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Workmen's Compensation

Burnet R. Maybanks III

WORKMEN'S COMPENSATION

I. RETALIATORY DISCHARGE

In *Hudson v. Zenith Engraving Co.*,[1] the South Carolina Supreme Court upheld an order of summary judgment denying recovery for intentional infliction of emotional distress arising from an alleged retaliatory discharge from employment. The court found "a total lack of evidence concerning the alleged retaliatory nature of such termination,"[2] and no evidence that the employer "acted in an outrageous manner."[3]

Plaintiff, an at-will employee of the copper roller division of the Zenith Engraving Company, sustained two work-related back injuries, and as a result of the second injury was continuously absent from work from November 1976 through October 1977. Although he received temporary total disability benefits during this period, he also applied for permanent disability compensation. On October 20, 1977, Zenith terminated plaintiff's employment for the following reasons: (1) plaintiff had shown neither any intent to return to work nor the physical ability to do so; and (2) plaintiff's job position no longer existed.[4] Following plaintiff's discharge, Zenith settled his permanent physical disability claim for $18,000. Plaintiff subsequently brought suit seeking damages for mental distress,[5] alleging his discharge was in retaliation for his seeking workmen's compensation benefits.

The tort of intentional infliction of emotional distress results in liability when defendant's "conduct has been so outra-

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1. ___ S.C. ___, 259 S.E.2d 812 (1979). See *Contracts, Annual Survey of South Carolina Law*, 32 S.C.L. REV. 49, 55 (1980).

2. *Id.* at ___, 259 S.E.2d at 814.

3. *Id.*

4. *Id.* at ___, 259 S.E.2d at 813. The copper roller division had been discontinued.

5. One is liable for the tort of mental distress if he "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . ." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). *See* Bellamy v. General Motors Acceptance Corp., 269 S.C. 578, 239 S.E.2d 73 (1977); Rhodes v. Security Fin. Corp., 268 S.C. 300, 233 S.E.2d 105 (1977); Turner v. A B C Jalousie Co., 251 S.C. 92, 160 S.E.2d 528 (1968). For a case in which an abusive discharge of an at-will employee was held actionable as intentional infliction of emotional distress, see Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976).

geous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[6] At trial, plaintiff argued that his malicious and intentional discharge by Zenith in retaliation for his pursuit of compensation benefits constituted the requisite outrageous conduct. The supreme court, however, concluded that there was no evidence that plaintiff had been subjected to "rude or hostile" treatment by Zenith.[7] Further, the court found no evidence that plaintiff had been discharged in retaliation for seeking benefits or that any Zenith employee had acted outrageously toward plaintiff.[8] The court, therefore, affirmed the lower court's decision to grant summary judgment in favor of defendant. The court also determined that Zenith had not violated plaintiff's contractual rights by discharging him.[9] Plaintiff was an at-will employee and, accordingly, he could quit or be discharged at any time for any reason or for no reason at all.[10] Since it found no evidence of retaliatory discharge, the court did not decide whether an employee's allegations of "retaliatory discharge" stated an independent claim for which relief could be granted.[11]

Other courts ruling on this issue have reached conflicting results,[12] but employees generally have recovered in the most re-

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6. ___ S.C. at ___, 259 S.E.2d at 814 (quoting RESTATEMENT (SECOND) OF TORTS § 46(1), Comment *d* (1965)).

7. ___ S.C. at ___, 259 S.E.2d at 814.

8. *Id.*

9. *Id.*

10. South Carolina has followed the general rule in a case factually similar to *Hudson.* Raley v. Darling Shop, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950). See note 16 and accompanying text *infra.*

11. In dismissing the complaint of a terminated at-will employee who alleged that defendant employers had conspired to have him discharged, the supreme court stated that "the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract." Ross v. Life Ins. Co. of Va., ___ S.C. ___, ___, 259 S.E.2d 814, 815 (1979).

12. Cases in which "retaliatory discharge" has been held actionable include: Raden v. City of Azusa, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Leach v. Lauhoff Grain Co., 51 Ill. App. 2d 1022, 366 N.E.2d 1145 (1977); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978). See 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.36 (Supp. 1979).

Cases in which "retaliatory discharge" has been held not actionable include: Loucks

cent cases.[13] One of the first courts to address this issue was the South Carolina Supreme Court in *Raley v. Darling Shop, Inc.*[14] While plaintiff in that case was hospitalized for a work-related injury, an agent of the employer visited her and threatened her with discharge if she did not withdraw her claim from the Industrial Commission. Plaintiff resisted these threats and subsequently was discharged. The court concluded that the employer's conduct, however reprehensible, did not constitute a tortious invasion of plaintiff's rights because she refused, in response to the threats, to withdraw her claim before the Commission.[15]

Courts denying recovery have generally done so on two grounds. The first is the general rule that an at-will employment contract may be terminated at any time by any party with or without cause or justification.[16] "This is true whether the discharge by the employer was malicious or done for other improper reasons."[17] For example, in *Loucks v. Star City Glass Co.*,[18] plaintiff argued that while his contract of employment was

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v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977)(*Loucks* interpreted Illinois law, and, although not expressly overruled, is no longer law in Illinois after the supreme court recognized the tort in *Kelsay*); Martin v. Tapley, 360 So. 2d 708 (Ala. 1978); Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. Ct. App. 1974); Narens v. Campbell Sixty-Six Express, 347 S.W.2d 204 (Mo. 1961); Christy v. Petrus, 356 Mo. 1187, 295 S.W.2d 122 (1956); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); Raley v. Darling Shop, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950). Professor Larson states that *Christy* and *Narens* can be explained partly by the existence in Missouri of an express criminal penalty for retaliatory discharge. The Missouri court stated that the existence of such a criminal penalty implied the exclusion of a civil remedy. 2A A. LARSON, *supra*, at 63 (Supp. 1979). *See generally* Annot., 63 A.L.R.3d 979 (1975); 81 AM. JUR. 2d *Workmen's Compensation* § 55 (1976).

