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Torts

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TORTS[1]

I. NEGLIGENCE

A. *Standard of Care*

South Carolina case law concerning electrical contact torts has developed in harmony with general negligence law.[2] The supreme court's decision in *Foreman v. Atlantic Land Corp.*,[3] however, introduces uncertainty into this area of the law by failing to clarify the duty of care required of the power company in insulating wires and posting warning signs.

Foreman and Talbott, employees of the American Boring and Tunnelling Company, received electrical shock injuries when a crane operated by an alleged employee of the Atlantic Land Corporation came into contact with a South Carolina Electric & Gas Company[4] power line. Foreman and the administratrix of Talbott's estate brought suit claiming that SCE&G had been negligent in maintaining its high voltage lines.[5]

The standard of care adopted by the court in *Foreman* requires compliance with the National Electric Safety Code. Three cases provided the court with authority for adopting the NESC as the standard of care;[6] in these cases, however, compliance served merely as evidence of the defendant power companies' due care rather than as a distinct standard of care. Nonetheless, the South Carolina Supreme Court placed more significance on the power company's compliance with the safety code than did the three foreign courts by adopting the requirements of the code as the standard governing the duty to insulate power lines and by incorporating compliance as one facet of a two-part test to determine the need for warning signs in a particular case.[7]

On the issue of power line insulation the court held that a

1. Products liability is treated in *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 101 (1979).

2. An example of the South Carolina Supreme Court's approach to this area of the law is Elliot v. Black River Elec. Coop., 233 S.C. 233, 104 S.E.2d 357 (1958).

3. 271 S.C. 130, 245 S.E.2d 609 (1978).

4. Hereinafter referred to as SCE&G.

5. 271 S.C. at 132, 245 S.E.2d at 610.

6. Nelson v. Iowa-Ill. Gas and Elec. Co., 160 N.W.2d 448 (Iowa 1968); Dillard v. Southwestern Pub. Serv. Co., 73 N.M. 40, 385 P.2d 564 (1963); Virginia Elec. and Power Co. v. McCleese, 206 Va. 127, 141 S.E.2d 755 (1965).

7. 271 S.C. at 132-33, 245 S.E.2d at 610.

power company's failure to further insulate a line situated at a "sufficient height in compliance with safety codes" does not constitute negligence.[8] Compliance with the safety code in some situations may be accomplished by satisfying the minimum height requirements; where these requirements are not applicable in light of the circumstances, other safety code provisions must be the guide.[9] While the court apparently sets forth the National Electric Safety Code as the required standard of care applicable to power companies, the final portions[10] of the *Foreman* opinion inject ambiguity into the process of discerning the exact standard of care required. The court apparently considers the standard of care to be a general foreseeability standard, *i.e.,* power lines need not be insulated if their heights render tortious contacts reasonably unforeseeable. The court never provides a summation of the standard of care required of the power company; thus, one is left with two possible interpretations of the required standard: compliance with the requirements of the safety code or compliance with a general foreseeability standard. A reading of the *Foreman* opinion raises doubts that either of these interpretations alone is sufficient. The practitioner handling an electrical contact case should cautiously avoid focusing on less than the entire opinion in arguing the power company's breach of duty.

Appellants in *Foreman* also argued that SCE&G was negligent in failing to post warning signs in the area. The court disagreed with the appellants and set forth a two-part standard to determine when warning signs are unnecessary. The first part of the standard requires a determination of whether the lines were "sufficiently elevated."[11] Considering the court's approach to the isolation/insulation standard, the meaning of "sufficiently elevated" is not clear. The second determination is whether the crane operator was aware of the danger involved. Although this formulation appears straightforward, the precise level of aware-

8. The court stated that "[i]t is uncontroverted that the wire height at the accident scene was 29 feet, above the minimum of 22 feet set by the National Electric Safety Code. While this Code has no legislative sanction, it is difficult to conceive a better test of care than compliance with its provisions." *Id.* at 132, 245 S.E.2d at 610 (citations omitted).

9. Although National Electric Safety Code Rule 232 governs height requirements, it merely sets forth minimum requirements which apply only to areas whose descriptions fit those set forth in Rule 232. Since the area involved in *Foreman* did not fit any category under Rule 232, Rule 202 applied. Rule 202 requires that lines be placed at heights above the minimum level if certain local conditions exist.

10. 271 S.C. at 133-34, 245 S.E.2d at 611.

11. *Id.* at 133, 245 S.E.2d at 610.

ness required of the crane operator is not clearly enunciated. Furthermore, the court said that if these two conditions were met, warnings would serve no purpose. Presumably if a plaintiff could demonstrate that warnings would serve a purpose, a duty to warn might arise.[12]

B. Contributory Negligence

The South Carolina "railroad statute"[13] provides for the recovery of a penalty or damages for injuries received at railroad crossings when the railroad corporation fails to give the signals required by the statute. The statute allows an injured party to recover despite his lack of care unless his negligence was gross or wilful. The South Carolina Supreme Court has recognized that the provision creates a statutory cause of action;[14] a federal decision has held that accordingly the statute must be strictly construed.[15]

Central of Georgia Railway v. Walker Truck Contractors[16] presented the South Carolina Supreme Court with the novel question of whether section 58-17-1440 could be charged to a jury in a common-law railroad suit.[17] Prior to *Central,* the statute had been invoked only in a suit brought under the section itself. In

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12. *Id.*

13. S.C. CODE ANN. § 58-17-1440 (1976). The statute provides:

> If a person is injured in his person or property by collision with the engine or any car of a railroad corporation at a crossing and it appears that the corporation neglected to give the signals required by the General Railroad Law and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision or to a fine recoverable by indictment, unless it is shown that in addition to a mere want of ordinary care the person injured or the person having charge of his person or property was at the time of the collision guilty of gross or wilful negligence or was acting in violation of the law and that such gross or wilful negligence or unlawful act contributed to the injury.

