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TORTS

I. FRAUD AND DECEIT

During the survey year, in *Gilbert v. Mid-South Machinery Co.*[1] the supreme court further defined what types of misrepresentations may be justifiably relied upon to give rise to a fraud and deceit action. The trial court judge had refused to direct a verdict for the defendants, having found sufficient evidence to support a fraud and deceit action and to send the case to the jury;[2] the defendants appealed.

In December 1971, James and Cecil Gilbert purchased a laundromat in Anderson, South Carolina, from Mid-South, which had exercised a purchase option on the business several days before selling it to the Gilberts. Thomas Coker, president of Mid-South, had been contacted by the Gilberts in response to a newspaper advertisement regarding the facility. During the course of their negotiations, Coker had represented himself as an expert in the laundromat business. He told the Gilberts that they would gross approximately $3,000 per month and that their net would be $1,000 per month; but in response to their queries about business records, he told them none existed while, in fact, the previous owner had kept such records. The deal was struck and under terms of the sale the Gilberts paid $7,000 in cash to Mid-South, plus $5,000 amortized over five years, and assumed the $32,051.24 balance due on a lease agreement with Falco, Inc., the owner-lessor of the cleaning equipment located in the facility. Four consecutive months of losses resulted in the Gilberts' failure to make any further lease payments. A judgment was rendered against them for $31,960.13, representing the amount due on the balance of the lease plus attorneys' fees. In July 1973, the Gilberts instituted an action for fraud and deceit against defendants Mid-South and Coker. Judge Grimball, in the Court of Common Pleas, Anderson County, refused to direct a verdict for the defendants and the jury awarded $45,000 actual and $5,000 punitive

1. 267 S.C. 211, 227 S.E.2d 189 (1976).

2. In an action for fraud based on representation in South Carolina, the plaintiff must prove nine elements: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. Flowers v. Price, 190 S.C. 392, 395, 3 S.E.2d 38, 39 (1939) (citing 26 C.J. *Fraud* § 6 (1921)).

damages to the Gilberts.[3]

The supreme court's review centered on Coker's statements regarding the laundromat's profitability and his denial that any business records were kept. In order to uphold the lower court, the supreme court had to overcome the bar of *Jones v. Cooper*[4] which held that if the truth is easily in reach of a party, he cannot rely on a misstatement of fact.[5] The appellants contended that the plaintiffs had had the opportunity to discover business records and to discern the profitability of the business for themselves and, therefore, had no right to rely on the misrepresentations. The *Gilbert* court held that since the subject matter of the representation in *Jones, i.e.,* the location of vending machines, was "open, patent, and visible,"[6] the case was distinguishable from *Gilbert* which dealt with a representation regarding something intangible, such as business profits. Therefore, the plaintiffs were not precluded from reliance as a matter of law. The court determined that it was properly a jury question whether the Gilberts were reasonably prudent in their reliance on Coker's statement.[7] As to defendant Coker's denial of the existence of business records, the court noted initially that the misrepresentations relied upon to bring a fraud and deceit action must be "predicated on misstatements of fact rather than misstatements of opinion,"[8] the distinction being "that what was susceptible of exact knowledge" at the time the statement was made is generally a statement of fact.[9] The court viewed the evidence as raising a presumption that Coker knew that records existed:

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3. 267 S.C. at 217-19, 227 S.E.2d at 191-92.

4. 234 S.C. 477, 109 S.E.2d 5 (1959).

5. *Id.* at 489, 109 S.E.2d at 11. In *Jones,* the plaintiff relied on an advertisement stating the income to be derived from an investment as well as on a representation of an agent of the defendant that certain hot dog cooking machines, which the plaintiff agreed to purchase, would require servicing only one day a week and would be placed in proper locations by the defendant. Plaintiff, without checking these locations, initially agreed to defendant's placements, but the next day he tried to back out of the purchase because the selected locations were in the poorest sections of town. In the action for fraud against the seller, the court found the ads stating the probable income of purchasers to be merely "dealers talk" or "puffing." The court also held that the plaintiff could have found out the truth of the appropriateness of the locations if he had wanted to since they could have been easily checked out before the agreement was completed.

6. 267 S.C. at 220, 227 S.E.2d at 193.

7. *Id.*

8. *Id.* (citing 37 AM. JUR. 2d *Fraud and Deceit* § 45 (1968)).

9. 267 S.C. at 220-21, 227 S.E.2d at 193 (quoting 37 AM. JUR. 2d *Fraud and Deceit* § 46 (1968)).

> [I]t is not necessary, in order to establish fraud, to prove that the person making the allegedly false representation had actual knowledge of its falsity; if he makes it as of his personal knowledge, with reckless disregard of his lack of information as to its truth, his knowledge of its falsity is legally inferable.[10]

The statements made to the Gilberts by Coker were found to be misstatements of fact sufficient to constitute actionable fraud.

