South Carolina Law Review

Volume 33
Issue 1 *Annual Survey of South Carolina Law*

Article 12

8-1981

Torts

Elizabeth A. Ferrell

TORTS

I. FRAUDULENT MISREPRESENTATION

In *M.B. Kahn Construction Co. v. South Carolina National Bank,*[1] the South Carolina Supreme Court held that a misrepresentation is not actionable if it "induces [a party] to perform an act he was legally obligated to perform."[2] Before a plaintiff can recover for a fraudulent misrepresentation, he must establish both the materiality of the misstatement and his reliance on its truth.[3] These elements of fraud are interrelated and both are satisfied if the misrepresentation "played a substantial part in leading the plaintiff to adopt his particular course."[4] Thus, when a plaintiff is not induced by a misstatement to adopt one course of action in derogation of alternative courses, the misrepresentation is neither material nor solely relied upon.

In 1973, Harborside Corporation began developing a condominium project financed by construction loans from South Carolina National Bank (SCN). These loans were secured by SCN's first mortgage on the project.[5] M.B. Kahn Construction Com-

---

1. _ S.C. _, 271 S.E.2d 414 (1980).

2. *Id.* at _, 271 S.E.2d at 415.

3. O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d 50 (1974). In South Carolina, a plaintiff must establish nine elements to recover for fraudulent misrepresentation:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury.

Id. at 281, 204 S.E.2d at 52. This survey deals with only two of these elements: materiality and reliance.

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 714 (4th ed. 1971). A misrepresentation is material if:

> (a) A reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT (SECOND) OF TORTS § 538 (1977). *See generally,* James & Gray, *Misrepresentation - Part II,* 37 MD. L. REV. 488, 497-502, 518-22 (1978).

5. _ S.C. at _, 271 S.E.2d at 414-15.

pany (Kahn) undertook construction of the condominiums pursuant to a contract with Harborside, that provided for monthly progress payments of ninety percent of the value of labor and materials stored at the site. The balance of the contract price was due upon completion of the project. If Kahn did not receive its progress payment from Harborside within seven days following the monthly due date, the contract permitted Kahn to suspend performance after giving notification of intent to suspend and allowing an additional seven-day grace period for payment.[6]

Near the completion of the project, a progress payment to Kahn was late but was paid within the fourteen-day period. During this time, Kahn made inquiries about the developer's ability to make future payments and was referred to SCN, the construction lender.[7] When told that approximately $330,000 remained due on the contract, an SCN mortgage loan officer indicated to Kahn that there were sufficient funds in the developer's loan account to meet these future obligations.[8] At the time of the inquiry, however, only about $43,000 actually remained in Harborside's account.[9] It was not until after Kahn had completed construction in September 1974 that it learned the developer's loan account contained an amount insufficient to pay the balance due.[10] Alleging that SCN's representation of the sufficiency of funds in Harborside's loan account had induced Kahn to complete the construction project,[11] Kahn instituted an action for fraudulent misrepresentation against the bank.[12] The special

---

6. *Id.* at _, 271 S.E.2d at 415.

7. *Id.* at _, 271 S.E.2d at 415.

8. Record at 35-36.

9. *Id.* at 35-36.

10. _ S.C. at _, 271 S.E.2d at 415. Harborside and Kahn entered into an agreement in which Kahn executed a waiver and release of its mechanic's lien in exchange for $156,000 in cash and a deferred payment of $84,000 by Harborside. As security for this obligation to pay, Kahn received a note and second mortgage on the condominium project. The agreement further provided that Kahn was to receive a specified amount on the sale of each unit in the complex. Record at 32. By August of 1975, however, Kahn had received only $2,000 from the sale of condominium units. _ S.C. at _, 271 S.E.2d at 415. On August 6, 1975, SCN commenced foreclosure proceedings on its first mortgage and note. Pursuant to a foreclosure judgment, the condominium complex was sold free of Kahn's mortgage lien. Record at 33. The proceeds from this sale were insufficient to pay the $82,000 still due Kahn. _ S.C. at _, 271 S.E.2d at 415.

11. Record at 34-35.

12. In addition to its fraudulent misrepresentation claim, Kahn asserted causes of action for interference with the contractual relationship between Kahn and Harborside,

referee found that SCN knowingly made the false representation[13] and intended that Kahn rely on the misstatement by completing construction or refraining from filing a mechanic's lien.[14] Although the referee concluded that Kahn was ignorant of the falsity of the representation and had a right to rely on SCN's statement,[15] he dismissed the action on the theory that the misrepresentation "was not material to any decision that Kahn had the right to make with respect to continuing work."[16] The trial judge confirmed these findings. The South Carolina Supreme Court, affirming the dismissal of Kahn's cause of action for fraudulent misrepresentation, held that because Kahn was legally obligated to complete construction under its contract with Harborside, it could not have been induced to do so by SCN's misrepresentation.[17]

Kahn contended that although it was under contract to construct the condominium project, Harborside's insolvency would have justified a work stoppage until it received assurance of Harborside's financial ability to meet future obligations.[18] Relying upon section 287 of the *Restatement of Contracts,* the Supreme Court rejected this contention.

> The prospective inability of a party to perform its obligation under a contract due to insolvency discharges the other party from its duties under the contract *where it has reasonably and materially changed its position, and a longer time than per-*

---

unjust enrichment due to Kahn's uncompensated completion of the project, breach of contract, and negligent supervision of Harborside's loan account (Kahn claimed to be a third party beneficiary to the loan agreement). Record at 34. These causes of action were dismissed by the special referee and affirmed by the trial court. Kahn did not appeal. _ S.C. at _, 271 S.E.2d at 415.

13. Record at 35-36, 41.

14. *Id.* at 41-42.

15. *Id.* at 42-43. The special referee also found that, assuming reliance, Kahn's damages would amount to $33,166. *Id.* at 43-44.

16. *Id.* at 40. The special referee determined that

> [a]lthough the representation may have been material to Kahn's decision to take or refrain from taking some action other than stopping work, and Kahn may have taken or refrained from taking such other action in reliance on the representation, I find and conclude that the representation was not material to any decision that Kahn had the *right* to make with respect to continuing work, as *Kahn had no option* in that respect, but was required to continue work under the construction contract.