Id.

14. King v. Southern Ry. Co., 249 S.C. 236, 153 S.E.2d 690 (1967).

15. Whilton v. Richmond & D.R. Co., 57 F. 551 (C.C.D.S.C. 1893).

16. 270 S.C. 533, 243 S.E.2d 923 (1978).

17. The essence of the charge, according to defendant-respondent, was the following:

> If the jury determined that the statutory signals, required by § 58-15-910, were not given by the railroad, and that such failure to give the statutory signals was a proximate cause of the accident, . . . in order for the railroad to defeat the Defendant's assertion of the railroad's comparative negligence, the railroad would have to show that the Defendant's driver was guilty of gross or wilful negligence, that such negligence contributed to the accident and was equal to, or greater than, the negligence of the Defendant.

Brief of Defendant-Respondent at 42.

all but one prior federal case,[18] the statute had been used "offensively" by the injured plaintiff suing a defendant railroad company.

Central of Georgia Railway alleged that one of its locomotives had sustained damages as the result of defendant's truck being negligently and recklessly driven into the path of the locomotive. Plaintiff argued that section 58-17-1440 only created a statutory cause of action in favor of the parties injured in railroad crossing accidents. The statute was not, according to the plaintiff, to be applied to a common-law action brought by a railroad company to recover damages done to its locomotive. A strict construction of the provision was requested.[19]

Defendant disagreed with plaintiff's contention that the statute could be applied only when the railroad was the defendant. The statute, according to defendant, merely modified the common-law duty of care required of those using railroad crossings when it is proved that the railroad has not given the proper signals.[20] The defendant focused on the purposes of the statutory crossing signals recognized in *Lawrence v. Southern Railway, Carolina Division*[21] — "to warn the unwary"[22] and to arouse the motorist approaching a railroad crossing who might be "momentarily abstracted or inadvertent."[23] Arguably, these purposes would be met by invoking the statute whenever the facts allowed, regardless of whether the railroad company was the plaintiff or the defendant in the action.[24]

The supreme court cited no authority in support of its ruling that the railroad statute could be invoked in the factual context of *Central.* Perhaps citation of authority was unnecessary in this instance; although the earlier use of the statute had been re-

18. Seaboard Coast Line R.R. v. Owen Steel Co., 348 F. Supp. 1363 (D.S.C. 1972) recognized that a defendant could rely on the provisions as a shield against a suit by a railroad company for property damage.

19. 270 S.C. at 538, 243 S.E.2d at 926.

20. Brief of Defendant-Respondent at 44.

21. 169 S.C. 1, 167 S.E. 839 (1933).

22. *Id.* at 12-13, 167 S.E. at 843.

23. *Id.*

24. In Seaboard Coast Line R.R. v. Owen Steel Co., 348 F. Supp. 1363 (D.S.C. 1972), the district court recognized that section 58-17-1440 could be used by a motorist injured at a railroad crossing either as a plaintiff suing the negligent railroad company or as a defendant being sued by the negligent railroad company. The case was not factually on point with *Central* because it was tried under the comparative negligence statute. Defendant-respondent argued *Seaboard* in its brief, but plaintiff-appellant did not deal with the case either in its brief or reply brief.

stricted to actions brought by a motorist injured in a railroad crossing accident, the text of the statute itself provides no indication that it could not be applied in a situation like *Central.*

In light of *Central,* the practitioner should be aware that the applicability of section 58-17-1440 is subject to the following considerations: first, as originally recognized, the statute can apply in actions brought under the statute by motorists against railroad companies;[25] secondly, general principles of contributory negligence apply to common law suits brought by motorists against railroad companies, but the statute does not;[26] thirdly, the statute may be applied in cases that involve railroad companies bringing common law suits against motorists.[27]

C. Proximate Cause—Causation in Fact

The concepts of causation in fact and proximate cause are two distinct concepts of negligence law which are often hopelessly confused. After establishing that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, the proximate cause issue remains to be resolved.[28] As Prosser explains, the proximate cause issue is "essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[29] General concepts of justice and administrative possibility and convenience are factors frequently considered in relation to proximate cause issues, but such policy considerations have no connection with the question of causation in fact.[30]

The South Carolina Supreme Court's opinion in *Green v. Lilliewood*[31] unquestionably blurs the distinction between these two concepts. *Green* involved a medical malpractice suit brought by a school teacher and her husband[32] against a specialist in

25. King v. Southern Ry. Co., 249 S.C. 236, 153 S.E.2d 690 (1967).
26. *Id.*
27. 270 S.C. 533, 243 S.E.2d 923 (1978).
28. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244 (4th ed. 1971).
29. *Id.*
30. *Id.,* § 41 at 237.
31. ___ S.C. ___, 249 S.E.2d 910 (1978).
32. Mrs. Mary G. Green brought suit for personal injuries as a result of alleged medical negligence of Dr. Lilliewood. Her husband, James Green, Jr., brought a companion action for medical expenses and loss of consortium. The cases were tried together, with the determination of Mrs. Green's case on appeal being understood to settle her husband's case. Record at *i.*

obstetrics and gynecology. The lower court granted Dr. Lilliewood's motion for a directed verdict because no cause and effect relationship was shown between the defendant's negligence and the plaintiff's injuries.[33] The briefs of appellant and respondent first stated the issue on appeal as one of causation in fact,[34] but presented their arguments in terms of proximate cause and causation.[35] The court's opinion in *Green* adopted almost the same approach.[36]

One is left to conclude that the parties to the *Green* suit and the supreme court all meant "causation in fact" when they employed the term "proximate cause." The practitioner relying on the *Green* opinion should recognize the court's tendency to use the terms interchangeably.[37] Much confusion will thus be avoided by the attorney who conceptualizes negligence law in accordance with Prosser.