Another aspect of the case involved an issue that Justice Rhodes indicated had never been discussed previously by the court. The appellants contended that errors in the jury charge entitled them to a new trial. In his charge, the trial judge had instructed the jury that the weight of the evidence must be "clear, cogent, and convincing,"[11] which is the correct charge in South Carolina;[12] but he also had made references to the plaintiff's having the burden of proving his case by the greater weight or "preponderance of the evidence" test.[13] The supreme court refused to take the isolated segments of the charge which might possibly have implied a lesser burden of proof, but instead considered whether the charge, taken as a whole, was consistent with the requirements as to the weight and sufficiency of the evidence to prove fraud. The court found the applicable law to be as follows:

> Fraud must be established by a preponderance of the evidence . . . . However, the courts have frequently stated that fraud must be established by evidence that is . . . clear, cogent, and convincing . . . . These expressions, however, have been interpreted to mean only that there must be a preponderance of evidence sufficient to overcome the presumption of innocence of

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10. *Id.* at 221, 227 S.E.2d at 193 (quoting Aaron v. Hampton Motors, Inc., 240 S.C. 26, 34, 124 S.E.2d 585, 588 (1962) (citation omitted)). In *Aaron,* the court upheld a judgment against a used car dealer for misrepresenting the mileage on an automobile to a buyer. The court used this legal inference to find the requisite knowledge of falsity.

11. 267 S.C. at 222, 227 S.E.2d at 194.

12. Carter v. Boyd Constr. Co., 255 S.C. 275, 178 S.E.2d 536 (1971). In *Carter,* the supreme court discussed the jury charge as follows:

> The jury was correctly instructed that in order for the plaintiff to be entitled to a verdict he was required to prove fraud by clear, cogent, and convincing evidence. Near the end of his charge, however, his Honor used language which could have been construed by the jury as meaning that fraud could be proved by a simple preponderance of the evidence. We doubt if the jury so understood it, but it would be well for such language to be avoided on a retrial.

Id. at 281-82, 178 S.E.2d at 540.

13. 267 S.C. at 222, 227 S.E.2d at 194.

> moral turpitude or crime, and, while the evidence must be clear and convincing, such clear and convincing proof may be met by a preponderance of the evidence.[14]

Since the charge as a whole embodied these principles, the instruction was viewed as proper.

The supreme court upheld the $45,000 actual and $5,000 punitive damages against the defendants stating that "the injured party in a fraud and deceit action is entitled to recover such damages as will compensate him for his pecuniary loss and place him in the same position he occupied before being defrauded."[15] The court determined that the amount of money paid to Mid-South, the amount of the judgment obtained against the Gilberts on the balance due on the lease plus attorney's fees, and the amount of losses the plaintiffs sustained while running the business were all proper elements of damages; therefore, the award was not excessive. That the amount awarded did not reflect any adjustments for the value of the assets that the Gilberts had acquired apparently did not concern the court since the "[d]efendants did not request a more specific charge as to the measure of damages"[16] and the trial judge had charged that actual damages should be any money or pecuniary loss suffered by the Gilberts proximately resulting from the defendants' alleged wrongful conduct.[17]

II. Defamation

The twin torts of libel and slander were considered by the South Carolina courts in several contexts during 1976. *Ross v. Columbia Newspaper, Inc.*[18] and *Anderson v. Stanco Sports Library, Inc.*[19] were both decided for the defendant publishers on the ground that substantial truth of the alleged libel is a defense to the allegation in South Carolina. *Ross* was decided by the South Carolina Supreme Court, while the *Anderson* decision was handed down by the Fourth Circuit Court of Appeals.

Larry Ross brought his action for libel against Columbia

14. *Id.* at 222-23, 227 S.E.2d at 194 (quoting 37 C.J.S. *Fraud* § 114a (1943)).
15. *Id.* at 223, 227 S.E.2d at 194 (citing Thomas v. American Workmen, 197 S.C. 178, 14 S.E.2d 886 (1941)).
16. *Id.* at 224, 227 S.E.2d at 194.
17. *Id.*
18. 266 S.C. 75, 221 S.E.2d 770 (1976).
19. 542 F.2d 638 (4th Cir. 1976).

Newspapers after the defendant had published two articles concerning a shooting incident involving Ross and his wife. Ross had been taken to the police station, where he was fingerprinted and placed in a cell block. An arrest record was made which indicated that the charge against him was investigation for assault and battery with intent to kill. The reporter for the *Columbia Record* relied on the offense report to construct his first article headline: "WOMAN IS SHOT; HUSBAND HELD IN INCIDENT."[20] The article incorrectly referred to the plaintiff as having been charged with assault and battery with intent to kill where, in fact, Mrs. Ross did not press charges, and no warrant was ever issued; the article further identified the weapon involved as a .22 rifle, whereas it was a pistol. The next day a second article appeared under the headline: "MAN QUESTIONED IN WIFE'S DEATH RELEASED FROM JAIL,"[21] but the last sentence of the article correctly reported that Mrs. Ross was in a Columbia hospital.[22] The newspaper's defenses were that the articles were substantially true and that the paper was qualifiedly privileged. Judge Morrison, in the Richland County Court of Common Pleas, directed a verdict for the defendant.

