) (1969).

18. 253 S.C. 155, 169 S.E.2d 396 (1969).

19. South Carolina, along with Michigan and Pennsylvania, is in the undisputed minority in failing to adopt this doctrine by name. *See* 65A C.J.S. *Negligence* § 220.3 (1969). South Carolina's position has, however, deteriorated in areas involving relationships such as bailments, master-servant, passenger-carrier, and bank-depositer, where there is privity between the parties. In these areas, negligence law will recognize a *prima facie* case predicated solely upon a presumption or inference. Orr v. Saylor, 253 S.C. 155, 164, 169 S.E.2d 396, 400 (1969) (Weatherford, A.A.J., dissenting).

D. *Liability of Landlord to Tenant*

The non-liability of a landlord to a tenant for bodily injuries arising out of the landlord's failure properly to make repairs on the leased premises was illustrated in *Sheppard v. Nienow*.[20] In *Sheppard* the plaintiff, a small child, was injured while being carried by his mother who tripped after dark on a metal stake located on their rented property in the defendant's trailer park. The plaintiff alleged negligence on the part of the defendant in failing to replace burned out lights in nearby lamp posts and in failing to remove the stake from the plaintiff's yard, both acts having been requested.

The court pointed out that there was no legal duty involved here which would support an action *ex delicto*. Noting that the parties could vary their legal relationship so as to impose a duty to repair, the court reaffirmed the oft-stated South Carolina view that any such failure to repair under such an agreement would give rise only to an action *ex contractu*. In an action *ex contractu* damages for personal injuries to tenant or family are not recoverable.[21]

E. *Attractive Nuisance*

The fact that a dirt clod was not viewed by the court as an inherently dangerous instrumentality was dispositive of the issue raised in the case of *Kirven v. Askins*.[22] This action was brought to recover for injuries received by the minor plaintiff when struck in the eye by a dirt clod while he was at a construction site under the control of the defendant. This suit was founded upon two basic theories: the first was the theory of attractive nuisance; the second was its sister theory as espoused in *Everett v. White*.[23] The first theory states that, where the owner or occupier of grounds brings or artificially creates something thereon which by its nature is especially attractive to children and at the same time dangerous to them, he must take reasonable care to see that the dangerous items are so guarded that the children will not be injured by them.[24] Under the

20. 254 S.C. 44, 173 S.E.2d 343 (1970).
21. *See* Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963); Pendarvis v. Wannamaker, 173 S.C. 299, 175 S.E. 531 (1933); Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932); RESTATEMENT (SECOND) OF TORTS § 356 (1965).
22. 253 S.C. 110, 169 S.E.2d 139 (1969).
23. 245 S.C. 331, 140 S.E.2d 582 (1965).
24. Additionally, unless the child goes on the property by reason of the temptation of the very instrumentality which is held to be the attractive nuisance, he cannot recover. Hancock v. Aiken Mills, Inc., 180 S.C. 93, 185 S.E. 188 (1936).

Everett theory, where the dangerous thing may not be, strictly speaking, inherently attractive to children, yet where it is left so exposed that children are likely to come in contact with it, the responsible person is charged with the duty of taking reasonable pains to prevent injury to them.[25] In both instances the defendant's duty of care arises from maintenance of an inherently dangerous instrumentality; a commonplace clod of dirt was not viewed to be such.

This holding is consistent with decisions in other jurisdictions which have held that lime putty,[26] unslaked lime,[27] a piece of shingle,[28] and a pile of sand[29] are not inherently dangerous.

F. *Doctrine of Sudden Emergency*

In *Poulos v. James*[30] the court recognized that the doctrine of sudden emergency[31] may be applicable in cases involving rear-end automobile collisions. At issue was the question of whether the sudden stopping of a preceding vehicle, which results in a rear-end collision, is a normal hazard, or whether it is such an unexpected event as to make the doctrine available to the rear motorist. Noting that other courts have applied the doctrine in rear-end collision cases,[32] the South Carolina Supreme Court held that, absent anything which would put one on notice otherwise, a driver is entitled to presume that vehicles being driven to the front will be operated in accordance with traffic laws and with due care. Consequently, the court held that a charge as to the doctrine of sudden emergency was proper and that the issue of contributory negligence on the part of the rear driver such as would make the doctrine inapplicable was properly submitted to the jury.[33]

25. *See* Lynch v. Motel Enterprises, Inc., 248 S.C. 490, 151 S.E.2d 435 (1966).
26. Camp v. Peel, 33 Cal. App. 2d 612, 92 P.2d 428 (1939).
27. Latta v. Brooks, 293 Ky. 346, 169 S.W.2d 7 (1943).
28. Massino v. Smaglick, 3 Wis. 2d 607, 89 N.W.2d 223 (1958).
29. Landman v. M. Susan & Associates, Inc., 63 Ill. App. 2d 292, 211 N.E.2d 407 (1965).
30. 174 S.E.2d 152 (S.C. 1970).
31. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 (3d ed. 1964): "[A]n actor who is confronted with an emergency is not to be held to the standard of conduct normally applied to one who is in no such situation."
32. *See* Harris v. Clark, 251 Iowa 807, 103 N.W.2d 215 (1960); Hill v. Hill, 168 Kan. 639, 215 P.2d 159 (1950); Jaeger v. Estep, 235 Ore. 212, 384 P.2d 175 (1963); Annot., 80 A.L.R.2d 76 (1961).
33. The doctrine is not available if the emergency has resulted from the negligent acts of the party seeking to invoke it. For an analysis of the doctrine of sudden emergency in South Carolina, *see* Wise, *The Sudden Emergency Doctrine As Applied In South Carolina,* 20 S.C.L. REV. 408 (1968).