II. IMMUNITY FROM SUIT

A. *Conditional Immunity*

The South Carolina Supreme Court, in *Hanselmann v. McCardle,*[38] was presented with the opportunity to consider the extent of immunity from tort liability enjoyed by county employees, but the majority opinion provides little insight into precisely what immunity such employees can expect.

Sommai Hanselmann died from complications associated with the disease hemotysis. The estate of the deceased brought wrongful death and pain and suffering actions against three physicians, their professional associations, a laboratory technician, and a laboratory aide. The estate claimed that Edwards, the laboratory technician, and Brooks, the laboratory aide, did not follow specified laboratory procedures and reported test results connected with the deceased's illness without exercising proper care. At trial, the two Richland Memorial Hospital employees demurred on the ground that as public employees they enjoyed

33. *Id.*

34. Brief of Appellants at 5; Brief of Respondent at 1.

35. Brief of Appellants at 6, 7; Brief of Respondent at 1, 4.

36. ___ S.C. ___, 249 S.E.2d 910, *passim.*

37. The *Green* opinion is not the first time the supreme court has used the terms "proximate cause" and "causation" interchangeably. *See, e.g.,* Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976).

38. 270 S.C. 367, 242 S.E.2d 421 (1978).

immunity from suit for their discretionary official acts committed without malice. The trial court denied the demurrer and defendants appealed.

In affirming the lower court's denial of the demurrer, the supreme court recognized that public employees like Edwards and Brooks are not as a matter of law immune from tort liability under the facts presented. Defendants-appellants argued that the common-law immunity rule established in *Long v. Seabrook*,[39] should be applied.[40] *Long* recognized that "[i]n a tort suit against a public official whose duties are discretionary, it must be shown that in the performance or nonperformance of those duties the public official was guilty of corruption, or bad faith, or influenced by malicious motives, before a recovery can be had."[41]

Responding to appellants' reliance on *Long*, plaintiff-respondent argued that the present case was distinguishable from *Long* on three points. First, the respondent argued that a laboratory technician and aide are distinguishable from the "public official" who was the defendant in *Long*.[42] Secondly, the acts of Edwards and Brooks were ministerial, whereas the acts complained of in *Long* were discretionary.[43] Appellants maintained in response that the methods of testing and sample analysis necessarily required discretion on the parts of Edwards and Brooks and that the method of transmitting the results of the tests was not prescribed by law with sufficient precision to "leave nothing to the discretion of the official on whom the duty is imposed."[44] Finally, the respondent argued that the acts complained of in *Long* were *ex delicto* whereas the acts of Edwards and Brooks were *ex contractu*.[45] Appellant refused to admit this as an issue because the respondent had not alleged any contractual relationship in the pleadings.[46]

In the context of these arguments, the court's response that

39. 260 S.C. 562, 197 S.E.2d 659 (1973).

40. Brief of Appellants (Pain and Suffering) at 4; Brief of Appellants (Wrongful Death) at 4.

41. 260 S.C. at 569, 197 S.E.2d at 662.

42. Brief of Respondent at 13, 14, Hanselmann v. McCardle, 270 S.C. 367, 242 S.E.2d 421 (1978).

43. *Id.* at 14. Appellants considered the ministerial/discretionary distinction to be the central disagreement between the parties. Reply Brief of Appellants at 2.

44. Reply Brief of Appellants at 3.

45. Brief of Respondent at 14.

46. Reply Brief of Appellants at 1.

the "scope of immunity, if any"[47] should be decided at trial arguably reveals the court's uncertainty whether the defendants were "public officials" performing "discretionary duties," as was the case in *Long*. Terming the issue before it a "critical" one, the court further admits the novelty of the question raised. Although the court in *Hanselmann* considered the issue of conditional immunity to be best decided at trial, it did not adopt the same approach when, in a later case, the issue of absolute governmental immunity arose.[48]

B. Absolute Governmental Immunity

Despite the persuasive arguments that can be made to the contrary, the South Carolina Supreme Court continues to adhere to the doctrine of absolute governmental immunity from tort liability. *Wright v. City of North Charleston*[49] provided the court with an opportunity to either completely overrule the doctrine or, alternatively, to resurrect a previously recognized rule allowing recovery from municipalities for personal injuries occurring in city parks and playgrounds. The supreme court refused to do either.

Plaintiff sued the City of North Charleston for personal injuries resulting from a defect in a merry-go-round located in a public park under defendant's control. The trial court sustained defendant's demurrer. On appeal, the supreme court focused solely on the question of whether governmental immunity had been waived by the state under South Carolina Code section 5-7-70,[50] thus permitting plaintiff's cause of action. The section provides:

> Any person who shall receive bodily injury or danger in his person or property through a defect in any street, causeway, bridge or public way or by reason of a defect or mismanagement of anything under control of the corporation within the limits of any city or town may recover in an action against such city or town the amount of actual damages sustained by him by reason thereof if such person has not in any way brought about any such injury or damage by his own negligent act or negligently contributed thereto.[51]

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47. 270 S.C. at 369, 242 S.E.2d at 422.
48. Wright v. City of North Charleston, 271 S.C. 534, 248 S.E.2d 480 (1978).
49. *Id.*
50. S.C. CODE ANN. § 5-7-70 (1976).
51. *Id.*