Id. (emphasis added).

17. _ S.C. at _, 271 S.E.2d at 415.

18. Brief of Appellant at 18.

mitted under the contract has elapsed before performance by the insolvent party.[19]

Because the progress payments to Kahn were made within the time permitted under the contract, the court concluded that Kahn's obligation to perform was not discharged by Harborside's insolvency.[20]

The court was correct in concluding that Harborside's progress payment to Kahn within the fourteen-day grace period was timely. The court's paraphrase of the *Restatement* position, however, incorrectly stated that both a material change in position *and* the lapse of the insolvent party's time for performance must occur before the solvent party's contractual obligations are discharged.[21] Having treated the *Restatement* position as a conjunctive rather than a disjunctive requirement, the court did not consider whether Kahn could have materially altered its position had it known of Harborside's insolvency.[22] Because, under a proper reading of this section, a substantial change in position would have fully discharged Kahn's obligation to complete construction, the bank's misrepresentation was material to Kahn's decision to finish the project.

---

19. _ S.C. at _, S.E.2d at 416. In paraphrasing § 287 of the *Restatement*, the court incorrectly used the word "and" instead of "or." Although that error may not have been the only basis for its application, the court indicated that *both* requirements had to be met before insolvency excuses the solvent party's performance. See text accompanying notes 21-22 *infra*.

20. _ S.C. at _, 271 S.E.2d at 416.

21. *Id.* That section actually states:

> In promises for an agreed exchange a promisor need not perform at the time fixed for performance of his promise if performance of the exchange is made uncertain because the other party is insolvent . . . unless performance of the exchange is rendered, tendered, or made reasonably certain by security. If the promisor reasonably and materially changes his position, *or* a longer time than is permissible under the contract elapses, before performance of the exchange is rendered, tendered or secured, the duty of the promisor is discharged.

RESTATEMENT OF CONTRACTS § 287(1) (1932) (emphasis added).

22. _ S.C. at _, 271 S.E.2d at 416. The court indicated that Kahn had completed performance substantially at the time the misrepresentation was made, implying that Kahn could not have changed its position materially and been discharged from the contract. *Id.* at _, 271 S.E.2d at 416. Even though Kahn substantially had completed the project, there is the possibility that it already had contracted to undertake another construction project upon the completion of the Harborside complex. Had Kahn known of Harborside's insolvency and ceased construction of the condominium project so it could have begun immediate preparations for the subsequent project, it would have altered its position materially with respect to the contract with Harborside.

More importantly, the court entirely failed to consider the availability to Kahn of a course of conduct other than permanent discharge of its contractual obligations. Even though a contract remains in force, a solvent party may have the right to suspend performance temporarily pending the receipt of adequate assurance of the insolvent party's return performance.[23] Assuming, *arguendo*, that the court was correct in concluding that Harborside's insolvency did not discharge Kahn's obligations completely,[24] under the same *Restatement* section relied upon by the court, Kahn still would have been justified in suspending performance until future payments from Harborside were "rendered, tendered, or made reasonably certain by security."[25] Because Kahn could have pursued this course of conduct had it known of Harborside's insolvency, SCN's misrepresentation clearly induced Kahn to continue construction.

Moreover, Harborside's inability to provide Kahn with adequate assurance of performance would have discharged Kahn permanently from its contractual obligations under a separate *Restatement* section.[26] Although insolvency alone may be insufficient to permanently relieve the solvent party from perform-

---

23. *Cf.* Rock-Ola Mfg. Co. v. Leopold, 98 F.2d 196 (5th Cir. 1938) in which the court indicated that, although insolvency alone is insufficient to rescind a contract for sale on credit,

> [a] distinction must be drawn between rescission and a refusal to deliver except for cash. In the latter case, the contract is treated by the seller as still in force and as binding upon both buyer and seller. The right to demand cash is an incident to the contract and arises therefrom by operation of law. . . .
>
> . . . If appellee was insolvent, the right of the seller to demand cash was paramount to the buyer's right to receive the goods.

Id. at 197-98.

24. See note 27 and accompanying text *infra*.

25. RESTATEMENT OF CONTRACTS § 287(1) (1932). See note 21 *supra*. *See* Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co., 14 Ariz. App. 486, 484 P.2d 639 (1971). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 276(1) (Tent. Draft No. 8, 1973).

26. According to the RESTATEMENT (SECOND) OF CONTRACTS § 275 (Tent. Draft No. 8, 1973),

> [w]hen reasonable grounds for insecurity arise with respect to an obligor's future performance as a result of . . . .
>
> . . . .
>
> (b) his apparent inability to perform without a breach by non-performance . . . his failure upon a reasonable demand by the obligee to give within a reasonable time such assurance of due performance as it is reasonable to require is a repudiation.

Id. This provision is analogous to the right of a seller to demand adequate assurance under the UNIFORM COMMERCIAL CODE. S.C. CODE ANN. § 36-2-609 (1976).

ing,[27] if the nature of the insolvent's future obligations is the payment of money, the insolvency of a party gives reasonable grounds for insecurity that he will be unable to perform.[28] An insolvent's potential inability to render future performance coupled with his failure to provide reasonable assurance that he will perform notwithstanding his present financial condition may be treated as a repudiation of the contract.[29] Had Kahn known of Harborside's insolvency and failed to receive adequate assurance of performance, it would have been relieved of its duty to complete the condominium project.

The court found that Harborside's insolvency did not discharge Kahn's legal obligation to complete the construction project. The court, however, failed to consider Kahn's right to suspend performance until adequate assurance was given and its corresponding right to regard any inability to give assurance as a repudiation of the contract. Because Kahn could have pursued courses of action other than prompt continuation of the construction schedule,[30] the court should have concluded that SCN's misrepresentation of Harborside's insolvency materially affected Kahn's decision.