The supreme court affirmed the directed verdict on the grounds that the defense of substantial truth was sufficient, relying on *Dauterman v. State-Record Co.*,[23] which held that a sufficient defense is made out when the evidence establishes that the alleged libelous statement is substantially true.[24] In *Ross,* the court refused to place a strict technical standard for accuracy on newspaper reporters' use of terms which have precise legal definitions:

> The fact that no warrant had been executed during the time period when the articles were written, does not mean that plaintiff was neither arrested nor charged as the terms were used in the articles. To require such a strict adherence to legal terminology from the news media, we think, would be unreasonable.[25]

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20. 266 S.C. at 78, 221 S.E.2d at 772.

21. *Id.* at 79, 221 S.E.2d at 772.

22. *Id.*

23. 249 S.C. 512, 154 S.E.2d 919 (1967).

24. *Id.* at 514, 154 S.E.2d at 919.

25. 266 S.C. at 80, 221 S.E.2d at 773. At trial plaintiff's counsel questioned the reporter regarding his understanding of certain legal terms:

Q. Did you consider it a charge? That offense report a charge?

A. When a person is arrested for the offense of assault and battery with intent to kill, I would consider it tantamount to a charge.

The obvious error in the headline was likewise not actionable. The rule in South Carolina as stated in *Jones v. Garner*[26] is that a headline "must be construed in connection with the article it precedes to determine whether it had a defamatory meaning."[27] The *Ross* court reasoned that the last sentence of the article, which revealed that Mrs. Ross was not dead, "rendered innocuous"[28] any harm caused by the headline, since the headline had not referred to the plaintiff by name.

The *Dauterman* holding that substantial truth is a defense to a libel action was reinforced by the federal court in *Anderson.* The plaintiff was a convicted murderer serving a life sentence. *Detective Cases* magazine had used newspaper accounts and the transcript of the trial record to develop an article initially published in April 1966, under the title "Swim With Murder Off Folly Beach." A second and identical publication of the article in May 1968 was entitled "Double Indemnity for a Sleep-Around Wife." In the interim between the two publishings, Stanco Sports Library, Inc. had become publisher of the magazine. Only the second article was relevant to the libel action since the statute of limitations barred any action regarding the first.[29]

The Fourth Circuit upheld Judge Chapman's award of summary judgment for the defendant. The lower court had found that Anderson was a "public figure" and the event was of "public interest" which brought the case within the ambit of the holding of *New York Times Co. v. Sullivan*[30] and required that actual malice be proved.[31] However, the court of appeals felt it unneces-

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Q. You consider an offense report a charge?

A. That shows a man was arrested for the offense of assault and battery with intent to kill and since that was the formal record of the Police Department available to me, I would assume that he had been charged, yes, sir.

Record at 78.

26. 250 S.C. 479, 158 S.E.2d 909 (1968).

27. *Id.* at 486, 158 S.E.2d at 912 (citing 33 AM. JUR. *Libel and Slander* § 88 (1941)).

28. 266 S.C. at 81, 221 S.E.2d at 773.

29. 542 F.2d at 639 n.1.

30. 376 U.S. 254 (1964).

31. The *New York Times* case announced the principle that for a public official to recover damages for defamation he must prove that the statement was made with "actual malice." 376 U.S. at 279. Judge Craven explained that *New York Times* involved only "public officials," but that the principle had been extended to include "public figures," Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and events of "public concern," Rosenbloom v. Metromedia, 403 U.S. 29 (1971). He further explained that the latest standard is set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and confines the application of the principle to consideration of the character of the allegedly defamed party rather than to the newsworthiness of the event. 542 F.2d at 640 n.2.

sary to decide whether a convicted murderer is a public figure and instead upheld the defense that the article was substantially true: "Any deviations from the sworn testimony at trial were inconsequential embellishments made by the author to add color or interest to the article. They did not cause Anderson's "good name" to be sullied any more than it already had been by the fact of his murder conviction."[32]

The holdings of *Ross* and *Anderson* indicate that the defense of substantial truth is a significant threshhold to overcome in libel actions. By relying on this defense, the *Ross* court avoided the issue of the newspaper's qualified privilege, and the *Anderson* court did not have to determine whether a convicted murderer is a public figure in order to uphold the district court's summary judgment.

Another case before the supreme court in 1976 involved the requirement of publication in a libel or slander action. Since defamation cases involve the protection of reputation, it is essential that the defamation be communicated to one other than the plaintiff.[33] In *Kendrick v. Citizens and Southern National Bank,*[34] the supreme court used the lack of any susceptible inference of publication as grounds to reject plaintiff's appeal from the trial court's granting a summary judgment for the defendant.