The statute on its face allows recovery for bodily injury caused "by reason of a defect [in] . . . anything under control of the corporation within the limits of any city . . . ."[52] This statute was interpreted by some early South Carolina cases to impose liability upon cities for injuries occurring in public parks and playgrounds.[53]

The last case to so interpret the statute was a 1920 case, *Haithcock v. City of Columbia*,[54] upon which plaintiff relied. The subsequent decisions by the supreme court, however, have rejected *Haithcock* and the earlier cases which had held cities liable under the statute. The decisions in *Hicks v. City of Columbia*[55] and *Furr v. City of Rock Hill*,[56] relying on a 1932 case, *Reeves v. City of Easley*,[57] completely eroded the *Haithcock* decision. *Reeves* recognized that the words of the statute "by reason of defect or mismanagement of anything under the control of the corporation" relate to instrumentalities used to maintain the streets, causeways, bridges, or public ways for safe travel.[58] This strict construction approach invoked in *Reeves* was determinative for the court in *Wright*.

Wright sounds the death knell for any hope of reverting to the *Haithcock* rationale. Apparently, the only authority that will persuade the South Carolina Supreme Court to abrogate municipalities' immunity from liability for negligence is a statute explicitly providing for the elimination of the immunity.

Wright provided a superb opportunity for the South Carolina Supreme Court to hold the municipality liable for its negligence. The court had before it a statute which ostensibly provided the plaintiff with a cause of action against the city. In addition, the court had available South Carolina case law interpreting the statute favorably to the plaintiff. The recognition of a cause of action in this case would not have required any "judicial legislating" by the court.[59] While the supreme court had expressed reservations

52. *Id.*

53. *See, e.g.*, Stone v. Florence, 94 S.C. 375, 78 S.E. 23 (1913); Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

54. 115 S.C. 29, 104 S.E. 335 (1920).

55. 225 S.C. 553, 83 S.E.2d 199 (1954).

56. 235 S.C. 44, 109 S.E.2d 697 (1959).

57. 167 S.C. 231, 166 S.E. 120 (1932).

58. *Id.* at 253, 166 S.E. at 128.

59. The supreme court recognized its "legislative" powers in Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 486, 234 S.E.2d 873, 876 (1977).

about the doctrine of governmental immunity in an earlier case, *Belton v. Richland Memorial Hospital,*[60] the depth of the court's reservations is questionable in light of the *Wright* opinion.

The legislature should give serious consideration to reforming this area of the law. As the appellant argued in *Wright,* simple justice dictates that immunity should be the exception rather than the rule; "[i]t is not . . . better for an individual to suffer a grievious wrong than to impose liability on the people vicariously through their government."[61] The availability of liability insurance to municipalities would cushion the adverse effects of tort suits brought against municipalities.

C. *Statutory Immunity*

During the 1978 legislative term, the General Assembly also dealt with the issue of immunity from tort liability. The legislature passed an act[62] exempting duly appointed members of state or local professional societies and medical staff peer review committees from tort liability.[63] Such immunity covers:

> Any act or proceeding undertaken or performed within the scope of the functions of any such committee if such committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration and acts in the belief that the action taken by him is warranted by the facts known to him.[64]

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60. 263 S.C. 446, 211 S.E.2d 241 (1975). The court maintained:

> 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.

Id. at 451, 211 S.E.2d at 243.

61. Brief of Appellant at 3, Wright v. City of North Charleston, 271 S.C. 534, 248 S.E.2d 480 (1978).

62. S.C. CODE ANN. § 40-71-10 (Cum. Supp. 1978).

63. *Compare* this statute *with* the holding in Brown v. Anderson County Hosp. Ass'n:

> [A]nyone 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.

268 S.C. at 487, 234 S.E.2d at 876-77.

64. S.C. CODE ANN. § 40-71-10 (Cum. Supp. 1978).

The ten "professional societies"[65] covered by the act must meet a special membership requirement[66] to fall within the ambit of the statute. The act has no application to an officer or employee of a public corporation.

III. VICARIOUS LIABILITY

The South Carolina Supreme Court and the Fourth Circuit Court of Appeals, applying South Carolina law, were asked to determine whether an employer should be liable for the actionable wrong committed by its employee. Faced with different factual situations, the courts came to different conclusions. Both cases serve to indicate the difficulty in maintaining a summary judgment ruling on the issue of vicarious liability.

The *respondeat superior* doctrine is generally invoked to obtain recovery from the master for injuries committed by the servant's negligent acts.[67] Modern courts have also recognized that the doctrine can be applied to hold the master responsible for the intentional acts of the servant.[68] If the master should have foreseen the possibility of the servant's tortious act in light of the servant's duties, the master will be held liable.[69] The intentional tort must be so reasonably connected with the agent's duties that it is within the scope of his employment.[70] Accordingly, masters have been held liable for assaults by their servants.[71] South Carolina law has previously recognized an employer's vicarious liability for assault committed by an employee.[72]

In *Jamison v. Howard*,[73] plaintiff Jamison sought recovery

65. The ten societies covered by the statute are legal, medical, osteopathic, optometric, chiropractic, psychological, dental, accounting, pharmaceutic and engineering organizations. *Id.*

66. The professional societies covered by the statute must have "as members at least a majority of the eligible licentiates in the area served by the particular society and any foundations composed of members of such societies." *Id.*

67. *See* W. SEAVEY, LAW OF AGENCY § 87, at 148 (1964); W. PROSSER, *supra* note 28, § 69, at 458.