II. ABROGATION OF PARENTAL IMMUNITY

More than fifty years ago, the South Carolina Supreme

---

27. *E.g.*, Hodes v. Hoffman Int'l. Corp., 280 F. Supp. 252 (S.D.N.Y. 1968) (applying New York law); Hanna v. Florence Iron Co., 222 N.Y. 290 (1918). *Accord,* Clements v. Jackson County Oil & Gas Co., 61 Okla. 247, 161 P. 216 (1916) (insolvency alone does not discharge the solvent party because the insolvent still may be able to perform). *Contra,* Select Theatres Corp. v. Johnson, 145 F. Supp. 583 (S.D.N.Y. 1956), *aff'd per curiam,* 249 F.2d 655 (2d Cir. 1957) (dicta indicating that insolvency is treated as anticipatory breach).

28. "If the obligor's insolvency constitutes the grounds for the obligee's insecurity, he is entitled to assurance in the form of actual performance, a conditional offer of performance, or reasonable security." RESTATEMENT (SECOND) OF CONTRACTS § 275, Comment e (Tent. Draft No. 8, 1973). Because this insecurity arises with respect to future performance, no previous breach by nonperformance need be shown. *Id.* at Comment c. Thus, Harborside's tender of progress payments to Kahn within the time permitted under the contract is relevant to but not conclusive in determining the effect of failure to give assurance of continued performance.

29. See note 26 *supra.*

30. "Kahn might have discontinued the contract and answered to Harborside, or considered the advisability of a mechanics' lien, or attempted some type of settlement negotiations with the developer." _ S.C. at _, 271 S.E.2d at 417 (Littlejohn, J., dissenting).

Court declared that an unemancipated child had no right to maintain a negligence action against his parent for personal injuries.[31] Since that time, this immunity has been held reciprocal, barring a parent's negligence action against the child for personal injuries.[32] In more recent decisions, the immunity has been extended to shield from liability parents sued by the child's estate for wrongful death[33] and persons *in loco parentis*.[34] The legislature responded to this judicially created doctrine[35] by enacting section 15-5-210 of the South Carolina Code,[36] which abrogated parent-child immunity with respect to automobile torts.

Both the statute and the parental immunity doctrine were challenged in *Elam v. Elam*,[37] as violating the equal protection clauses of the South Carolina[38] and United States Constitutions.[39] Sustaining these constitutional objections,[40] the South Carolina Supreme Court invalidated section 15-5-210[41] and abol-

---

31. Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930).

32. Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956).

33. Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963).

34. Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967) (stepfather-child relationship).

35. Parental immunity was first recognized in Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). See PROSSER, *supra* note 4, at 964-65.

36. S.C. CODE ANN. § 15-5-210 (1976) provides: "An unemancipated child may sue and be sued by his parents in an action for personal injuries arising out of a motor vehicle accident. In any such action there shall be appointed a guardian ad litem as provided by law for such child."

37. _ S.C. _, 268 S.E.2d 109 (1980). In *Elam*, the court considered the consolidated appeals of three unemancipated minor passengers who were injured while riding in automobiles allegedly operated negligently by their parents.

38. S.C. CONST. art. I, § 3.

39. U.S. CONST. amend. XIV, § 1. The defendant-respondent argued that the distinction drawn by section 15-5-210 was purely arbitrary because there was no rational reason to permit unemancipated minors injured in motor vehicle accidents to maintain suit while denying recovery for other parental acts of negligence. Brief of Respondent at 5-6.

40. For an analysis of the constitutional issues in *Elam*, see *Constitutional Law, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 21, 21-25 (1981).

41. _ S.C. at _, 268 S.E.2d at 110. The South Carolina Supreme Court has invalidated two other automobile tort statutes on equal protection grounds: the automobile comparative negligence statute, S.C. CODE ANN. § 15-1-300 (1976) in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978); and the automobile guest statute, S.C. CODE ANN. § 15-1-290 (1976) in Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979). The constitutional issues in *Marley* are examined in *Constitutional Law, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 21, 29 (1979). For a discussion of *Ramey*, *see Constitutional Law, Annual Survey of South Carolina Law*, 32 S.C.L. REV. 29, 29 (1980); *Torts,*

ished the doctrine of parental immunity.[42]

In its examination of the inconsistencies in the parent-child immunity doctrine, the court noted that the doctrine's prohibitive effect was limited to suits between parent and unemancipated child for tortious injuries.[43] An emancipated child, regardless of age, could maintain a negligence action against the parent.[44] The injustice of blanket immunity is illustrated by the following example.

> Two siblings reside under the same parental roof. One is an unemancipated minor aged 17 years and the other an emancipated minor aged 16. The latter is a married daughter living at home while her husband is serving an Army hitch overseas. While both are riding as passengers in a car driven by the father, an accident occasioned by the father's negligence occurs, resulting in injuries to both children. The parental immunity doctrine bars an action by the unemancipated 17 year old, but not by the married daughter.[45]

Moreover, an unemancipated child could sue his parent for property or contract disputes.[46] Finding "no logical justification for such distinctions,"[47] the court concluded that the policies which persuaded courts to adopt parental immunity have lost their vitality.[48]

South Carolina's adoption of parental immunity was based upon the preservation of family harmony, unity, and parental discipline.[49] The theory underlying this rationale was that permitting a parent and child to maintain tort actions against each other would seriously erode family stability.[50] The court in *Elam*

Annual Survey of South Carolina Law, 32 S.C.L. REV. 205, 217 (1980).

42. _ S.C. at _, 269 S.E.2d at 112.

43. *Id.* at _, 268 S.E.2d at 110.

44. *Id.* at _, 268 S.E.2d at 110.

45. Streenz v. Streenz, 11 Ariz. App. 10, 12, 461 P.2d 186, 188 (1969) (Howard, J., dissenting). Arizona abolished parental immunity the following year in Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970).

46. _ S.C. at _, 268 S.E.2d at 110. *E.g.*, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952). *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 256 (1968); PROSSER, *supra* note 4, at 865.

47. _ S.C. at _, 268 S.E.2d at 110.

48. *Id.* at _, 268 S.E.2d at 111.

