South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 14

1971

Torts

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TORTS

I. PRODUCTS LIABILITY

In *Burr v. Coca-Cola Bottling Co.*, the respondent, after consuming three swallows from a drink bottled by the appellant, detected an odd, powdery, flat taste. After examining the remaining contents, she found a foreign substance or wad in the liquid.[1] Approximately two hours later, she became nauseated and, thereafter, suffered from diarrhea and chest pains.[2] The court noted that the time lapse between the drinking of the beverage and a subsequent illness was not necessarily controlling, but in the principal case a lapse of two hours between consumption and illness negated the inference that the respondent's illness was proximately caused by drinking the alleged deleterious substance, especially since nausea and diarrhea are often produced by other causes. The court felt a directed verdict should have been awarded appellant at the trial stage.[3]

Since only one reasonable inference could be drawn from the evidence, the court in *Campbell v. Robbins Tire & Rubber Co.*,[4] felt a directed verdict should have been awarded appellant at trial. The respondent, while filling a tire tube manufactured by appellant, was injured when the tire tube exploded. The court held that the respondent failed in his burden of proving that a defect existed in the tube because of faulty and negligent manufacturing. The tire was examined by an independent expert furnished by the appellant, who testified that after a thorough inspection he found no defect in the chemical composition, tensile strength, or stretch quality of the tire.

II. SUDDEN EMERGENCY

In *Still v. Blake*,[5] the respondent's act of swerving in the left lane of traffic when confronted with a sudden emergency was submitted to the jury to determine whether this amounted to negligent and reckless

1. 181 S.E.2d 478 (S.C. 1971).

2. The contents of the bottle were not chemically analyzed and the doctor's report did not speculate on the cause of illness.

3. *See* Fowler v. Coastal Coca-Cola Bottling Co., 252 S.C. 579, 167 S.E.2d 572 (1969).

4. 182 S.E.2d 73 (S.C. 1971).

5. 255 S.C. 95, 177 S.E.2d 469 (1970).

conduct.[6] The court reiterated its position that one confronted with a sudden emergency is not held to the same standard of conduct as a person who has time to contemplate alternative courses of action. If the emergency was not created by the driver, the choice made, even though not the wisest, frees him from liability if a reasonable man of ordinary prudence placed in a similar situation might have made the same choice.[7]

III. DANGEROUS ANIMALS

The plaintiff has the burden of proving the dangerous propensities of an animal showing that the owner either knew or should have known that the particular animal had a vicious disposition. In *Giles v. Russell*,[8] the plaintiff was thrown off a motorcycle after colliding with a dog owned by the defendant. The evidence indicated the dog had chased the motorcycle in a threatening manner and the court affirmed a judgment for the plaintiff, feeling the question was properly left with the jury to decide whether the owner had sufficient knowledge of the dangerous characteristics of his dog to constitute negligence in failing to keep the dog restrained. Since the characteristics of an animal are likely to remain constant, evidence of the dog's viciousness subsequent to the accident was allowed to be introduced.

IV. RELEASE

In *Bartholomew v. McCartha*,[9] the South Carolina Supreme Court followed the trend of authority and held that the release of one tort-feasor does not automatically release other tort-feasors. The controlling test should be the intention of the parties, unless the plaintiff has, in fact received full compensation amounting to a satisfacton.[10]

6. *Id.* at 99, 177 S.E.2d at 471. The respondent testified that the appellant had given a right turn signal prior to reaching an intersection, but at the last minute made a sudden left turn. The respondent, anticipating a right turn in accordance with the alleged signal, intended to pass through the intersection simultaneously with appellant's turning right and clearing the lane, but when confronted with the abrupt left turn, swerved his vehicle unsuccessfully in the hope of avoiding a collision.

7. McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966); Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964).

8. 180 S.E.2d 201 (S.C. 1971).

9. 179 S.E.2d 912 (S.C. 1971).

10. The common law rule held that the release of one tort-feasor released all, even if the releasor expressly reserved his rights against the other tort-feasors. This doctrine rested upon the theory that a release implied a satisfaction and that there should only be one recovery for a joint wrong. *See* 73 A.L.R.2d 403 (1960).

V. DUTY OF CARE

In *Still v. Blake*,[11] the court reaffirmed its position that a forward vehicle is in no better position from a liability standpoint than a following vehicle. Both drivers are expected to exercise due care under the circumstances.[12] Whether the rear vehicle in this case was following too close was a question of fact for the jury.

