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Torts

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TORTS

I. CHARITABLE IMMUNITY

In 1977 the judiciary and legislature modified the immunity that had previously protected charitable and sovereign hospitals from tort liability, but they refused to extend the new rule to other charitable organizations. In *Brown v. Anderson County Hospital Association*[1] the South Carolina Supreme Court held that a charitable hospital may be liable for injuries inflicted through acts of commission or omission of its agents, servants, employees, or officers, if "the aggrieved party can establish that the injuries occurred because of the hospital's heedlessness and reckless disregard of the plaintiff's rights."[2] Taking note of the decision of the supreme court in *Brown* and the pleas of plaintiffs' attorneys,[3] the South Carolina General Assembly totally abrogated the doctrine by its ratification of Act No. 182 on June 7, 1977.[4] The Act gives any person injured or killed by a tortious act of a charitable or state hospital's employee, agent, servant, or official the right to sue the organization for up to $100,000 actual damages.[5]

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1. 268 S.C. 479, 234 S.E.2d 873 (1977).

2. *Id.* at 487, 234 S.E.2d at 876. The decision "applies only to this case and to those causes of action arising after the filing of this opinion." *Id.* at 488, 234 S.E.2d at 877.

3. The supreme court has consistently held, up to the present time, that it was within the prerogative of the legislature to modify or abrogate the doctrine of charitable immunity and to waive sovereign immunity to allow suits against government supported hospitals. Some members of the South Carolina Bar have repeatedly tried to force the court into action and have also requested the legislature to act. *See, e.g.*, Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976); Belton v. Richland Memorial Hosp., 263 S.C. 446, 211 S.E.2d 241 (1975). *See also* note 18 *infra.*

4. No. 182, § 3, 1977 S.C. Acts 452 [codified at S.C. CODE ANN. § 44-7-50 (Cum. Supp. 1977)].

5. *Id.*

In addition to limiting recovery to $100,000, the section bars action against the employee who committed the tortious act if the claimant receives a judgment. Only the employing entity may be named as a party defendant; plaintiff may not name the employee individually when bringing an action under the provisions of the Act. If the employee is named as a defendant, then the employer shall be substituted "when it can so reasonably be determined." The section, however, in no way limits actions against doctors or dentists. *Id.*

Section four of the Act provides for procurement of liability insurance by the state for its employees and hospitals and for physicians and dentists rendering services for the state when no fee is charged for those services. S.C. CODE ANN. § 1-11-140 (Cum. Supp. 1977).

Section two provides for a three-year statute of limitations for medical malpractice actions. The period is determined from the "date of the treatment, omission or operation

Brown was initiated when decedent's administrators sued Anderson Memorial Hospital to recover damages for injuries suffered by the deceased and for his subsequent death.[6] Brown was committed to the hospital for unidentified causes and strapped to a bed. A fire started in his room while he was confined; he received severe burns and later died. Plaintiffs alleged that defendant's agents were negligent and reckless in several respects: allowing the fire to start, failing to extinguish it in a timely fashion, and failing to protect the decedent from it.[7] The trial court granted summary judgment for defendant on the ground of charitable immunity.[8] Plaintiffs appealed to the supreme court, and petitioned for reconsideration of the court's position on the doctrine.

Appellant asked the court to follow other jurisdictions' decisions overruling the doctrine of charitable immunity.[9] The principal rationale advanced by appellant and the amicus curiae briefs submitted in support of abrogation[10] was that the original reason for charities' immunity from tort liability no longer exists. Charitable immunity was created on public policy grounds to prevent financial ruin of charitable organizations.[11] The possibility of paying tort judgments could destroy charities through bankruptcy

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giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence." *Id.* § 15-3-545. If the cause of action arises out of negligent leaving or placement of foreign objects in the body, the action must commence within two years from date of discovery or when discovery should reasonably occur. The section further provides that it is not retroactive. *Id.*

6. *See* S.C. CODE ANN. §§ 15-5-90, 15-51-10, -20 (1976).