Donald Kendrick brought the action in the Common Pleas Court of Richland County based on an incident with the bank manager. Kendrick had refused to return money received from cashing a bad check written to Mrs. Kendrick by one of his tenants. The defendant had cashed the check without investigating it, since Mr. Kendrick was recognized as a good customer. When Kendrick refused to reimburse the bank, the manager requested that he close his account. The alleged libel stemming from the incident was a statement in a letter from the manager stating, " 'This is to acknowledge our telephone conversation this morning concerning the check we cashed for you that was no good.' "[35] The plaintiff viewed this as implying that he passed bad checks.

32. 542 F.2d at 641. The court cited an example of the legal insignificance of the alleged libelous statements. Anderson had admitted Mafia connections but claimed he was libeled by the article attributing to him an admission that he was a "high ranking member of the Mafia." *Id.*

33. W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971). *See* Tucker v. Pure Oil Co. of the Carolinas, 191 S.C. 60, 66, 3 S.E.2d 547, 549 (1939).

34. 266 S.C. 450, 223 S.E.2d 866 (1976).

35. *Id.* at 453, 223 S.E.2d at 867.

The alleged slander occurred during a telephone conversation between the plaintiff and the bank manager in which the manager was alleged to have said, " 'I want you to close your accounts . . . we do not want your kind of business.' "[36] The supreme court rejected the libel claim because the letter was mailed to Mr. Kendrick at his proper address and opened only by him; therefore, there was no publication. The slander claim also failed because the court held that the telephone conversation was private, between the plaintiff and the bank manager, and even if a third party at the bank had overheard the manager's words, there was no indication that the third party would know to whom the manager was referring in his remarks.[37] Since neither the libel nor the slander was published, the court affirmed the trial court's summary judgment for the defendant.

Another libel case considered by the court was *Ayers v. Columbia Newspapers, Inc.*,[38] in which forty guards and employees from Richland County Detention Center brought a single complaint against the defendant newspaper alleging libel in an article which referred to the group in an allegedly defamatory manner.[39] The court held that *Ayers* was controlled by the doctrine of *Ryder v. Jefferson Hotel Co.*[40] and affirmed the trial judge by printing his order sustaining the defendant's demurrer as a directive of the supreme court. The principle of *Ryder* is as follows:

> When a tort of a personal nature, as . . . a libel . . . is committed upon two or more, the right of action must, except in very few special cases, be several. In order that a joint action may be possible there must be some prior bond of legal union between the persons injured . . . of such a nature that the tort interferes

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36. *Id.*

37. *Id.* at 454, 223 S.E.2d at 867-68. The court cited with approval Neeley v. Winn-Dixie Greenville, Inc., 255 S.C. 301, 178 S.E.2d 662 (1971), which adopted the rule of 50 AM. JUR. 2d *Libel and Slander* § 143 (1970):

> Defendant's words are actionable only if they refer to some ascertained or ascertainable person, and to be entitled to recover, the plaintiff must show that he is the person with reference to whom the statement was made . . . . The language used must . . . be such that persons reading or hearing it will, in light of the surrounding circumstances, be able to understand that it refers to the person complaining, and it must have been so understood by at least one other person.

255 S.C. at 308, 178 S.E.2d at 665.

38. 267 S.C. 103, 226 S.E.2d 252 (1976).

39. The April 24, 1975, article in *The State*, "Richland Grand Jury Probing Possible Prison Drug Sale," discussed the possibility of a grand jury investigation concerning a narcotics ring involving guards and jail personnel. Brief for Respondent at 1.

40. 121 S.C. 72, 113 S.E. 474 (1922).

> with it, and . . . produces a wrong and consequent damage common to all.[41]

The lower court found that since the joined parties would be affected differently by the alleged causes of action, the complaint improperly united the several causes of action; consequently, the defendant's demurrer was sustained.

III. Actionable Negligence

In *Howard v. Riddle*[42] the supreme court affirmed the decision of Judge Price in the County Court, Greenville County, to refuse plaintiff's motion for a directed verdict as to defendant's liability for damages in an automobile accident. Plaintiff Dorothy Howard brought the action against defendant Shirley Riddle after the mishap, which was caused when the defendant lifted her foot from her brakes, and her car rolled approximately three feet and bumped the rear end of the plaintiff's vehicle while both had been stopped at a traffic light. After all the testimony, the plaintiff moved for a directed verdict as to Mrs. Riddle's liability, contending that the defendant's negligence was established as a matter of law. The trial judge denied the motion, and the jury returned a verdict for the defendant, from which an appeal was made.

The sole issue on appeal concerned the lower court's refusal to direct a verdict for the appellant.[43] In a 3-2 decision, Justice Rhodes upheld the trial court. The court cited with approval the definition of actionable negligence stated in *Gray v. Southern Facilities, Inc.*,[44] that "[i]t is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another."[45] For the plaintiff's motion for a directed

41. 267 S.C. at 106, 226 S.E.2d at 253 (quoting Ryder v. Jefferson Hotel Co., 121 S.C. at 75, 113 S.E. at 474-75).