13. See cases cited note 12 *supra*.

14. 216 S.C. 536, 59 S.E.2d 148 (1950).

15. *Id.* at 538, 59 S.E.2d at 149.

16. This rule has been recognized in South Carolina at least since Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936). *See* Ross v. Life Ins. Co. of Va., ___ S.C. ___, 259 S.E.2d 815 (1979); Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955); Orsini v. Trojan Steel Co., 219 S.C. 272, 64 S.E.2d 878 (1951); Parker v. Southeastern Haulers, Inc., 210 S.C. 18, 41 S.E.2d 387 (1947). *See also* 9 S. WILLISTON, CONTRACTS § 1017 (3d ed. 1967); Annot., 62 A.L.R.3d 271 (1975). If no time is specified and no consideration is given, the contract will be interpreted as one of employment only for as long as either party wishes. RESTATEMENT (SECOND) OF AGENCY § 442, Comment *a* (1958). *See generally* 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1960); 53 AM. JUR. 2d *Master and Servant* § 43 (1970).

17. Martin v. Tapley, 360 So. 2d 708, 709 (Ala. 1978).

18. 551 F.2d 745 (7th Cir. 1977).

terminable at will, it was not terminable at will for a retaliatory reason. The court disagreed with this contention, stating that "[a] court may be sympathetic to hardship inflicted on a discharged employee and unsympathetic to 'bad' reasons motivating discharge but it is not the judicial business to rewrite a fragile employment contract to which the parties have agreed."[19]

The second general ground for denial is that it is the role of the legislature, not the courts, to provide for a retaliatory discharge cause of action. The absence of a provision in the Workmen's Compensation Act creating a private cause of action has been viewed as a deliberate policy decision of the legislature.[20] Thus, in *Christy v. Petrus,*[21] the court concluded that the legislature's careful specification of the rights and liabilities of employees and employers without providing for retaliatory discharge evidenced a lack of intent to create such a right.[22] The Court of Appeals of North Carolina, in *Dockery v. Lampart Table Co.,*[23] summarized the policy and legal arguments against recognizing a tort cause of action for retaliatory discharge. First, such recognition is not consistent with the common-law rule concerning the rights and liabilities of at-will employees to quit or be discharged.[24] Second, "remedies for claims resulting from alleged violations of the spirit of the act are best left to the legislature."[25] Third, the legislature's failure to provide for a tort of retaliatory discharge was evidence of its intent that no such claim be created.[26] The dissent in *Kelsay v. Motorola, Inc.,*[27] also pointed out that by adopting a cause of action for retaliatory discharge, the court transformed the normal employment

19. *Id.* at 747.

20. *See* Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978). See note 22 *infra.*

21. 365 Mo. 1187, 295 S.W.2d 122 (1956).

22. *Id.* at 1193, 295 S.W.2d at 126. Similarly, in Dockery v. Lampart Table Co., 36 N.C. App. 293, 297, 244 S.E.2d 272, 275 (1978), the court said, "[i]f the General Assembly of North Carolina had intended a cause of action be created, surely, in a workmen's compensation statute as comprehensive as ours, it would have specifically addressed the problem."

23. 36 N.C. App. 293, 244 S.E.2d 272 (1978).

24. *Id.* at 297, 244 S.E.2d at 275.

25. *Id.* at 299, 244 S.E.2d at 276.

26. *Id.* at 300, 244 S.E.2d at 276-77. The court pointed out that the legislature had provided tort remedies for employees discharged for engaging in union activities. *Id.* at 300, 244 S.E.2d at 277.

27. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

contract, terminable at the will of either party, into tenured employment for every employee who files a workmen's compensation claim.[28]

The Indiana Supreme Court, in *Frampton v. Central Ind. Gas Co.*,[29] was the first court to hold that a former employee could recover on a theory of retaliatory discharge.[30] In *Frampton*, the court, noting the established principle that workmen's compensation acts should be construed liberally in favor of employees, stated that an employee must be able to assert his rights under the Act without fear of reprisal if the goals and public policies of the Act are to be effectuated fully.[31] The Indiana Act, embracing well-defined and well-established public policy, required strict employer adherence in the following provision: "No contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act."[32] The court believed that the threat of retaliatory discharge contravened public policy within the meaning of the statute. Having no case-law precedent to follow, the court analogized to cases concerning retaliatory eviction of tenants for re-

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28. *Id.* at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part)(quoting Loucks v. Star City Glass Co., 551 F.2d 745, 746-47 (7th Cir. 1977)). The dissent also pointed out that

> [h]enceforth, no matter how indolent, insubordinate or obnoxious an employee may be, if he has filed a compensation claim against an employer, that employer may thereafter discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages, which could well severely impair or destroy the solvency of small businesses.