G. *Guest Statute*

The South Carolina Guest Statute[34] denies any cause of action for injury to a passenger riding without payment against an owner or operator of a motor vehicle, unless the injury results from an accident which was "intentional" or was caused by the owner's or the operator's "heedlessness" or by his "reckless disregard for the rights of others."[35] In *Dearybury v. Albert*,[36] brought under this statute, the plaintiff and the defendant were both minors, sixteen years of age. The South Carolina Supreme Court reversed a jury verdict for the defendant on the grounds that the trial judge's charge, to the effect that a guest can only hold the driver to such a standard of care as the driver's experience and driving proficiency allow, was erroneous. The court held that the proper measurement of tortious conduct in such a case is that standard based on the actions of "a person of ordinary reason or prudence"[37] acting under similar circumstances. The court said that this was true whether the question was one of simple negligence or one of recklessness under the guest statute.[38] This decision, which is directly contrary to the position taken in most jurisdictions regarding the standard of care to which a guest is entitled,[39] significantly eases the plaintiff's burden of proof in cases involving an allegedly unskilled driver.

H. *Assault and Battery*

In *May v. Gentry*[40] the court held that, in a case dealing with alleged assault and battery, to which reasonable force used in ejecting a trespasser is a recognized defense, it is not necessary to charge that a trespasser must be given an opportunity to depart,[41] since this fact is implicit in the use of "reasonable

34. S.C. CODE ANN. § 46-801 (1962).
35. *Id.* "Intentional" means causing the act purposely, willfully or designedly; "heedless" means careless; and "reckless disregard of the rights of others" means wanton misconduct evincing a reckless indifference of consequences to the life, limb, health, reputation, or property rights of another. Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935).
36. 253 S.C. 263, 170 S.E.2d 15 (1969).
37. Suber v. Smith, 243 S.C. 458, 134 S.E.2d 404 (1964).
38. Jones v. Dague, 252 S.C. 261, 166 S.E.2d 99 (1969).
39. *See* 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 501 (1963); 43 A.L.R.2D 1155 (1955); 60 C.J.S. *Motor Vehicles* § 402 (1969). Most courts hold in accord with the trial judge's charge that a guest can only hold the driver to such a standard of care as the driver's experience and driving proficiency allow.
40. 174 S.E.2d 764 (S.C. 1970).
41. *Accord,* State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928).

force."[42] This standard of temperance demanded of a landowner is born of common sense; consequently, this decision merely further identifies the "reasonable man."

II. INDIGNITIES AGAINST THE PERSON

A. *Abuse of Process*

Bell Lines, Inc. v. Strickland[43] involved an action brought for freight charges allegedly due on a shipment of tires. The defendant counterclaimed alleging, *inter alia*, "abuse of process" in that prior to the commencement of the action the plaintiff had maliciously harassed the defendant in order to collect a non-existent debt and had otherwise injured the defendant's credit. The court, sustaining the plaintiff's demurrer to the counterclaim, held that mere commencement of a civil action for the purpose of obtaining jurisdiction of the defendant does not constitute the tort of abuse of process which is the "malicious misuse or perversion of [legal] process for an end not lawfully warranted by it."[44] Such definition of abuse of process is in accord with the scope of this tort in South Carolina and elsewhere.[45]

B. *Invasion of Privacy*

In *Gantt v. Universal C.I.T. Credit Corporation*[46] the plaintiff charged that defendant's agents had invaded her right of privacy by actions allegedly designed to embarrass, humiliate, and otherwise harass the plaintiff into compelling her husband to make mortgage payments owed solely by the husband to the defendant. The defendant, demurring, claimed that mere oral declarations do not support the action and that the communications complained of were of a purely private nature for the permitted purpose of collection of a debt by a creditor; the trial court overruled the demurrer.

On appeal from this ruling the supreme court acknowledged that the tort of invasion of privacy exists in South Carolina,[47]

42. *See* State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955), as to use of reasonable force; *see* State v. Bradley, 126 S.C. 528, 120 S.E. 248 (1923), for a summary of the rights of a landowner to eject a trespasser.
43. 173 S.E.2d 788 (S.C. 1970).
44. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967).
45. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 876 (3d ed. 1964). The "malice" required, except as to punitive damages, is not spite or ill will, but rather the improper purpose itself for which the process is used.
46. 173 S.E.2d 658 (S.C. 1970).
47. *See* Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956); Holloman v. Life Ins. Co., 192 S.C. 454, 7 S.E.2d 169 (1940).

but noted that the issues of whether an oral declaration will support the action[48] and to what extent a creditor can pursue the wife of a debtor are still open questions of significance in South Carolina. Consequently, the court refused to decide these questions on the pleadings and affirmed.