42. 266 S.C. 149, 221 S.E.2d 865 (1976).

43. *Id.* at 150, 221 S.E.2d at 865.

44. 256 S.C. 558, 183 S.E.2d 438 (1971).

45. 266 S.C. at 151, 221 S.E.2d at 866 (quoting 256 S.C. at 567, 186 S.E.2d at 442). The supreme court also relied on the relevant section from 65A C.J.S. *Negligence* § 251(6)(b) (1966):

> Plaintiff must show, as a matter of law, not only that defendant was negligent but also that his negligence was a contributing or proximate cause of the injury, and plaintiff's motion must be denied where defendant's negligence, or that such negligence proximately caused the injury, is not the sole conclusion which reasonable men could draw from the evidence.

266 S.C. at 151, 221 S.E.2d at 866.

verdict to prevail, it was necessary not only for the plaintiff to establish the negligent act (in this case the admitted action of the respondent in lifting her foot from the brake without exercising due care), but also for her to prove "that such negligence was a proximate cause of *some* damage to plaintiff."[46] The matter of damages was in sharp dispute during the lower court proceedings;[47] therefore, no error was found for the trial judge's refusal to direct the verdict reaching defendant's liability.

Chief Justice Lewis wrote the dissent which maintained that the trial judge's failure to direct a verdict for the appellant on the issue of respondent's liability was prejudicial error.[48] The Chief Justice reasoned that the case should have gone to the jury only for a determination of damages, if any, since the act of negligence (as the majority had agreed) was already proved as a matter of law.[49] Otherwise, on the strength of the record, it was impossible for the supreme court to determine the basis for the jury's decision, which could have been either "(1) that there was no liability or (2), as the majority now surmises, no damages were sustained."[50]

IV. Wrongful Death: Actual Negligence, Family Purpose Doctrine, Excessive Damages

In *Lucht v. Youngblood*[51] the South Carolina Supreme Court upheld a judgment for the plaintiff who, as administrator of his deceased daughter's estate, had instituted an action for wrongful death resulting from an automobile accident. Seventeen year old Eileen Lucht was killed when the car in which she was a passenger collided with a car driven by seventeen year old defendant John Youngblood. The car was owned by defendant George

46. *Id.* at 151, 221 S.E.2d at 866.

47. The transcript of the proceedings in the lower court reveals that plaintiff had continued to drive her car for at least a month after the accident, that she had seen her doctor immediately after the accident, but not at all during the year preceding the trial, and that she did not have an estimate of damages to her vehicle made until just prior to trial, some 16 months after the accident. Also, the highway patrol was not called while the parties conversed after the accident, nor did any patrolman respond when the plaintiff called after defendant left the scene. Record at 9-18. Furthermore, the defendant testified that during their conversation after the accident the plaintiff had agreed there was no damage to her vehicle. Record at 26.

48. 266 S.C. at 153, 221 S.E.2d at 866.

49. *Id.* at 152, 221 S.E.2d at 866.

50. *Id.*

51. 266 S.C. 127, 221 S.E.2d 854 (1976).

Youngblood, John's father. In the Common Pleas Court of Charleston County, Judge Spruill entered judgment on a verdict in favor of the plaintiff but reduced the jury's award of $168,000 to a total judgment of $103,000 against the defendants. Justice Ness wrote for a 4-1 majority and addressed each of the four points appealed by the defendants.

The collision occurred on an S-curve of a four lane Charleston street divided by a double yellow line. The actual negligence of the defendant driver was established at trial by evidence positioning the vehicles in the plaintiff's daughter's lane after the accident and by a statement in the defendant driver's deposition that he "didn't have time enough to cross that yellow line by much."[52] In dismissing defendant's contention that the evidence failed to establish negligence, Justice Ness reasoned, "Certainly the circumstantial evidence, combined with the admission of the defendant was sufficient for the jury to conclude that the accident was caused by the defendant's crossing the double yellow line . . . ."[53] Furthermore, since the jury had been charged with the doctrine of sudden emergency, its verdict was held to be a rejection of the defense, and the actual negligence of the defendant was upheld.[54]

Defendant George Youngblood, the father of the driver, was made a party to the action under the family purpose doctrine.[55] The doctrine is a judicial fabrication and expands the concept of agency to make the parent responsible for the torts of a minor child who lives in the parents' household and operates an automobile provided by the parent for the use of the family. Established in South Carolina in 1913 by *Davis v. Littlefield,*[56] at a time when universal automobile liability insurance was not required, the doctrine still stands. Although ordinarily the application of the doctrine is a question of fact for the jury to decide, in *Lucht* the supreme court upheld the lower court's ruling that the doctrine applied as a matter of law because the testimony below was uncontradicted.[57] The court also recognized that the family purpose doctrine is still valid in South Carolina and was not, as appellants

52. *Id.* at 132, 221 S.E.2d at 857.