7. Record at 1.

8. *Id.* at 3.

9. Brief for Appellant at 1. For more discussion of the present status of the law in other states on the doctrine of charitable immunity in general, *see, Annot.*, 25 A.L.R.2d 29 (1952); 2 L. FRUMER, M. FRIEDMAN, L. PILGRIM, I. THAU, & R. DOBBIN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES 363-77 (1957 & Cum. Supp. 1977); IIA HOSP. L. MANUAL § 3, at 45-55 (1973). For historical discussions of the doctrine and excellent critical analyses, see President and Dir. of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); W. PROSSER, LAW OF TORTS § 117 (4th ed. 1971); Freezer, *The Tort Liability of Charities*, 77 U. PA. L. REV. 191 (1928).

10. The South Carolina Trial Lawyers Association and Professor David G. Owen, University of South Carolina School of Law, submitted amicus briefs in favor of modification or abrogation. Submitting briefs advocating maintenance of the status quo were the South Carolina College Council, South Carolina Hospital Association, the General Board of South Carolina Baptist Convention and the Medical Society of South Carolina Operating Roper Hospital.

11. Brief for Appellant at 6; Vermillion v. Women's College of Due West, 104 S.C. 197, 201, 88 S.E.2d 649, 650 (1916).

and loss of donations.[12] This potential financial instability of a charitable organization, however, is no longer a real danger. Hospitals' budgets are frequently supported by patient revenue.[13] In addition, most hospitals are covered by liability insurance.[14]

The supreme court reversed for plaintiff. The majority was persuaded by the logic of the dissent in *Lindler v. Columbia Hospital,*[15] the case that established the doctrine of charitable immunity in South Carolina. The criticism expressed by that dissent was that the charity's funds should "remedy the evil itself has done, before it attempts to remedy the evils done by others."[16] This view represents a major change in position for the supreme court.[17]

Before it could rationally modify or abrogate the doctrine, however, the court had to overcome a major obstacle. In the past, the court had insisted that any action to abolish the doctrine should be legislative.[18] The court pointed out, however, that the

12. President and Dir. of Georgetown College v. Hughes, 130 F.2d 810, 822 (D.C. Cir. 1942).

13. *Id.* at 824. *See also* amicus curiae brief of South Carolina Trial Lawyers Ass'n at 9-17.

The *Brown* court recognized this fact. 268 S.C. at 485 n.3, 234 S.E.2d at 875-76 n.3. According to the figures presented therein, Anderson Memorial Hospital received $12 million annually from patient revenues and only $100,000 from Anderson County. The court also mentioned the hospital administrator's deposition testimony that the "hospital's funds come by and large from paying patients and at least 90% of all patients pay their bills," although he "denied that the appropriation adequately defrayed the expense of treating charity patients." *Id.*

14. Brief for Appellant at 6.

15. 98 S.C. 25, 81 S.E. 512 (1914).

16. *Id.* at 35, 81 S.E. at 515.

17. Until the *Brown* decision the court supported immunity for charitable and sovereign institutions and refused to limit its scope. Since the doctrine was created in 1914 and gave hospitals immunity, the court extended coverage to colleges, Vermillion v. Women's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916); Y.M.C.A.s, Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948); and churches, Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966).

The court refused to extend immunity to an action for nuisance and trespass, Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907 (1930); a cause of action arising out of a commercial venture unrelated to the charitable purpose of the organization, Eiserhardt v. State Ag. & Mech. Soc'y of S.C., 235 S.C. 305, 111 S.E.2d 568 (1959); a nonprofit, rural electric cooperative, Bush v. Aiken Electric Coop., 226 S.C. 442, 85 S.E.2d 716 (1955); and intentional torts, Jeffcoat v. Caine, 261 S.C. 25, 198 S.E.2d 258 (1973).