74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part).

29. 260 Ind. 249, 297 N.E.2d 425 (1973).

30. Professor Larson states, "[i]t is odd that such a decision was so long in coming. Perhaps the explanation may lie in the fact that the conduct involved is so contemptible that few modern employers would be willing to risk the opprobrium of being found in such a posture." 2A A. LARSON, *supra* note 12, at 63.

31. 260 Ind. at 251, 297 N.E.2d at 427.

32. *Id.* at 252, 297 N.E.2d at 427-28 (quoting IND. CODE ANN. § 22-3-2-15 (Burns 1974)). A virtually identical provision appears in the South Carolina Workmen's Compensation Act: "No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this Title except as otherwise expressly provided in this Title." S.C. CODE ANN. § 42-1-610 (1976). *Contra*, Greenwood v. Atchison, Topeka & Santa Fe Ry. Co., 129 F. Supp. 105 (S.D. Cal. 1955)(proceedings brought under Federal Employers' Liability Act).

porting health and safety code violations.[33]

Several courts have held for employees when an employer arbitrarily discharged an employee because he exercised a statutory right or when the dismissal was contrary to public policy.[34] In *Brown v. Transcon Lines*,[35] the Oregon Supreme Court thus recognized the tort of retaliatory discharge, following the rule of

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33. 260 Ind. at 252-53, 297 N.E.2d at 428. The court cited Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), in which the court allowed retaliatory eviction as a defense to a landlord's action for possession, and Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971), in which a California court allowed retaliatory eviction as the basis for an affirmative cause of action. For an analysis of other possible analogies supporting the *Frampton* decision, see Lambert, *Workmen's Compensation*, 35 AM. TRIAL LAW. A.L.J. 150 (1974). The court in *Dockery* distinguished *Frampton*, pointing out that the North Carolina courts have expressly rejected the use of retaliatory eviction as a defense by a tenant. 36 N.C. App. at 295-96, 244 S.E.2d at 274-75.

34. The South Carolina Supreme Court arguably has recognized the public policy exception to the terminable-at-will doctrine. In Branham v. Miller Elec. Co., 237 S.C. 540, 545, 118 S.E.2d 167, 170 (1961), the court found for an at-will employee discharged in violation of the spirit of the right to work law, and stated, "[f]reedom of contract is subordinate to public policy . . . ." In *Hudson*, the court stated that "[c]ourts in a minority of jurisdictions, however, have recognized in decisions made subsequent to *Raley* an exception to the general rule when there has been a violation of public policy." ___ S.C. at ___, 259 S.E.2d at 813. The court cited *Frampton*; Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)(employee discharged for accepting jury duty); and Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1955)(termination for refusal to commit perjury), but commented that even if this exception were to be recognized it would not avail Hudson because he had alleged mental distress and not breach of or tortious interference with his employment contract. ___ S.C. at ___, 259 S.E.2d at 813-14. *See* Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961)(employee discharged for promoting unionism); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)(employee discharged for refusing foreman's sexual advances); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978)(employee discharged as a result of his efforts to have employer bank comply with state and federal consumer credit protection laws); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

Further, in *Sventko v. Kroger Co.*, the court stated,

> It is too well-settled to require citation that an employer at will may not suddenly terminate the employment of persons because of their sex, race, or religion. Likewise, the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state.

69 Mich. App. 644, 647, 245 N.W.2d 151, 153 (1976). *But see* Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), in which the discharge was held not actionable because the employer did not violate any clear mandate of public policy.

35. 284 Or. 597, 588 P.2d 1087 (1978).

Nees v. Hocks.[36] *Nees* concerned an employee who was discharged for going on jury duty contrary to the direction of her employer. In finding for the employee, the court stated that there are situations in which a discharge is for such a "socially undesirable motive" that the employer is liable in damages.[37] The court in *Brown* stated that discharging an employee for seeking benefits constituted such a "socially undesirable" motive.[38] Similarly, in *Leach v. Lauhoff Grain Co.*,[39] an Illinois court stated that, although it recognized an employer's interest in having the freedom to discharge at-will employees, this interest was outweighed by the strong public interest in providing financial and medical benefits to injured employees when the employer was attempting to evade liability under the Act.[40] The court stated further that the Workmen's Compensation Act eliminated the employee's common-law tort action in return for his right to receive compensation benefits. To allow the employer to discharge an at-will worker because he applied for compensation benefits is tantamount to saying to the employee, "[a]lthough you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, it is a sure thing. However, if you exercise that right, we will fire you."[41] Finally, in *Kelsay v. Motorola, Inc.*,[42] the court pointed out that because many employees faced with the threat of retaliatory discharge choose to retain their jobs, they are left, in effect, without either a common-law or statutory remedy. This result relieves employers of their responsibility under the Act and seriously undermines the whole statutory scheme.[43]

Plaintiff in *Hudson* sued only for damages for intentional infliction of emotional distress. It is left for future cases to decide whether an employee who has been discharged for an alleged retaliatory reason can also bring suit for the independent tort of "retaliatory discharge." Despite the holding in *Raley*, the employee may argue that (1) the supreme court has acknowl-

