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Torts

Willard R. Nichols

TORTS

I. NEGLIGENCE

A. *Duty of Care*

1. Malpractice

Burke v. Pearson[1] was a medical malpractice action based on a heating pad burn. The plaintiff, while in the hospital, had used the heating pad for four days before her injury was discovered. The heating pad was a standard, low-temperature, hospital model with printed instructions on the back stating that it should not be used on sleeping or unconscious persons unless they were carefully attended. During treatments with the heating pad the plaintiff had been continuously unconscious or semiconscious due to medication prescribed by her doctor. She therefore maintained that the doctor breached his duty of care by not giving special instructions to the nursing staff concerning the use of the pad.

The supreme court, reversing the lower court decision for the plaintiff, held that she presented no evidence that the doctor had reason to think the printed instructions on the heating pad would not be followed. The court considered it reasonable for him to expect proper use of the pad without any special instructions.

Justice Littlejohn dissented, maintaining that the directions on the back of the heating pad were "general and for normal use."[2] He also considered the doctor's terse, written instruction to the staff, "heating pad to back," insufficient to ensure that the plaintiff would receive proper care. In his view, medical testimony indicating that such instructions were customary skirted the real issue—that the plaintiff, because of her insensibility, was an extraordinary case to whom the doctor owed the duty to make specific instructions.[3]

2. Occupied Crossing Doctrine

In *Still v. Hampton & Branchville R.R.*[4] the plaintiff, while driving at night, collided with the middle of a train at an un-

1. 259 S.C. 288, 191 S.E.2d 721 (1972).
2. *Id.* at 297, 191 S.E.2d at 726.
3. *Id.* at 298, 191 S.E.2d at 726.
4. 258 S.C. 416, 189 S.E.2d 15 (1972).

guarded rural crossing. His action charged the railroad with negligence in not adequately marking the crossing. There was conflicting testimony about the location of the advance warning sign, but the court found that the crossing was marked by conventional crossbuck signs in compliance with the South Carolina Code.[5] The court treated the plaintiff's argument—that the railroad owed a duty to warn motorists with lights, flagmen, or other appropriate means because of the special hazard—as a recognition of the occupied crossing doctrine.[6] Under this doctrine, in the absence of an unusual hazard, a railroad has the right to occupy a crossing for its legitimate purposes and need only furnish such warning to travelers as may be required by statute. The doctrine is accepted by most jurisdictions[7] and has been applied previously in this state.[8] Thus, because there was no evidence establishing the existence of an unusual hazard, there was no "extra" duty placed upon the railroad.

The plaintiff had also brought suit against the South Carolina Highway Department, alleging that the Department had located the warning sign too near the crossing and had allowed it to deteriorate. Section 33-232 of the South Carolina Code[9] requires that a claimant plead and prove the absence of contributory negligence in order to recover from the Department. Because the plaintiff had done neither, the supreme court concluded that contributory negligence could be inferred and held that the Department had been correctly granted a directed verdict.[10]

3. Attractive Nuisance Doctrine

In *Byrd v. Melton*,[11] an action for the wrongful death of an infant drowned in a drainage ditch, the plaintiff based his claim on the attractive nuisance doctrine. The Supreme Court of South Carolina, concurring with the weight of authority, held that liability should be imposed on landowners for physical harm to trespassing children only when the injury has been caused by an

5. S.C. CODE ANN. §§ 46-310, 58-999 (1962).
6. 258 S.C. at 426, 189 S.E.2d at 20.
7. *See* 65 AM. JUR. 2d *Railroads* § 490 (1972).
8. Poole v. Southern Ry., 250 S.C. 213, 157 S.E.2d 175 (1967).
9. S.C. CODE ANN. § 33-232 (Cum. Supp. 1971).
10. 258 S.C. at 428, 189 S.E.2d at 21.
11. 259 S.C. 271, 191 S.E.2d 515 (1972).

artificial condition.[12] In *Byrd*, "[t]he stream was a natural water course forming a part of the natural drainage system of the City of Columbia . . . ,"[13] which the defendant did not control, create, or maintain.[14] He was therefore not liable for the death of the infant trespasser.