In *Jeffcoat* the court indicated that it realized the doctrine no longer had public support. 261 S.C. at 80, 198 S.E.2d at 260.

18. In Belton v. Richland Memorial Hosp., 263 S.C. 446, 211 S.E.2d 241 (1975) (per curiam decision), the court reaffirmed the stand it had taken on immunities.

> Once firmly rooted, such [public] policy [created by the courts] becomes in effect a rule of conduct or of property within the state. In the exercise of proper

doctrine originally was established by the court. Because it was not a creature of legislative enactment, it therefore was subject to judicial modification.[19] The common-law practice of stare decisis also was held not to bar modification of the rule; its purpose is to ensure "certainty and stability," not "petrifying rigidity."[20]

After shifting its position on abrogation of charitable immunity, the court refused complete expungement of the doctrine. Emphasizing the "vital role" charitable hospitals play in South Carolina and a desire not to show "insensitivity . . . to legitimate charitable concerns," the court lowered, but did not remove, the shield of immunity.[21] Only those suits based on allegations of heedless and reckless negligence were to be allowed.[22]

Justice Ness concurred in the result but dissented because he believed that the doctrine should be abolished completely.[23] He agreed with the majority opinion that the doctrine is outmoded; however, they differed on the utility of maintaining any immunity for charitable hospitals. While the majority was concerned with the hospitals' continuing vitality as charities serving the public interest, the dissent characterized the charitable hospital as a business institution that should be held responsible for its torts as is any other business establishment.[24] Justice Ness emphasized he would abolish hospitals' protection under the doctrine and leave true charities with the affirmative defense of immunity.[25]

The supreme court's modification of the doctrine of charitable immunity only applies to hospitals.[26] The *Brown* holding ex-

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judicial self-restraint, the courts should leave it to the people, through their elected representatives in the General Assembly, to say whether or not it should be revised or discarded.

263 S.C. at 450, 211 S.E.2d at 242 (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958)). *See also* Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976).

19. 268 S.C. at 485-86, 234 S.E.2d at 876.

20. *Id.* at 486-87, 234 S.E.2d at 876.

21. *Id.* at 487, 234 S.E.2d at 876.

22. *Id.*

The Act covers tortious acts, therefore, the legislature appears to have gone farther than the court by proscribing negligent as well as reckless conduct. S.C. CODE ANN. § 44-7-50 (Cum. Supp. 1977).

23. 268 S.C. at 488, 234 S.E.2d at 877. Justice Gregory joined in the dissent.

24. *Id.* at 490-91, 234 S.E.2d at 878-79.

25. *Id.* at 490, 234 S.E.2d at 878-79.

26. Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977).

In Crowley v. Bob Jones Univ., 268 S.C. 492, 234 S.E.2d 879 (1977), decided the same day as *Brown*, the court refused to rule on reconsideration of the rule applied to eleemosy-

pressly does not extend to "modify the defense of charitable immunity as to churches, rescue missions, orphanages, colleges, and other institutions which are charitable in nature, purpose and operation."[27] The legislative action in Act No. 182 also waives immunity only for charitable and state-supported hospitals.[28] Consequently, previous decisions outlining the scope of charitable immunity are still relevant to all other charitable organizations.[29]

II. DEFAMATION

In *Stevens v. Sun Publishing Co.*[30] plaintiff, a former state senator, brought suit against defendant, publisher of *The Field and Herald* and *The Sun News*,[31] for malicious publication of a defamatory article with intent to damage plaintiff's reputation and ruin his career.[32] From a jury verdict of $50,000.00 in favor of plaintiff, defendant appealed on the ground that the trial judge erred in not granting its motion for judgment *non obstante veredicto*, and argued plaintiff had failed to sustain his burden of proof.[33] The supreme court affirmed the trial court's decision.[34]

Because defendant's exceptions required a review of the jury's findings of fact, the proper scope of review to be given the record on appeal was at issue. This question, however, was left

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nary corporations organized for educational purposes. The case was not developed sufficiently to enable a decision on "so far-reaching an issue," and the case was remanded for further proceedings. *Id.* at 491, 234 S.E.2d at 881. While the case is not overly significant because of other problems of law involved, arguably it reemphasized applicability of the doctrine to educational eleemosynary corporations.

