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Torts

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TORTS

I. DEFAMATION

A. *Qualified Privilege Extended to Summons, Complaint not Served*

In *Padgett v. The Sun Publishing Co.* and its companion case, *Stevens v. The Sun Publishing Co.*,[1] both of which were defamation actions, the South Carolina Supreme Court held that a qualified privilege attaches to the publication of pre-trial documents, including the summons and the complaint.[2] The general rule regarding libelous statements made in the course of judicial proceedings is that such statements are absolutely privileged if relevant to the proceeding.[3] The subsequent publication of the statements is privileged only if made without malice. These decisions place South Carolina in accord with the majority rule.[4]

The dispute that led to the litigation in *Padgett* and *Stevens* began when John L. Reaves filed a Summons, complaint not served,[5] in the office of Clerk of Court for Horry County.[6] On

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1. 278 S.C. 26, 292 S.E.2d 30 (1982).

2. *Id.* at 30-31, 292 S.E.2d at 33.

3. *See, e.g.*, Sierra Madre Dev., Inc. v. Via Entrad Townhouses Ass'n, 20 Ariz. App. 550, 514 P.2d 503 (1973); Anderson v. Hartley, 222 Iowa 921, 270 N.W. 460 (1936); Hammer v. Ford, 127 Minn. 146, 145 N.W. 810 (1916); Annot., 38 A.L.R.3d 272 (1971).

4. *See, e.g.*, Fitch v. Daily News Publishing Co., 116 Neb. 474, 217 N.W. 947 (1928); Annot., 59 A.L.R. 1056 (1929); Kilgore v. Koen, 133 Or. 1, 288 P. 192 (1930); Annot., 104 A.L.R. 1125 (1936).

5. In South Carolina the summons may be served with or without the complaint. S.C. CODE ANN. § 15-13-230 (1976) states:

> A copy of the complaint need not be served with the summons, except when service is made upon a motor vehicle carrier under the provisions of § 15-9-340 or upon a nonresident director of a domestic corporation under the provisions of § 15-9-430. But if a copy of the complaint be not so served the summons must state where the complaint is or will be filed, and if the defendant, within twenty days thereafter, causes notice of appearance to be given and, in person or by attorney, demands in writing a copy of the complaint, specifying the place within the State where it may be served, a copy thereof must within twenty days thereafter be served accordingly. Only one copy of the complaint need be served on the same attorney.

Dean Lightsey notes that "[T]he cases have indicated that the court will insist upon

the face of this summons appeared "Cause of Action: Alienation of Affection and Criminal Conversation."[7] The named defendants were James P. Stevens, Sr., James P. Stevens, Jr., and Carroll D. Padgett.[8] The complaint in this action was filed approximately three weeks later.

On March 28, 1977, Reaves instigated another lawsuit against the same three defendants by filing a Summons and Complaint charging the defendants with barratry and champerty.[9] None of the actions instituted were brought to trial.

The plaintiffs' allegations of defamation were based upon reports of these three filings published in the *Sun News*. The newspaper published an account of the summons, complaint not served, despite admonitions by the elder Stevens to the newspaper's reporter that a summons was purely a jurisdictional tool containing no allegations. The *Sun News* published the latter two stories without making any effort to elicit a response from the named defendants.[10]

At trial, the jury found for the plaintiffs and awarded them $100,000 in actual damages and $200,000 in punitive damages.[11] The court denied motions for a judgment n.o.v. and a new trial. The defendant then appealed the denial of its motions to the South Carolina Supreme Court on the grounds that a qualified privilege protected the publication and that no evidence of actual malice was present in the record.[12] The court noted that South Carolina law requires a Summons, complaint not served, and complaints to be filed with the clerk of court.[13] When filed, the court reasoned, these documents become public records in

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strict compliance with the requirements of the statute, perhaps, recognizing the possibility that the method of service may mislead lay defendants who might not fully understand the seriousness of the document." H. LIGHTSEY, SOUTH CAROLINA CODE PLEADING 35 (1976).

6. Brief for Appellant at 2. This litigation arose amidst the background of a heated political campaign. John L. Reaves opposed State Senator James P. Stevens, Sr. in his bid for reelection. Previous litigation between the two included criminal charges brought by Reaves against Stevens and divorce proceedings in which Stevens represented Reaves' wife. 278 S.C. at 27-28, 292 S.E.2d at 31.

7. Record at 217.

8. *Id.*

9. *Id.* at 226-27.

10. *Id.* at 51, 118, 123, 178.

11. *Id.* at 217.

12. 278 S.C. at 32, 292 S.E.2d at 33-34.

13. *Id.* at 31, 292 S.E.2d at 33.

the court of a judicial proceeding.

Relying on *Lybrand v. The State*,[14] the court stated that the contents of documents filed in the course of judicial proceedings are protected by a qualified privilege and may be published without liability unless actual malice is shown.[15] The court noted that actual malice occurs "when reporters and publishers depart from responsible standards of investigation and print articles on the basis of an admittedly unreliable source, without further verification. . . ."[16] The court went on to observe that "[the] record is devoid of any evidence upon which to base a finding of actual malice."[17] Finding no fault on the part of the appellant, the court ruled that *Gertz v. Welch*[18] forbade the imposition of liability upon the publication.[19]

The *Lybrand* decision provided the court with much of the foundation for the result in *Padgett*.[20] The earlier opinion recognized that many jurisdictions did not include pleadings in the class of judicial proceedings that may be published under a qualified privilege.[21] Courts of that era, wary of the potential for

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14. 179 S.C. 208, 184 S.E. 580 (1935).

15. *Id.* at 218, 184 S.E. at 584.

16. 278 S.C. at 32, 292 S.E.2d at 34.

17. *Id.* at 32, 292 S.E.2d at 33. In finding no actual malice, the court noted that a publisher may invoke the privilege by publishing the contents of public records with "substantial accuracy." *Id.*, 292 S.E.2d at 34. The court leaves for another day the intriguing question of how far a reporter may deviate from a verbatim report of the contents of public records and still be "substantially accurate" within the meaning of the privilege.

In their separate dissents, Justice Harwell and Justice Ness agreed that there were obvious reasons to doubt the veracity of the statements in the documents and that, therefore, the jury could have reasonably found actual malice. The *Sun News* published the contents of the documents despite the elder Stevens' admonitions and with knowledge of the ongoing dispute between the parties to the instant cases. Both Justice Harwell and Justice Ness urged that publication under these circumstances was tantamount to a reckless disregard for the truth. *Id.* at 34-38, 292 S.E.2d at 35-37.

18. 418 U.S. 323 (1979).

19. In *Gertz*, the United States Supreme Court left it to the states to determine their own standard of media liability to private individuals so long as the states did not impose strict liability. *Id.* at 347.

20. 179 S.C. at 208, 184 S.E. at 580.

21. *Id.* at 212, 184 S.E. at 582. *See, e.g.*, Bilt v. Cranford, 6 Ga. App. 145, 64 S.E. 488 (1909); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Nisson v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911); American Publishing Co. v. Gamble, 115 Tenn. 663, 90 S.W. 1005 (1906); Fennegan v. Eagle Printing Co., 173 Wis. 5, 179 N.W. 788 (1920); Annot., 52 A.L.R. 1438 (1928).

abuse, frowned upon the publication with impunity of information contained in pleadings prior to any indication that the suit was genuine and not brought merely to take advantage of the privilege.[22] As the court in *Lybrand* pointed out, however, this rule, in practice, would not provide any real protection against publication of libelous statements.[23]

The *Lybrand* court noted that other jurisdictions distinguished pleadings from other matters in the course of judicial proceedings on the grounds that until a trial or hearing is held, pleadings are not discussed in open court.[24] This distinction, the court reasoned, would not protect a party against libel. Anyone wishing to publish defamatory statements could file a libelous pleading and then move to have the pleading amended. The motion to amend would require a hearing in open court; the publication of matters raised in open court would then, in any jurisdiction, be afforded a qualified privilege. Thus, the *Lybrand* court reasoned that, with regard to the qualified privilege, any distinction between pleadings and other matters was illusory. The court asserted that publication of pleadings filed with a court would therefore be protected by a qualified privilege.[25]

In extending the rule in *Lybrand* to include publication of a Summons, complaint not served, the *Padgett* majority noted that both a summons and a Summons, complaint not served, must be filed with the clerk of court and are thus available for public inspection. Since anyone who wishes to see either of these documents may do so, the publication of either, the court reasoned, should be protected by a qualified privilege.[26]

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22. *See, e.g.*, Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888):

> One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to the courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by anyone who gets access to them, no more effectual way of doing malicious mischief with immunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. . . . A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or, on trial, the case may entirely fail of proof or probability. The law has never authorized any such mischief.