68. W. PROSSER, *supra* note 28, § 70, at 464.

69. RESTATEMENT (SECOND) OF AGENCY § 245 (1957).

70. W. PROSSER, *supra* note 28, § 70 at 464.

71. *See* Tarman v. Southard, 205 F.2d 705 (D.C. Cir. 1953) (taxi driver ran over customer during a dispute between the two about a fare); Dilli v. Johnson, 107 F.2d 669 (D.C. Cir. 1939) (waiter beat patron when the latter threatened to report a complaint to the owner); Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921) (assault by angered agent following plaintiff's tender of fifty pennies in payment of a bill).

72. Jones v. Elbert, 206 S.C. 508, 34 S.E.2d 796 (1945).

73. 271 S.C. 385, 247 S.E.2d 450 (1978).

against Howard, as principal, and Hallums, as Howard's agent, for his injuries. George Howard, Jr., owner of Howard's Party Shop in downtown Greenville, hired James Hallums to manage his business. William Jamison, operator of a Greenville County nightspot called the Chocolate City Lounge, on several occasions bought beer and wine on credit from the Party Shop. Jamison's purchases from the Party Shop were made only in dealings with the shop's manager, Hallums. Hallums customarily received payment from Jamison whenever Jamison sold the beer and wine. Jamison never received any indication that credit purchases from Hallums were not direct purchases from the Party Shop or that Hallums did not have authority to sell merchandise on credit.

In December 1975, Jamison purchased on credit $189.00 worth of beer and wine from the Party Shop, but the purchases were subsequently stolen from his place of business. The theft rendered Jamison unable to pay the Party Shop the amount due. On two occasions, Hallums attempted to collect the money but was unsuccessful. Hallums thereafter informed Jamison that the Party Shop owner had agreed to give Jamison more time to pay in return for twenty dollars.[74]

After previous attempts to collect the debt, Hallums and an acquaintance, Marvin Morgan, visited Jamison in January 1976 seeking payment. Hallums informed Jamison that Howard, the Party Shop owner, wanted to either receive payment or see Jamison.[75] Jamison asked the identity of Morgan and Morgan responded, "I work with the man sonny, don't you worry about who I am."[76] When Jamison refused to cooperate with them, Hallums handed Morgan a pistol, which had been given to him by Howard for use in his work, and instructed Morgan to kill Jamison. As a result of the gunshot wounds, Jamison was left a paraplegic.

Howard's motion for summary judgment was granted by the trial court on the ground that there was no evidence that defendant Hallums was acting as Howard's agent at the time of the alleged assault. Plaintiff appealed the order for summary judgment.

The supreme court concluded that there was evidence to support a reasonable inference that Hallums acted as Howard's agent. Significant to the court was Jamison's apparent under-

74. Record at 17.
75. Brief of Appellant at 5 (citing Record at 17, 18).
76. Record at 18.

standing that the credit purchases he had made from Hallums were direct purchases from respondent Howard's Party Shop. In addition, all inferences from the testimony to the court were that Hallums gave credit and attempted to collect the debt as the employee of Howard. The supreme court found that whether Hallums was acting within the scope of Howard's employment was an issue of material fact which precluded the granting of summary judgment in favor of defendant Howard.

The brevity of Chief Justice Lewis' analysis was the result of the status of the case as an appeal from an order for summary judgment. The court's approach was dictated by the premise that summary judgment should not be granted when the only controversy between the parties is based on divergent conclusions or inferences drawn from undisputed evidentiary facts.[77] *Jamison* indicates the court's eagerness to avoid the use of summary judgment in determining the lack of vicarious liability, thus barring an injured plaintiff from his day in court. The result in *Jamison* does appear consistent with the earlier South Carolina case of *Jones v. Elbert*[78] which recognized that any factual issue over whether a servant was acting within the scope of his authority when he injured a third person should be submitted to the jury.[79]

In the final analysis, the *Jamison* decision was hastened not only because of the summary judgment status of the case and the rule that reasonable inferences are to be settled against the master, but arguably because of the compelling closing statements made by appellant's counsel: "The case should be remanded . . . for a trial by jury on the merits of the case. Only thus may the appellant be compensated for the terrible and permanent injuries sustained by him as a result of his failure to pay a $189.00 account for beer and wine on time."[80]

The *respondeat superior* doctrine is not the exclusive theory that may be used to hold a master liable for the acts of his servant. For example, an employer having a nondelegable duty[81] to

77. 271 S.C. at 386, 247 S.E.2d at 451.

78. 206 S.C. 508, 34 S.E.2d 796 (1945).

79. *Id.* at 514-15, 34 S.E.2d at 799.

80. Brief of Appellant at 80, Jamison v. Howard, 271 S.C. 385, 247 S.E.2d 450 (1978).

81. There are three forms of the duty of protection:

> First, a person may have a duty to protect another which can be performed either by exercising care personally in protecting the other or by exercising care in the employment of an independent contractor to protect the other. Secondly,

provide protection for others and their property is liable for all acts of his employees which breach this duty. Common carriers, innkeepers, and hospitals are held to this duty.[82] Under this nondelegable duty theory, it is not the scope of employment which determines the extent of the master's liability, but the nature of the duty assumed by the contract or special agreement entered into by the parties.[83]

In South Carolina and other jurisdictions, the common carrier owes to its passengers the highest degree of care possible, within the practical operation of its business.[84] Most courts, including those in South Carolina, restrict the imposition of this higher duty to carriers engaged in transportation for hire.[85] This area of the law, however, is currently undergoing expansion, especially in New York;[86] Massachusetts[87] and Illinois[88] have also ex-

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there may be a duty to protect another at all hazards, a duty which is not fulfilled unless the other is protected and which is not satisfied by the use of care. This duty normally exists only when undertaken by contract. Thirdly, one may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection. In this third class, the duty of care is nondelegable.

RESTATEMENT (SECOND) OF AGENCY § 214, comment a (1957).