27. 268 S.C. at 487-88, 234 S.E.2d at 877.

28. No. 182, § 3, 1977 S.C. Acts 452.

29. *See* note 17 *supra*.

30. 270 S.C. 65, 240 S.E.2d 812 (1978), *cert. denied*, 46 U.S.L.W. 3753 (1978). A previous opinion that decided procedural questions involved, Stevens v. Sun News Co., 267 S.C. 63, 226 S.E.2d 236 (1976), is discussed in *Practice and Procedure, Annual Survey of South Carolina Law*, 29 S.C.L. REV. 156-62 (1977).

31. Plaintiff, James Stevens, served as State Senator from Horry County from 1955 to 1976. Defendant's newspapers circulated in the Horry County area.

32. Record at 3-18.

The allegedly libelous report concerned the relationship between plaintiff and his brother, Tommie Stevens, a purported con man and plaintiff's participation in the Sandy Island Dvelopment Corporation, whose operations prompted federal intervention. *Id.* at 8, 51, 184-203. Another defamatory statement objected to was that plaintiff was being sued for abuse of his political power. Plaintiff's former sister-in-law brought the suit, alleging he had helped pressure two Horry County magistrates into issuing unlawful warrants for her arrest. The suits were later dropped and were not pending at the time the article was published. Record at 17.

33. 270 S.C. 65, 70, 240 S.E.2d 812, 814 (1978); Record at 244-45.

34. *Id.*, 240 S.E.2d at 813.

unresolved. The issue of scope of review arises from a conflict between the South Carolina Constitution[35] and the position taken by the United States Supreme Court on scope of review in defamation cases. *New York Times v. Sullivan*[36] was the United States Supreme Court's initial application of the first amendment of the United States Constitution to state defamation actions. It called for "independent examination" of the entire record in defamation cases to ensure that the "judgment does not constitute a forbidden intrusion on the field of free expression."[37] Subsequent cases in state and federal courts have raised *New York Times* independent examination to the level of a constitutional requirement.[38] Article V, section 5 of the South Carolina

35. S.C. CONST., art. V, § 5.

36. 376 U.S. 254 (1964).

37. *Id.* at 285, quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963). The principles announced in *New York Times* were reaffirmed by the Supreme Court in Gertz v. Welch, Inc., 418 U.S. 323 (1974).

38. *See* reply brief for Appellant (citing Fadell v. Minneapolis Star & Tribune Co., Inc., 557 F.2d 107 (7th Cir. 1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976)). *See also* Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977) ("To ensure that proper weight has been given to the protection of first amendment rights, it is important that the court make 'an independent examination of the whole record.'" *Id.* at 913); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) ("Supreme Court has required that an appellate court make an independent examination of the whole record," 529 F.2d at 210); Sprouse v. Clay Communication Inc., ___ W. Va. ___, 211 S.E.2d 675 (1975), *cert. denied* 423 U.S. 882 (1975) ("the clearest legal principal [sic] emerging from a reading of libel cases is that each case must be considered by an appellate court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment." 211 S.E.2d at 689). *Contra,* Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977) ("The standard of review on libel actions is the same as in other cases . . . We have repeatedly said that we will not retry the facts." 562 F.2d at 631). RESTATEMENT (SECOND) OF TORTS, § 580B, Comment *k* (1977) states:

> The determination of whether a defendant was negligent involves the application of the standard (what a reasonable person would do) to the facts that are found to exist in the particular case. This question is frequently called a fact issue and it is normally submitted to the jury. But the rule that liability cannot be imposed for a defamatory publication unless the defendant was negligent or more seriously at fault is a rule imposed by the Constitution. The application of the standard, therefore, necessarily involves a constitutional right, as in the case of the determination of whether the defendant acted in reckless disregard of the truth or falsity of a communication in a defamation action by a public official or public figure. (See § 580A, Comment *g*). As in that case, the determination is subject to possible constitutional review all the way through the appellate process.