53. *Id.*

54. *Id.* at 132 and n.1.

55. For a discussion of the family purpose doctrine in South Carolina, see Note, *The Family Purpose Doctrine,* 18 S.C.L. REV. 638 (1966).

56. 97 S.C. 171, 81 S.E. 487 (1913).

57. 266 S.C. at 133, 221 S.E.2d at 857.

argued, superseded by the Motor Vehicle Financial Responsibility Act.[58]

A more difficult question was the appellants' argument that the trial court had erred in prohibiting them from cross-examining the plaintiff on his earlier pleadings in the case.[59] Originally, the plaintiff had alleged that the driver of the car carrying his daughter had negligently crossed the dividing line of the highway and, combined with John Youngblood's negligence, had caused the accident. However, the complaint was amended, and the driver of the car in which Eileen Lucht was riding was released by a covenant not to sue.[60] The trial judge refused to allow cross-examination concerning the prior pleading to insure that the jury was not informed about the earlier named defendant's release by covenant not to sue. The supreme court recognized the difficulty facing the trial judge, who was "rightfully concerned that if the defendants [*sic*] were examined on the prior pleadings, the existence of the covenants and its details would be spread before the jury."[61] But, nonetheless, the court ruled that the trial judge should have allowed cross-examination with an additional charge to the jury explaining the plaintiff's election of defendants. This error was held not reversible, however, since the "administrator was not a witness to the accident and would have no way of knowing what transpired except from talking with witnesses. Accordingly, any impeachment would have been of no value . . . ."[62] Justice Littlejohn registered a dissent on this issue, viewing the error as both erroneous and prejudicial.[63] He reasoned that "[i]f the jury had been told that the plaintiff had previously represented to the court in a prior pleading that the [driver of the car carrying his daughter] was across the center line, the result might have been different."[64]

58. S.C. CODE ANN. §§ 56-9-10 to 56-9-910 (1976). The appellant's argument was that the Motor Vehicle Financial Responsibility Act served the same purpose for which the family purpose doctrine had been created, that is, "to provide some form of financial responsibility for a minor's use of a family vehicle," and therefore should be considered to supersede the doctrine as a legislative enactment of public policy. Brief for Appellant at 38-39. Two cases were noted specifically as authority for this contention: Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949), and McMartin v. Saemisch, 254 Iowa 45, 116 N.W.2d 491 (1962). Brief for Appellant at 39-42.

59. 266 S.C. at 134, 221 S.E.2d at 857.

60. *Id.* at 134, 221 S.E.2d at 858.

61. *Id.* at 135, 221 S.E.2d at 858.

62. *Id.*

63. *Id.* at 139, 221 S.E.2d at 860.

64. *Id.* at 141, 221 S.E.2d at 861.

The jury awarded the plaintiff $168,000 actual damages, which the trial judge reduced to $110,000, from which $7,000 was deducted as received under the covenant not to sue. The Youngbloods contended that the remaining total judgment against them of $103,000 was "so grossly excessive as to show that it was actuated by passion, prejudice, sympathy and partiality . . . so shocking as to require a new trial absolute."[65] But the supreme court observed that although the largest verdict for a wrongful death of a minor previously upheld in the South Carolina Supreme Court was $50,000 in 1955,[66] they could not overlook the impact of inflation and reduced buying power.[67] Furthermore, in 1972 the Fourth Circuit Court of Appeals had affirmed an award of $125,000 by Judge Hemphill, the Federal District Judge, sitting without a jury, in a wrongful death action of a minor.[68] Despite the size of the verdict in *Lucht,* the supreme court did not regard it as excessive.[69]

V. Sovereign Immunity

Boyce v. Lancaster County Natural Gas Authority[70] presented an opportunity for the South Carolina Supreme Court to reconsider its position on whether quasi-municipal corporations are immune to actions *ex delicto* because of the doctrine of sovereign immunity.[71] In a 4-1 per curiam decision, the court confronted the strong *stare decisis* effect of prior decisions and chose not to alter the doctrine.

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65. *Id.* at 135, 221 S.E.2d at 858.

66. Mock v. Atlantic Coast Line R.R., 227 S.C. 245, 87 S.E.2d 830 (1955).

67. 266 S.C. at 136, 221 S.E.2d at 858-59.

68. Adams v. Hunter, 343 F. Supp. 1284 (D.S.C. 1972), *aff'd* 471 F.2d 648 (4th Cir. 1973).

69. 266 S.C. at 138, 221 S.E.2d at 860. The court pointed out that the standard applied for review of the excessiveness of jury verdicts was far from precise and quoted Gruenfeld v. Long Island R.R., 393 U.S. 156 (1968): "The standard has been variously phrased: 'Common phrases are such as: "grossly excessive," "inordinate," "shocking to the judicial conscience," "outrageously excessive," "so large as to shock the conscience of the Court," "monstrous," and many others.'" *Id.* at 159.

70. 266 S.C. 398, 223 S.E.2d 769 (1976).