In *Bootle v. Labrasca*,[13] the plaintiff was injured when she fell in defendant's restaurant. The court, affirming a judgment for the plaintiff, held that the jury was the proper body to determine if the defendant failed to adequately light or otherwise warn of a step down between adjacent dining areas and if the plaintiff was contributorily negligent in failing to detect the condition.

VI. STATUTORY DUTY OF CARE

In *Harris v. Marion Concrete Co.*,[14] the supreme court restated its position that in South Carolina, violation of a statute is negligence *per se*.[15] In *Harris* the plaintiffs were injured when the defendant-owned truck ran through a red traffic light, causing a collision. In affirming judgment for the plaintiffs, the court held that the defendant had violated sections 46-306 and 46-361[16] of the Code of Laws of South Carolina relating to traffic control signals and maximum speed limits.

In *Hightower v. Greenville County*,[17] the plaintiff brought an action for personal injuries when the car in which she was a passenger struck a hole in a blacktop road maintained by the county.[18] The right

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11. 255 S.C. 95, 177 S.E.2d 469 (1970).

12. Oliver v. Blakeney, 244 S.C. 565, 137 S.E.2d 772 (1964).

13. 255 S.C. 134, 177 S.E.2d 544 (1970).

14. 320 F. Supp. 16 (D.S.C. 1970).

15. Bell v. Atlantic Coast Line R.R., 202 S.C. 160, 24 S.E.2d 177 (1943); Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153 (1942); Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938).

16. S.C. CODE ANN. § 46-306 (1962) states that a green signal means "go," a yellow signal means "caution," and a red signal means "stop." S.C. CODE ANN. § 46-361 (1962) states: a person should drive no faster than is reasonable and prudent and . . . [i]n every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with the legal requirements and the duty of all persons to use due care.

17. 255 S.C. 192, 177 S.E.2d 785 (1970).

18. S.C. CODE ANN. § 33-921 (1962) provides:

> Any person who shall receive bodily injury or damage in his person or property through a defect or the negligent repair of a highway, . . . occa-

front wheel of the automobile was severed from the car and the plaintiff was thrown against the steering wheel and injured. A sewer cut had been made across the road on or about September 4, 1968. Thereafter, the cut was filled and tamped. The County Supervisor was apparently notified of the excavation in September, 1968, and was aware that the cut would leave soft, though tamped dirt in the roadway. The county made no inspection of the road until February 27, 1969, the date of the accident. By this time, the sewer cut had naturally become sunken or concave, although testimony differed as to the exact depth of the cut. The court felt the jury was warranted in concluding that the defect had existed for a sufficient length of time to put the county on constructive notice of it, and that the county was negligent in failing to remedy the defect.

In a similar case, *Hammet v. City of Spartanburg*,[19] the plaintiff was allowed to recover for personal injuries after his car allegedly hit a hole in a street maintained by the city, causing him to depress the accelerator pedal, lose control of his automobile, and strike a tree. Although section 47-70 of the Code[20] places the burden on the plaintiff to prove his freedom from contributory negligence when bringing an action against a municipal corporation, the issue of contributory negligence was for the jury to determine.

VII. FAMILY PURPOSE AND JOINT ENTERPRISE DOCTRINES

In *Lollar v. Dewitt*[21] the appellant was injured when a mule-drawn wagon, upon which she was riding, was struck in the rear by respondent's vehicle. The appellant alleged in her complaint that the respondent was operating his vehicle in a careless and reckless manner. The respondent alleged in his answer, by way of a fourth defense, that appellant's husband, the driver of the wagon, was contributorily negligent and that his negligence should be imputed to the appellant under the family purpose and joint enterprise doctrines. At appropriate stages of the trial, the appellant moved to strike the fourth defense from the answer but this motion was denied. In reversing the lower court's

sioned by the neglect or mismanagement of the county, may recover in an action against the county the amount of actual damage sustained by him by reason thereof, provided such person has not in any way brought about such injury or damage by his own act or negligently contributed thereto.

19. 179 S.E.2d 614 (S.C. 1971).
20. S.C. CODE ANN. § 47-70 (1962).
21. 179 S.E.2d 607 (S.C. 1971).

decision, the supreme court held that the defenses of the family purpose doctrine and joint enterprise theory should have been striken in accordance with appellant's motion. Although South Carolina recognizes the family purpose rule,[22] the record failed to disclose evidence that the appellant owned the mule and wagon and furnished them for family purposes, a prerequisite to the application of the doctrine. The joint enterprise theory was also inapplicable because in order to impute negligence from a driver to a passenger the latter must have some direction and control over the progress and management of the vehicle.[23] In *Lollar* no evidence was introduced to show that appellant had such control over the movement of the wagon.

