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Torts

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TORTS

I. AUTOMOBILE LIABILITY

Owens v. Gresham[1] helped explain the term "guest" in the South Carolina guest statute.[2] Thomas Gresham entered a filling station, leaving his car running and lights on, and entered into a conversation with the appellant's decedent, John B. Owens, Jr. Owens then left in the automobile with Gresham and was shortly thereafter killed when the automobile was hit by another vehicle. John B. Owens, Sr. brought suit against Gresham in the name of his son's estate alleging that Owens had been a *passenger* in Gresham's car. The trial judge instructed the jury that the plaintiff could recover only under the guest statute, which reads in part:

> No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard for the rights of others.[3]

The supreme court held that this instruction was erroneous and remanded the case. The court said that the limitation of liability imposed by this statute applies only to a guest who is transported without payment. Payment may be anything of tangible benefit to the driver of the vehicle, i.e., payment does not have to be monetary, it only need be some benefit gained by the driver beside hospitality and companionship. Thus, whether one is a guest or passenger usually depends on the circumstances of each particular case.

In the case at hand, the court noted that, taking the evidence in a light most favorable to the plaintiff, an inference could be drawn from the testimony that Owens went with Gresham for Gresham's benefit.[4] Thus, the status of the decedent was a jury question and could not be determined as a matter of law by the judge.

1. 258 S.C. 46, 186 S.E.2d 816 (1972).
2. S.C. CODE ANN. §46-801 (Cu. Supp. 1972).
3. *Id.*
4. There was no direct testimony to this fact.

The court also noted that if the jury decided that Owens was, indeed, a passenger instead of a guest, Gresham owed him the duty to exercise ordinary care to avoid injuring him as at common law.

The supreme court again dealt with the guest statute in *Berry v. Hall.*[5] After visiting relatives the plaintiff and defendant in defendant's car, returned to defendant's home for plaintiff to pick up his car. As plaintiff was getting out of the back seat of defendant's two-door car, the defendant put the car in gear and began moving, so as not to block plaintiff's car. This caused the plaintiff, Berry, to fall and injure himself, for which injuries he brought suit against Hall under the guest statute.[6]

At the trial level the jury found for the plaintiff and Hall appealed that verdict. The supreme court reversed and remanded but only after agreeing in the most part with the trial judge. The defendant claimed that a directed verdict should have been handed down in his favor. The court disagreed, saying that the question of heedlessness or recklessness on the part of the defendant is ordinarily one for the jury. The court also disagreed with the defendant's motion on contributory negligence. In South Carolina contributory negligence on the part of the plaintiff will not bar recovery under the guest statute. Only contributory heedlessness and recklessness on the part of the plaintiff will do this,[7] and the presence of contributory recklessness and heedlessness again is a jury question.[8]

In this case there was enough evidence presented to draw a reasonable inference either way regarding the actions of the plaintiff or the defendant for the question to go to the jury (as to the heedlessness or recklessness of the defendant or contributory heedlessness or recklessness of the plaintiff).

However, the case was reversed on another issue. In his instructions to the jury, the trial judge read Section 46-511,[9]

5. 258 S.C. 63, 187 S.E.2d 242 (1972).
6. S.C. CODE ANN. §46-801 (Cu. Supp. 1972).
7. Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967).
8. Ardis v. Griffin, 239 S.C. 529, 123 S.E.2d 876 (1962).
9. S.C. CODE ANN. §46-511 (Cum. Supp. 1972).

which deals with operating unsafe vehicles, and Section 46-401[10] which deals with starting stopped vehicles. Section 46-511 specifically states that it applies only to vehicles driven on any highway and Section 46-401 when read in conjunction with Section 46-288[11] also applies only to vehicles being driven on the public highway. The defendant claimed that since this accident took place on private property, the reading of these portions of S. C. Code was reversible error. The court agreed and remanded the case, saying only that these portions do not relate to vehicles operated on private property and the trial judge was in error in instructing the jury by the use of these sections.