4. Automobile Guest Statute

The South Carolina guest statute establishes the following standard of care:

> 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 of the right of others.[15]

In *Powell v. Simons*,[16] an action for the death of a passenger resulting from a collision at an intersection where vandals had replaced a stop sign with a "stop ahead" sign, the court routinely held that a passenger cannot recover against a driver for simple negligence. The duty owed to a passenger is to avoid injuring him "willfully or by conduct in reckless disregard of his rights."[17] In explaining these terms the court said:

> The test by which a tort is to be characterized as reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the deceased.[18]

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12. *Id.* at 276, 191 S.E.2d at 517; *see* RESTATEMENT (SECOND) OF TORTS § 339 (1965); 62 AM. JUR. 2d *Premises Liability* § 148 (1972); 65 C.J.S. *Negligence* § 63(82) (1966); Fitch v. Selwyn Village, Inc., 234 N.C. 632, 68 S.E.2d 255 (1951).

13. 259 S.C. at 276, 191 S.E.2d at 517.

14. The court also relied on the fact that the city authorities had not found it feasible to pipe and cover the stream. The cost of fencing was, in their opinion, prohibitive. Notice of the condition in the form of neighbors' petitions was held to create no liability where none existed under law. *Id.* at 275, 191 S.E.2d at 517.

15. S.C. CODE ANN. § 46-801 (1962).

16. 258 S.C. 242, 188 S.E.2d 386 (1972).

17. *Id.* at 246, 188 S.E.2d at 387.

18. *Id.* at 246, 188 S.E.2d at 387-88, *citing* Suber v. Smith, 243 S.C. 458, 134 S.E.2d 404 (1964).

Player v. Thompson[19] was another case that hinged on whether a driver's conduct was heedless or reckless. The court summarized the facts as follows: Thompson permitted his estranged wife to use his car for family purposes. The wife in turn asked a friend to drive it to the store knowing that the friend did not have a license. The plaintiff, who was a passenger in the car, presented evidence that it was a rainy night, that the car's tires were slick, and that the driver had been warned to slow down. While the car was traveling at 25 m.p.h., a dog ran into the road causing the driver to slam on the brakes, lose control, and slide off the road.

Viewing these facts in the light most favorable to the plaintiff, the supreme court held that the trial judge erred in deciding as a matter of law that no evidence of recklessness had been adduced. The question of recklessness in an action governed by the guest statute is, of course, for the jury to decide unless "only one reasonable inference . . . can be [drawn] from the evidence."[20]

The possibility that the driver would be found reckless on remand revived the potential related liability of Thompson and his wife whom the plaintiff had sued for negligent entrustment under the family purpose doctrine. Therefore, the court reversed the trial judge's decision to grant nonsuits to those defendants.

B. Proximate Cause

In *Fortner v. Carnes*[21] the plaintiff brought an action to recover from a garageman for the loss of his vehicle which had been stolen and wrecked. He relied on the facts that the door of the garage had not been well secured and that the ignition keys had been left in the car on the night of the theft.

Carnes contended that his lack of due care was not the proximate cause of the plaintiff's loss. To support this position he relied on the well settled rule stated in *Stone v. Bethea*[22] and *Johnston v. Atlantic Coast Line R.R.*:[23] When a third person's willful, malicious, or criminal act intervenes between the defen-

19. 193 S.E.2d 531 (S.C. 1972).
20. *Id.* at 533, *quoting In re* Crawford, 205 S.C. 72, 92, 30 S.E.2d 841, 849 (1944).
21. 258 S.C. 455, 189 S.E.2d 24 (1972).
22. 251 S.C. 157, 161 S.E.2d 171 (1968).
23. 183 S.C. 126, 190 S.E. 459 (1937).

dant's negligence and the occurrence of the injury, and the act was neither intended by the defendant, nor could have been foreseen by him, the causal chain between the negligence and the injury is broken.

The court, though acknowledging this general rule, distinguished *Fortner* as a bailment case in which the bailee had the burden of showing due care.[24] The court held that the theft itself constituted the injury or loss to the bailor and that there was no act of a third party intervening between the negligence of the bailee and the resulting injury.

The issue of proximate cause was also raised in *Player v. Thompson*,[25] where a dog ran in front of the defendant's car causing her to lock the brakes and slide off the road injuring a passenger. The defendant did not have a driver's license, the tires on her car were slick, and a passenger had warned her to slow down because of the wet road. The court framed the question in terms of two concurring causes and reasoned: "In order to hold a defendant liable, it is not necessary to prove that his or her recklessness was the sole proximate cause of the injury. It is sufficient if it be a concurring or a contributing proximate cause."[26] In making the determination that something is a concurring cause, the court employs a "but for" test.[27] Thus, it held that it was not unreasonable to conclude that the concurring action of the driver and the dog proximately caused the injury.