VIII. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

In *Ruth v. Lane*[24] the plaintiff-employee was severely burned while using an acetylene torch. The defendant relied on the defenses of contributory negligence and assumption of risk and treated them interchangeably. The court noted that there had been considerable confusion in the past concerning the two defenses, but in *Ruth*, since the jury below found the employer negligent, the defense of assumption of risk was inapplicable because "assumption of risk, in its true sense, rests in contract, not tort."[25]

22. Reid v. Swindler, 249 S.C. 483, 154 S.E.2d 910 (1967); Porter v. Hardee, 241 S.C. 474, 129 S.E.2d 131 (1963); Norwood v. Coley, 235 S.C. 314, 111 S.E.2d 550 (1959); Hewitt v. Fleming, 172 S.C. 266, 173 S.E. 808 (1934); Burbage v. Curry, 127 S.C. 349, 121 S.E. 267 (1923); Mooney v. Gilreath, 124 S.C. 1, 117 S.E. 186 (1923); Davis v. Littlefield, 97 S.C. 171, 81 S.E. 487 (1914).

23. Spradley v. Houser, 247 S.C. 208, 146 S.E.2d 621 (1966); Ray v. Simon, 245 S.C. 346, 140 S.E.2d 575 (1965).

24. 254 S.C. 451, 175 S.E.2d 820 (1970).

25. Cooper v. Mayes, 234 S.C. 491, 495-96, 109 S.E.2d 12, 15 (1959) distinguished the two defenses:

> Assumption of risk, in its true sense, rests in contract, not tort. A true case of assumption of risk arises when an employee, without negligence on his part or that of his employer, is injured as the result of a hazard ordinarily incident to the proper performance of the duties of his employment. When by his own negligence the employee increases the hazard to which his work would normally expose him, and as a result of such negligence and not of any negligence of his employer sustains injury from the abnormal hazard which he has thus created, he is barred from recovery by his own negligence. Where the extraordinary hazard is attributable to the employer's negligence, but would not have caused the injury except for the negligence of the employee, the bar to recovery is not assumption of risk, but contributory negligence. Where negligence enters into the consideration of the

But in *Canady v. Martschink Beer Distributors, Inc.*,[26] the court restated its position that the defense of assumption of risk could be used in a "factually appropriate" tort action, the key not being contract, but consent.[27] *Canady* was an action brought by a guest passenger against the driver of an automobile. The court inferred from the evidence that the driver was under the influence of intoxicants, and that the plaintiff voluntarily chose to remain in the car; therefore, the issue of contributory negligence and recklessness should have been submitted to the jury.[28] The facts of this case did not, however, warrant the defense of assumption of risk.

In *Blout v. McCrory Construction Co.*[29] the defendant, in the process of remodeling a department store, had placed a two by four shoe or footing across the bottom of a doorway being eliminated. At the store's request, the passageway was temporarily left unsealed to allow employees to conduct business in the adjoining room. The plaintiff, her attention being diverted while examining a customer's check, tripped and fell over the shoe. The court reasoned that since the employee had traveled through the opening on numerous occasions, she was contributorily negligent as a matter of law. The fact that the plaintiff had momentarily forgotten the danger because she was studying the check, was not considered to be an adequate rebuttal to the charge of contributory negligence. Summarizing from the authorities the court stated:

> While forgetfulness of, or inattention to, a known danger may under certain circumstances be excused, it is recognized that a too liberal application of the principle can result in fraud and could completely destroy the defense of contributory negligence. Therefore, it is settled that mere forgetfulness or inattention if insufficient. . . . In order to keep forgetfulness of, or inattention to, a

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rights of an injured employee against his employer, the issue moves from the field of contract into that of tort. Attempt in such cases to interrelate assumption of risk and contributory negligence is more academic than practical, and sometimes loses sight of the fact that the difference between the two is fundamental and not merely of degree.

26. 255 S.C. 119, 177 S.E.2d 475 (1970).