For further discussion of the applicable scope of review, *see* Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. 422, 467-69 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 TEX. L. REV. 199, 249-50 (1976); *Recent Developments,* 52 WASH. L. REV. 975, 984-85 (1977). For a discussion of the development of the recently published Restatement provisions on defamation, see Wade, *Defamation, The First Amendment and the Torts Restatement,* 11 FORUM 3 (1975).

Constitution, however, limits the state supreme court's appellate jurisdiction and review of factual findings.[39] The South Carolina Supreme Court consistently has held that its power of review in an action at law tried by a jury extends only to determining whether the verdict is wholly unsupported by the evidence.[40] In *Stevens,* the court decided, however, the verdict was correct under either type of review and avoided a conflict between the South Carolina Constitution and the first amendment.[41]

The common law imposed a strict liability standard for libelous and slanderous communications, tempered by absolute and conditional privileges protecting the public interest.[42] This standard resulted in large judgments rendered against newspapers.[43] The United States Supreme Court began reformation by imbuing the law of defamation with constitutional principles. Although some commentators disagree with the Court's method of accomplishing reform,[44] a national law of defamation undoubtedly has developed in Supreme Court decisions applying the first amendment to public communications.[45]

New York Times held that damages could not be recovered

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39. S.C. CONST. art. V, § 5 states:

> And the Court shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law, except in cases where the facts are settled by the jury and the verdict not set aside, and shall constitute a Court for the correction of errors at law under such regulations as the General Assembly may prescribe.

See also S.C. CODE ANN. §§ 14-3-320 to -330 (1976).

40. Townes Assoc. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773, 775 (1976); Odom v. Weathersbee, 225 S.C. 253, 260, 81 S.E.2d 788, 792 (1954); Worrell v. South Carolina Power Co., 186 S.C. 306, 314, 195 S.E. 638, 641 (1938).

41. 270 S.C. at 70, 240 S.E.2d at 815.

42. *See* W. PROSSER, *supra* note 9, § 113, at 772-74 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS, *Special Note on Conditional Privileges and the Constitutional Requirement of Fault* at 259-61 (1977); Wade, *supra* note 38 at 4.

43. For example, in *New York Times,* a jury verdict of $500,000 was awarded against defendant at trial.

44. *See, e.g.,* Green, *The Communicative Torts,* 54 TEX. L. REV. 1, 5 (1975): "The success of these efforts [introducing negligence law into libel actions] would be extremely harmful to the administration of tort law, particularly to the litigants' assertions of their rights and defenses."

45. The Supreme Court has given some indication to this effect:

> Our touchstones are that acceptable limitations must neither affect 'the impartial distribution of news' and ideas, nor because of their history or impact constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.
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> *The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values.*

Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967) (emphasis added).

in an action for defamation of a public official[46] without clear and convincing evidence of actual malice on the defamer's part.[47] Under the first amendment, a showing of knowledge or reckless disregard of the falsity or truth of the material is required to establish actual malice.[48] The public's interest in the activities of public officials and the public officials' "access to the means of counterargument to be able 'to expose through discussion the falsehood and falacies' of the defamatory statement" are the Court's justifications for these stricter standards of fault and proof.[49] The standard of fault imposed by *New York Times* necessarily implies that the defamation plaintiff, as in *Stevens,* must prove defendant's malice as an element of the cause of action.[50]

In *Stevens,* the court found, when reviewing the record in the manner mandated by state law,[51] that ample testimony was available to satisfy the actual malice requirement of *New York Times v. Sullivan.*[52] De novo review of the record, assuming it was re-

46. Although the issue of who is a public official or public figure has been widely litigated; *see, e.g.,* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Welch, Inc., 418 U.S. 323 (1974); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Ray, 401 U.S. 265 (1971); Rosenblatt v. Baer, 383 U.S. 75 (1966); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); in *Stevens* characterization of plaintiff as a public official was accepted by both parties and the court.