72 Mich. at 568-69, 40 N.W. at 734.

23. 179 S.C. at 213, 184 S.E. at 582.

24. *Id.* at 217-18, 184 S.E. at 584.

25. *Id.* at 218, 184 S.E. at 584.

26. 278 S.C. at 32-33, 292 S.E.2d at 34.

Courts in most jurisdictions are in accord with the result reached in *Padgett*. Following the landmark decision in *Campbell v. New York Evening Post*,[27] courts have extended the qualified privilege to pre-trial documents, reasoning that these documents are public records and their publication is merely a report of information already available for public inspection.

Padgett v. Sun News should alleviate much of the confusion surrounding the publication of matters in the course of judicial proceedings. News media personnel now have a bright line indicating under what circumstances pre-trial documents may be published.

David C. Morrison

B. Qualified Privilege does not Protect Inaccurate Reports of Judicial Proceedings

In *Jones v. Sun Publishing Co.*,[28] the South Carolina Supreme Court held that a journalist's inaccurate and defamatory reports of judicial proceedings are not protected by a qualified privilege. Liability for inaccurate reports may be imposed if a jury finds that the defamatory error resulted from the negligence of the publisher or his employee. The court's decision in *Jones* may also allow juries to measure a reporter's actions against a reasonable man standard rather than against the standards observed within the journalism profession.

James Jones and four other men were arrested in Horry County on "tape pirating" charges in 1975.[29] Two months after the arrests, Monk, a reporter for Sun Publishing's Myrtle Beach newspaper, placed a call to the Columbia office of the United States Attorney and spoke with Williams, the attorney prosecuting the case against Jones and the others. Williams told Monk that four men had pleaded guilty to the charges that afternoon in Florence. He then gave Monk four names, spelling each one. Although notes made by Monk during the conversation showed James Jones to be among those pleading guilty, the charges

27. 245 N.Y. 320, 157 N.E. 153 (1977). *Campbell* was among the first cases that broke with the old rule and extended the qualified privilege to pleadings filed with a court official.

28. 278 S.C. 12, 292 S.E.2d 23 (1982), *cert. denied*, ___ U.S. ___ (1982).

29. Record at 16.

against Jones had actually been dropped.

An article published the next day in the *Sun* paper reported that James Jones and three others had pleaded guilty to tape pirating charges. Williams' supervisor was quoted as the source of the information. Following publication of this article, Jones brought a libel suit against the newspaper.

At trial, the jury found for Jones in the amount of $35,000. The judge entered a judgment n.o.v. for the defendant, ruling that there was insufficient evidence to support a verdict for the plaintiff. On appeal, the supreme court reversed the trial court and reinstated the jury's verdict.

The court found sufficient evidence in the record to support a finding of negligence on the part of Monk[30] and discussed two possible grounds for such a finding. First, the jury may have concluded that Williams had correctly relayed the contents of the record and that Monk misunderstood him or inadvertently recorded the wrong name in his notes.[31] Alternatively, the court suggested that the jury could have found that Monk failed to act according to "acceptable standards of reporting" by relying on his conversation with Williams rather than checking the records himself.[32] The court concluded that either ground would warrant a finding of "some measure of legal fault,"[33] the standard to be used since Jones was not a public figure.[34]

The supreme court also rejected the theory that inaccurate reports of the contents of judicial proceedings and other matters of public record are protected by a qualified privilege.[35] While

30. 278 S.C. at 14, 292 S.E.2d at 24.

31. *Id.*, 292 S.E.2d at 24.

32. *Id.* at 14-15, 292 S.E.2d at 24.

33. *Id.* at 15, 292 S.E.2d at 24.

34. The supreme court relied upon Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in support of its decision to apply a negligence standard in *Jones*. In *Gertz*, the United States Supreme Court held that in cases involving defamation of nonpublic figures, states may impose liability "so long as they do not impose liability without fault." 418 U.S. at 347.

35. The court compared the facts in *Jones* to those in Time, Inc. v. Firestone, 424 U.S. 448 (1976). In *Firestone*, the plaintiff was married to a tire empire heir. The couple became embroiled in a lengthy separation dispute. While the plaintiff's husband's counterclaim for divorce alleged adultery and extreme cruelty, the Florida court granted the divorce on other grounds. *Time*, relying on reports from wire services, a correspondent, and a "stringer," published a brief article reporting that the husband's counterclaim had been awarded on grounds of adultery and extreme cruelty. The court in *Firestone* held that the first amendment did not require protection of erroneous reports, even though

previous South Carolina decisions[36] have upheld the right to publish anything appearing in judicial records, defamatory or otherwise, the court refused to extend the qualified privilege to erroneous reports.[37]

Even if an erroneous report is not privileged, a finding of fault must be made before liability is imposed.[38] The court's failure to adequately explain its reasoning in *Jones* is thus troubling, for a close examination of the opinion and the record indicates that liability without fault may have been imposed.

The court found a jury issue in whether "the U.S. attorney erred in reading the names to Monk, or whether the reporter erred in writing them down."[39] No evidence is present in the record, however, to show an error by Monk. Monk's notes taken during the conversation with Williams include the plaintiff's

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the subject matter might be of some "informational value." *Id.* at 455-56.

The court's reliance on *Firestone* as a guideline for first amendment requirements is well placed. Although the facts in *Firestone* differ significantly from those in *Jones*, the *Firestone* court's discussion of Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975), cited in *Jones*, indicates that the rule in *Firestone* has a scope of application extending beyond its own facts. In *Cox*, a television reporter went to a courthouse and, by checking records open to the public, discovered the name of a teenage girl who had been raped and murdered. Georgia had a statute prohibiting the broadcast of the names of rape victims. The Court reasoned that the first and fourteenth amendments protected any information available to the general public from state censorship, 420 U.S. at 494-96. The *Firestone* Court's reliance on *Cox* implies that erroneous reports gathered from *any* source may be unprotected.

Firestone represents the latest relevant development in the line of cases that began with New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Sullivan* held that a public official could not bring an action for defamation absent a showing of malice. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1968), extended the doctrine to include public figures. The rule was extended further by the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which introduced a subject-matter test of public versus private interest. Any report of a matter of public interest would be protected by the *Sullivan* rule. *Gertz* rejected this dichotomy and reverted to a public figure standard.

36. McClain v. Multimedia, Inc., 275 S.C. 282, 270 S.E.2d 124 (1980); Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936).

37. 278 S.C. at 16, 292 S.E.2d at 25. The court did not address the status of the qualified privilege as developed in the common law of South Carolina after *Sullivan*. Pre-*Sullivan* cases in South Carolina held that qualifiedly privileged reports would not give rise to a cause of action absent a showing of malice. The publisher would be liable if he abused or went beyond the requirements of the occasion. *See* Cullum v. Dun and Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (1956); Fulton v. Atlantic Coast Line R. Co., 220 S.C. 287, 67 S.E.2d 415 (1951).