27. Baker v. Clark, 233 S.C. 20, 103 S.E.2d 395 (1958).

28. Since the plaintiff was a guest passenger he could recover against the defendant only upon sustaining his burden of proof that the defendant had acted recklessly or intentionally. Thus plaintiff's contributory negligence would not defeat recovery, unless it amounted to a reckless disregard for his own safety. Benbow v. Davis, 248 S.C. 402, 150 S.E.2d 235 (1966).

29. 254 S.C. 208, 176 S.E.2d 407 (1970).

> known danger from constituting contributory negligence as a matter of law, the evidence must be such as to give rise to a reasonable inference that the forgetfulness or inattention relied upon was induced by some immediate and adequate disturbing cause, to be determined in the light of the exigencies of the situation and the facts and circumstances of the particular occasion.[30]

Since the plaintiff's distraction was self-created and not the product of outside influences, the court concluded that she simply failed to exercise due care for her own safety.

In his dissenting opinion, Justice Bussey felt the defendant's conduct amounted to a conscious failure to exercise ordinary care and thus contributory negligence should not have presented a bar to recovery. Justice Bussey saw no useful purpose in placing a two by four shoe across the passageway and felt the defendant should have taken steps to minimize the hazard created by it.

IX. FRAUD

In *Lawson v. Citizens and Southern National Bank*,[31] the complaint, carefully worded to avoid making a choice among alternative remedies, in essence charged that the defendant, in developing certain land for residential purposes, filled in a large gully with stumps and other improper material and then concealed this defect by capping the area with clay. This was a case of novel impression in South Carolina and the supreme court ruled in accord with other states that have acted upon the particular question, by requiring a duty to disclose land fills.[32] The court considered the facts alleged in the complaint sufficient to state a cause of action for fraud and deceit.[33]

In *Paine-Henderson v. Eastern Greyhound Lines, Inc.*,[34] the plain-

30. *See* 38 AM. JUR. *Negligence* § 187 (1941); 74 A.L.R. 2d 950 (1960); 65 C.J.S. *Negligence* §187 (1950).

31. 180 S.E.2d 206 (S.C. 1971).

32. 37 AM. JUR.2d *Fraud and Deceit* § 160 (1968); 80 A.L.R.2d 1453 (1961).

33. The court noted that the plaintiff was not required to label his cause of action:

> When attacked by demurrer for insufficiency of facts, a complaint must be liberally construed in favor of pleader and sustained if facts alleged, and inferences reasonably deducible therefrom, entitle plaintiff to any relief on any theory of the case, even though different from that on which he may have supposed himself entitled to recover.

See also Everette v. White, 245 S.C. 331, 140 S.E.2d 582 (1965); Turbeville v. Gordon, 233 S.C. 75, 103 S.E.2d 521 (1958).

34. 320 F. Supp. 1138 (D.S.C. 1970).

tiff was induced through advertisements of Grey Advertising, Inc., to travel from Washington, D.C. to Charleston, South Carolina, via a through Greyhound bus. He decided to make the return trip by similar means and was informed by a ticket agent that his 3:45 P.M. bus would travel directly to Washington. In Richmond, Virginia, the plaintiff was awakened and told that the bus on which he was riding was going to New York and would not stop in Washington. The plaintiff was also informed that his luggage had already been shipped by another bus to Washington. Upon arriving at his destination, the plaintiff could not find his luggage and it has not subsequently been found. The plaintiff's suitcase allegedly contained the only copy of a manuscript of a completed novel and screenplay.

The defendant, Greyhound Lines, moved for summary judgment on the grounds that its liability was limited to $50.00 for loss of luggage.[35] Notices of liability limits were posted in the terminal and on plaintiff's claim check. The plaintiff testified that he did not see the notices in the terminal nor did he read his claim check. Since the matter in controversy involved interstate commerce, federal law was applicable.[36] Uniform liability rates were established by Congress to protect carriers from exaggerated claims; however, since the contract of carriage in *Paine-Henderson* had been induced by the alleged fraud of the carrier's agent, the District Court of South Carolina held that the liability limits would be avoided if fraud was proven. Therefore, after determining that fraud may have been present defendant's motion for summary judgment was denied.

In *Carter v. Boyd Construction Co.*,[37] the court restated the nine elements essential for recovery in a case of actual fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.[38]

35. The $50.00 liability limit was provided by the defendant's ". . . [t]arrif duly filed with the Interstate Commerce Commission in accordance with the Carmack Amendment, 49 U.S.C. Section 20(11), which was made applicable to motor carriers by 49 U.S.C. Section 319. . . . The tariff further stated that valuable papers including manuscripts were carried at the owner's risk."