47. 376 U.S. at 279-80.

48. *Id.* The phrase "knowledge or reckless disregard" is used for the most part rather than "actual malice" in the cases since *New York Times.* The phrase has been defined to require a "high degree of awareness of . . . probable falsity." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). "[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." Gertz v. Welch, Inc., 418 U.S. 323, 332 (1974).

49. 388 U.S. at 155. This theme of a self-help remedy is repeated in later cases, *see* Gertz v. Welch, Inc., 418 U.S. 323 (1974), and appears to be a major justification for placing the actual malice standard on public officials. Those who have thrust themselves into the "'vortex' of an important public controversy," 388 U.S. at 155, have given up any "legitimate call [they had] upon the court for protection in light of . . . prior activities and means of self-defense." 388 U.S. at 154. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), further explains the distinction in treatment between public figures and officials and private individuals:

> [c]ommunications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual . . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.

Id. at 345.

50. RESTATEMENT (SECOND) OF TORTS § 580B, Comment *j* (1977).

51. *See* notes 38 and 39 and accompanying text *supra.*

52. 270 S.C. at 70, 240 S.E.2d at 815.

quired, revealed that appellant published the articles with "reckless disregard of the falsity of their contents."[53] Evidence particularly indicative of malice or reckless disregard was testimony that the reporter who had written the offending article used a biased source.[54] One witness testified that the reporter spoke of *The Sun News'* dislike for plaintiff before publication and knew before printing the article that some of the information was false.[55] This led the court to conclude actual malice was present under either standard of review.[56]

New York Times has had a cumulative effect on the procedural elements of the law of defamation. Historically the burden of proving the truth of the defamatory statement to escape liability had been on the defendant.[57] Because proof of malice now brings into issue the defendant's knowledge of the falsity or reckless disregard of the truth, the burden of proving truth need never shift to the defendant. When the plaintiff meets the burden of proving actual malice at trial, however, the South Carolina Supreme Court is unlikely to impose procedural disadvantages upon appeal.

III. PREMISES LIABILITY

In *Shipes v. Piggly Wiggly St. Andrews, Inc.*,[58] the South Carolina Supreme Court held that a storeowner's duty to take reasonable care[59] to protect invitees does not as a matter of course include the duty of protecting customers against criminal attacks of third parties.[60] This duty will arise, however, if the plaintiff can prove the owner or occupier of land knew or had reason to know

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. RESTATEMENT (SECOND) OF TORTS § 580B, Comment *j* (1977).
58. 269 S.C. 479, 238 S.E.2d 167 (1977).
59. The duty of reasonable care is recognized by Dean Prosser and South Carolina case law to be the duty owed by owners and occupiers of land to their invitees. Turner v. Sinclair Refining Co., 254 S.C. 36, 173 S.E.2d 356 (1970); Mullinax v. Great Atlantic & Pac. Tea Co., 221 S.C. 433, 70 S.E.2d 911 (1952); W. PROSSER, *supra* note 9, § 61, at 392 (4th ed. 1971).
60. 269 S.C. at 485, 238 S.E.2d at 169. This appears to be the majority rule. *See, e.g.*, O'Brien v. Colonial Village, Inc., 119 Ill. App. 2d 105, 255 N.E.2d 205 (1970); Levin v. Sears, Roebuck & Co., 535 S.W.2d 525 (Mo. Ct. of App. 1976); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975); Eastep v. Jack-in-the-Box, Inc., 546 S.W.2d 116 (Tex. Civ. App. 1977). *See also Annot.*, 10 A.L.R.3d 619 (1966 & Supp. 1977). For a discussion of Eastep v. Jack-in-the-Box, see 18 S. TEX. L.J. 612 (1977).