In *Jarvis v. Green*[12] the supreme court ruled on a finding of negligence by the jury and its effect on punitive damages. The plaintiff Viola Jarvis' automobile was struck in the rear by the automobile of one Reeder after Reeder's car had been struck in the rear by the defendant, Green. At the trial, the judge directed a verdict against punitive damages and then sent the question of negligence on Green's part to the jury. The jury returned a verdict for the plaintiff for actual damages and the plaintiff appealed, hoping for punitive damages also. The court, Moss, C. J. reversed and remanded.

The court noted that the violation of the statute under consideration[13] is ordinarily a jury question.[14] Likewise, the determination of the exercising of due care on the part of the defendant is one for the jury. Thus, if the jury decided that the defendant did not use reasonable care and that he violated Section 46-393, it could find the defendant negligent per se, i.e., in violation of statute and should consider evidence of recklessness and willfulness on the issue of punitive damages. Thus, the trial judge should have passed the question of punitive damages to the jury where there was evidence of lack of due care and negligence per se. His failure to do so was reversible error.[15]

10. S.C. CODE ANN. §46-401 (Cum. Supp. 1972).
11. S.C. CODE ANN. §46-288 (Cum. Supp. 1972).
12. 257 S.C. 558, 186 S.E.2d 765 (1972).
13. S.C. CODE ANN. §46-393 (Cum. Supp).
14. *See*, West v. Sowell 237 S.C. 641, 118 S.E.2d 692 (1961).
15. 257 S.C. 558, 186 S.E.2d 765 (1972).

II. INTENTIONAL TORTS

A. *Fraud*

The supreme court dealt with the issue of fraud in *Lundy v. Palmetto State Life Insurance Co.*[16] The defendant Palmetto State Life Insurance Co., was charged with fraudulently deceiving the plaintiff's testate into giving up life insurance coverage which was rightfully hers. Della M. Reynolds, sister of the plaintiff, worked at Myrtle Beach Air Force Base until 1967, at which time she retired. Upon leaving the base she was told that she could convert her government life insurance policies into policies with any one of several insurance companies with no physical examination. On May 17, 1967, Federal Employees Group Life Insurance advised Miss Reynolds that the right to convert her insurance would expire on June 1, 1967, and again that it would not be necessary for her to take a physical to convert the insurance. The letter also listed the names of several private companies who would convert the policy, one of which was the defendant. From this point, the testimony at the trial stage was very contradictory. The plaintiff claimed that Miss Reynolds applied to the defendant company to convert this insurance. Upon this application, the plaintiff claimed, Oliver Hinson, an agent of defendant, required the decedent to undergo a physical examination and after such examination turned down decedent's request for conversion and returned payment. This action claimed the plaintiff, was fraudulent and thus, the estate of Della M. Reynolds was entitled to $6,000, the maximum amount of the converted policy, upon Miss Reynold's death.

The defendant claimed that Miss Reynolds never applied for this conversion but only for a new policy which could not be issued because of her health. Upon a jury verdict for the plaintiff, the defendant appealed on the issue of proof of fraud. The supreme court reversed and remanded. The court first stated all of the necessary elements for an action in fraud:

a) a representation,
b) its falsity,
c) its materiality,
d) the speaker's knowledge of its falsity,

16. 256 S.C. 506, 183 S.E.2d 335 (1971).

e) his intent that it should be acted upon by the person,
f) the hearer's ignorance of its falsity,
g) his reliance on its truth,
h) his right to rely thereon, and
i) his consequent and proximate injury,

noting that the plaintiff must show that each element exists and the failure to show any one is fatal to recovery.[17] Taking the facts in the light most favorable to the plaintiff, however, there was still not enough evidence of some of these elements for the question to go to the jury. Miss Reynolds knew of the falsity of the agent's statements as she had previously been notified that she would not have to undergo a physical. Thus, she could not justifiably rely on Hinson's word that the physical was necessary. On this point, said the court, the evidence is susceptible of only one reasonable inference and there it is a question of law for the court.[18]

In sum, the court said that Miss Reynolds could not be deceived by that which she knew to be false and remanded the case.