36. Boston & Me. R.R. v. Hooker, 233 U.S. 97 (1914); Mitchell v. Union Pac. R.R., 188 F. Supp. 869 (S.D. Cal. 1960).

37. 255 S.C. 274, 178 S.E.2d 536 (1971).

38. 255 S.C. at 280-81, 178 S.E.2d at 539.

X. LIBEL AND SLANDER

In *Neeley v. Winn-Dixie Greenville, Inc.*,[39] sufficient publication to sustain actionable libel was found to be lacking. Certain checks marked "NSF" were accidentally mailed by defendant to the plaintiff's address. The defendant intended the checks to be received by David W. Neeley, but the address of the plaintiff, David A. Neeley was used. The plaintiff's wife, who had authority to open his mail, intercepted the letter. The court held that the defendant could not reasonably have known that the letter would be opened and read by a person other than the plaintiff and since no one else saw the letter, there was no publication.[40]

In *Neeley*, the plaintiff also failed in his burden of proving that the letter was written to and published concerning him, a requirement of section 10-676 of the South Carolina Code of Laws.[41] The evidence indicated the plaintiff, his wife, and the defendant's agent who signed the letter, all knew that the plaintiff had nothing to do with writing the bad checks.

In *Prentise v. Nationwide Mutual Insurance Co.*,[42] appellant's husband, in his application for automobile liability insurance, reported that he had not been involved in an accident within the past five years and that his wife did not drive his automobile. His policy was cancelled after a routine check with the Highway Department indicated that appellant's husband had been involved in an accident two years prior to the issuance of the policy. An investigative agency also reported to Nationwide that appellant was a driver of her husband's car and that she was "mentally retarded."[43] Upon request, and consonant with the state statute,[44] the insurer specified in a letter to the insured the reasons

39. 255 S.C. 301, 178 S.E.2d 662 (1971).

40. The court quoted from 92 A.L.R.2d 227 (1963):

> Where the sender of libelous matter directed the material to the defamed only and was not reasonably charged with knowledge that a third person might 'intercept' and read the libelous matter before it reached the person allegedly defamed, it has been held that there was no publication of the libelous matter upon which a civil action for damages could be based.

41. S.C. CODE ANN. § 10-676 (1962).

42. 181 S.E.2d 325 (S.C. 1971).

43. *Id.* at 327. Appellant testified that she was an epileptic and had been treated in two hospitals and by numerous physicians for her condition.

44. S.C. CODE ANN. § 46-750.54 (Supp. 1966) provides that upon written request the insured is entitled to know the reasons for policy cancellation.

for policy cancellation, mentioning that certain investigations revealed that insured's wife was mentally retarded and a driver of his automobile. In an action for alleged libel, the court held that the letter was privileged communication and the evidence did not support the existence of express malice or malice in fact necessary to destroy the privilege.[45]

In *Duckworth v. First National Bank*,[46] publication of an alleged slanderous statement was established through circumstantial evidence. The case was submitted to the jury to resolve the dispute of whether bank customers were within earshot range of bank officer's alleged statement asking respondent who he was trying to swindle. The court relied on *Tobias v. Sumpter Telephone Co.*[47] where the rule was announced that publication may be established, in the absence of positive testimony by a person claiming to have heard the slanderous remark by:

> [E]vidence tending to show that third persons were present and near enough at the time to hear the words spoken. And evidence of the latter class would be sufficient to take the case to the jury for them to say whether the words spoken were heard by the third person present, even though such person should deny having heard them.[48]

In *Duckworth* the court also held that the question of whether the statement of the bank officer exceeded the privileged occasion was a question of fact for the jury. The burden was on the appellant bank to prove by a preponderance of the evidence that the alleged slanderous statement was made upon a privileged occasion to rebut the inference of malice; this the appellant failed to do.[49]

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45. *See* S.C. CODE ANN. § 46-750.53 (Supp. 1966).
46. 254 S.C. 563, 176 S.E.2d 297 (1970).
47. 166 S.C. 161, 164 S.E.2d 446 (1932). *See also* Perott v. Davison-Paxton Co., 218 S.C. 189, 62 S.E.2d 95 (1950).
48. 166 S.C. at 165, 164 S.E. at 448.
49. Cartwright v. Herald Publishing Co., 220 S.C. 492, 68 S.E.2d 415 (1951).