71. The doctrine of sovereign immunity rests upon public policy considerations. An outgrowth of the historical logic that the "King can do no wrong," the doctrine also shows a reluctance to use public resources to redress private injuries or to subject the government to embarrassing and inconvenient lawsuits. Additional support for the doctrine is taken from the agency theory whereby agents of the state are always considered outside the scope of their authority when they commit torts. For a broad treatment of the doctrine's background, its application to the states, and subsequent attempts to restrict its effects, see W. Prosser, Law of Torts § 131 (4th ed. 1971).

Plaintiff Adelaide T. Boyce commenced her action in January 1975, alleging that the agents, servants, and employees of the defendant Lancaster County Natural Gas Authority (hereafter the Authority) had negligently caused an explosion at her home in Lancaster, South Carolina, in October 1973. Mrs. Boyce sought $500,000 actual and punitive damages for personal injuries and the destruction of her house and adjoining property. The defendant demurred to the complaint on the ground that no cause of action existed in tort against the Authority because it was a body corporate and politic created by Act No. 879 of 1954 of the General Assembly and thus shared in the sovereign immunity of the state. In the Sixth Judicial Circuit, Judge Gregory sustained the demurrer and plaintiff appealed.

Appellant contended that section 4(a)[72] of the act creating the Authority granted the Authority the power "to sue or be sued" and such power amounted to a waiver of immunity from tort actions. The court felt that this contention was expressly treated in *Rice Hope Plantation v. South Carolina Public Service Authority.*[73] In *Rice,* decided in 1950, the South Carolina Supreme Court had held that the Public Service Authority, having the power to produce and sell electricity, was a governmental agency and an integral part of the state and therefore was immune from an action *ex delicto.*[74] The *Boyce* court established that the Authority, which had the power to buy and sell natural gas, was, like the Public Service Authority in *Rice,* a quasi-municipal corporation since the "manufacture and sale of power is a public and governmental function"[75] and as such enjoyed the same immunity. As the *Rice* court had previously determined that similar language did not waive this immunity, the *Boyce*

72. No. 879, [1954] S.C. Acts & Jt. Res. 2325 provides in pertinent part: "SECTION 4. **Powers** — In order that the Authority shall be fully empowered to construct the System, to operate it, and to enlarge and extend the same within the limits of its Service Area, it shall be empowered: (a) To sue and be sued."

73. 216 S.C. 500, 59 S.E.2d 132 (1950).

74. The Public Service Authority had previously been held to be a "*quasi*-municipal corporation, exercising certain governmental functions as an agency of the State" in Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 137, 20 S.E.2d 645, 648 (1942). The *Rice* court agreed and further conferred upon it a sovereign status, stating: "Manifestly, a *quasi*-municipal corporation, as an agency of the State, is also in a real sense a part of the State, and shares in its sovereignty." 216 S.C. at 516, 59 S.E.2d at 138.

75. 266 S.C. at 401, 223 S.E.2d at 770 (citing Welling v. Clinton Newberry Natural Gas Auth., 221 S.C. 417, 71 S.E.2d 7 (1952)). The court further compared the two agencies noting that their powers and the legislative acts creating them were relatively indistinguishable.

court declared that the language of section 4(a) could not be interpreted as a waiver of the Authority's immunity to tort action.[76]

The appellant additionally urged the court to recognize, as a matter of public policy, that the Authority was subject to tort liability for negligent acts committed when engaging in a commercial or proprietary enterprise.[77] The distinction between governmental and proprietary functions is recognized by the overwhelming majority of jurisdictions,[78] but the court, acknowledging that the South Carolina courts have "consistently refused to recognize a distinction between governmental and proprietary

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76. 266 S.C. at 402, 223 S.E.2d at 770. After establishing the initial immunity of the Public Service Authority, the *Rice* court determined that this immunity was not waived by its creating act, S.C. CODE ANN. § 59-1 (1962) (current version at § 58-31-10 (1976)). The court explained that such immunity was not waived unless it is *expressly* waived and that "immunities attaching to sovereignty 'are never to be considered as waived or surrendered by any inference or indication.' " 216 S.C. at 516, 59 S.E.2d at 138 (quoting Brooks v. One Motor Bus, 190 S.C. 379, 383, 3 S.E.2d 42, 43 (1939)).

In contrasting language identical to section 4(a) of Act No. 879 of the 1954 General Assembly, the *Rice* court stated:

> In the case of *Sherbert v. School District No. 85, Spartanburg County*, 169 S.C. 191, 168 S.E. 391, 393, the Court held that a statute providing that a school district "may sue and be sued" cannot be construed "to make a school district liable in an action *ex delicto*, as it is not so expressly provided by its terms."
>
> It follows from what we have said that the power conferred upon the South Carolina Public Service Authority "to sue or be sued" cannot reasonably be construed to authorize an action *ex delicto*.

216 S.C. at 516, 59 S.E.2d at 138.

77. 266 S.C. at 402, 223 S.E.2d at 770.