38. Time, Inc. v. Firestone, 424 U.S. at 459; Gertz v. Robert Welch, Inc., 418 U.S. at 347.

39. 278 S.C. at 14, 292 S.E.2d at 24.

name,[40] and all names were spelled out by Williams. Further, Williams admitted that on other occasions he had confused the various Joneses in his mind,[41] and that it was possible he had made the same mistake while talking to Monk.[42] He also stated that he had no "specific recollection" of what he said during the conversation.[43]

The court also inadequately explains its second ground for a finding of negligence. The opinion does not suggest how a jury could conclude that Monk departed from acceptable journalistic standards. The jury could not have found that Monk failed to meet standards observed within his profession—a determination of "journalistic malpractice"[44] — because no expert testimony on this issue was offered at trial.[45] The only evidence of the usual practice of reporters in South Carolina was offered by Williams, who testified that it was accepted and customary practice for out-of-town reporters to gather information about criminal proceedings in the federal court by calling his Columbia office.[46] The court commented that this practice was unnecessary in this instance. The "six day hiatus between the guilty pleas and the publication of the defamatory article negates any rush by the respondent to print 'hot news.' "[47] A reading of the record reveals, however, that Monk's article was indeed hot news since it was published the day after the guilty pleas were entered.[48] Six days had passed since the charges against Jones were actually dropped, but that act was not the subject of Monk's

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40. Brief of Respondent at 8.

41. Record at 77.

42. *Id.* at 89.

43. *Id.* at 77.

44. For a discussion of the journalistic malpractice standard, see R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 253-55 (1980).

45. The RESTATEMENT (SECOND) OF TORTS § 580B comment g (1965), gives the following standard:

> The defendant, if a professional disseminator of news, such as a newspaper, a magazine, or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. . . . Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself. . . .

46. Record at 70, 71.

47. 278 S.C. at 15, 292 S.E.2d at 24.

48. Record at 88-89.

article.[49]

The failure of the trial court or the supreme court to require expert testimony on journalistic standards suggests that South Carolina has adopted a reasonable man standard for judging the actions of reporters.[50] Application of this standard does not, however, explain the court's decision in *Jones*. No evidence appears in the record that would lead to the conclusion that a reasonably prudent man would have acted any differently than Monk.[51]

The South Carolina Supreme Court has imposed a stringent standard upon journalists in this state. The court has determined that a reporter should not rely on information gathered from a public official, but instead should read the actual records before publishing his report. Publishers and their counsel would be well advised to review their information gathering procedures and standards in light of the decision in *Jones*.

Theodore B. DuBose

II. Vicarious Liability

In *Fernander v. Thigpen*,[52] the South Carolina Supreme Court extended the liability of a franchisor to the torts of an employee of its franchisee. This decision weakens the ability of a franchisor to contractually relieve itself of liability for acts of the franchisee or its employees.

Brenda Fernander was killed while riding home with the as-

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49. *Id.* at 88.

50. This standard has also been adopted by the Supreme Court of Tennessee:

> In determining the issue of liability, the conduct of the defendant is to be measured against what a reasonably prudent person would or would not have done under the same or similar circumstances. This is the ordinary negligence test that we adopt, not a "journalistic malpractice" test whereby liability is based upon a departure from supposed standards of care set by publishers themselves.

Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978); *see also* Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292 (1977).

51. For cases factually similar to *Jones* but with contrary results, *see* LeBoef v. Times Picayune Publishing Corp., 327 So.2d 430 (La. App. 1976); Wilson v. Capital City Press, 315 So.2d 430 (La. App. 1975). Reporters relied on public officials for their information, and the officials misstated the public records. The courts held that the defendants had not deviated from acceptable standards in relying on a supposedly reliable source.

52. 278 S.C. 140, 293 S.E.2d 424 (1982).

sistant manager of the Burger Chef in which she worked. Her estate filed wrongful death and survival actions against the assistant manager, Burger Chef Systems, Inc. (Burger Chef), and A & H Foods, Inc. (A & H Foods), the Sumter franchise of Burger Chef. The trial court granted summary judgment for Burger Chef based on its franchise agreement with A & H Foods.[53] On appeal, the South Carolina Supreme Court reversed and remanded.

The supreme court addressed two issues in *Fernander*: whether an agency relationship existed between Burger Chef and A & H Foods and whether the franchise agreement absolved Burger Chef of liability.[54]

Initially, the court distinguished *Murphy v. Holiday Inns, Inc.*,[55] a similar case upon which the lower court had based its summary judgment. It noted that the Virginia Supreme Court in *Murphy* had not considered the issue of apparent authority and that the plaintiff there had furnished only the licensing agreement as evidence of an agency relationship. Since the plaintiff in *Fernander* presented direct testimony of several A & H Foods employees and pursued the theory of apparent authority, the supreme court reasoned *Murphy* was not dispositive.[56]

The court then examined the doctrine of apparent authority. It noted the testimony of two A & H Foods employees who stated that they thought Burger Chef was A & H Foods. The court also considered the physical indicia of the franchise, such as the Burger Chef trademark on napkins, uniforms, and advertising. The majority found that this evidence supported an inference of an agency relationship between the two corporations, despite an express provision in their franchise agreement stating that A & H Foods was an independent contractor.[57]

After finding evidence of an agency relationship, the court

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53. Record at 40. Some confusion exists on when summary judgment was actually granted. The supreme court stated that the trial court ruled after an examination of the franchise agreement. In a petition for rehearing, however, the respondent-petitioner argued that this was an inaccurate statement because the trial court also considered testimony submitted concerning the issues of actual agency, apparent authority, and agency by estoppel.

54. 278 S.C. at 142, 293 S.E.2d at 425.

55. 216 Va. 490, 219 S.E.2d 874 (1975).

56. 278 S.C. at 142, 293 S.E.2d at 426.

57. *Id.* at 143, 293 S.E.2d at 426; Record at 63.

turned to the more traditional "right to control" test.[58] The court noted that Burger Chef retained control over the trademarks, the menu, the quality of food, and the food preparation procedures. The court also found that Burger Chef controlled the daily operating policies and management of the employees. This finding was based upon a provision in the franchise agreement that enabled Burger Chef to require compliance by all personnel "with all reasonable requirements" made by Burger Chef.[59] The court concluded by holding that sufficient evidence existed to take the agency issue to the jury and remanded the case for a new trial.[60]

The supreme court may have erroneously found evidence of apparent authority in *Fernander*. Apparent authority generally is used in contractual matters to prevent a principal from holding out a party as his agent and later denying the relationship when a third party has reasonably relied upon the misrepresentation.[61] The doctrine embraces two elements: a representation by the principal, either directly to a third party or to the community, that an agent is authorized to bind the principal and a reasonable reliance upon the representation by the third party.[62]

The court failed to discuss these elements in the context of *Fernander*. Neither the assistant manager nor Burger Chef Systems made any representation that transportation from work was a service provided by Burger Chef. In fact, the agreement and custom between A & H Foods and its employees was the opposite.[63] Moreover, both the assistant manager and Brenda Fernander's father testified that they thought the assistant manager was taking Brenda home "as a favor."[64] The estate also of-

58. 278 S.C. at 144, 293 S.E.2d at 426. The right to control test is applied according to the standards of the RESTATEMENT (SECOND) OF AGENCY § 220 (1958), and is used to determine whether a master-servant relationship exists to hold the principal liable. *Id.* at § 219. Absent this relationship, the principal cannot be liable for physical harm caused by his agent. *Id.* at § 250.

59. 278 S.C. at 144, 293 S.E.2d at 426-27. Record at 50.

60. 278 S.C. at 144, 293 S.E.2d at 427.

61. Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958); Mortgage and Acceptance Corp. v. Stewart, 142 S.C. 375, 140 S.E. 804 (1927); RESTATEMENT (SECOND) OF AGENCY §§ 8, 159 comment b, 267 (1958).

62. Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971); RESTATEMENT (SECOND) OF AGENCY § 265 (1958).

63. Record at 86. This was the first instance in which the assistant manager had ever taken an employee home.

64. Record at 74, 88, 157-58.

fered no proof of reasonable reliance by the deceased or her family, a point discussed by the dissent.[65] Neither Brenda nor her family could have reasonably relied upon the assistant manager's offer as being cloaked with the authority of Burger Chef; he was clearly acting in an individual capacity outside the apparent scope of his employment with A & H Foods.

However, even if evidence of apparent authority existed, the majority should have noted that a principal is not liable for the acts of an agent outside the apparent scope of his employment.[66] Brenda Fernander's ride home after work was not within the apparent scope of the assistant manager's employment and Burger Chef should not have been liable for his negligence.

In addition to the problems with its apparent authority analysis, the court misapplied the traditional "right to control" test.[67] Although *Murphy* was distinguished on other grounds, the test employed in *Murphy* was the test normally utilized by the South Carolina Supreme Court to determine tort liability in a franchise situation.[68] Therefore, the significance of the decision should not be diminished greatly. The plaintiff in *Murphy* sought damages for injuries suffered at a Holiday Inn motel. After examining the agreement between Holiday Inn and its licensee, the Virginia Supreme Court found that Holiday Inn had not retained enough control over the day-to-day operation of the motel necessary to make it liable. The court noted that although Holiday Inn controlled the architecture, furnishings, and equipment, it retained no power to hire or fire employees, fix prices, set expenditures, determine working conditions, or share in the profit or loss.[69] Because Holiday Inn lacked the necessary daily control, the court denied any principal-agent and master-servant relationship between the two defendants.

Similarly, in *Fernander*, Burger Chef had no power to hire or fire employees,[70] control business expenses,[71] or directly su-

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65. 278 S.C. at 146-48, 293 S.E.2d at 428-29.

66. 233 S.C. at 587, 106 S.E.2d at 275; RESTATEMENT (SECOND) OF AGENCY §§ 228, 267 comment b, illustration 3 (1958).

67. Burriss v. Texaco, Inc., 361 F.2d 169 (4th Cir. 1966); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969); RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)(1958).

68. *See, e.g.*, Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939).

69. 216 Va. at 495, 219 S.E.2d at 878.

70. Record at 81-83, 122, 128-29.

71. *Id.* at 53-54.

pervise inventory levels.[72] In addition, A & H Foods bore the entire risk of loss.[73] Since Burger Chef retained no control over day-to-day operating procedures or personnel management, the court could easily have denied liability by finding that the requisite right to control was missing.

In extending the liability of a franchisor to include the torts of its franchisee's agent,[74] the supreme court has misinterpreted the thrust of the doctrine of apparent authority and weakened the right to control test. The extension of these theories threatens the fundamental reasons for franchising. In order to avoid situations such as *Fernander*, the franchisor could eliminate all control over its franchisee's daily operations and attempt to avoid the holding out element of apparent authority by communicating to the public the franchisee's true status. These alternatives, however, can mitigate the uniformity of the franchised business, thereby reducing the value of its reputation and trademark. Consequently, the only viable option remaining for a franchisor is the acquisition of expanded liability insurance coverage.[75]

Ruth Elaine Folline

III. NEGLIGENCE

A. Presumptions Against a Minor's Capacity for Negligence Abrogated in South Carolina

In *Standard v. Shine*,[76] the South Carolina Supreme Court rewrote this state's law concerning a minor's capacity for contributory negligence. The question of whether a minor has the

72. *See id.* at 47-49.

73. *Id.* at 67.

74. There are several popular theories in tort jurisprudence which, though not explicitly used by the court, might explain the thinking behind the result it reached. Likely examples include the "Deep Pocket Theory" (the master is liable because he is able to pay for the misfortunes that his business caused), the "Risk Distribution Theory" (the loss should be placed on the master because he is most likely to reflect the cost in the product price), and the "General Deterrence Theory" (if dangerous activities are made more expensive, the master will find a safer substitute). J.D. HINES, AGENCY AND PARTNERSHIP 39, 42-43 (1924).

75. *See* BORCHARD & EHRLICH, *Franchisor-Tort Liability: Minimizing the Potential Liability of a Franchisor for a Franchisee's Torts*, 69 TRADE-MARK REP. 109, 123 (1979).

76. ___ S.C. ___, 295 S.E.2d 786 (1982).

capacity for primary negligence was decided for the first time. The court held that presumptions against the capacity of minors to be negligent will no longer be recognized. The standard of care to which minors will be held in primary and contributory negligence is the standard of behavior expected of a child of like age, intelligence, and experience under similar circumstances.[77] The court also construed the South Carolina Parental Responsibility Act for the first time,[78] holding that age-based presumptions will not be allowed when determining the capacity of minors to commit malicious and intentional torts under the Act's provisions.[79]

Appellant Larry Shine, Jr., age six, allegedly started a fire, which resulted in substantial damage to an apartment owned by the respondent and leased by the appellants. Respondent sought to recover actual damages. Appellants asserted that a minor under seven years of age is legally incapable of negligence or a malicious and intentional tort and demurred to the complaint. Appeal was taken from the trial court's order denying the demurrer.[80]

The supreme court held that the demurrer was properly denied. In a unanimous decision, the court reasoned that because children of the same age do not always have the same abilities, no arbitrary limits should exist regarding the capacity of minors to be either primarily or contributorily negligent. Noting that the issue of a minor's capacity for primary negligence was one of first impression in South Carolina, the court stated that under the "prevailing view"[81] primary and contributory negligence

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77. *Id.* at ___, 295 S.E.2d at 787.

78. S.C. CODE ANN. § 20-7-340 (Supp. 1981) provides:

> When any unmarried minor under the age of seventeen years and living with his parent shall maliciously and intentionally destroy, damage or steal property, real, personal or mixed, the owner of such property shall be entitled to recover from such parent of such minor actual damages in a civil action court of competent jurisdiction in an amount not exceeding one thousand dollars; *provided, however,* that nothing herein contained shall in any way limit the application of the family purpose doctrine.

The complaint, in part, charged liability under § 15-75-30 of the 1976 Code. That section, with language identical to that in the present section, was repealed in 1981 as part of a reorganization of sections referring to domestic and juvenile matters and was replaced by the present section.

79. ___ S.C. at ___, 295 S.E.2d at 788.

80. *Id.* at ___, 295 S.E.2d at 787.

81. *Id.* at ___, 295 S.E.2d at 787.

should be treated alike with regard to the abolition of age-based presumptions of capacity.

After putting primary and contributory negligence on an equal footing, the court set forth the standard of care required of all minors charged with either form of negligence. Adopted from the Restatement (Second) of Torts, the standard of conduct for a minor under fourteen years of age is that expected of a child of like age, intelligence, and experience under like circumstances.[82]

More than sixty years ago the South Carolina Supreme Court held in *Sexton v. Moll Construction Co.*,[83] that a child under seven years old was, as a matter of law, incapable of contributory negligence.[84] This rule was derived from a common-law presumption that a child under seven was incapable of committing a crime.[85]

Similar categorical rules were later created regarding older children. In *Chitwood v. Chitwood*,[86] the court recognized a rebuttable presumption of incapacity in children aged seven to fourteen and a presumption of capacity for contributory negligence in older children.[87]

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82. RESTATEMENT (SECOND) OF TORTS § 283A (1965). Comment b cites factors in addition to age that should be taken into account in determining if the minor is contributorily negligent, *i.e.*, the living conditions of the child, his experience in dealing with particular hazards, and his education concerning those hazards. *Id.*

83. 108 S.C. 516, 95 S.E. 129 (1918).