It should be noted, however, that the Ohio courts have found such vicious and intentional harassment by a collection agency, as here alleged, to be an invasion of privacy.[49] The Ohio court stated:

> An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[50]

If the allegations in *Gantt* are true, a similar finding by the South Carolina Supreme Court of an actionable invasion of privacy would seem to be in the best interest of the public.

III. COMMERCIAL WRONGS

A. *Conversion*

In *Long v. Gibbs Auto Wrecking Co.*,[51] the plaintiffs brought an action for conversion of their automobile. Testimony showed that the automobile had been involved in an accident and was subsequently bailed to one Boatwright, a wrecker operator, who stored it on his lot. Shortly thereafter, an agent of Gibbs, negligently mistaking the plaintiffs' automobile for one recently purchased from Boatwright by Gibbs, carried the plaintiffs' car away. Upon discovering the error, Boatwright immediately notified Gibbs and made repeated attempts to have the automobile returned. But, despite these efforts and with full knowledge that the vehicle belonged to the plaintiffs, Gibbs sold it to a third party and refused to account to the plaintiffs for its value. The court held that these actions constituted a conversion and affirmed the award of both actual

48. Among those jurisdictions which have decided this point, there is a split of authority. *See* 19 A.L.R.3D 1318 (1968); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (3d ed. 1964).
49. *See* Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).
50. *Id.* at 35, 133 N.E.2d at 341.
51. 253 S.C. 370, 171 S.E.2d 155 (1969).

damages (the car's value at time of conversion) and punitive damages.[52]

B. *Fraud and Deceit*

In *Daniels v. Coleman*[53] the plaintiff, alleging that the defendant had obtained a mortgage and note from him fraudulently, brought this action based on fraud and deceit. The only actual damages testified to were due to travel expenses and phone calls stemming from the incident. In reversing the trial court, the supreme court decided that it was error to instruct that damage is inherent in a promissory note which has been delivered because of fraud. While noting that there is authority for this proposition when fraud is pled as an affirmative defense,[54] the court held that, when the plaintiff asserts fraud and deceit, he must establish proof of violation of a legal right and actual damage and the two elements must concur.[55] Nor do travel expenses, phone calls, and other general inconveniences associated with protection of one's legal interests constitute the "actual damage" necessary to support the cause of action.[56] This holding restates the South Carolina position as to damages and represents the majority rule that the time and attentions inevitably required to protect one's rights are generally not actionable as damages (although they may be where earnings are lost).[57]

C. *Trespass*

An additional issue in the case of *Daniels v. Coleman* involved an alleged trespass *quare clausum fregit*. Testimony showed that the plaintiff had obtained title to a farm, subject to a life estate in a house thereon held by the plaintiff's father. In ruling that the plaintiff could not maintain an action for trespass upon this residence, the court noted that, in order to establish an injury to one's possessory right in realty, one must first be in possession, either actually or constructively.[58] Consequently,

52. *Accord,* Powell v. A.K. Brown Motor Co., 200 S.C. 75, 20 S.E.2d 636 (1942), and Neel v. Clark, 193 S.C. 412, 8 S.E.2d 740 (1940), as to the elements of this tort.

53. 253 S.C. 218, 169 S.E.2d 593 (1969).

54. 91 A.L.R.2D 354 (1963).

55. Davis v. Southern Life Ins. Co., 249 S.C. 194, 153 S.E.2d 399 (1967); Rice v. Palmetto State Life Ins. Co., 196 S.C. 410, 13 S.E.2d 493 (1940).

56. *See* Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 148 S.E.2d 742 (1966); Aaron v. Hampton Motors, Inc. 240 S.C. 26, 124 S.E.2d 585 (1962).

57. 37 C.J.S. *Fraud* §§ 40, 41, 141(2) (1943).

58. Constructive possession is recognized to be in a person holding legal title to real property which is unoccupied or occupied only by an agent or representative of said legal owner. *See* Lane v. Mims, 221 S.C. 236, 70 S.E.2d 244 (1952); 52 AM. JUR. *Trespass* § 27 (1944).

since constructive possession is displaced by the actual possession[59] of a party holding a freehold, the plaintiff had no possessory right to be violated, such right lying only in the father. This case thus represents a logical expansion of earlier holdings to the effect that a landlord cannot maintain an action for trespass to leased premises possessed by a tenant[60] and is consistent with the proposition that, since trespass interferes with possession, there must first be possession.[61]

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59. Littleton v. Roberts, 181 S.C. 303, 187 S.E. 349 (1936).
60. Dial v. Gardner, 104 S.C. 456, 89 S.E. 396 (1916).
61. Macedonia Baptist Church v. City of Columbia, 195 S.C. 59, 10 S.E.2d 350 (1940).