49. Parker v. Parker, 230 S.C. 28, 31, 94 S.E.2d 12, 13 (1956).

50. Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968). The purpose of

acknowledged three factors militating against the continuing viability of this justification. First, the disruption of the family occurs at the time of the injury, long before any suit is brought.[51] Second, because "the existence of universal automobile liability insurance" makes the insurance company the real defendant, intrafamily suits are unlikely to be disruptive.[52] Finally, even when the defendant family member lacks insurance coverage, tort actions cannot be regarded seriously as creating greater family conflict than property or contract disputes.[53]

Moreover, the court rejected the possibility of fraud and collusion as sufficient justification for retaining parental immunity[54] and indicated, without elaboration, that its ruling on this issue in *Ramey v. Ramey*[55] was dispositive.[56] The court in *Ramey* abolished South Carolina's automobile guest statute on constitutional grounds and noted that "the wholesale elimination of all guests' causes of action for negligence does not treat similarly situated persons equally, but instead improperly discriminates against guests on the basis of a factor which bears no significant relation to actual collusion."[57] It then concluded that the discriminatory effect of the statute outweighed any inciden-

---

parental immunity was

> to uphold, protect and sustain the family unit as a basic, living pillar of our society under parental discipline. Authority was vested in the father, or other parent, as head of the house. The law sought to shield the family unit from disruptive, internal disturbances. It is based upon the assumption that the parent will care for guard and control the infant and other members of the family unit. That is his obligation. It was proper, therefore, for the courts to grant him immunity from the commonplace failures bound to occur in the course of daily life in every household . . . .

Henderson v. Henderson, 11 Misc. 2d 449, 454, 169 N.Y.S.2d 106, 112 (1957).

51. _ S.C. at _, 268 S.E.2d at 111 (citing Falco v. Pados, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971)). *Accord,* Petersen v. City & County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970).

52. _ S.C. at _, 268 S.E.2d at 111. Although the court only considered the widespread existence of automobile liability insurance, the availability of other types of insurance to compensate the child for injuries greatly diminishes the possibility of disruption in other contexts as well. *See, e.g.,* Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); Anderson v. Stream, _ Minn. _, 295 N.W.2d 595, 600 n.7 (1980).

53. _ S.C. at _, 268 S.E.2d at 111. *Accord,* Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

54. _ S.C. at _, 268 S.E.2d at 111.

55. 273 S.C. 680, 258 S.E.2d 883 (1979).

56. _ S.C. at _, 268 S.E.2d at 111.

57. 273 S.C. at 685, 258 S.E.2d at 885 (quoting Brown v. Merlo, 8 Cal.3d 855, 877, 506 P.2d 212, 215, 106 Cal. Rptr. 388, 391 (1973)).

tal benefit it might have had in preventing collusive suits.[58] Similarly, the prevention of collusive suits does not justify adherence to a parental immunity doctrine which denies recovery to all minors.[59] "It would be unjust to bar arbitrarily the claims of injured minors deserving of relief solely because some cases may involve possible collusion between two parties."[60] As the court concluded in *Ramey*, the imposition of civil law sanctions for collusive litigation is preferable to the exclusion of an entire class of litigants.[61] Finding the threat of family discord and collusive suits insufficient to justify parental immunity, the court in *Elam* abolished this doctrine in South Carolina.[62]

Some courts, however, have found that partial abrogation of the doctrine better protects a child's interests, while effectively limiting disruptive litigation.[63] In these jurisdictions, parental immunity has been abolished with two exceptions: "(1) Where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."[64]

This approach has been the subject of disapproval[65] because the terms "ordinary" and "reasonable" are subject to several interpretations: first, a parent is immune only if his conduct is not negligent; and second, he is immune if his conduct is negligent but not outrageous.[66] This inherent difficulty in determining the

---

58. 273 S.C. at 685, 258 S.E.2d at 885.

59. Sorensen v. Sorensen, 369 Mass. 350, 365, 339 N.E.2d 907, 915 (1975).

60. *Id.* Another inconsistency with the collusive suit argument not considered in *Ramey* is that the possibility of collusion is no more immediate in parent-child suits than in actions between parents and emancipated children, brothers and sisters, and husbands and wives. Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 651, 92 Cal. Rptr. 288, 291 (1971).

61. 273 S.C. at 685, 258 S.E.2d at 885.

62. _ S.C. at _, 268 S.E.2d at 112.

63. Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968). *Accord,* Schneider v. Coe, 405 A.2d 682 (Del. 1979); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968).

64. Plumley v. Klein, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972). *Accord,* Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

65. See CLARK, *supra* note 46, at 258-59.

66. Anderson v. Stream, _ Minn. _, _, 295 N.W.2d 595, 598 (1980) (overruling Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968)).

precise scope of the partial parental immunity doctrine creates the "danger of arbitrary line-drawing"[67] and inconsistent results.[68]

Recognition of this danger has led some courts that have totally abrogated parental immunity to establish guidelines for determining whether the parent would be held liable for negligent exercise of parental authority or discretion.[69] "The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, . . . the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"[70] This standard is not meant to shield parents from or subject them to liability for every child-rearing mistake. Rather, it permits judicial scrutiny of the reasonableness of parental conduct on a case-by-case basis.[71]

The Supreme Court of South Carolina, having abrogated the parental immunity doctrine in *Elam,* should now consider the "ordinary and reasonable parent" standard as the measure for determining the existence of parental liability. This standard accommodates two competing societal interests: protection of parents in their exercise of discretion and authority in raising children and allowance of children's meritorious claims for un-

---

67. *Id.* at _, 295 N.W.2d at 598.

68. *Compare* Paige v. Bing Constr. Co., 61 Mich. App. 480, 233 N.W.2d 46 (1975) *with* Thoreson v. Milwaukee & Suburban Transport Corp., 56 Wis. 2d 231, 201 N.W.2d 745 (1972) (different results in determining whether parental supervision was included in the parental authority exception).

69. Gibson v. Gibson, 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Anderson v. Stream, _ Minn. _, 295 N.W.2d 595 (1980). For a criticism of the reasonable parent standard, see Anderson v. Stream, _ Minn. at _, 295 N.W.2d at 601-04 (Rogosheske, J., dissenting).

70. Gibson v. Gibson, 3 Cal.3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. A reasonableness standard

> would not require that a parent live up to some idealized picture of a model father or mother. A mere misjudgment in supervising one's child would not necessarily constitute a tortious breach of duty. In determining whether the bounds of reasonable behavior have been transgressed, all of the relevant facts and circumstances would have to be considered.