84. *Id.* at 521, 95 S.E. at 130. *See also* Butler v. Temples, 227 S.C. 496, 88 S.E.2d 586 (1955); Limehouse v. Southern Ry. Co., 216 S.C. 424, 58 S.E.2d 685 (1950); King v. Holliday, 116 S.C. 463, 108 S.E. 186 (1921).

85. In 1902 the Illinois Supreme Court analogized the common law rule which exempted children under seven years old from criminal prosecution to the defense of contributory negligence. Thus was created the "Illinois rule," which asserted that children under seven were incapable of contributory negligence. Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902). *But cf.* Collins v. South Boston H.R. Co., 142 Mass. 301, 7 N.E. 856 (1886), which involved allegations of contributory negligence of a four year-old boy and his eleven year-old sister in an accident in which the boy was run over by a horse drawn streetcar. The court set forth the Massachusetts rule: "[C]hildren as well as adults should use their prudence and discretion which persons of their years ordinarily have. . . . They cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless." *Id.* at 317, 7 N.E. at 860.

86. 159 S.C. 109, 156 S.E. 179 (1930).

87. *Id.* at 112, 156 S.E. at 180. The categories were delineated in multiples of seven, a scheme of Biblical origin which Dean Prosser termed "a poor reason for such arbitrary limits." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 156 (4th ed. 1971). According to Prosser, "[U]ndoubtedly there is some irreducible minimum [age at which a minor is incapable of negligence]. . . but it ought not to be fixed by rules laid down in advance

The court in *Chitwood* proposed a two-part test for cases involving alleged contributory negligence of minors. First, the above presumptions are engaged to determine the child's capacity for contributory negligence. Second, if the child is found capable, it must be determined whether he exercised due care.[88] The test of due care under *Chitwood* is whether the child acted as a child of his age, capacity, discretion, knowledge, and experience ordinarily would under the same or similar circumstances.[89]

The *Chitwood* standard of due care is quite similar to the standard adopted by the court in *Shine*. The *Shine* court has removed the capacity issue, step one in *Chitwood*, and left as the only issue whether the child exercised that degree of care expected of a child of like age, intelligence, and experience under like circumstances.

In *Sexton* and *Chitwood*, the minors involved were plaintiffs, and thus the issue in both cases was whether a minor is capable of contributory negligence. *Shine* is distinguishable because the minor was a defendant and the issue was his capacity for primary negligence. While a minor's capacity for primary negligence is a question not previously addressed by the South Carolina Supreme Court,[90] dicta in several of its contributory negligence decisions suggest that no distinction existed between a minor's capacity for contributory negligence and his capacity for primary negligence. In *King v. Holliday*,[91] the court suggested that a four-year-old was incapable of either trespass or negligence. Two children under the age of seven were found to be incapable of personal negligence in *Limehouse v. Southern Ry. Co.*[92] The court in *Butler v. Temples*[93] found a two-year-old incapable of negligence. Under *Shine*, presumptions of incapacity are inapplicable to either primary or contributory negligence by minors of any age.

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without regard to the particular case." *Id.*

88. 159 S.C. at 112-13, 156 S.E. at 180-81.

89. *Id.* at 113, 156 S.E. at 180.

90. ___ S.C. at ___, 295 S.E.2d at 787.

91. 116 S.C. 463, 466, 108 S.E. 186, 187 (1921)(a four year-old boy recovered against the owner of an automobile that struck the boy when he was on a highway).

92. 216 S.C. 424, 427, 58 S.E.2d 685, 687 (1950)(Two minor passengers in a car driven by their mother were injured when the car was struck by a train. The court did not elaborate on its use of the term "personal negligence.").

93. 227 S.C. 496, 502, 88 S.E.2d 586, 589 (1955)(a two year-old girl was killed while playing in her driveway by a guest backing out his automobile).

Plaintiffs found further grounds for recovery, albeit a limited recovery, in the Parental Responsibility Act. The court focused on section 20-7-340 which provides that the parent of "*any* unmarried minor"[94] living at home will be liable to the owner of property maliciously damaged by the minor up to one thousand dollars. The court concluded that the legislature's language, which does not admit exceptions due to age, encompassed the defendant and therefore the demurrer to section 20-7-340 was properly overruled.[95] This aspect of the decision assures that a child's age will not automatically bar his parents' liability under South Carolina's parental responsibility statute.

Standard v. Shine will have a significant impact on the disposition of cases involving the negligence and contributory negligence of minors. Parties will no longer benefit from the presumptions of capacity and incapacity when prosecuting or defending claims. As a result, disputes of this kind will necessitate an inquiry into the minor's conduct based on his age, intelligence, experience, and the particular circumstances surrounding the incident in question. In actions brought under the Parental Responsibility Act, there will be no presumption that the minor was incapable of committing a malicious act.

Douglas A. Barfield, Jr.

B. Last Clear Chance does not Apply When Plaintiff's Contributory Negligence Continues Until the Injury Occurs

In *Brown v. George*,[96] the South Carolina Supreme Court limited application of the last clear chance doctrine to instances in which the plaintiff's negligence is so distant in the chain of causation that it is, as a matter of law, not a proximate cause of his injury.[97] Thus, the last clear chance doctrine will not be recognized if the plaintiff's contributory negligence continues until the injury occurs.

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94. ___ S.C. at ___, 295 S.E.2d at 787 (quoting S.C. CODE ANN. § 20-7-340 (Supp. 1981)(emphasis supplied by the court)).

95. ___ S.C. at ___, 295 S.E.2d at 787-88.

96. ___ S.C. ___, 294 S.E.2d 35 (1982).

97. ___ S.C. at ___, 294 S.E.2d at 36 (citing Smith v. Blackwell, 250 S.C. 170, 156 S.E.2d 867 (1967); Hopkins v. Reynolds, 243 S.C. 568, 135 S.E.2d 75 (1964); Seay v. Southern Ry., 205 S.C. 162, 315 S.E.2d 133 (1944)).

In *Brown*, the respondent brought suit to recover damages for injuries sustained when the appellant's automobile struck him. Around ten o'clock in the morning Brown exited from a truck parked off the shoulder of the road across from a liquor store and began to cross the highway. Appellant George was driving approximately fifty to fifty-five miles per hour, and was about two hundred fifty yards south of the store when he saw Brown in the left lane.[98] George testified that he immediately sounded his horn, hit his brakes, and swerved slightly to the right. He further testified that the respondent glanced in his direction.[99] The respondent's companion who had seen the accident, testified that Brown had walked in front of the appellant's sliding car.[100] The respondent testified that although he had been drinking since four o'clock that morning, he was not drunk, but merely "good and high."[101]

The jury awarded Brown a $15,000 verdict, and the defendants appealed, arguing that the denial of their motion for either judgment n.o.v. or for a new trial was error. The appellants alleged that the trial judge had erred in charging the last clear chance doctrine.[102] The supreme court agreed, reversed, and remanded for entry of judgment for the appellants.

The majority in *Brown* stated that the last clear chance rule is not applicable in every case in which the plaintiff is contributorily negligent. "It applies only where the antecedent negligence of the plaintiff has become remote in the chain of causation and a mere condition of his injury. [The doctrine] does not apply when the plaintiff's act combines with the defendant's act as a proximate cause of the injury."[103] The court reasoned that since the respondent was concurrently negligent in walking from a place of safety into the path of appellant's automobile, the doctrine was inapplicable.[104] The court also stated that when an

98. ___ S.C. at ___, 294 S.E.2d at 36; Record at 44.

99. ___ S.C. at ___, 294 S.E.2d at 36; Record at 44-45.

100. ___ S.C. at ___, 294 S.E.2d at 36.

101. *Id.* at ___, 294 S.E.2d at 36; Record at 23, 30.