C. *Contributory Negligence*

Two of the three contributory negligence cases decided during the survey period involved a determination of how the reasonable man as plaintiff would act. The other case demonstrated the application of the rule that contributory negligence is not a bar to recovery when the defendant's conduct is willful or wanton.

In *Steele v. Lynches River Electric Cooperative, Inc.*,[28] the

24. The theory behind placing the burden on the bailee is that he is in a better position to present evidence and that it would be unreasonable to make the bailor show the lack of due care. 258 S.C. at 459-60, 189 S.E.2d at 26.

25. 193 S.E.2d 531 (S.C. 1972).

26. *Id.* at 533-34.

27. "It is enough to impose liability to show that it is a proximate concurring cause; that is, one that was so efficient in causation that, but for it, the injury would not have occured . . . ." 193 S.E.2d at 534, *quoting* Horton v. Greyhound Corp., 241 S.C. 430, 439, 128 S.E.2d 776, 781 (1962) (italics omitted).

28. 259 S.C. 239, 191 S.E.2d 253 (1972).

supreme court reversed the trial court's refusal to enter judgment *n.o.v.* for the defendant because of the plaintiff's contributory negligence. Although contributory negligence is usually a question of fact for the jury, if there is but one reasonable inference to be drawn from the evidence viewed in the light most favorable to plaintiff, the question is one of law for judicial decision.[29] In *Steele* the plaintiff received a 7200 volt shock when he climbed a fence to cut an electric wire dangling from a transmission pole. To support its ruling that this act was not negligent as a matter of law, the trial court advanced the questionable premise that, because the wire appeared to carry no more than customary household current (120 volts), the plaintiff under normal circumstances "should not have anticipated that he would sustain such injury as actually occurred."[30] The plaintiff, however, had testified that he did not know what injury to expect.[31] Consequently, he could hardly have acted in reliance on normal circumstances.

The supreme court, noting that the plaintiff had completed the tenth grade,held him to know that a wire charged with electrical current is dangerous. Although the degree of danger from this particular wire may not have been evident, the plaintiff's purposeful action in touching the wire constituted contributory negligence.

In *Smoak v. Seaboard Coast Line R.R.*[32] the supreme court reviewed an automobile passenger's obligation to avoid accidents. The suit was brought for the wrongful death of a passenger in a truck that collided with a train at a railroad crossing. Seaboard asserted the defense of contributory negligence, contending that the deceased had failed to warn the truck driver of the oncoming train. In reviewing the evidence, the supreme court noted that, although a driver should be told of hazards known to the passenger, a passenger is not obligated to watch the road to perceive dangers in the absence of peculiar circumstances.[33] Because there was no evidence that the passenger in this case should have been more alert than the driver, who had braked the truck at least 177 feet before the collision, the inference drawn by the jury that the

29. *E.g.*, Carroll v. Wilson, 255 S.C. 536, 180 S.E.2d 198 (1971).
30. Record at 156.
31. *Id.* at 60.
32. 193 S.E.2d 594 (S.C. 1972). *See also* Survey of Damages *supra*.
33. *Id.* at 596.

passenger had not been negligent was clearly supported by the record.

The auto accident involved in *Bennett v. Peeler*[34] occurred at the intersection of a four lane highway and a secondary road. The east and westbound lanes of the highway were separated by a grassy median traversed by the road at the intersection. Near the intersection was a filling station where the defendant's beer truck was parked. The plaintiff's intestate, Bennett, had been driving west on the highway but crossed it at the intersection to enter the station. When Bennett left the station and attempted to recross the eastbound lanes to get back on the highway, his vision was momentarily blocked by the beer truck. As Bennett was crossing the inside eastbound lane, his car was hit by Peeler's and both drivers were killed. The jury exonerated Peeler but held for the plaintiff against the owner of the beer truck even though Bennett's failure to yield the right of way to Peeler constituted negligence per se.

The plaintiff averred that the driver of the beer truck had, in violation of state law,[35] parked the truck partially on the travelled portion of the road. As noted above, the defense of contributory negligence was based on Bennett's violation of a statute[36] by failing to yield the right of way to Peeler. Violation of a statute is not only negligence per se but may also be evidence of willfulness or wantonness.[37] Because both the truck driver and Bennett had violated statutes, the conduct of either or both could have been considered willful and wanton by the jury. A majority of the supreme court therefore held that the jury could reasonably reach the dubious conclusion that the truck driver's violation constituted recklessness while that of the plaintiff only amounted to negligence. Since simple contributory negligence is not a defense to recklessness,[38] the trial court did not have the authority to grant the defendant judgment *n.o.v.*

D. Products Liability

Although products liability cases are often quite complex, some of the clearest examples of negligent manufacture are the

34. 258 S.C. 545, 189 S.E.2d 814 (1972).
35. S.C. CODE ANN. § 46-481 (1962).
36. *Id.* § 46-424.
37. Jumper v. Goodwin, 239 S.C. 508, 515, 123 S.E.2d 857, 860 (1962).
38. Jowers v. Dupriest, 249 S.C. 506, 154 S.E.2d 922 (1967).