Nolechek v. Gesuale, 46 N.Y.2d 343, 346-47, 385 N.E.2d 1268, 1277, 413 N.Y.S.2d 340, 350 (1978) (Fuchsberg, J., concurring).

71. *See* Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity,* 47 U. COLO. L. REV. 795, 810 (1976). *See generally,* Note, *Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation.* 10 RUT-CAM. L.J. 661 (1979).

reasonable parental conduct.

III. No Cause of Action for "Wrongful Life"

In *Phillips v. United States*,[72] a child born with Down's Syndrome[73] commenced an action against the United States[74] for wrongful life.[75] The claim alleged that the negligent failure of a physician to warn the child's parents of the possibility of his defective birth proximately caused his parents to continue the pregnancy.[76] Because the action was instituted pursuant to the Federal Tort Claims Act,[77] the district court was obligated to apply the law of the state in which the negligence occurred.[78] Defendant moved for summary judgment, asserting that a wrongful life allegation did not state a claim upon which relief could be granted.[79] The district court granted the motion, con-

---

72. 508 F. Supp. 537 (D.S.C. 1980). In a companion case, the plaintiff's parents brought suit for wrongful birth, alleging that they would have terminated the pregnancy had they known of the possibility of the child's birth defects. The district court denied the defendant's motion for summary judgment, finding the wrongful birth claim a legally cognizable cause of action. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981). For a discussion of the distinctions between actions for wrongful life and wrongful birth, see Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15 (1980).

73. Down's Syndrome is a syndrome of mental retardation associated with physical abnormalities including retarded growth, laxness of joint ligaments, and broad hands and feet. 508 F. Supp. at 539 n.3 (citing STEDMAN'S MEDICAL DICTIONARY 1382 (4th unabr. lawyer's ed. W. Dornette 1976)).

74. The action was brought under the Federal Tort Claims Act on behalf of the child by his father as guardian ad litem.

75. *See generally*, Trotzig, *supra* note 72.

76. By asserting a wrongful life claim,

> [t]he child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.

Comment, *"Wrongful Life": The Right Not to be Born*, 54 TULANE L. REV., 480, 485 (1980).

77. 28 U.S.C. §§ 2671-2680 (1976).

78. 28 U.S.C. § 1346 (b) (1976). Absent controlling precedent, the district court must "attempt to predict the determination that the state Supreme Court would reach on the question." 508 F. Supp. at 540. *Cf.* Quinones v. United States 492 F.2d 1269, 1273 (1974) (predicting that the state of Pennsylvania would recognize a cause of action for negligent maintenance of employment records).

79. 508 F. Supp. at 538. Defendant also asserted that failure to provide genetic counseling and testing did not constitute negligence with respect to the plaintiff; that

cluding that a cause of action for wrongful life does not exist in South Carolina, and that the South Carolina Supreme Court, if confronted with a wrongful life claim, would decline to recognize it for public policy reasons.[80]

Plaintiff's mother was a patient of the Charleston Naval Regional Medical Center throughout her pregnancy. During one visit to the center, Mrs. Phillips completed a prenatal questionnaire in which she indicated that her sister was afflicted with Down's Syndrome. This family history of mental retardation was noted by the physician attending Mrs. Phillips, yet, despite this information, she was neither counseled further nor given genetic testing.[81]

The court examined wrongful life cases in the few jurisdictions that have addressed the issue.[82] Noting that only one state has allowed such a cause of action,[83] the court focused on the

---

plaintiff suffered no legally cognizable damages; and that plaintiff lacked standing to sue. *Id.*

80. *Id.* at 544.

81. *Id.* at 540.

82. Only seven other jurisdictions have addressed wrongful life claims. Six have refused to recognize this cause of action. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Elliot v. Brown, 361 So. 2d 546 (Ala. 1978) (denial of wrongful pregnancy claim which the court characterized as a cause of action for wrongful life); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (overruled in part by Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979)); Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); Greenberg v. Kliot, 47 A.D.2d 765, 367 N.Y.S.2d 966 (1975) (facts summarized in Park v. Chessin, 60 A.D.2d 80, 93, 400 N.Y.S.2d 110, 116-18 (1977) (Titone, J., dissenting)); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Speck v. Finegold, _ Pa. Super Ct. _, 408 A.2d 496 (1979); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

83. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 175 Cal. Rptr. 477 (Ct. App. 1980). The district court determined that certain factual dissimilarities diminished the applicability of *Curlender* to the case at bar. In *Curlender*, defendants, a physician and two medical laboratories, were alleged to have committed *preconception* negligent acts. At the request of plaintiff's parents, defendants completed genetic tests to determine whether the parents were carriers of heriditary Tay-Sachs Disease. Receipt of erroneous information that they were not carriers was determinative of the parents' decision to conceive the plaintiff. The district court indicated that this preconception negligence may well have affected the public policy issues examined in *Curlender*. Moreover, the court considered the reasoning in *Curlender* unpersuasive; noting that Robak v.

justifications for denying wrongful life claims. The difficulty of ascertaining damages is readily apparent,[84] because an award of compensatory damages for an infant plaintiff's birth would require "a comparison between the Hobson's choice of life in an impaired state and nonexistence."[85] Nonetheless, the court determined that if the calculation of damages were the only impediment to the plaintiff's recovery, the cause of action would not be denied.[86]

The court reached similar conclusions with respect to whether the defendant owed a duty of care to an unborn child and whether the doctor's breach of this duty was the proximate cause of the child's birth. To the extent that prenatal torts have been recognized in South Carolina when the fetus was viable at the time of the negligent act,[87] the court concluded that there is no inherent barrier to a finding that the defendant owed the unborn child a duty of care.[88] In terms of causation, the plaintiff's allegation that the physician's negligence prevented a parental decision to terminate the pregnancy, coupled with the availability of eugenic abortions,[89] indicated that proximate cause was not an "insurmountable barrier."[90]

Although the court was not dissuaded by these considerations, it denied plaintiff's claim. Courts have been prompted to reject claims for wrongful life for many reasons,[91] yet, the district court perceived the single policy consideration underlying them all, "the preciousness and sanctity of human life," to be the determinative factor in granting defendant's motion for

---

United States, No. 77 C 3595 (N.D. Ill. August 11, 1980), the single case decided subsequent to *Curlender*, also declined to recognize a wrongful life claim. 508 F. Supp. at 541.