102. The appellants also alleged that the trial judge had erroneously charged the jury to consider the plaintiff's intoxicated condition when determining a pedestrian's duty when crossing a highway. ___ S.C. at ___, 294 S.E.2d at 36. The supreme court agreed with appellant that this charge was prejudicial. *Id.* at ___, 294 S.E.2d at 37.

103. *Id.* at ___, 294 S.E.2d at 36.

104. ___ S.C. at ___, 294 S.E.2d at 36.

emergency arises too suddenly for a defendant to avoid the accident, the last clear chance doctrine does not apply.[105] As the majority viewed the evidence, the appellant did not have sufficient time to avoid harming Brown, who had negligently placed himself in peril. Therefore, the trial judge should not have charged the last clear chance rule.[106]

Despite a vigorous dissent,[107] the case is decided correctly under South Carolina law. Cases in this state discussing the last clear chance doctrine generally exhibit one of two typical fact patterns. In the first type of case, the helpless plaintiff is in a position of peril from which he cannot extricate himself.[108] In the second type of case, the plaintiff is not helpless and, in fact, contributes to the accident.[109] Cases that fall into the first category contain a question of fact regarding the defendant's negligence. Cases that fall into the second category contain an issue of law—whether the plaintiff was contributorily negligent—and should result in a judgment for the defendant, because the plaintiff could have prevented the injury had he exercised due care.[110] *Brown* falls into the latter category. The majority found,

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105. *Id.* at ___, 294 S.E.2d at 36 (citing Durant v. Stuckey, 221 S.C. 342, 70 S.E.2d 473 (1952)).

106. ___ S.C. at ___, 294 S.E.2d at 36-37.

107. *Id.* at ___, 294 S.E.2d at 37 (Ness, J., dissenting). The dissent focused on the appellant's testimony that he first saw the respondent from a distance of at least two hundred yards. Justice Ness reasoned that the jury could have found that the appellant had an opportunity to avoid injuring the respondent. Citing Cooper v. Driggers, 276 S.C. 299, 277 S.E.2d 893 (1981), the dissent concluded that the evidence was sufficient to warrant application of the last clear chance doctrine.

The dissent's analysis fails to recognize one of the requirements for invocation of the last clear chance doctrine as enunciated in *Cooper*. Under *Cooper*, the doctrine is inapplicable unless "the defendant sees that a negligent plaintiff is in a predicament from which he may not extricate himself." *Id.* at 301, 277 S.E.2d at 894. The only evidence that suggests such a predicament in *Brown* is the respondent's drunkenness. Further evidence shows, however, that the respondent was able to walk across the highway, negating any inference that he could not extricate himself from the peril. *Cf. infra* note 116.

108. *E.g.*, Smith v. Blackwell, 250 S.C. 170, 156 S.E.2d 867 (1967); Jones v. Atlanta-Charlotte Air Line Ry. Co., 218 S.C. 537, 63 S.E.2d 476 (1951).

109. *E.g.*, Eastern Brick & Tile Co., Inc. v. United States, 281 F. Supp. 216 (D.S.C. 1968); Page v. United States, 212 F. Supp. 668 (D.S.C. 1963); Farrell v. Weinard, 143 F. Supp. 939 (D.S.C. 1956); Durant v. Stuckey, 221 S.C. 342, 70 S.E.2d 473 (1952).

110. The jury determines liability only when a reasonable difference of opinion exists over whose act produced the injury. If "it clearly appears from the evidence that there was contributory negligence or gross contributory negligence proximately entering into and contributing to the accident at the time of its occurrence, it is the duty of the

as a matter of law, that the plaintiff was concurrently negligent, thus barring the application of the last clear chance doctrine.[111]

The essential elements of the last clear chance rule as it applies in South Carolina appear in *Jones v. Atlanta-Charlotte Air Line Ry. Co.*[112] The first requirement is that the negligent plaintiff was, immediately before the accident, "unable to avoid it by the exercise of reasonable vigilance and care."[113] As the majority in *Brown* viewed the evidence, the respondent could have avoided the accident through reasonable caution.[114] Although he was "good and high"[115] the respondent was able to walk across the highway and, in the majority's opinion, should have been able to perceive approaching vehicles.[116] Because the respondent directly contributed to the accident through his continuing negligence, the first requirement for the application of the rule is not met, and the doctrine cannot be applied.[117]

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court to so find as a matter of law." Truett v. Atlantic Coast Line R.R. Co., 206 S.C. 144, 152, 33 S.E.2d 396, 399 (1945).

111. ___ S.C. at ___, 294 S.E.2d at 36.

112. 218 S.C. 537, 63 S.E.2d 476 (1951). This case quotes RESTATEMENT OF TORTS § 479 (1936), which lists the elements of the last clear chance doctrine:

> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant
>
> 1. knows of the plaintiff's situation and realizes the helpless peril therein; or
>
> 2. knows of the plaintiff's situation and realizes the peril involved therein; or
>
> 3. would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and
>
> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

Id. at 548, 63 S.E.2d at 480.

113. *Id.* at 548, 63 S.E.2d at 480. *See* RESTATEMENT (SECOND) OF TORTS § 479 comment a (1965).

114. ___ S.C. at ___, 294 S.E.2d at 36.

115. *Id.* at ___, 294 S.E.2d at 36.

116. Record at 45. In intoxication cases, the court draws a distinction when the plaintiff is prostrate from intoxication. In these situations the court will hold that the extent of "helplessness interrupts the negligence of the victim so that subsequent negligence of a defendant brings into play the rule of last clear chance." *Jones*, 218 S.C. at 550, 63 S.E.2d at 482.

117. *See also* Hopkins v. Reynolds, 243 S.C. 568, 135 S.E.2d 75 (holding that the

Under *Brown v. George*, a trial judge must not charge a jury on the last clear chance doctrine unless the evidence tends to show that the plaintiff was in inextricable peril and that the defendant could have avoided injury to the plaintiff despite the latter's conduct. Evidence tending to show only one of these elements will not support application of the doctrine.

Ruth Elaine Folline

C. *Abrogation of Parental Immunity Doctrine: Prospective Application*

In *Walton v. Stewart*,[118] the South Carolina Supreme Court refused to retroactively apply *Elam v. Elam*,[119] the decision in which it eliminated the parental immunity doctrine in South Carolina. While other courts have found a different approach to the same issue,[120] the supreme court followed the lead of at least two other jurisdictions which have held that decisions abrogating the doctrine will be applied prospectively only.[121]

On August 12, 1978, the illegitimate child, for whose benefit the action in *Walton* was brought, lost his left heel while operating a lawnmower during a visit to his natural father's home. The child normally lived with his mother and her family. He had spent little time with his father until two years before the accident, when he began to visit his father's home for brief periods of time. The father had provided no support for his son other than the room, board, and small amount of clothing that were supplied during these visits.[122]

The minor's guardian ad litem brought a tort action for damages against the father based upon negligence. The trial judge ruled that the action was barred by the parental immunity

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last clear chance doctrine is not available to a plaintiff who is guilty of concurrent and contributory negligence continuing up to the time of the accident).

118. 277 S.C. 436, 289 S.E.2d 403 (1982).

119. 275 S.C. 132, 268 S.E.2d 109 (1980).

120. Some courts allow the new rule to operate in all similar cases in which the injury complained of occurred on or after the date of the injury in the case adopting the new rule. Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Black v. Solmitz, 409 A.2d 634 (Me. 1979).

121. Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Vickers v. Vickers, 109 N.H. 69, 242 A.2d 57 (1968).

122. The child's natural mother stated that the father would give the child things when the mother asked him to do so. 277 S.C. at 437-38, 289 S.E.2d at 404.

doctrine, which was in effect at the time of the accident, and granted summary judgment for the father. The supreme court affirmed.