criminal acts were impending.[61] If the obligation to protect against criminal attacks of third parties is established, then a storeowner who negligently fails to provide protection may be liable for injuries sustained on the property, despite the intervening criminal act of another.[62]

The incident that sparked this litigation occurred in defendant's parking lot. Plaintiff was beaten and robbed at dusk by two assailants while attempting to enter his vehicle after purchasing groceries. The lights in the lot were either not on or were not burning brightly.[63] Plaintiff brought the action alleging defendant's negligent failure to protect invitees.[64] From a decision granting defendant's motion for a directed verdict, the supreme court affirmed.[65]

Plaintiff framed the issue on appeal as whether the testimony, viewed in the light most favorable to plaintiff, raised a reasonable inference that defendant failed to light and supervise the parking lot adequately.[66] He argued defendant had a duty to light the lot adequately because business proprietors owe to their invitees a full duty of reasonable care.[67] Plaintiff argued this duty

61. 269 S.C. at 485, 238 S.E.2d at 169. The court fails to specify the degree to which attacks must be likely to occur. In *Shipes* the court said "respondent did not know or have reason to know of criminal attacks such as the one on appellant." *Id.* The implication is that at least one attack must have already occurred and that the presence of hoodlums is insufficient to give rise to fear of imminent assault. The court noted a decision of the Tennessee Supreme Court that held merchants must guard against criminal attacks of third parties if they knew these attacks were occurring or "about to occur," leaving some hope that the South Carolina Supreme Court may adopt such a standard in the future. Cornpropst v. Sloan, 528 S.W.2d 188, 198 (Tenn. 1975).

62. Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737 (1946); Green v. Atlanta & Charlotte Air Line Ry., 131 S.C. 124, 126 S.E. 441 (1925). Logically the proximate cause issue will not prove burdensome once the duty to protect against attacks of third parties has been established. To establish the duty, knowledge of imminent criminal acts must be proven, which would also seem to establish foreseeability of possible criminal attacks, and, therefore, continuing responsibility of the original tortfeasor. *See* Brief for Appellant at 15-16. *Contra* Brief for Respondent at 8-11. The rule stated by *Ayers* is as follows:

> The intervening negligence of another will not excuse the first tort-feasor, if the intermediate wrong or a similar one should have been foreseen in the exercise of due care; the original negligence remains active and constitutes a concurring proximate cause of the ultimate injury. We repeat that it matters not that the supervening and concurrent cause was an act of negligence of a third person or even a willful or criminal act. (citations omitted.)

208 S.C. at 276, 37 S.E.2d at 741.

63. 269 S.C. at 482, 238 S.E.2d at 168. *See also* Record at 20, 30, 32, 34, 46.

64. Record at 4-5.

65. 269 S.C. at 481, 238 S.E.2d at 167.

66. Brief for Appellant at 4.

67. *Id.* at 5. This definition of the duty of reasonable care was drawn from Prosser's

included "taking reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the premises."[68] The foreseeable risk of criminal conduct outweighed the slight burden of providing adequate lighting, and created the duty.[69] Plaintiff argued that the need to light the parking lot and whether adequate lighting had been provided were jury issues.[70]

Defendant first argued that it had no duty to protect invitees from criminal acts of third parties and, therefore, had no duty to provide lights in the parking lot.[71] Although agreeing with plaintiff that the occupier of land has a "duty of exercising ordinary and reasonable care to maintain his premises"[72] for invitees, defendant maintained that storekeepers are not insurers of their customers' safety.[73] It argued that the duty of ordinary care does not extend to criminal acts of third parties, unless a storeowner has sufficient notice of the possibility of this danger.[74] Finally, defendant submitted that plaintiff failed to present sufficient evidence to prove defendant had "knowledge or notice of any relevant criminal activity,"[75] and, therefore, the trial court had properly granted defendant's motion for directed verdict.[76]