B. Assault and battery

In *Nauful v. Milligan*[19] the supreme court elaborated on the old common law doctrine that words alone are never a provocation for an assault and battery. A neighborhood scuffle between parties' children resulted in the plaintiff's calling the defendant's children "white trash." The defendant then called the plaintiff into the middle of the street where the two engaged in a heated conversation. Plaintiff placed his hands on defendant's shirt and defendant said, "Hit me," which plaintiff proceeded to do. The lower court issued a summary judgment on the liability of the defendant. The supreme court agreed with the lower court in this respect, citing *City of Gaffney v. Putnam*:[20]

> In view of the fact that peace and good order forbid that individuals shall right their own wrongs, we have announced the rule in numerous

17. Moye v. Wilson Motors, 254 S.C. 471, 176 S.E.2d 147 (1970); Davis v. Upton, 250 S.C. 288, 157 S.E.2d 567 (1967); Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959).

18. Tetterton v. Foggie, 253 S.C. 600, 172 S.E.2d 369 (1970).

19. ___ S.C. ___, 187 S.E.2d 511 (1972).

20. 197 S.C. 237, 15 S.E.2d 130 (1941).

> cases that in the absence of statute, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault and battery, unless accompanied by an actual offer of physical violence.[21]

The facts in the case did not show that there was any threat of physical harm from the plaintiff, thus there was no provocation on his part, and thus, the defendant could not use provocation as a defense.

The defendant also claimed that he was engaged in mutual combat with the plaintiff, but the court disagreed saying for mutual combat to exist a mutual intent and willingness to fight must be manifested. The testimony showed that defendant initiated the fight so no mutual intent was present.

C. Malicious Prosecution

Cisson v. Pickens Savings and Loan Association[22] dealt with malicious prosecution. The fact situation which stemmed chiefly from a previous case[23] should be briefly stated. One McWhorter hired Cisson (a building contractor) to construct a house which McWhorter financed through a mortgage on the house with the defendant, Pickens Savings and Loan. Upon completion of the house, there was a disagreement as to whether Cisson had been paid in full and he filed a mechanic's lien against the property, subsequently bringing a suit to foreclose on the lien. The defendant with the permission of the court intervened as a third party, probably to protect its security interest. The defendant presented the same defense as McWhorter, but was dismissed as a party by the trial judge. Cisson won a judgment against McWhorter who did not appeal. The defendant in the present case, however, did appeal on the grounds that he was wrongfully dismissed from the suit. The supreme court held he had no right to appeal.

In an action against the defendant for money claimed for a mortgage, the plaintiff Cisson also charged the defendant with malicious prosecution for its intervention in the McWhorter case.[24] The lower court issued a summary judgment for Pickens Savings and Loan and the plaintiff appealed.

21. *Id.*
22. 258 S.C. 37, 186 S.E.2d 822 (1972).
23. Cisson v. McWhorter, 255 S.C. 174, 177 S.E.2d 603 (1970).
24. *Id.*

The supreme court agreed with the lower court noting that for an action to be in malicious prosecution, four elements must be present:

1) defendant's instituting a judicial proceeding
2) want of probable cause
3) malice in instituting the proceedings
4) resulting injury or damage

Here the plaintiff's sole contention that there was lack of probable cause for defendant to intervene in the action was based on fact that the defendant lost at the trial level and agin in the supreme court. This, the court held, did not show lack of probable cause. Quoting from Prosser, the court noted, "it is generally agreed that the termination of the proceeding in favor of the person against whom it is brought is no evidence that probable cause was lacking, since in a civil action, there is no preliminary determination of the sufficiency of the evidence to justify the suit."[25]

The principle is basic, the court went on, to protect the "basic right of citizens to sue or defend when sued."[26]

In the present case, the defendant did have as an interest his first mortgage on the property. This was enough justification for him to enter suit. Thus, an action for malicious prosecution could not be sustained since all four of the above elements could not be demonstrated.