The court reasoned that since the injury had occurred before its decision in *Elam* and since the new rule was to be applied prospectively only,[123] the parental immunity doctrine was still applicable to the parties in *Walton*.[124] The supreme court found that the father's relationship with his son in *Walton* was sufficient to allow application of the parental immunity doctrine in favor of the father. The father had a legal obligation to support the illegitimate child,[125] and no evidence of the complete emancipation needed to exempt the parent from immunity was shown.[126]

The parental immunity doctrine in South Carolina evolved through a line of supreme court cases.[127] The policy arguments advanced in support of the doctrine were that parental immunity fosters family harmony and prevents collusive lawsuits.[128] At their inception these arguments, as applied to a close family unit, may have had some rational basis. As the family relationship becomes attenuated, however, the rationale behind these policy arguments becomes less persuasive. Such is the case in *Walton*.

The court in *Walton*, giving significant weight to the legal support obligation,[129] extends immunity to a natural parent who gives minimal support to and rarely sees his illegitimate child. The court apparently assumed that a legal support obligation indicates the existence of a family relationship that must be protected. The policy arguments in favor of parental immunity have been held invalid, however, in cases in which only legal parent-

123. *Id.* at 438, 289 S.E.2d at 404.

124. *Id.*, 289 S.E.2d at 404.

125. The court cited McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970), to support this proposition. This legal obligation is statutorily mandated by S.C. CODE ANN. § 20-7-40 (Supp. 1981).

126. Partial emancipation will not suffice to abrogate parental immunity. Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956).

127. Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967); Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 883 (1930).

128. *See supra* note 125.

129. S.C. CODE ANN. § 20-7-40 (Supp. 1981); McGlohen v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970).

age[130] exists.[131]

The supreme court cited *Hyder v. Jones*[132] and *Brown v. Anderson County Hospital Association*[133] as support for its decision in *Walton* to apply the abrogation of the parental immunity doctrine prospectively. The *Brown* decision applied a new, judicially created rule prospectively so that affected persons could obtain liability insurance. No real prospect exists, however, that parents in respondent's position will obtain liability insurance to cover a negligent act such as the one in *Walton.* Thus, the reasoning of *Brown* may be inapposite. Further, the *Hyder* decision prospectively applied a statute abrogating parental immunity in automobile accident cases. Because statutes are presumed to operate prospectively, the court reasoned that the statute involved created a new right of action rather than a mere change in procedure. Although a decision creating a new remedy where none previously existed should be applied prospectively,[134] the abrogation of the parental immunity rule did not create a new remedy; it lifted the bar to an existing one. Thus, *Hyder* may also be inapplicable to the facts in *Walton.*

Walton v. Stewart makes it clear that illegitimate, unemancipated minors have no causes of action in negligence against either of their natural parents for injuries that occurred before the decision abrogating the parental immunity doctrine. If the child receives any support from the parent, that parent will be immune from suit even though he does not have primary custody of the child. The court's decision has no bearing upon causes of action arising after July 2, 1980, the date of the decision in *Elam v. Elam*

Charles J. Baker, III

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130. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

131. *Cf.* Fugate v. Fugate, 582 S.W.2d 663 (Mo. 1979) (where parents are divorced, the parent not having primary custody when the tort occurs cannot invoke parental immunity because the traditional family has been disrupted prior to the injury); Kiefer v. Kiefer, 497 S.W.2d 851 (Mo. 1973)(child should at least be allowed to show evidence that there was no family relationship to protect).

132. 271 S.C. 85, 245 S.E.2d 123 (1978).

133. 268 S.C. 479, 234 S.E.2d 873 (1977). *See also* Peters v. McCalla, 461 F. Supp. 14 (D.S.C. 1978); Douglass v. Florence General Hospital, 273 S.C. 716, 259 S.E.2d 117 (1979).

134. Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916).

IV. PRODUCTS LIABILITY

The South Carolina Supreme Court in *Claytor v. General Motors Corp.*[135] held that certain lug bolts manufactured by General Motors were not in a defective condition when they left the General Motors plant.[136] The court also ruled that General Motors did not owe a duty to users of its product to warn of the dangers of overtightening lug nuts.[137] Since two judges dissented and the basis of the majority opinion is not clear, *Claytor* offers little guidance to the practitioner who is trying to determine the method of analysis the court will apply in product defect cases.

The plaintiffs in *Claytor* were traveling on a secondary road when an Oldsmobile being driven in the opposite direction went out of control causing the two vehicles to collide. Evidence presented at trial indicated that the General Motors vehicle was out of control because it had lost one of its wheels. Expert testimony suggested that the lug bolts connecting the wheel to the vehicle had been cracked by overtightening of the lug nuts. These cracks subsequently enlarged, causing the lug bolts to break and the wheel to separate from the axle. The plaintiffs alleged separate theories of recovery based on negligence, breach of warranty, and strict tort liability with respect to the design of the lug bolts on the General Motors vehicle.

At trial the judge directed a verdict for General Motors, and the jury returned a verdict for the remaining defendants.[138] The plaintiffs appealed from the directed verdict. They asserted that the jury should have determined two issues: whether the lug bolts were the product of faulty design, and whether a warning should have been provided regarding the dangers which could result from overtightening the lug bolts.[139]

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135. 277 S.C. 259, 286 S.E.2d 129 (1982).

136. *Id.* at 264, 286 S.E.2d at 132.

137. *Id.*, 286 S.E.2d at 132.

138. The plaintiffs brought actions against the manufacturer of the vehicle, the local dealership which allegedly overtightened the lug nuts, and the owners and operators of the other vehicle. *Id.* at 261, 286 S.E.2d at 130.

139. The General Motors service manual specifies that 80 foot pounds of torque should be applied when tightening each lug nut. Testimony at trial indicated that the lug bolts would crack when subjected to the pressure of 200 foot pounds. There was also testimony "that a man of normal size, using a star wrench or common lug wrench could exert the necessary pull to initially crack the lug bolt." *Id.* at 266, 286 S.E.2d at 133 (Lewis, C.J., dissenting).

The South Carolina Supreme Court held that the evidence introduced at trial indicated the lug bolts were not in a defective condition when they left the General Motors factory.[140] The court observed that merely because a product can be much better or safer, it cannot be considered defective unless the evidence as a whole suggests "the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that forseeably attend use of the product."[141] The court reasoned that the failure of the bolts was caused not by their design but by their being overtightened during servicing. Addressing the question whether General Motors had adequately warned against overtightening of the lug nuts, the majority in *Claytor* noted that "[i]t is common knowledge"[142] that if one applies excessive force to a nut, it will crack. Adding that the mechanic who overtightened the nut should himself have known this, the court ruled that the circumstances did not require a warning.[143]

When one looks to *Claytor* for guidance in the area of defective products law one finds the opinion is less than precise in its reasoning. To properly analyze the issues of defective design and insufficient warning, the court should have begun by choosing an appropriate test of product defectiveness to which the facts could then be applied.[144] Then, if the evidence were susceptible of more than one reasonable inference, a jury issue would exist. The court did not take this approach, however; indeed it is unclear which test it actually used to decide the case. Although language in the opinion indicates the use of a consumer expectations test,[145] a cost-benefit test is also mentioned.[146]

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140. *Id.* at 264, 286 S.E.2d at 132.

141. *Id.* at 262-63, 286 S.E.2d at 131 (citing Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 S.E.2d 176 (1978)).

142. 277 S.C. at 265, 286 S.E.2d at 132.

143. *Id.* at 261, 286 S.E.2d at 130.

144. For a discussion of the considerations relating to determining what test to apply, *see* F.P. Hubbard, *Efficiency, Expectation, and Justice: A Jurisprudential Analysis of the Concept of Unreasonably Dangerous Product Defect*, 28 S.C.L. REV. 587 (1977).

145. 277 S.C. at 262, 286 S.E.2d at 131. The court quotes RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965), which defines "defective condition" as a product "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."