82. PROSSER, *supra* note 28, § 70 at 465.

83. See note 81 *supra*.

84. *See* Singletary v. Atlantic Coast Line Ry. Co., 217 S.C. 212, 60 S.E.2d 305 (1950); Hutto v. American Fire & Cas. Ins. Co., 215 S.C. 90, 54 S.E.2d 523 (1949); Robinson v. Duke Power Co., 213 S.C. 185, 48 S.E.2d 808 (1948). A common carrier is not an insurer of the safety of its passengers. *See* Lentz v. Carolina Scenic Coach Lines, 208 S.C. 278, 38 S.E.2d 11 (1946).

85. S.C. CONST. art. IX, § 3 (1895) defined this area by providing:

All railroad, express, canal and other corporations engaged in transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire are common carriers . . ., and are subject to liability and taxation as such.

This section, however, was repealed in 1971.

86. In Stone v. William M. Eisen Co., 219 N.Y. 205, 114 N.E. 44 (1916), the court recognized the higher duty implicitly arising whenever one person is placed in the control or protection of another, finding such a duty to grow out of "peculiar and special relationships." This view was applied in that case to an employer-customer relationship. In McKee v. Sheraton-Russell, Inc., 268 F. 2d 669 (2d Cir. 1959), the court held that a guest could recover for an assault by a hotel employer even without proving that the employee was acting within the scope of his employment or that the hotel was negligent in hiring or retaining him.

87. *See* Crawford v. Hotel Essex Boston Corp., 143 F. Supp. 172 (D. Mass. 1956).

88. *See* Mizlak v. Ettinger, 25 Ill. App. 3d 706, 323 N.E.2d 796 (1975). Illinois has enacted a statute extending the higher duty of care normally imposed on common carriers to private security agencies. ILL. ANN. STAT. ch. 38, § 201-10b(10) (Smith-Hurd 1973).

tended the common carrier duty. In *Rabon v. Guardsmark, Inc.*,[89] the Fourth Circuit Court of Appeals considered the issue of extending common carrier liability to noncommon carriers.

Melvin Roberts, employed by Guardsmark, Inc. as a security guard, was assigned to the Hewitt-Robbins plant in Columbia, South Carolina, to provide protection for the plant and its employees. Pursuant to his employment as a security guard, he carried a loaded thirty-eight caliber pistol for which he was duly licensed by the South Carolina Law Enforcement Division. On Sunday night, January 19, 1975, Lola Rabon was working late at the plant with her supervisor. As the two left the building, Ms. Rabon discovered that she had left her car keys behind and returned to the building to get them. When Ms. Rabon returned to the building, Roberts forcibly assaulted and raped her at gunpoint. Plaintiff Rabon claimed that the assault by Guardsmark's agent rendered her unable to continue working and caused her other injuries.

Interpreting the law of South Carolina, the district court held, and the parties apparently agreed, that the facts of the case did not bring it within the traditional doctrine of *respondeat superior*. The court concluded, however, that a security guard company such as Guardsmark would be held to the higher standard of care which South Carolina law imposes on common carriers, and that under the facts, this standard of care was clearly breached by Guardsmark.

Overturning the decision of the district court,[90] the Fourth Circuit of Court of Appeals ruled that no reasoned basis existed to conclude that the South Carolina Supreme Court would extend common carrier liability to private security agencies. Specifically, the circuit court disagreed with the lower court by ruling that the South Carolina Private Detective and Private Security Agencies Act[91] merely establishes a licensing scheme and does not address the civil liability of private security agencies.

Section 40-17-130 of this Act confers upon a licensed security

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Under this statute an Illinois federal court, in Stewart Warner Corp. v. Burns Int'l Security Servs., Inc., 353 F. Supp. 1387 (N.D. Ill. 1973), held a security agency liable for a fire set by one of the agency's guards in a building he was assigned to guard.

89. 571 F.2d 1277 (4th Cir.), *cert. denied*, 99 S. Ct. 191 (1978).

90. The dissenting opinion of Circuit Judge K.K. Hall stated, in an emotional tone that "the voice of all that is right and just cries out for affirmance in this case." 571 F.2d at 1282 (Hall, J., dissenting).

91. S.C. CODE ANN. §§ 40-17-10 to -170 (1976).

guard "the authority and power which sheriffs have to make arrest of any persons violating or charged with violating any of the criminal statutes of this state."[92] Plaintiff Rabon argued, and the district court agreed, that the legislature's granting of police and sheriff powers to security guard companies and security guards evidenced their public service qualities. She argued that as the duty of protection owed by common carriers arises from its public service character and the special relationship of carrier to passenger, so also arises the duty of protection owed by a security guard company to those it protects.[93] The circuit court responded to this argument by noting three theories (one of which was argued by the plaintiff) that other jurisdictions had used to support the higher duty of the common carrier. The court concluded that it was unable to ascertain which theory, if any, explained the South Carolina common carrier decisions.[94] Thus, from the court's point of view, no reasoned basis existed to conclude that the supreme court would extend common carrier liability to private security agencies.

At least two controlling points of law weakened the persuasiveness of the plaintiff's arguments on the scope of the South Carolina Private Detective and Private Security Agencies Act. First, the rule in South Carolina is well-established that common-law rules are not changed or overturned except by clear and unambiguous statutory language.[95] Second, the circuit court had two years earlier invoked this established rule in determining the very issue presented in *Guardsmark, i.e.,* whether a licensing and regulating statute created a higher legal duty.[96]

Although not controlling, persuasive authority was provided by the Seventh Circuit case of *Apex Smelting Co. v. Burns.*[97] In

92. *Id.* § 40-17-130.