In some very interesting dicta, the supreme court also stated that an action for malicious prosecution could be sustained for instituting a civil proceeding even where there is no arrest or intervention with property. This stand is found in the Restatement of Torts, Section 674.[27]

III. NEGLIGENCE

Sanders v. Western Auto Supply Company[28] involved negligence in the design of a riding lawnmower. The plaintiff, a five-year old, while running to jump on the mower with his father, slipped and fell. As he fell his hand entered the discharge chute of the mower, severely injuring the boy's hand. The boy, by his father, brought suit against Western Auto

25. Prosser on Torts, (3d) Ed., Section 114, p. 874.
26. 258 S.C. 37, 44, 186 S.E.2d 822, 825.
27. *Id.*
28. 256 S.C. 490, 183 S.E.2d 101 (1971).

Supply Co. as a chain retailer (the mower was sold under its trade name). The theory that the defendant was responsible for the manufacturing of the mower was never challenged.

After expert testimony that the mower was not designed as safely as most other comparable mowers, the jury held that the defendant was not liable for injuries sustained by the plaintiff. The plaintiff appealed on the grounds that the instructions he proposed for the jury were erroneously omitted by the trial judge. The supreme court agreed in part and disagreed in part while reversing and remanding the case.

Sanders first requested a charge paraphrased from *Mickle v. Blackmon*,[29] dealing with duty of care of the seller of a chattel. There was no error in the trial judge rephrasing this charge, since it only covered simple negligence and this was covered adequately in the charge the trial judge did use.

However, the plaintiff also requested the following charge:

> Negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, is the proximate cause of the injury. So that where several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them, it being sufficient that his negligence is an efficient cause, without which the injury would not have resulted, or to as great an extent.[30]

This charge was refused by the trial judge on the grounds that it was inappropriate because there was no negligence charged except that of the defendant. The supreme court held this to be in error noting that the defendant alleged as a defense that the injury was caused solely by the boy running and falling into the mower. Even though the jury was instructed that the plaintiff could recover only upon showing negligence of defendant and such negligence as the proximate cause of the injury, that there was no issue as to the father's negligence and that the child because of his immaturity could not be charged with negligence, the supreme court found that a charge on concurrent negligence was necessary. This was because the jury could have believed, and very probably did believe, that the conduct of the father and child was a more direct cause of injury than any defect in design of the mower.

29. 252 S.C. 202, 166 S.E.2d 173 (1969).
30. *Id.*

The charge presented by the plaintiff would have been adequate to guide the jury in its deliberations.[31]

The court also held trial judge to be correct in refusing instructions dealing with breach of warranty in this negligence case.[32]

A slippery banana peel was the subject of *Anderson v. Winn-Dixie Greenville, Inc.*[33] The plaintiff while shopping in defendant's grocery store, stepped on a banana peel left on the floor and fell injuring herself. In a lower court trial the jury found for the plaintiff. The defendant appealed claiming insufficiency of evidence to go to the jury. The supreme court reversed he lower court decision, with Brailsford, J., writing the opinion for the majority. Bussey, J. filed a dissenting opinion.