146. 277 S.C. at 263, 286 S.E.2d at 132. The court stated that for a product to be unreasonably dangerous, numerous factors must be considered, "including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and

When the consumer expectations test[147] is applied to the design defect issue in *Claytor*, it appears that a jury question did exist. As the dissenting opinion points out, "[t]he desire to be sure that the wheel will not come off impels the tendency in the average individual to tighten the lug bolts as tightly as possible."[148] Thus, it is arguable that a reasonable juror could find that the ordinary consumer's expectation is that lug bolts can and should be tightened as tightly as possible to insure safety. Evidence presented at trial indicated that a man of normal size using a common lug wrench could exert enough force to crack the lug bolts which were being questioned in *Claytor*.[149] Since an ordinary person can exert force sufficient to crack the lug bolts,

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potential seriousness of injury, and the obviousness of danger." *Id.* at 263, 286 S.E.2d at 132.

For an analysis of the consumer expectations test and the cost-benefit test, see F.P. Hubbard, *supra* note 143.

147. South Carolina has legislatively adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) for the determination of liability for product defectiveness.

Section 402A is codified in S.C. CODE ANN. § 15-73-10 (1976), which states:

> (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.

S.C. CODE ANN. § 15-73-20 (1976) states: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

S.C. CODE ANN. § 15-73-30 (1976) incorporates by reference the comments to § 402A. The court in Hatfield v. Atlas Enterprises, Inc., 274 S.C. 247, 262 S.E.2d 900 (1980), acknowledges that with enactment of S.C. CODE ANN. § 15-73-10, -30 (1976), South Carolina recognizes the doctrine of strict liability in tort for defective products. The comments to this section provide that a product is in a defective condition when "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965). The contemplated condition is determined by reference to the expectations of the *ordinary* consumer who purchases the product with the *ordinary* knowledge common to the community as to the product's characteristics. *Id.*, comment i. The product is "unreasonably dangerous" if the danger inherent in the product's use exceeds the consumer's expectations. *Id.*

148. 277 S.C. at 268-69, 286 S.E.2d at 134.

149. *Id.* at 266, 286 S.E.2d at 133.

a jury issue existed on whether the danger present in this situation exceeded consumer expectations.

Proper application of the cost-benefit test[150] to the design defect issue in *Claytor* also results in a jury question. Although the court cited several factors to be considered in making a cost-benefit determination,[151] the opinion contains no express analysis of these factors as they apply to the facts in the case. Apparently the court found as a matter of law that the benefits of the lug bolts outweighed the risks inherent in their use; therefore, no defect existed. This conclusion is not, however, supported by the evidence presented at trial. Testimony was offered which indicated that a relatively inexpensive increase in the size of the lug bolts would prevent the type of damage that occurred in this case.[152] While this testimony is not conclusive,[153] it does support the contention that the jury should have decided whether the net benefits provided by the lug bolts, as manufactured, were outweighed by the costs required to make the bolts impervious to the amount of tightening that was likely to be applied to them.

Using a consumer expectations analysis, the *Claytor* court addressed the warning issue and concluded that General Motors owed no duty to warn of overtightening the lug nuts because it is common knowledge that damage will result from the application of excessive force to a nut.[154] No factual basis, however, is sup-

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150. The RESTATEMENT cost-benefit analysis suggests that whether a product is unreasonably dangerous is determined by considering whether the benefits of the product outweigh the risks accompanying use of the product which cannot be eliminated by existing technology. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

151. The factors which the court articulated in *Claytor* were: (1) the usefulness and desirability of the product, (2) the cost involved for added safety, (3) the likelihood of injury, (4) the potential seriousness of injury, and (5) the obviousness of danger. 277 S.C. at 262, 286 S.E.2d at 132.

For discussion of other factors articulated by commentators, see, e.g. Montgomery and Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976), Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974), and Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

152. 277 S.C. at 267, 286 S.E.2d at 133.

153. The increased cost per bolt must be multiplied by the number of lug bolts that would be manufactured in the future, and this cost factor must be considered with the other factors previously articulated.

154. *Id.* at 265, 286 S.E.2d at 132.

plied for this asserted empirical generalization. Moreover, the purported common knowledge about overtightening does not support the court's conclusion. It was not clear from the evidence that the reasonable person would know how much force would constitute "excessive" force on the lugs in question. If the amount of force necessary to damage the lug bolt was less than the amount the ordinary consumer contemplates would be required to adequately fasten a wheel, then a warning was required to alter the ordinary consumer's expectations.

Under a cost-benefit analysis of the warning question, a duty to warn would exist if the cost of giving the warning were less than the cost of the accidents the warning might prevent. The facts presented in *Claytor* suggest that a printed warning in the Oldsmobile owner's manual would most likely have prevented enough accidents to make the cost of providing the warning appear insignificant. Thus, under both the consumer expectations and the cost-benefit tests, there existed a jury issue on whether General Motors had a duty to warn of the risks of overtightening these specific lug bolts.

Even if a jury were to find that the lug bolts or warning were defective, the plaintiffs would have had to show that the defect was both the cause in fact and the proximate cause of the injury.[155] While a cause in fact issue did not exist on the design defect, this issue did apply to the warning defect. If the warning were given to the consumer, it would not have affected the mechanic's conduct. Arguably then, the lack of warning could not have been the cause in fact of the injury.[156]

It follows, then, that a proximate cause issue also existed, for if it were not foreseeable that the mechanic would overtighten the lug bolts, the mechanic's improper tightening would

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155. Whether a defect is the cause in fact of the injury is usually determined by applying the "but for" test. That is, if the injury would not have occurred "but for" the defect, then the defect is the cause in fact of the injury. *See, e.g.*, Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962)("but for" test used to determine whether the plaintiff's contributory negligence was a cause in fact of the accident).

Whether the defect was the proximate cause of the injury is a judicial policy determination of the extent to which a defendant will be held liable for his acts. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41-42 (4th ed. 1971). For South Carolina cases, see Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)(discussing relation between causation and foreseeability); Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977).

156. *See infra* notes 158-159 and accompanying text.

then be a supervening cause in the chain of causation between General Motors and the injury.[157] In addressing this proximate cause issue the *Claytor* court simply held that the proximate cause of the damage to the lug bolts and the collision causing the plaintiffs' injuries was the mechanic's improper application of torque.[158] The court's conclusion that the proximate cause of the injury was the mechanic's negligence does not, however, necessarily lead to the conclusion that no defect existed. In fact, this approach is contrary to the proximate cause analysis that the court has used in past decisions.[159] The court has stated that when there is a contention that an intervening agency interrupts the foreseeable chain of events, the primary wrongdoer is, nevertheless, liable if the acts of the intervening agency were foreseeable.

Applying this analysis to the facts in *Claytor*, the resolution of the proximate cause question depends upon whether it was foreseeable that an objective, knowledgeable mechanic would overtighten these lug nuts. If indeed this act was foreseeable, General Motors had a duty either to properly design the product or adequately warn of its dangers. Failure to do either constituted the proximate cause of the injury.

In *Claytor*, the issue was not whether General Motors was liable. Rather, the issue was whether a jury question existed regarding several issues: (1) design defect, (2) warning defect, (3) cause in fact, and (4) proximate cause. A careful application of the *Restatement* analysis to the facts in this case should have resulted in the submission of these issues to the jury. Instead, the court upheld the directed verdict without clearly explaining what analytical framework it was using or how the facts should be applied to that framework. The effect of *Claytor* on South Carolina products liability law is to create additional confusion in an area in dire need of analytical clarity.

David E. Dukes

157. 277 S.C. at 265, 286 S.E.2d at 132.

158. *See, e.g.*, Young v. Tide Craft, Inc., 270 S.C. at 463, 242 S.E.2d at 676 (1978); Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968).

159. Young v. Tide Craft, Inc., 270 S.C. at 463, 242 S.E.2d at 676.