84. *See, e.g.*, Glietman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

85. Becker v. Schwartz, 46 N.Y.2d 401, 413, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

86. 508 F. Supp. at 542.

87. Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) (recognizing a cause of action for the wrongful death of a viable fetus).

88. 508 F. Supp. at 542.

89. The alternative of an eugenic abortion "would certainly appear to fall within the ambit of the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)." 508 F. Supp. 537.

90. *Id.*

91. *E.g.*, Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977) (the metaphysical, theological, or philosophical nature of the issues); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (absence of recognized damages).

summary judgment.[92]

IV. Products Liability

A. *No Retrospective Application of Section 402A*

Since the 1974 legislative enactment of strict tort liability, section 15-73-10 of the South Carolina Code,[93] the South Carolina Supreme Court has several times avoided determining whether the statute operates retroactively.[94] The question now has been resolved: causes of action arising before the 1974 enactment cannot be based upon statutory section 402A of the *Restatement (Second) of Torts.*

In *Hatfield v. Atlas Enterprises, Inc.*,[95] plaintiff brought a products liability action based upon negligence, breach of warranty, and strict liability in tort for injuries sustained from a blaze caused by fireworks. Defendant's demurrer to the strict liability cause of action was sustained by the trial court, which ruled that this theory of recovery was not recognized in South Carolina at the time plaintiff was injured.[96] On appeal, plaintiff contended that strict tort liability was part of the state's common law at the time of the injury and, alternatively, that section 402A should be applied retroactively.[97]

The court relied upon its dictum in *Lane v. Trenholm*

---

92. 508 F. Supp. at 543-44.

93. S.C. Code. Ann. § 15-73-10 (1976) provides that:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

94. *See* Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978); Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 240 S.E.2d 511 (1977). For a brief analysis of the retroactivity issue in *Young* and *Marchant*, see *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. Rev. 101, 114-15 (1979).

95. 274 S.C. 247, 262 S.E.2d 900 (1980).

96. The action was brought against the manufacturers and distributors of the fireworks. *Id.* at 248, 262 S.E.2d at 900.

97. *Id.* at 248-49, 262 S.E.2d at 900-01.

Building Co.[98] that the legislature had "recognized the clear drift of the common law in this state when it codified Restatement of Torts (2) Section 402A, which imposes strict liability in tort upon the suppliers of defective products"[99] and concluded that strict liability in tort was not part of the common law of South Carolina.[100] Although the court provided no further explanation, its conclusion is supportable. At the time plaintiff was injured, negligence and breach of warranty were the primary theories of recovery available in products liability actions.[101] Although the abrogation of the privity requirement[102] in breach of warranty actions arguably has made that theory virtually identical to strict tort liability,[103] the latter theory was not available to a plaintiff until the legislative enactment of section 402A.[104]

Addressing the issue of retrospective application of section 402A, the court stated without further exposition that "the reasoning in *Hyder v. Jones*[105] . . . is dispositive of this issue and supports the trial court's decision that these provisions operate prospectively only."[106] In *Hyder,* the court articulated the gen-

---

98. 267 S.C. 497, 229 S.E.2d 728 (1976).

99. *Id.* at 504 n.3, 229 S.E.2d at 731 n.3.

100. 274 S.C. at 248, 262 S.E.2d at 901.

101. In two diversity cases interpreting South Carolina law, the district court reached this conclusion. Cooley v. Salopian, 383 F. Supp. 1114, 1118 (D.S.C. 1974); McHugh v. Carlton, 369 F. Supp. 1271, 1271 (D.S.C. 1974).

102. *E.g.,* Gasque v. Eagle Machine Co., 270 S.C. 499, 243 S.E.2d 831 (1978); Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967); Beasley v. Ford Motor Co., 237 S.C. 506, 117 S.E.2d 863 (1961). *See* S.C. CODE ANN. § 36-2-318 (1976) (effective January 1, 1968).

103. A breach of warranty action is a form of strict liability since the plaintiff is not required to establish failure to exercise due care. *See generally,* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16[4][a] (1980); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 3:1 (1974); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort,* 19 RUTGERS L. REV. 692 (1965).

104. Applying South Carolina law in two diversity actions, the district court determined that strict tort liability for defective products did not exist in the state's common law prior to 1974. Cooley v. Salopian, 383 F. Supp. 1114 (D.S.C. 1974); McHugh v. Carlton, 369 F. Supp. 1271 (D.S.C. 1974).

105. 271 S.C. 85, 245 S.E.2d 123 (1978). In *Hyder,* the court held that S.C. CODE ANN. § 15-5-210 (1976), which abrogates the doctrine of parental immunity with respect to automobile accidents, would not be given retrospective effect. Prior to this enactment, common law parental immunity prevented children from maintaining tort actions against their parents. Because the statute clearly created a right of action unavailable at common law, it was construed as operating prospectively only. *Id.* at 88, 245 S.E.2d at 125.

106. 273 S.C. at 249, 262 S.E.2d at 901.

eral rule that a statute is presumed to have prospective effect unless the legislature clearly intends the act to have retrospective application.[107] South Carolina's strict tort statutes, including the comments to section 402A incorporated by reference,[108] reveal no express or implied intent by the General Assembly to apply the provisions retroactively. The general rule is inapplicable, however, when a statute is remedial or procedural.[109] There is one limitation on the retrospective application of a remedial statute: if it supplies "a legal remedy where formally [sic] there was none,"[110] the statute may be given prospective effect only.[111] The court, offering no analysis on this issue, relied solely upon its conclusion that, prior to the enactment of section 402A, strict tort liability was not judicially recognized in products liability actions.[112] The court's reliance on *Hyder* suggests that the legislative enactment of strict liability in tort provided a remedy previously unavailable in products liability actions;[113] hence the statute cannot operate retroactively.[114]

Confronted with a similar problem of the retrospective application of a statutory section 402A,[115] the Arkansas Supreme

---

107. 271 S.C. at 88-89, 245 S.E.2d at 125. *Accord,* Howard v. Allen, 368 F. Supp. 310 (D.S.C. 1973); Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973); Jefferson Standard Life Ins. Co. v. King, 165 S.C. 219, 163 S.E. 653 (1932).