Evidence was introduced at trial going to the issue of notice of the risk incurred by the store's invitees. On this issue, the court acknowledged evidence that the only crimes of which the manager was aware were theft from an employee's car in the parking lot and shoplifting in the store.[77] Apparently this was the basis for the conclusion that defendant did not know or have reason to know of the potential crime to establish a duty of reasonable care against the criminal acts of third parties.[78] The court failed to mention testimony plaintiff had introduced that crimes were frequently committed in the parking lot because of the locale, poor

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treatise and reads as follows: "the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm." W. PROSSER, *supra* note 9, § 61 at 393.

68. Brief for Appellant at 5.
69. *Id.* at 6.
70. *Id.* at 10.
71. Brief for Respondent at 4.
72. *Id.* at 3.
73. *Id.*
74. *Id.* at 4.
75. *Id.* at 6.
76. *Id.* at 8.
77. 269 S.C. at 482, 238 S.E.2d at 168. *See also* Record at 71, 65.
78. 269 S.C. at 485, 238 S.E.2d at 169.

lighting conditions, and fortuitous means of exit.[79] Why this evidence was not considered is unclear. The court stated that under the facts of the case defendant "did not know or have reason to know of criminal attacks such as the one on [plaintiff]."[80] The court appeared to distinguish, however, between incidents within and outside of the storeowner's personal knowledge which leads one to the conclusion that actual knowledge may be required before a duty to protect customers from criminal attacks can be established. Unless actual knowledge can be shown, then the premises liability plaintiff presumably will have a difficult time getting past defendant's motion for a directed verdict on this preliminary issue.

After ruling on the duty of care owed by owners and occupiers of land to their invitees against criminal acts of third parties, the court went on to mention that, assuming a duty to adequately light the parking lot was present, plaintiff had failed to prove a breach of that duty.[81] Addressing the secondary issue plaintiff had presented on appeal, the court held that proof of how long the lights had been extinguished was necessary to raise a jury issue on defendant's negligence.[82] The amount of proof set out by the *Shipes* opinion to get the negligence issue to the jury is the same as that required for constructive notice in slip and fall premises liability cases.[83] Proof of how long the lights had been out should be presented by the plaintiff at trial.[84]

Shipes serves to illustrate plaintiffs' difficulty in successfully

79. Brief for Appellant at 2-3, *see also* Record at 36-38, 45-48, 52-53.

80. 269 S.C. at 485, 238 S.E.2d at 169.

81. *Id.*

82. *Id.*

83. *See* Joye v. Great Atl. & Pac. Tea Co., 405 F.2d 464 (4th Cir. 1968); Mullen v. Winn-Dixie Stores, 252 F.2d 232 (4th Cir. 1958); H.L. Green Co. v. Bowen, 223 F.2d 523 (4th Cir. 1955); Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 184 S.E.2d 77 (1971); Wimberley v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969). *See also* McKay, *Merchants Liability in South Carolina for Injuries on the Premises — An Anachronism*, 23 S.C.L. REV. 709 (1971).

84. Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 184 S.E.2d 77 (1971), set the standard for constructive notice as the appearance that "the condition has existed for such length of time prior to the injury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care; conversely, absent evidence of such preexistence, the defendant may not be charged." 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971). For a discussion of *Anderson*, see *Torts, Annual Survey of South Carolina Law*, 24 S.C.L. REV. 665, 673-74 (1971). For a condemnation of the heavy burden of proof this standard places on the plaintiff, *see* Wimberley v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969) (Justice Bussey, dissenting); *Torts, Annual Survey of South Carolina Law*, 21 S.C.L. REV. 659, 666-68 (1969).

litigating premises liability actions. The difficulty of establishing duty and breach of duty is likely to dissuade plaintiffs' counsel from attempting to resolve this type of dispute through the courts.

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