36. 272 Or. 210, 536 P.2d 512 (1975).
37. *Id.* at 218, 536 P.2d at 515.
38. 284 Or. at 603, 588 P.2d at 1090.
39. 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977).
40. *Id.* at 1026, 366 N.E.2d at 1148.
41. *Id.* at 1024, 366 N.E.2d at 1147.
42. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
43. *Id.* at 182, 384 N.E.2d at 357.

edged the evolution, since *Raley*, of exceptions to the terminable-at-will doctrine;[44] (2) freedom to contract has long been subordinate to well-defined public policy in South Carolina;[45] and (3) the threat of retaliatory discharge constitutes a prohibitive device by the employer to evade his responsibilities under the Act.[46]

II. STATUTORY EMPLOYER: LIABILITY OF OWNER TO WORKMEN OF CONTRACTOR[47]

In *Wilson v. Duke Power Co.*,[48] the supreme court upheld a lower court's finding that the owner of a building under construction is not the statutory employer of a contractor's workmen for purposes of the Workmen's Compensation Act if the tasks being performed would not normally be accomplished by the owner or his employees.[49] This result appears to depart from earlier interpretations of the South Carolina Workmen's Compensation Act.

Plaintiff sued to recover for personal injuries sustained when contact with a high voltage wire caused him to suffer burns and to fall seventeen feet from a building under construction. Defendants were Byars, owner of the building under construction, and Duke Power Company, operator of the transmission line. Defendant Byars poured a concrete floor for a structure that encroached upon Duke Power's right of way. In December, 1975, Duke Power became aware of this encroachment and warned Byars that the building could not be built safely because of its proximity to high voltage wires. Byars decided to continue construction and contracted with the Husky Construction Company for the work. On April 19, 1976, after the steelwork for the structure had been completed, Husky brought a crew, which included plaintiff, to install the roof. The accident occurred shortly thereafter.

Defendant Byars, in part, contended that he was plaintiff's

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44. See note 34 *supra*.

45. See note 34 *supra*

46. See note 32 and accompanying text *supra*.

47. *See generally* A. CUSTY, THE LAW OF WORKMEN'S COMPENSATION IN SOUTH CAROLINA § 3.4.1 (1976).

48. 273 S.C. 610, 258 S.E.2d 101 (1979).

49. *Id.* at 617, 258 S.E.2d at 104.

statutory employer and thus was insulated from tort liability section 42-1-400 of the Workmen's Compensation Act.[50] This section provides that

> [w]hen any person . . . undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.[51]

The purpose of this section is to extend workmen's compensation benefits to those employees who would not be entitled to them otherwise and to provide double protection to employees through both the owner's and the contractor's liability under the Act.[52] The remedy provided in the Act is exclusive, however, and the injured workman may not maintain a common-law action against the owner.[53] Thus, if the court determined that the work being done by the Huskey Construction Company was a part of Byars' general business within the meaning of the section, plaintiff-employee would be limited to workmen's compensation benefits.

The question before the court was whether plaintiff was performing work that was a part of Byars' "trade, business or occupation."[54] The lower court found that plaintiff was not engaged in such work, because he was not doing work Byars nor-

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50. S.C. CODE ANN. § 42-1-400 (1976).

51. *Id.*

52. *See, e.g.,* MacMullen v. South Carolina Elec. & Gas Co., 312 F.2d 662 (4th Cir.), *cert. denied,* 373 U.S. 912 (1963); Blue Ridge Rural Elec. Coop., Inc. v. Byrd, 238 F.2d 346 (4th Cir. 1956), *rev'd on other grounds,* 356 U.S. 525 (1958); Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

53. *See* Corollo v. S.S. Kresge Co., 456 F.2d 306 (4th Cir.), *cert. denied,* 407 U.S. 911 (1972); Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); cases cited note 52 *supra.*

54. S.C. CODE ANN. § 42-1-400 (1976). For statutory text, see text accompanying note 51 *supra.* For cases which have held the employee of a contractor or subcontractor to be a "statutory employee" engaged in the "trade, business, or occupation" of the owner, *see, e.g.,* Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); cases cited notes 52 & 53 *supra.*

mally would have his own employees do.[55] In the lower court's opinion,

> [c]onstruction activity generally can become part of the business if the defendant by its size and nature is accustomed to an ongoing program of construction [and] is equipped, both as to skilled manpower and tools, to normally handle, such tasks. . . .
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> The Defendant Byars had some finishing work in regard to improving his property but he had never actually erected a structure. . . . The Plaintiff was simply not performing tasks at the time of his accident that the Defendant Byars would have normally accomplished himself or by his employees.[56]

On appeal, the supreme court affirmed summarily, stating only that "[t]he lower Court properly found that the construction work being performed was not a part of Byars' trade, business, or occupation."[57] This view is in accord with that of Professor Larson,[58] but conflicts with recent decisions by the Fourth Circuit Court of Appeals. In *Blue Ridge Electric Cooperative v. Byrd*,[59] the cooperative was in the business of supplying electric power to rural communities. Byrd's immediate employer contracted with the cooperative to construct new electric transmission and distribution lines and to construct two appurtenant substations. Byrd argued that, within the meaning of the compensation statute, "construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees . . . ."[60] The Fourth Circuit Court of Appeals rejected this argument as follows:

> We do not think that this interpretation of the statute is tenable. . . . [T]he statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The

55. 273 S.C. at 616-17, 258 S.E.2d at 104-05.