The court summed up the requirements for negligence in a case such as this by quoting from several previous cases.[34]

> It is settled law that a merchant is not an insurer of the safety of a customer in his store. His duty is to exercise due care to keep his premises in reasonably safe condition. Proof that a dangerous condition of the floor existed because of the presence of some foreign matter thereon is insufficient, standing alone, to support a finding of negligence. Unless it is inferable from the evidence that the storekeeper was responsible for creating the hazard, knowledge of its existence, either actual or constructive, is essential to recovery against him. The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the jury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care; conversely, absent evidence of such preexistence, the defendant may not be so charged.[35]

Thus in this case, plaintiff had the burden of proving either that defendant knew the peel was on the floor or in the exercise of due care should have known that it was on the floor. The plaintiff attempted to meet this burden by inferences reasonably drawn from the statement of an employee of the defendant after the fall to the effect that they (defendant)

31. *Id.*

32. *Id.*

33. 257 S.C. 75, 184 S.E.2d 77 (1971).

34. Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Wimberly v. Winn-Dixie, 252 S.C. 117, 165 S.E.2d 627 (1969); Gilliland v. Pierce Motor Co., 235 S.C. 268, 111 S.E.2d 521 (1959); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 268 (1957).

35. 257 S.C. 75, 184 S.E.2d 77.

should have had the place cleaned up but had not yet "gotten around to it." This is only evidence dealing with constructive notice of the defendant.[36]

The court held that this statement alone could not create a reasonable inference that the defendant knew the peel was there. This reasoning is based on the theory that if the employee knew the banana peel was there, i.e., if he had discovered it before, "his simple duty to pick it up would have been exactly the same whether or not, otherwise, the area should have been cleaned up."[37] The court rather attributed this statement to spur of the moment chagrin and reversed the case on lack of sufficiency of evidence of defendant's negligence.[38]

In *Marsh Plywood Corp. v. South Carolina State Highway Dep't*[39] the supreme court upheld a lower court decision that the defendant, appellant, Sotterfield was liable for the loss of income for cut timber incurred by plaintiff. Sotterfield Construction Company contracted with South Carolina Highway Department to build part of I-95. The work on I-95 caused water to back up on land to which plaintiff had a 3 year timber deed. Plaintiff notified defendant of this condition, but Sotterfield failed to alleviate the situation. To do so he would have to build a deam ditch which was already required by South Carolina Highway Department specifications. (This ditch was finally built after the timber contract expired.) Marsh, after the expiration of its contract brought suit against the defendant for the value of the timber left standing which it was prevented from cutting due to negligent construction practices of the defendant. The lower court awarded Marsh Plywood Corp. this amount. Sotterfield appealed on other grounds but the supreme court affirmed the decision with some dicta noting the correctness of the decision below on the issue of negligence.

Maus v. Pickens Sentinel Co.[40] dealt with negligence in unloading a printing press. The plaintiff had shipped the press from Tennessee to the defendant in Pickens. The de-

36. Plaintiff also contended that the banana peel was brown and mushy but the court said this was irrelevant because of the nature of bananas.

37. 257 S.C. 79, 184 S.E.2d 78.

38. *Id.*

39. 258 S.C. 119, 187 S.E.2d 515 (1972).

40. 258 S.C. 6, 186 S.E.2d 809 (1972).

fendant was engaged by the plaintiff to unload the press and place it in the office of the purchaser. While this was being done, the press was dropped to the ground and totally destroyed. Maus charged the defendant with negligence in the unloading of the press and recovered a lower court judgment against the defendant for the value of the press.

The defendant appealed to the supreme court on a number of issues of which only the following deal with tort law. The court, writing the opinion affirmed the lower court decision.

First, the defendant claimed the court erred in excluding testimony that the second press sent to the Pickens Sentinel Company was bolted down more securely than the first. The court ruled this exclusion was correct, citing Wigmore,[41] and drawing an analogy to the "rule excluding evidence that an injury-producing object or place was repaired or improved after the injury was incurred."[42]

The defendant next contended that the trial judge erred in charging as follows, when the plaintiff alleged specific negligence:

> I charge you further that when a thing which causes injury or damage is shown to be under the management or control of another and the accident in such or in the ordinary course of things does not happen if the one who possesses the management or control use proper care, it affords reasonable evidence, in the absense[*sic*] of explanation that the accident arose from the lack of care.[43]