93. Brief of Respondent at 24.

94. 571 F.2d at 1281 n.5.

95. Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940); Nuckolls v. Great Atlantic & Pacific Tea Co., 192 S.C. 156, 5 S.E.2d 862 (1939).

96. In Hatfield v. Palles, 537 F.2d 1245 (4th Cir. 1976), the plaintiff was injured in a fire and resulting explosion in a building used to store fireworks. The building was owned by the defendant landlord and leased to the plaintiff's father. The plaintiff contended that the defendant was under a higher duty to keep the premises in a safe condition pursuant to South Carolina Code provisions which regulated the prevention and investigation of fire and pursuant to the specific provisions regarding fireworks. The circuit court in *Hatfield* disagreed with these contentions, reasoning that to adopt the plaintiff's interpretation of the Fire Marshall statutes would derogate well-settled rules of common law.

97. 175 F.2d 978 (7th Cir. 1949).

Apex, a detective agency subject to licensing and regulation was exonerated from liability for arson committed by one of the agency's guards. Only after a clear enactment by the Illinois legislature of a law imposing common carrier liability upon employers of detective and security guards did the Illinois Federal Court extend the common carrier standard of care to such an agency.[98]

The circuit court's approach in reaching its decision in *Guardsmark* deserves attention. The circuit court indicated that a "substantial factor" in its decision was the usual deference on the part of the South Carolina Supreme Court to the state legislature in matters involving a change in the common law. The court noted the reluctance of the South Carolina courts to expand tort liability, but at least one of the two examples[99] given by the circuit court to illustrate this reluctance undermined the substance of its argument.

The circuit court stated that "[t]he Supreme Court of South Carolina has twice declined to abolish or alter the doctrine of charitable immunity, although it expressed no doubt about its authority so to do. . . . It took a similar position with respect to the necessity of the privity of contract requirement in products liability cases . . . ."[100] In so stating, the circuit court completely ignored a recent decision in which the South Carolina Supreme Court altered one of the rulings referred to by the circuit court.

In 1977, the South Carolina Supreme Court in *Brown v. Anderson County Hospital Association*[101] 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

98. Brief of Appellant at 33-34, Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4th Cir. 1978).

99. One week before the *Guardsmark* decision, the South Carolina Supreme Court decided Gasque v. Eagle Machine Company, Ltd., 270 S.C. 499, 243 S.E.2d 831 (1978). *Gasque* abolished "the necessity of privity [of contract] as to any natural person who may be expected to sue, consume, or be affected by the product, and extend[ed] third party beneficiary protection to this class of person with respect to both injury and damage to 'person or property'". *Gasque* recognized the legislative abolishment of the common-law doctrine of requiring privity of contract. Although the court in *Guardsmark* failed to cite *Gasque,* that decision does support the contention in *Guardsmark* that the legislature leads the way in changing rules of common law. For a treatment of *Gasque* see, *Products Liability, Annual Survey of South Carolina Law,* 31 S.C.L. REV. 101, 101-07 (1979).

100. 571 F.2d at 1282.

101. 268 S.C. 479, 234 S.E.2d 873 (1977).

> because of the hospital's heedlessness and reckless disregard of the plaintiff's rights.[102]

Although *Brown* was limited to hospitals and to causes of actions arising after May 10, 1977, it nonetheless judicially altered the doctrine of charitable immunity, contrary to the findings of the circuit court in *Guardsmark.*

If the circuit court in *Guardsmark* had considered *Brown,* perhaps it would have reached a different conclusion concerning the usual deference of the South Carolina Supreme Court to the legislature in matters involving a change in the common law. The circuit court's discussion of the deference of the state's highest court to the legislature could be viewed as mere dictum except that the circuit court termed its consideration of such deference a "substantial factor" in its conclusion.

IV. TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE

Prior to December 1975, Ken Crabb was employed by Sales Consultants, Inc., an employment agency. In March 1975, Patricia Smith answered an advertisement of Sales Consultants concerning a sales position with Holt, Rinehart and Winston, Inc. (HRW), a national publisher of books. Crabb was assigned by Sales Consultants to handle negotiations between Smith and HRW.

In *Smith v. Holt, Rinehart & Winston,*[103] Smith alleged that after employment was virtually agreed upon, she learned that Crabb had been interviewing for the job with HRW, and that he was given the position for which she had applied. Smith contended that she was never told that an employee of Sales Consultants was being considered for the position, and that Crabb's actions were approved by the employment agency which accepted a fee from HRW with knowledge that the agency was breaching a contract with Smith.[104] Finally, it was alleged that Crabb and HRW conducted negotiations in secret at the same time that Smith was interviewing for the position, and that Crabb's actions constituted a course of double dealing and wilful, deceitful, and malicious conduct which deprived Smith of the prospective advantage she had in the likelihood of lucrative and permanent

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102. *Id.* at 487, 234 S.E.2d at 876-77.
103. 270 S.C. 446, 242 S.E.2d 548 (1978).
104. Record at 3.

employment with HRW.[105] Upon these allegations, Smith brought suit against Holt, Rinehart and Winston, Inc., Sales Consultants of Columbia, Inc., and Ken Crabb for "tortious interference with prospective advantage" a heretofore unrecognized cause of action in South Carolina.

The trial court recognized the viability of a cause of action for tortious interference with prospective advantage, but dismissed the complaint for failure to allege facts sufficient to support the cause of action. Plaintiff requested permission to amend her pleadings but the request was denied. On appeal, the supreme court, in a 3-2 decision,[106] ruled that a cause of action for interference with prospective advantage is not recognized in South Carolina.