56. Record at 588-89.

57. 273 S.C. at 617, 258 S.E.2d at 104-05.

58. *See* 1C A. LARSON, *supra* note 12, § 49.12. Professor Larson states that "the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business. . . . The test . . . is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors." *Id.* at 9-53.

59. 238 F.2d 346 (4th Cir. 1956), *rev'd on other grounds*, 356 U.S. 525 (1957).

60. *Id.* at 351.

> manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise.[61]

In *MacMullen v. South Carolina Electric & Gas Co.*,[62] MacMullen's immediate employer contracted to furnish and install a coal-handling system as part of the construction of a steam power generating plant. MacMullen was shocked severely while attempting to complete alignment for the new equipment. The district court found that MacMullen's work was part of a very specialized field and that only four companies in the United States supply, install, and calibrate coal-weighing equipment.[63] Because South Carolina Electric and Gas had neither the facilities nor the personnel to plan and carry out the construction of a steam-generating plant or a coal-handling system, the district court found that MacMullen was not performing work that was a part of the utility's trade, business, or occupation.[64] Quoting extensively from *Blue Ridge Electric Cooperative*, the Fourth Circuit Court of Appeals reversed, stating that the basic purpose of the Act was the inclusion of employers and employees, not their exclusion. In the opinion of the court, holding the Act applicable only to maintenance and repair, and not to the "more important field of new construction," defeats this purpose.[65]

The view taken by the Fourth Circuit is similar to that expressed by the South Carolina court in *Boseman v. Pacific Mills*[66] in 1940. In that case, an employee of an independent

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61. *Id.* The court also stated that
> it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that § 72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution *"of the whole or any part of the work."* Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated.

Id. at 353 (emphasis original).

62. 312 F.2d 662 (4th Cir.), *cert. denied*, 373 U.S. 912 (1963).

63. 205 F. Supp. 811 (E.D.S.C. 1961).

64. *Id.* at 814.

65. 312 F.2d at 668 (citing *Blue Ridge Electric Coop.*, 238 F.2d at 346).

66. 193 S.C. 479, 8 S.E.2d 878 (1940).

contractor was burned to death when the water tank he was painting caught fire and exploded. The water tank was maintained by a cloth manufacturing mill. The mill denied the claim for workmen's compensation contending that the painting was not a part of its general business because the work was of such dangerous and unusual character that it had never been performed by its employees. The work had always been contracted out to an experienced steeplejack. The supreme court rejected these arguments and held the mill liable under the Act finding the tank to be such an integral and necessary part of the cloth manufacturing business that the painting of the tank constituted a part of the mill's trade, business, or occupation. Whether the court intended to establish a new definition of statutory employer by its affirmance of the lower court order in *Wilson* is not made clear by its opinion. The court's decision may have been influenced by the prospect that a different finding would have forced substitution of a workmen's compensation claim for a potentially much larger tort claim by the injured worker. Clarification of the court's reasoning is left for a later case.

III. DISTRIBUTION OF THIRD-PARTY SETTLEMENT PROCEEDS

In *Vaughn v. Eddins*,[67] the South Carolina Supreme Court held that state courts have no authority to vary the statutory distribution of settlement proceeds from a third-party action, absent an agreement between the insurance carrier holding a statutory lien on the proceeds and the employee. Plaintiff's decedent, during the course and within the scope of his employment with the City of Rock Hill, was killed in an accident caused by third parties. The city's insurance carrier, the State Workmen's Compensation Fund (State Fund), admitted liability and paid benefits totaling $32,910.65 to the employee's beneficiaries. Shortly thereafter, the administrator of the estate brought a wrongful death action against the third parties resulting in a settlement for $60,000. This settlement was reduced to judgment at trial.

A recovery against third parties after the worker or his dependents have received workmen's compensation benefits is subject to an insurance carrier's statutory lien

67. 272 S.C. 238, 251 S.E.2d 187 (1979).

> to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier, less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier.[68]

The trial court entered an order recognizing the State Fund's lien on the settlement proceeds to the extent of the workmen's compensation benefits paid by the State Fund, but concluded that the court had the authority to determine the distribution of those proceeds. The trial court accordingly distributed one-third of the State Fund's subrogated claim to plaintiff's attorney, one-third to the State Fund, and one-third to plaintiff's beneficiaries. The State Fund, which was given no notice or opportunity to be heard prior to the order of the lower court, appealed that portion of the order directing payment to the beneficiaries.

The trial court concluded that, because the settlement with the third parties occurred during trial, section 42-1-560(e) authorized the court to determine the proper distribution of the State Fund's subrogated claim. This section states that

> [t]he injured employee, or, in event of his death, his dependents, and the carrier *may, by agreement* approved by the Industrial Commission, or in event of a settlement made during actual trial of the action against the third party, approved by the presiding judge at the trial, provide for distribution of the proceeds of any recovery in the action different from that prescribed by subsection (b) or (c) of this section.[69]

The supreme court reversed the lower court's ruling holding that, although the employee and the carrier may agree to distribute the amount received from third parties differently from the method prescribed in section 42-1-560(b), neither the Industrial Commission nor the presiding judge has unilateral authority to vary the distribution of the proceeds absent such an agreement.[70]

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68. S.C. CODE ANN. § 42-1-560(b) (1976). *But see* [1977] *Op. S.C. Att'y Gen.* 320 which states that the third-party lien of a workmen's compensation carrier does not attach to amounts paid to an employee under his uninsured motorist policy.