The defendant in his brief charged that the plaintiff, because of his allegations, had to prove at least one specific act of negligence. This claim was based on *McCready v. Atlantic Coast Line R. Co.*,[44] a case which held that a shipper who alleges specific acts of negligence must prove negligence and may not recover on the presumption such as the one presented in this case. The court said the instruction was not in error as it only dealt with proof of negligence by circumstantial evidence instead of the burden of proof as between bailor and bailee or carrier and shipper. However, the court noted, it

41. 2 WIGMORE, EVIDENCE §283.
42. 258 S.C. at 12, 186 S.E.2d at 811.
43. *Id.* at 12, 186 S.E.2d at 811, 812.
44. 212 S.C. 449, 48 S.E.2d 193 (1948).

was not approving this charge, but only could find no error as argued by the defendant in this case.

Stating that the trial judge instructed the jury that the plaintiff need only show simple negligence to recover, the defendant argued that the jury should also have been instructed that simple contributory negligence would be a bar to plaintiff's recovery. This was held not to be an error, as the trial judge did adequately instruct the jury on contributory negligence in general.

The question of sufficiency of evidence was also decided in the plaintiff's favor as the court said that it would not review the defendant's appeal on this issue, as when the defendant moved for a directed verdict, he did so only on the basis of the plaintiff's contributory negligence. Thus, not having raised the issue of sufficiency of evidence at the appropriate trial stage, he could not raise the issue on appeal.

In a *per curiam* decision the Fourth Circuit Court of Appeals affirmed a district court decision[45] dealing with implied warranties of safety in shipping operations. Thus, in *Evans v. Carolina Shipping Company*[46] the court upheld the ruling that when a stevedore knew or there was ample evidence that he should have known that the customary method of unloading a ship was being improperly carried on and allowed it to continue, he breached his implied warranty to unload in safe conditions. The suit arose when a longshoreman, Norris Evans, was injured while unloading the SS Pacific Telstar. Bringing suit against the owner of the ship, Overseas Maritime Co., Inc., Norris collected for his injury. In this action Overseas Maritime with Evans entered a third party suit against the stevedore which had hired Norris claiming it was responsible for the injury as it knew of improper unloading activities and allowed them to continue. The district court awarded the plaintiff, Overseas, all which it had paid to Norris on the above theory and the Court of Appeals affirmed.

In still another case dealing with shipping, the Fourth Circuit Court of Appeals in *Chinese Maritime Trust Ltd. v. Carolina Shipping Co.*[47] reversed a district court ruling concerning negligence of a longshoreman. Theodore Horlbeck, a

45. Evans v. Carolina Shipping Co., 330 F. Supp. 654 (1970).
46. 541 F.2d 188 (1971).
47. 456 F.2d 192 (1972).

longshoreman in the employ of Carolina Shipping Co. was injured while unloading a ship belonging to Chinese Maritime Trust, Ltd. The suit was settled without trial, but Chinese Maritime immediately brought a third party suit for indemnification against warranty of workmanlike performance under facts similar to *Evans v. Carolina Shipping*.[48] The district court found that Horlbeck's injuries were due solely to his own negligence; thus the stevedore did not breach his warranty and Chinese Maritime could not recover.

However, on appeal the court of appeals reversed, citing *United States Lines, Inc. v. Jarka Corp.*,[49] for the proposition that "The contributory negligence of a longshoreman is implied to his employing stevedore and becomes actionable as a breach of stevedore's warranty of workmanlike performance.[50] Thus, Chinese Maritime was entitled to indemnification since "no conduct on its part precluded its recovery."[51]

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48. 451 F.2d 188 (1971).
49. 444 F.2d 26 (4 Cir. 1971).
50. 456 F.2d 192 at 193 (1972).
51. 444 F.2d 26 at 29 *citing* Weyerhouser Steamship Co. v. Narcirema Operating Co., Inc., 335 U.S. 563, 567 (1958).