78. The majority of states recognize this distinction. Functions of the municipal corporation, which are proprietary or corporate, remove it from the protection of immunity from suit usually enjoyed, and like a private corporation, a municipal corporation is held responsible for negligent acts. In *Boyce*, the plaintiff urged the court to consider two examples of this abrogation of sovereign immunity as adopted by sister states. In Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972), the North Carolina court reasoned as follows:

> [W]e recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia*, on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality.

Id. at 529, 186 S.E.2d at 908. The Virginia court, in Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962), recognized this distinction:

> In Virginia a municipal corporation is clothed with a twofold function — one governmental and the other proprietary. A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions. It may be liable, just as a private individual or corporation, for the failure to exercise or for negligence in the exercise of its proprietary functions.

Id. at 555, 125 S.E.2d at 811.

functions of a municipal corporation,"[79] refused to draw the distinction here.

Finally, the court pointed to its decision in *Belton v. Richland Memorial Hospital,*[80] in which it refused to overrule or modify the doctrine of sovereign immunity. The *Boyce* court adopted the rationale of *Belton:*

> We recognize that the doctrine of sovereign immunity has been assailed on many fronts and has been abolished or modified in more than one-half of the states either by judicial decision or by statute. While we have serious reservations about the soundness and fairness of the doctrine and do not question the authority of the courts to abolish it, we adhere to the view that reform in this field should be left to the legislature. That body has not been unmindful of the problem and over the years has enacted a number of statutes waiving immunity in specified cases on stated terms and conditions.[81]

In an articulate and forceful dissent, Justice Ness expressed "grave doubt about the continued vitality of the governmental immunity doctrine in general"[82] and showed a particular disapproval of the narrower instance whereby a quasi-municipal body, performing a proprietary function, is shielded by the "impenetrable armor of governmental immunity"[83] while its pri-

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79. 266 S.C. at 402, 223 S.E.2d at 770 (citing McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959)).

80. 263 S.C. 446, 211 S.E.2d 241 (1975).

81. 266 S.C. at 402, 223 S.E.2d at 770 (quoting 263 S.C. at 450-51, 211 S.E.2d at 243).

It is important to note that the defense of charitable immunity is no longer available to charitable hospitals. In Brown v. Anderson County Hospital Association, No. 20420 (S.C., filed May 10, 1977), the supreme court, per Justice Rhodes, held

> that anyone injured through tortious acts of commission or omission of the agents, servants, employees or officers of a charitable hospital in this State may recover damages against such hospital, if the aggrieved party can establish that the injuries occurred because of the hospital's heedlessness and reckless disregard of the plaintiff's rights. This standard of proof is one which is higher than that of simple negligence. It parallels that standard of proof required under S.C. Code § 46-801 (1962), known popularly as the Automobile Guest Statute.

It is emphasized that only hospitals were affected by *Brown. Cf.* Crowley v. Bob Jones Univ., No. 20421 (S.C., filed May 10, 1977) (concerning the charitable immunity of a school). The apparent reason for this contraction of the defense of charitable immunity is because hospitals obtain their revenues principally from paying patients rather than from state or county appropriations and private contributions. (*See* n.3 of *Brown.*) This economic rationale does not equally apply to other charitable institutions such as churches, orphanages, or colleges. To allow hospitals adequate time to obtain liability insurance, the court determined that the holding in *Brown* is to be applied only to appropriate claims filed after May 10, 1977.

82. 266 S.C. at 403, 223 S.E.2d at 771.

83. *Id.*

vate counterpart would not enjoy such protection. In his comprehensive treatment of the issue, Justice Ness traced the development of the doctrine in the common law of the English and American courts[84] and urged that the pragmatic reasoning that required acceptance of the doctrine in its earlier history was no longer valid and that the "purposes undergirding the broad and indiscriminate application of the doctrine have long since vanished."[85] While the majority adopted the rationale of *Belton*, which left reform to the legislature, as grounds for refusing to abolish or modify the doctrine of sovereign immunity, the dissent saw legislative inaction since *Belton* as an invitation for "judicial revocation of the doctrine."[86] Stressing that the *stare decisis* impact of earlier decisions is not binding when "out of touch with the needs of the present day society,"[87] Justice Ness viewed the exemption of the Authority from liability as "unconscionable . . . not in keeping with public policy . . . [and doing] little to enhance the betterment of society."[88] He concluded by urging that the governmental-proprietary distinction be adopted by South Carolina to insure that the respondent "accept the risks and attendant responsibilities along with the fruits of its enterprise."[89]

Albert N. Wergley

84. *Id.* at 404-06, 223 S.E.2d at 771-72.
85. *Id.* at 405, 223 S.E.2d at 772.
86. *Id.* at 406, 223 S.E.2d at 772.
87. *Id.*
88. *Id.* at 407, 223 S.E.2d at 773.
89. *Id.* at 409, 223 S.E.2d at 773.