"soft drink" cases. The plaintiff in *Miller v. Atlantic Bottling Corp.*[39] brought an action for damages after drinking a Mountain Dew with a "deleterious" substance in it. Only two or three swallows had been taken before a vile smell and taste were noticed, and an unidentified substance was found in the bottle. The plaintiff testified that, though nauseated immediately, she did not go to a doctor for two days. No chemical analysis of the substance was presented, and the plaintiff's doctor did not testify. Thus, the lower court granted a nonsuit to the defendant on the grounds that no evidence was presented of a causal connection between the substance and the plaintiff's illness.

The supreme court, while acknowledging that the plaintiff had the burden of proving that the beverage was unwholesome and that it caused the illness, held that the lower court erred in granting the nonsuit. Testimony established that the plaintiff was in good health before drinking the adulterated beverage but became nauseated immediately afterwards. The bottle containing a foreign substance was also introduced into evidence. Therefore the court, relying on *Mitchell v. Coca-Cola Bottling Co.*,[40] concluded that the plaintiff had carried his burden of proof:

> When the results of an alleged act of negligence are such that they are within the experience and observation of an ordinary layman, a jury or court sitting as the trier of the facts can draw a conclusion as to causal relationship without the necessity of expert medical testimony.[41]

A poorly designed product can subject a manufacturer to liability just as readily as a poorly made one. For example, the case of *Reamer Industries, Inc. v. McQuay, Inc.*[42] grew out of a fire in the newly constructed Orangeburg-Calhoun TEC Center. The general contractor made the necessary repairs and then brought an action against the supplier and manufacturer of a fan

39. 259 S.C. 278, 191 S.E.2d 518 (1972).

40. 11 App. Div. 2d 579, 200 N.Y.S.2d 478 (1969).

41. 259 S.C. at 282, 191 S.E.2d at 519. The court distinguished *Miller* from Burr v. Coca-Cola Bottling Co., 256 S.C. 162, 181 S.E.2d 478 (1971), and Fowler v. Coastal Coca-Cola Bottling Co., 252 S.C. 579, 167 S.E.2d 572 (1969). In *Burr* the sequence of events was thought to be too remote from the defendant's negligence, and in *Fowler* the plaintiff's illness could reasonably have been attributed to an act for which the defendant was not liable.

42. 344 F. Supp. 540 (D.S.C. 1971).

coil on theories of negligent design and construction and breach of implied warranty.

In finding for the plaintiff on the question of negligent design, the federal district court restated well established South Carolina law:

> [A] manufacturer who fails to exercise reasonable care in the manufacture of a chattel is liable to those whom he should expect to be endangered by its probable use or injuries caused by lawful use of the chattel in the manner and for the purpose for which it was supplied.[43]

Moreover, "[t]his principle applies without the necessity of privity between the manufacturer and the injured person."[44]

On the question of whether the negligent design was the proximate cause of the damage, the court also held for the plaintiff but stated: "Where circumstantial evidence is relied upon it is necessary that the evidence establish the reasonable likelihood or probability of the occurrence and not merely the possibility of the occurrence."[45]

While unwholesome foodstuffs and negligently designed products comprise a sizable portion of the products liability cases, the usual situation concerns a defective product such as in *Benford v. Berkeley Heating Co.*[46] This was an action against the manufacturer and the installer of a furnace which caused a fire that destroyed the plaintiff's home. The furnace vent had been installed too close to a pine beam, and a blower switch failed to operate properly thereby causing the temperature within the furnace to become higher than normal. The lower court found for the installer but against the manufacturer, and the manufacturer appealed.

The supreme court reversed the lower court decision with respect to the manufacturer's liability, holding that there was no evidence that the defective switch could have caused the fire by itself. In the court's view, the only reasonable inference from the evidence was that the installer's intervening negligence was not reasonably foreseeable by the manufacturer. This decision was based upon section 330 of the *Restatement of Contracts*:

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43. *Id.* at 544, *citing* Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966).

44. 344 F. Supp. at 544.