108. S.C. CODE ANN. § 15-73-30 (1976).

109. 271 S.C. at 88, 245 S.E.2d at 125.

110. *Id.* at 88, 245 S.E.2d at 125.

111. *Id.* at 88, 245 S.E.2d at 125.

112. 273 S.C. at 249, 262 S.E.2d at 901.

113. It has been suggested that § 402A created no new liabilities. To the extent that a seller of a defective product was subject to liability for negligence or breach of warranty prior to the enactment of § 402A, strict tort liability may lessen the "difficulty of establishing a prima facie case, [but] does not impose liability in a case where the defendant was assured of nonliability under negligence and warranty principles." *Torts, Annual Survey of South Carolina Law,* 27 S.C.L. REV. 554, 618 (1975). Furthermore, in its holding that strict liability was not part of South Carolina common law in 1970, the court made no mention of the existence of strict liability in tort in the limited area of abnormally dangerous activities. *See* Wallace v. A.H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960). In effect, strict liability also has been reached as a matter of common law in cases applying the common law implied warranty of habitability. *See* Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968).

114. *Contra,* Cooley v. Salopian, 383 F. Supp. 1114 (D.S.C. 1974) (applying South Carolina law). In *Cooley,* Judge Hemphill noted in dictum that § 402A was remedial, and, therefore, it applied retrospectively. *Id.* at 1118. The court, however, did not consider whether the statute created a new right of action.

115. ARK. STAT. ANN. § 85-2-318.2 (Supp. 1979). Statutory strict liability has been adopted in only six states: Arkansas, Georgia, Indiana, Maine, Oregon, and South Caro-

Court in *General Motors Corp. v. Tate*[116] determined that the statute would not be given retroactive effect because it created a new theory of recovery.[117] Strict liability in tort

> confers upon a plaintiff the right to recover damages upon a theory and under circumstances where a cause of action did not formerly exist. . . . Before the adoption of the act, appellee could have only recovered by proving negligence or breach of warranty. After the passage of the act . . . neither negligence nor breach of warranty would be an essential ingredient of the cause of action in strict liability. Thus a new cause of action exists and a new liability is imposed.[118]

The analysis provided by the Arkansas Supreme Court supports the conclusion reached in *Hatfield* that the legislative enactment of strict liability in tort can operate only prospectively.

B. Implied Warranty

In *JKT Co. v. Hardwick*,[119] the South Carolina Supreme Court held that a manufacturer-seller's implied warranties extend to a remote corporate vendee.[120] The court noted South Carolina's statutory extension of third-party beneficiary protection to natural persons,[121] but relied primarily upon the common

---

lina. W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY 204-05 n.7 (1980).

116. 257 Ark. 347, 516 S.W.2d 602 (1974).

117. *Id.* at 353-54, 516 S.W.2d at 606-07.

118. *Id. See also* Wansor v. George Hantscho Co., 243 Ga. 91, 252 S.E.2d 623 (1979) in which the Georgia Supreme Court held that statutory strict liability would not be applied retroactively because it created a new cause of action in tort. The scope of the statute, however, was narrower than § 402A and provided for strict liability against a manufacturer of defective personal property sold as new.

119. _ S.C. _, 265 S.E.2d 510 (1980).

120. *Id.* at _, 265 S.E.2d at 512.

121. S.C. CODE ANN. § 36-2-318 (1976). This section provides that "[a] seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty. A seller may not exclude or limit the operation of this section." *Id.*

The UNIFORM COMMERCIAL CODE provides three optional provisions for § 2-318. South Carolina's version, however, is nonstandard, a blend of alternatives B and C. The three alternatives are as follows:

Alternative A

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be

law erosion of privity[122] and found no reason to distinguish between consumer and corporate plaintiffs on the issue of privity.[123]

Plaintiff JKT purchased a warehouse that was constructed pursuant to a contract between the vendor and Easley Lumber Company, the general contractor. When, several years after construction, the warehouse roof began to blister and leak, JKT instituted an action for negligence, willfulness, and breach of warranty against Easley, Hardwick (the roofing subcontractor for Easley), and Celotex (the manufacturer-seller of the roofing materials).[124] The jury returned a verdict against Easley[125] and Celotex. On appeal, Celotex contended that privity of contract was essential to JKT's breach of warranty action because section 36-2-318 of the South Carolina Code dispensed with the need for privity only with respect to natural persons.[126] The supreme court rejected this contention.[127] Although language in the opin-

---

affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Four other states, Maine, Massachusetts, New Hampshire, and Virginia, have adopted nonstandard provisions. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 404 n.20 (1980). For a list of states adopting each alternative, see *id.* at 403-04.

122. See note 136 and accompanying text *infra*. The privity requirement also has been eliminated in products liability actions based upon the negligence of the manufacturer. *E.g.*, Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972); Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966).

123. _ S.C. at _, 265 S.E.2d at 512.

124. *Id.* at _, 265 S.E.2d at 511. Another defendant, the architect who designed the warehouse, was granted a nonsuit. *Id.* at _, 265 S.E.2d at 511.

125. The supreme court reversed the verdict against Easley. Easley's only connection with the installation of the roof had been to employ a subcontractor, Hardwick, to perform the work. Because the jury exonerated Hardwick, the verdict against Easley was inconsistent and the lower court erred in refusing to grant Easley's motion for judgment *n.o.v. Id.* at _, 265 S.E.2d at 514.

126. *Id.* at _, 265 S.E.2d at 512. See note 122 *supra*.

127. _ S.C. at _, 265 S.E.2d at 512.

ion suggests that the court construed section 36-2-318 to include corporate purchasers,[128] the holding rests on the erosion of the common law privity requirements.