69. S.C. CODE ANN. § 42-1-560(e) (1976)(emphasis added).

70. 272 S.C. at 242, 251 S.E.2d at 189.

IV. ACCIDENTS WHILE GOING TO AND FROM WORK

Plaintiff in *Fernander v. Thigpen*[71] brought an action for wrongful death and conscious pain and suffering of plaintiff's decedent who was involved in an accident while returning home from work. The lower court granted summary judgment for defendants holding that plaintiff's exclusive remedy was recovery of workmen's compensation benefits. The supreme court reversed.

Plaintiff's decedent had been employed on the late shift of a restaurant in Sumter, South Carolina. On January 16, 1976, after "punching out" from work at 10:42 p.m., the deceased assisted in the late-night cleanup of the restaurant while awaiting a ride home with her father. At 2:00 a.m., decedent's father called the restaurant and spoke with defendant, the assistant manager.[72] According to plaintiff's complaint, defendant, seeing the decedent still busy with her work, told her father that he, defendant, would take her home.[73] Decedent, acting upon this direction and agreement, finished her part of the late-night cleanup and rode home with defendant who, according to the plaintiff's intestate, was "intending to return . . . [to the restaurant] after taking her home."[74]Decedent was fatally injured after defendant lost control of his automobile while approaching her residence.

Decedent's administratrix, contending that the defendant was "acting not only for himself but as agent for the corporate Defendants,"[75] brought actions alleging negligence against defendant and his employers. The corporate defendants answered by asserting that, at the time of the accident, neither plaintiff nor defendant "was working as their agent, servant, or employee,"[76] and, alternatively, that if defendant was acting as an agent or employee, then plaintiff's exclusive remedy was workmen's compensation benefits.[77] All defendants moved for summary judgment upon the latter assertion; they contended that,

71. 273 S.C. 28, 253 S.E.2d 512 (1979).
72. Record at 5-6.
73. *Id.* at 6.
74. *Id.*
75. *Id.* at 4-5.
76. 273 S.C. at 30, 253 S.E.2d at 513.
77. *Id.*

by her own pleadings, plaintiff admitted that the deceased and defendant assistant manager were co-employees at the time of the accident and that defendant was performing work incident to his employer's business.[78]

To succeed on these motions, corporate defendants had to establish that the deceased was their employee,[79] that they were subject to the Act,[80] and that the injury complied with the Act's definition of that term.[81] Section 42-5-10, emphasizing the exclusive nature of recovery under the Act, provides that an employer who elects to come under the Act and "those conducting his business," including co-employees,[82] shall be liable to injured employees only to the extent of workmen's compensation benefits paid or due.[83] An "injury" within the meaning of the Act "shall

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78. Record at 64.

79. Before the Workmen's Compensation Act becomes the exclusive remedy, the employer-employee relationship must exist. This factor is jurisdictional. *E.g.*, Cooper v. McDevitt & Street Co., 260 S.C. 463, 466, 196 S.E.2d 833, 834 (1973); Chavis v. Watkins, 256 S.C. 30, 30-31, 180 S.E.2d 648, 649 (1971).

The term "employee" is defined in S.C. CODE ANN. § 42-1-130 (1976 & Cum. Supp. 1979) as "every person engaged in an employment under any . . . contract of hire . . . express or implied, oral or written, including . . . minors." *See generally* A. CUSTY, *supra* note 47, § 3.3. The legislative definition of "employee" was intended to be as broad as possible. *See* Gordon v. Hollywood-Beaufort Package Corp., 213 S.C. 438, 443, 49 S.E.2d 718, 720 (1948). Specifically excluded from the definition, however, are "workers whose employment is both casual and not in the course of trade, business, profession, or occupation of his employer." S.C. CODE ANN. § 42-1-130, -360 (1976 & Cum. Supp. 1979). Plaintiff argued in her motion for summary judgment that the deceased was a casual employee and, thus, was not covered by the Act, but the trial judge found that "[p]laintiff's own Affidavit together with her Complaints, establish that the deceased's employment was regular and not casual . . . ." Record at 67-68.

The supreme court noted that the corporate defendants also denied in their answer that plaintiff was their employee at the time of the accident. 273 S.C. at 30, 253 S.E.2d at 513. The word "employee," however, as seen above, has a particular statutory meaning. The corporate defendants may have meant by this denial that decedent's death did not arise out of the scope and within the course of her employment, rather than that decedent was a casual employee or otherwise did not meet the requirements of S.C. CODE ANN. § 42-1-130 (Cum. Supp. 1979).

80. *See* S.C. CODE ANN. § 42-5-10 (1976).

81. *Id.* § 42-1-160.

82. *E.g.*, Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952). See cases cited note 85 *infra*.