45. *Id.*

46. 258 S.C. 357, 188 S.E.2d 841 (1972). *See also* Survey of Evidence *supra.*

> In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it.[47]

Carolina Homebuilders, Inc. v. Armstrong Furnace Co.[48] is an interesting case that can be read for the proposition that a manufacturer[49] has a duty of care in assuring an appropriate choice of components. The plaintiff had purchased heating and cooling equipment for his apartment building from the defendant, and this action was for water damage caused by condensation from the cooling equipment spilling onto the floor rather than into the drain pans. At trial the defendant admitted that the problem resulted from the use of an evaporator that was not compatible with the plaintiff's furnace system. The court stated that the defendant was put on notice by the order for twenty-four furnaces, condensers, and evaporators that these appliances would be used in combination. Therefore, the jury could reasonably conclude that the defendant was negligent in filling the order without warning the plaintiff that the units did not match or giving adequate instructions about their use.

II. SLANDER

In *Smith v. Phoenix Furniture Co.*,[50] two of the defendant's employees mistook the plaintiff for his brother, called him a son-of-a-bitch and a bastard, and erroneously accused him of trying to "beat the furniture company out of money" owed to it.[51] The plaintiff took umbrage and promptly brought an action for slander.

The federal district court, in granting the defendant's motion for summary judgment, first noted that the abusive language was not actionable per se. It stated the South Carolina rule as follows:

47. RESTATEMENT OF CONTRACTS § 330, at 509 (1932). It should be noted that the plaintiff presented evidence supporting both implied warranty and negligence theories and, when compelled to elect, chose the former.

48. 259 S.C. 346, 191 S.E.2d 774 (1972) (reversed and remanded on grounds of prejudicial error in instructions).

49. The distributor of the equipment, Sun Heating Co., was dismissed from the action at the plaintiff's election. *Id.* at 354, 191 S.E.2d at 777.

50. 339 F. Supp. 969 (D.S.C. 1972).

51. *Id.* at 970.

> [W]ords are actionable [which] falsely or maliciously charge the commission of a crime, or which distinctly assume or imply one has committed a crime, or which raise a strong suspicion in the minds of hearers or readers that one has committed a crime, or which plainly and falsely charge the contraction of a contagious disease, adultery or want of chastity, or unfitness in the way of a professional trade.[52]

Because the words used by the defendant's employees did not fall within any of the categories above, in order to recover the plaintiff had to prove special damage; that is, actual damage "capable of being assessed at monetary value."[53] This was an insurmountable obstacle, for there was no evidence that the plaintiff had sustained any damage at all. The vulgar language amounted only to words spoken in anger: "It [did] not appear that anyone who heard the words . . . understood them in a defamatory sense."[54] Moreover, the plaintiff did not establish by way of colloquium that the epithets were directed at him, because the defendant's employees had mistaken him for his brother and had reviled only the latter.[55]

III. FRAUD

A common example of fraud occurs when a party to a transaction conceals a material fact that he has a duty to disclose.[56] This was the situation in *Lawson v. Citizens & Southern National Bank*.[57] The plaintiffs built a house on lots purchased from the defendant. Several years later, during repairs to stop the house from sinking, they discovered that the lots had been filled with construction debris and capped with clay. The defendant maintained that the plaintiffs knew of the gully on the property before they purchased it. The plaintiffs, however, contended that though they were aware of a small gully in the front of the property they purposely built their house on a different spot and had no knowledge that the lots had been filled.

52. *Id.* at 971, *citing* Matthews v. United States Rubber Co., 219 F. Supp. 831 (D.S.C.), *aff'd*, 332 F.2d 597 (4th Cir. 1963); Lesesne v. Willingham, 83 F. Supp. 918 (D.S.C. 1949).

53. 339 F. Supp. at 971, *citing* Sandifer v. Electrolux Corp., 172 F.2d 548 (4th Cir. 1949). *See generally* W. PROSSER, THE LAW OF TORTS § 112, at 760-62 (4th ed. 1971).

54. 339 F. Supp. at 972.

55. *See* W. PROSSER, THE LAW OF TORTS § 111, at 749 (4th ed. 1971).

56. *See, e.g.*, Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372 (1942).

57. 193 S.E.2d 124 (S.C. 1972).

The court resolved this conflict and disposed of the case by accepting the plaintiff's evidence as true because the defendant was appealing the trial court's refusal to grant it judgment *n.o.v.*[58] Concluding that the defendant's liability was clear, the court perfunctorily restated the law applicable to cases of this type: "Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts and make them known to the purchaser."[59]

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58. *Id.* at 126.
59. *Id.* at 128.