Section 36-2-318 of the South Carolina Code, which is an amalgam of two of the alternative forms provided by section 2-318 of the Uniform Commercial Code,[129] extends warranties to natural persons not in privity with the seller.[130] Because the plaintiff is a corporation rather than a natural person, this provision clearly does not eliminate the need for privity in the instant case. The court determined, however, that there was "no sound reason, in jurisprudence or logic, why the language of Code § 36-2-318 should be taken as the outer boundary of the abolition of privity, or why the developing case law should be inhibited thereby."[131]

The official comments to this section indicate that

> [t]his section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to the buyer who resells, extend to other persons in the distributive chain.[132]

Although this comment appears in the Code following South

---

128. "Celotex contends the term 'natural' describing the persons to whom implied warranties extend under this section, excludes respondent, a corporation, from its scope. This *construction* is untenable." _ S.C. at _, 265 S.E.2d at 512 (emphasis added). Apparently, this statement need not be taken in point of statutory construction in the strict sense; rather it expresses the court's intent to include remote corporate vendees as a matter of extended judicial application of implied warranty protection.

129. See note 121 *supra*.

130. See note 122 *supra*.

131. _ S.C. at _, 265 S.E.2d at 512.

132. S.C. CODE ANN. § 36-2-318, Official Comment 3 (1976). The South Carolina Reporter's Comments are directed toward Alternative A of the official version and not to South Carolina's nonstandard provision.

> The Commercial Code generally takes a neutral position on the issue of privity leaving the matter as stated in the official comments to Section 2-318 to "the developing case law." The one factual situation which the Commercial Code section deals with is where a member of a family buys defective goods which are consumed by other members of the family or guests in the home resulting in personal injury. In such case, the warranty runs with the goods, thus eliminating the privity requirement.

S.C. CODE ANN. § 36-2-318, South Carolina Reporter's Comments (1976). For a discussion of the South Carolina Reporter's Comments, see *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 101, 103-05 (1979).

Carolina's version of section 2-318, it is applicable only to alternative *A* and not to this state's nonstandard provision.[133] Moreover, jurisdictions in which courts have relied on this comment to justify the abrogation of the privity requirement in situations not covered by section 2-318 have a version identical to alternative *A*.[134] Although the official comment is not applicable to South Carolina law, its inclusion nonetheless evidences a legislative intent that section 36-2-318 should not restrict common law developments in the area of privity.[135]

Dispensing with the requirement of privity for remote corporate vendees in JKT is consistent with prior South Carolina decisions.[136] There is no valid reason for the court to "erect an artificial line distinguishing between consumer plaintiffs and

---

133. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 807 n.5 (1976). The language of the comment clearly indicates that it is applicable only to Alternative *A*—the beneficiaries named in Comment 3 are those expressly included in this alternative. For the text of the various alternatives to § 2-318, see note 121 *supra*. Moreover, Comment 3 appearing after § 2-318 of the U.C.C. specifically refers to the first alternative.

134. *See, e.g.*, Speed Fasteners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967) (applying Oklahoma law); Omaha Pollution Control Corp. v. Carver-Greenfield, 413 F. Supp. 1069 (D. Neb. 1976) (applying Nebraska law); Autrey v. Chemtrust Indus. Corp., 362 F. Supp. 1085 (D. Del. 1973) (applying Florida law); Fashion Novelty Corp. v. Cocker Mach. & Foundry Co., 331 F. Supp. 960 (D.N.J. 1971) (applying New Jersey law). *But see*, McHugh v. Carlton, 369 F. Supp. 1271 (D.S.C. 1974) (applying South Carolina law).

135. *But cf.* Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (1974). In *Monsanto*, the Superior Court of New Jersey declined to extend warranty protection to a corporate landlord. Without mentioning the official comments, the court determined that § 2-318, Alternative *A*, established an inclusive class and that it was "not the duty of the courts to amend the statute where the Legislature has spoken." *Id.* at 255, 326 A.2d at 95.

136. In breach of warranty actions, contractual privity once was an essential element of a plaintiff's cause of action. *E.g.*, Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); Mauldin v. Milford, 127 S.C. 508, 121 S.E. 547 (1924). Beginning in 1967, however, the court acknowledged the trend away from the privity requirement in products liability actions based upon breach of warranty. Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967). At the time *Springfield* was decided, South Carolina had adopted its version of the UNIFORM COMMERCIAL CODE. The provisions did not become effective until January 1, 1968. *Id.* at 137, 153 S.E.2d at 187. Since that time, the absence of contractual privity has not barred an innocent bystander's recovery for personal injuries against a retailer or a remote vendee's suit for economic loss. McHugh v. Carlton, 369 F. Supp. 1271 (D.S.C. 1974); Gasque v. Eagle Mach. Co., 270 S.C. 499, 243 S.E.2d 831 (1978). In *Gasque*, the court did not rely on the common law abrogation of the privity requirement, but interpreted § 36-2-318's reference to property damage as including economic loss. *Id.* at 503, 243 S.E.2d at 832. For a discussion of *Gasque*, see *Products Liability, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 101, 101 (1979).

corporate plaintiffs on the issue of privity."[137] With the *JKT* decision, the supreme court intends to "still all whispers of [privity's] continued existence."[138]

Elizabeth A. Ferrell

---

137. _ S.C. at _, 265 S.E.2d at 512.

138. *Id.* at _, 265 S.E.2d at 513. Several months after deciding *JKT*, the supreme court once again addressed the issue of privity in breach of warranty actions. In Terlinde v. Neely, _ S.C. _, 217 S.E.2d 768 (1980), the court held that a builder's "implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time." *Id.* at _, 271 S.E.2d at 770. This orderly advancement in the common law abrogation of privity suggests that the same result may be reached in future UCC warranty actions against manufacturers for defective used products. In *Terlinde*, the class of purchasers to whom the builder-vendor's implied warranties extended was determined by the length of time sufficient for latent defects to surface. For more complete discussions of *Terlinde*, see *Contracts, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 33, 33 (1981); *Property, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 125, 137 (1981). Similarly, applying § 36-2-318 language, persons purchasing products during the time latent defects can be expected to surface are "expected to use, consume or be affected by the goods." S.C. CODE ANN. § 36-2-318 (1976). Therefore, the seller's warranties also would be extended to this class of purchasers. The court could reasonably conclude that a manufacturer-seller's warranties extend for a reasonable time to the purchaser of a used defective product and that privity of contract is unnecessary to maintain a breach of warranty action.