The cause of action pleaded in *Smith* runs parallel to that for interference with existing contracts.[107] The basis for liability for the tort was originally predicated on malice and the action has remained essentially an intentional tort.[108] Prosser recognizes that cases allowing the tort have "turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it. As in the cases of interference with contract, any manner of intentional invasion of the plaintiff's interests may be sufficient if the purpose is not a privileged one."[109]

Since 1939, the supreme court has recognized a cause of action for tortious interference with contract.[110] In refusing to extend the concept to instances where no valid contract is in existence, the court maintained that no protection is afforded by the law to rights which are as yet expectancies. The supreme court in *Smith* refused to admit the existence of rights unless a present property right, *i.e.*, a contract, is in existence.[111]

In modern times it seems that one should have rights in an

105. *Id.* at 3-4.

106. Justices Rhodes and Ness concurred in the majority opinion written by Justice Littlejohn. Justice Gregory concurred in the dissenting opinion written by Chief Justice Lewis.

107. W. PROSSER, *supra* note 28, § 130 at 952.

108. *Id.*

109. *Id.*

110. Chitwood v. McMillan, 189 S.C. 262, 1 S.E.2d 162 (1939). *See also* Webster v. Holly Hill Lumber Co., 268 S.C. 416, 234 S.E.2d 232 (1977); Meadows v. South Carolina Medical Ass'n, 266 S.C. 391, 223 S.E.2d 600 (1976); Crowe v. Domestic Loans, Inc., 242 S.C. 310, 130 S.E.2d 845 (1963); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945); Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940).

111. 270 S.C. at 450, 242 S.E.2d at 549-50.

"expectancy." Prosser applicably quoted and commented that

> 'in a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it;'[112] . . . since a large part of what is most valuable in modern times depends upon 'probable expectancies,' as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue influence.[113]

As the dissenters in *Smith* argued, there is no sound distinction between tortious interference with a contractual relationship and tortious interference with the right to contract: the intent and the injury are the same.[114]

The court in *Smith* could have sustained the demurrers without refusing to recognize the cause of action in South Carolina by following the approach of the lower court. The lower court found no allegation of facts to support a finding of breach of any duty by any of the defendants or any illegal or improper conduct on their part.[115]

Although it was not necessary for the South Carolina Supreme Court to refuse to recognize the cause of action in reaching its result, it was even less necessary for the court to maintain that the proper way to recognize an action for tortious interference with prospective advantage was by legislative enactment. The tort that the plaintiff in *Smith* asked the court to recognize has been a part of the common law since a very early date.[116] The court gave no reason why the tort should not have been recognized by "judicial fiat." The court's insistence on deferring such a recognition to the state legislature unnecessarily hampers future judicial discretion in this area of tort law.

V. FALSE IMPRISONMENT

South Carolina Code Section 16-13-140[117] provides for de-

112. W. PROSSER, *supra* note 28, § 130 at 950 (quoting Brennan v. United Hatters of N. A., 73 N.J.L. 729, 65 A. 165 (1906)) (footnote added).

113. *Id.* (citing Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 53 A. 230 (1902)).

114. 270 S.C. at 450, 452, 242 S.E.2d at 548, 550 (Lewis, C.J., dissenting).

115. Record at 8. The dissenters in *Smith* went a step further than the lower court, finding the allegations of the plaintiff to be adequate to overcome the demurrers.

116. *See* W. PROSSER, *supra* note 28, § 130 at 949.

117. S.C. CODE ANN. § 16-13-140 (1976) provides:

fense to actions arising from a merchant's delay of suspected shoplifters. In *Faulkenberry v. Springs Mills, Inc.*,[118] the South Carolina Supreme Court allowed the statutory defense to be raised by an employer sued for false imprisonment by an employee.

Barbara Faulkenberry, a Springs Mills employee, was suspected of concealing cloth in her pocketbook. After two separate reports concerning Ms. Faulkenberry's behavior, she was delayed by her supervisor and security guards at the mill gatehouse as she left work. The sole purpose of the fifteen- or twenty-minute delay was to investigate whether she was attempting to remove her employer's property. After some discussion and Ms. Faulkenberry's continued refusal to open her pocketbook, she left without hindrance. She subsequently sued her employer for false imprisonment based upon her delay at the mill gatehouse.

The supreme court applied section 16-13-140 in *Faulkenberry,* although that section had previously been applied only to the merchant-shoplifter situation.[119] The *Faulkenberry* decision is noteworthy not only because it applies section 16-13-140 to a different set of facts, but the decision also provides the supreme court's interpretation of certain requirements found in the statute.

Pursuant to section 16-13-140, one sued under the statute may raise as a part of his defense the fact that reasonable cause existed to believe that the person delayed had committed the crime of shoplifting.[120] Disregarding the statute's requirement of showing mere "reasonable cause," the supreme court held that "probable cause" is required by the statute.[121] While clearly the court's holding ignores the express words of the statute, the "probable cause" requirement is arguably preferred. The application of the higher standard of probable cause is in no way foreign

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> In any action brought by reason of having been delayed by a merchant or merchant's employee or agent on or near the premises of a mercantile establishment for the purpose of investigation concerning the ownership of any merchandise, it shall be a defense to such action if: (1) The person was delayed in a reasonable manner and for a reasonable time to permit such investigation, and (2) reasonable cause existed to believe that the person delayed had committed the crime of shoplifting.

Id.

118. 271 S.C. 377, 247 S.E.2d 445 (1978).

119. *See* Jeffcoat v. K-Mart Discount Stores, 439 F.2d 713 (4th Cir. 1971).

120. S.C. CODE ANN. § 16-13-140 (1976).

121. 271 S.C. at 386, 247 S.E.2d at 447.

to a situation in which an individual is delayed as a result of one's suspicion that a crime has been committed.

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