83. S.C. CODE ANN. § 42-5-10 (1976). This section provides that

> [e]very employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter. While such security remains in force he or those conducting his business shall only be liable to any employee who elects to come under this Title for personal injury or death by accident to the extent and in

mean only injury by accident arising out of and in the course of the employment."[84] Therefore, an employee, who with his employer, is subject to the Workmen's Compensation Act and whose injury arises out of and in the course of his employment, cannot maintain a common-law action against his employer. Nor can he maintain an action against a co-employee whose alleged negligence caused the injury if the co-employee was conducting the employer's business at the time of the accident.[85]

The corporate defendants had to establish their proof from plaintiff's allegations because they had plead in their answer that plaintiff was not their employee and that the individual defendant was not conducting their business when the accident occurred. The lower court found that plaintiff's complaint and affidavit alleged that she was an employee within the meaning of

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the manner specified in this Title.

Id.

The basic exclusive-remedy section of the Act is in § 42-1-540. This section provides that

> [t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

Id.

84. S.C. CODE ANN. § 42-1-160 (1976). This section provides that

> *"[I]njury"* and *"personal injury"* shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of Chapter 11 of this Title. In construing this section an accident arising out of and in the course of employment shall include employment of an employee of a municipality outside the corporate limits of the municipality when the employment was ordered by a duly authorized employee of the municipality.

Id.

85. Cases discussing co-employee immunity include Burns v. Carolina Power & Light Co., 193 F.2d 525 (4th Cir. 1951), *cert. denied*, 344 U.S. 863 (1952); Merritt v. Smith, 269 S.C. 301, 237 S.E.2d 366 (1977); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969); Powers v. Powers, 239 S.C. 423, 123 S.E.2d 646 (1962); Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1953).

In *Merritt*, the court stated that " 'if an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary.' Since the co-employee's right of immunity parallels that of an employer, the same principle applies." 269 S.C. at 306, 237 S.E.2d at 369 (quoting Adams v. Davison-Paxon Co., 230 S.C. 532, 545, 96 S.E.2d 566, 572-73 (1957)).

the Act[86] and that the assistant manager was acting within the scope of his employment at the time of the accident. Therefore, the basic question was whether plaintiff was acting within the course and scope of her employment.

The general rule in South Carolina is that an employee going to or from the work place is *not* engaged in services growing out of and incidental to his employment, and, therefore, any injury sustained while engaging in such travel does not arise out of and in the course of employment.[87] Since the fatal injury occurred while defendant was taking plaintiff home, it appears that plaintiff was not covered by the Act. Nevertheless, there have been numerous cases in South Carolina in which the employee's travel to and from work has been held to be incidental to his employment and exceptions to the general rule have evolved. These exceptions, summarized in *Sola v. Sunny Slope Farms*[88] include:

> (1) *Where in going to and returning from work, the means of transportation is provided by the employer,* or the time that is consumed is paid for or included in the wages; (2) where the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment; (3) the way used is inherently dangerous and is either (a) the exclusive way of ingress and egress to and from his work; or (b) constructed and maintained by the employer; or (4) that such injury incurred by a workman in the course of his travel to his place of work and not on the premises of his employer but in

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86. *See* note 79 *supra.*

87. A. CUSTY, *supra* note 42, § 10.2.1.

> Nearly every employee must daily make his way to his employer's place of business or the place he performs his employer's work and must make his way home after completing his day's work. During such going to and from work the risks of accidental injury are not insubstantial, and many employees are in fact injured during those times. However, the general rule is that an employee going to or from the place where his work is to be performed is *not* engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment. Thus, the employee does not fall within the coverage of the Workmen's Compensation Law.

Id. (footnote omitted). *See, e.g.,* McDaniel v. Bus Terminal Restaurant Management Corp., 271 S.C. 299, 247 S.E.2d 321 (1978); McDonald v. E.I. DuPont De Nemours & Co., 223 S.C. 217, 74 S.E.2d 918 (1952); Hinton v. North Ga. Warehouse Corp., 211 S.C. 370, 45 S.E.2d 591 (1947); Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944).

88. 244 S.C. 6, 135 S.E.2d 321 (1964).

> close proximity thereto is not compensable unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and coming from his work.[89]

The lower court, declaring that plaintiff had alleged in substance that the assistant manager had promised the decedent a ride home in return for her help with the late-night cleanup, granted defendant's motion for summary judgment based on the exception to the general rule arising when the employer provides the means of transportation.[90] The supreme court, however, not-

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89. *Id.* at 14, 135 S.E.2d at 326 (citing Gallman v. Springs Mills, 201 S.C. 257, 263, 22 S.E.2d 715, 718 (1942)(emphasis added). *See* Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960); McDonald v. E.I. DuPont De Nemours & Co., 223 S.C. 217, 74 S.E.2d 918 (1952); Dicks v. Brooklyn Cooperage Co., 208 S.C. 139, 37 S.E.2d 286 (1946); Bailey v. Santee River Hardwood Co., 205 S.C. 433, 32 S.E.2d 365 (1944).

90. Cases applying the "transportation provided by the employer" exception include Daniels v. Roumillat, 264 S.C. 497, 216 S.E.2d 174 (1975); Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Bailey v. Santee River Hardwood Co., 205 S.C. 433, 32 S.E.2d 365 (1944); Ward v. Ocean Forest Club, Inc., 188 S.C. 233, 198 S.E. 385 (1938). *Cf.* Covington v. Atlantic Coast Line R.R., 158 S.C. 194, 155 S.E. 438 (1930); Sanders v. Charleston & W.C. Ry., 97 S.C. 50, 81 S.E. 283 (1913)(exception recognized in proceedings brought under the Federal Employers' Liability Act). The exception has been quoted with approval in Bickley v. South Carolina Elec. & Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972); Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960); McDonald v. E.I. DuPont De Nemours & Co., 223 S.C. 217, 74 S.E.2d 918 (1952); Gallman v. Springs Mills, 201 S.C. 257, 22 S.E.2d 715 (1942). In *Bailey,* the court stated that "[o]ff-premise injuries to or from work, in both liberal and narrow states, are compensable (1) if the employee is on the way to or from work in a vehicle owned *or supplied* by the employer . . . ." 205 S.C. at 441, 32 S.E.2d at 368 (quoting S. HOROVITZ, WORKMEN'S COMPENSATION 162 (1944))(emphasis added). In *Fowler,* the court, explaining the rationale for the rule, stated:

> [i]f the trip to and from work is made in a truck, bus, car or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment. The simple justification for this holding is that the employer has himself expanded the range of the employment and the attendant risks.

236 S.C. at 233-34, 113 S.E.2d at 741 (quoting 1 A. LARSON, *supra* note 12, § 17.10) (footnote omitted).

Courts in some states have held that the exception applies only when the transportation is provided by contract or agreement, or when the ride constitutes part of the employee's compensation. Capozzi v. United States, 326 F. Supp. 784 (E.D.N.Y. 1971); Belvin v. Cali, 325 So. 2d 897 (La. App. 1976); Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976). Professor Larson, however, states that

> the distinction between transportation provided by contract and transportation provided without agreement or as a courtesy is being increasingly questioned, since the fundamental reason for extension of liability—the extension of the actual employer-controlled risks of employment—is not affected by the question whether the transportation was furnished because of obligation or out

ing that defendant had driven one-half mile directly past plaintiff's house when the accident occurred, and that both corporate defendants had denied that either plaintiff or defendant were their employees at the time of the accident, declared that "[w]hether the driver and deceased were in the scope and course of their employment at the time of the accident is an issue to be determined at the trial of the case."[91]

The supreme court's decision to remand for a jury trial is understandable. Plaintiff raised questions of fact regarding whether the deceased was a casual or volunteer employee. Furthermore, even if the death was compensable, a question of fact was raised about whether individual defendant actually was en route to the decedent's home at the time of the accident or whether he had deviated from this route when he drove by her house without stopping.[92] *Boykin v. Prioleau*[93] illustrates an employee's deviation which caused the loss of co-employee immunity. In that case, plaintiff's intestate was employed on the late shift of a drive-in restaurant in Columbia, South Carolina that furnished his transportation from work. On December 18, 1966, he left the drive-in restaurant in his employer's car driven by defendant, whose duty it was to take plaintiff's intestate and other employees home. Instead of going directly to the employees' respective homes, defendant took them on an "extensive joy ride"[94] which included stops at two houses, two nightclubs, and a restaurant. Upon leaving the restaurant and heading back to Columbia, an accident occurred killing the decedent and defendant. After settling a workmen's compensation claim from the decedent's death, decedent's estate commenced a wrongful death action against defendant's estate. Defendant's administrator asserted that a tort action based on the negligence of a co-employee was barred by what is now section 42-5-10 of the Workmen's Compensation Act and moved for a directed verdict, which was subsequently granted. The supreme court reversed, holding that under that section, a co-employee is not immune

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of courtesy.

1 A. LARSON, *supra* note 12, § 17.30 (footnote omitted).

91. 273 S.C. at 31, 253 S.E.2d at 513.

92. Brief of Appellant at 6-8.

93. 255 S.C. 437, 179 S.E.2d 599 (1971).

94. *Id.* at 440, 179 S.E.2d at 600.

from tort liability "unless at the time of the delict, the employee . . . [is] performing work incident to the employer's business . . . ."[95] The court stated that, since "almost immediately upon driving away from his employer's place of business"[96] defendant abandoned his responsibility and "embarked upon the pursuit of his own ends,"[97] he was not conducting his employer's business within the meaning of the statute. The court believed that the question of whether he resumed the course and scope of his employment upon leaving the restaurant and heading back toward Columbia was at best a jury question and found that the lower court erred in finding for the defendant as a matter of law.

The similarity between *Boykin* and *Fernander* is striking since defendant in *Fernander* alleged that plaintiff's decedent was contributorily negligent in "knowingly and willingly consenting to joy ride with defendant" and in "knowingly and willingly continuing to ride with this defendant after she knew or should have known that he had gone past her home."[98] Arguably, therefore, questions of fact were raised in *Fernander* at least with regard to individual defendant's liability in tort. *Boykin* illustrates the risk to his co-employee immunity that a negligent employee undertakes when attempting to characterize plaintiff as contributorily negligent.

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95. *Id.* at 441, 179 S.E.2d at 600 (quoting Williams v. Bebbington, 247 S.C. 260, 266, 146 S.E.2d 853, 855-56 (1966)).

96. 255 S.C. at 441, 179 S.E.2d at 600.

97. *Id.*

98. Record at 14.