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Torts

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TORTS

I. IMMUNITY FROM SUIT

A. *Charitable Immunity Abolished*

In *Fitzer v. Greater Greenville South Carolina Y.M.C.A.*,[1] the South Carolina Supreme Court abolished the doctrine of charitable immunity, holding that a charitable institution is subject to the same liability for its tortious conduct as any other person or corporation.[2] This decision places South Carolina in the large majority of American jurisdictions that have ruled on this issue.[3]

The plaintiff attended Camp Greenville, which was operated by Greater Greenville South Carolina Y.M.C.A.[4] While at camp, he was injured by a rock thrown by another camper, and brought a negligence action to recover damages for the injuries sustained. The trial court granted a summary judgment to the defendant, holding that the suit was barred by the doctrine of charitable immunity. On appeal, the supreme court reversed.[5]

The court first held that summary judgment was inappropriate because there was a genuine issue of material fact[6] as to whether Camp Greenville was a commercial venture, to which charitable immunity would not apply.[7] Although the case could

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1. ___ S.C. ___, 282 S.E.2d 230 (1981).

2. *Id.* at ___, 282 S.E.2d at 231-32.

3. *E.g.*, Ray v. Tucson Med. Ctr., 72 Ariz. 22, 230 P.2d 220 (1951); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Haynes v. Presbyterian Hosp. Ass'n., 241 Iowa 1269, 45 N.W.2d 151 (1950); Noel v. Menninger Found., 175 Kan. 751, 267 P.2d 934 (1954); Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960); Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920); Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965); Friend v. Cove Meth. Church, 65 Wash. 2d 174, 396 P.2d 546 (1964); Adkins v. St. Francis Hosp. 149 W. Va. 705, 143 S.E.2d 154 (1965).

4. The plaintiff's mother, in her affidavit opposing summary judgment, stated that she did not know the camp was allegedly a charitable institution and obtained liability insurance through the camp. ___ S.C. ___, 282 S.E.2d 230.

5. *Id.* at ___, 282 S.E.2d at 230.

6. Jamison v. Howard, 271 S.C. 385, 247 S.E.2d 450 (1978).

7. ___ S.C. at ___, 282 S.E.2d at 231 (citing Eiserhardt v. State Agric. & Mech. Soc'y., 235 S.C. 305, 111 S.E.2d 568 (1959)).

have been reversed at this point, the court found the critical issue to be continued adherence to the doctrine of charitable immunity.[8] Referring to its recent decision limiting the doctrine,[9] the court observed that immunity was out of step with the general trend of legislative and judicial policy to distribute the losses incurred in the operation of an enterprise among those who received its benefits.[10] Noting that the abolition of the doctrine in other jurisdictions had not led to the demise of charities, the court emphasized that arguments supporting the rule could no longer withstand judicial scrutiny.[11] The court also pointed out the inconsistencies inherent in a doctrine that permits an institution to be organized for the dispensation of aid to others, and at the same time denies that aid to those whom it has injured in the course of its activities.[12] Concluding that stare decisis was an insufficient reason to follow a rule that no longer served a legitimate purpose,[13] the supreme court abolished the doctrine of charitable immunity.[14]

The doctrine originated in England in 1861,[15] and was soon after introduced into the United States.[16] Almost from its incep-

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8. ___ S.C. at ___, 282 S.E.2d at 231.

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

10. ___ S.C. at ___, 282 S.E.2d at 231, (citing Brown v. Anderson County Hosp. Ass'n., 268 S.C. at 486, 234 S.E.2d at 876).

11. ___ S.C. at ___, 282 S.E.2d at 231 (citing Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965)).

12. ___ S.C. at ___, 282 S.E.2d at 231 (citing Geiger v. Simpson Meth-Episc. Church, 174 Minn. 389, 396, 219 N.W. 463, 465 (1928)).

13. The court noted that the availability of liability insurance underscored the "unreasonableness" of continued adherence to the rule. ___ S.C. at ___, 282 S.E.2d at 230 (citing Brown v. Anderson County Hosp. Ass'n., 268 S.C. at 491, 234 S.E.2d at 873).

14. ___ S.C. at ___, 282 S.E.2d at 232-33.

15. Holliday v. St. Leonard's, 142 Eng. Rep. 769 (1861). The rule was quickly repudiated. Foreman v. Mayor of Canterbury, 6 L.R.-Q.B. 214 (1871).

16. McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1976). For further discussion concerning the importation of the doctrine to the United States from England, *see* Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960). Jurisdictions adopting the doctrine based their decisions on several rationales: (1) the trust fund theory (funds of a charity are held in trust for the beneficiaries and the diversion of the funds to pay tort claims would defeat the charitable purpose of the institution). *E.g.*, Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943); (2) the nonapplicability of respondeat superior to charities (charity does not derive any profits from the services of its employees whereas other enterprises are established for the benefits of a master who is benefited financially by having servants). *E.g.*, Blackman v. Y.W.C.A., 179 Wis. 178, 191 N.W. 751 (1922); (3) the assumption of risk or waiver theory (a person who accepts the benefits of a charity agrees to waive the liability, assert no tort claim against the benefac-

tion, the courts began limiting the effects of the rule.[17] By 1971, only three states, including South Carolina, adhered to the unaltered doctrine.[18]

Although the South Carolina Supreme Court appeared hesitant for some years to unilaterally modify such a firmly entrenched doctrine,[19] the absence of legislative action forced it to take the initiative. Recent South Carolina decisions had already severely limited the scope of the rule, precluding immunity (1) when the activity generating the liability was predominantly commercial;[20] (2) for intentional torts;[21] and (3) for hospitals

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tor, and assumes the risk of negligence). *E.g.*, Wilcox v. Idaho Falls Latter Day Saints Hosp. 59 Idaho 350, 82 P.2d 849 (1938); and (4) the public policy theory (public policy should encourage charitable institutions, and it is better for the community at large to bear the loss rather than the individual. *E.g.*, Hearns v. Waterbury Hosp., 66 Conn. 98, 33 A. 595 (1895).

17. *See supra* note 3.

18. Maine, New Mexico, and South Carolina. Although Maine has the doctrine in its complete form, the Maine legislature has limited its application to charities that do not carry liability insurance. If a charitable institution carries liability insurance, the institution is deemed to have waived immunity for the amount of the insurance during the period of coverage. ME. REV. STAT. ANN. tit. 14 § 158 (1964). The Maine Supreme Court has since refused to abrogate the doctrine because the legislature relied on the doctrine when it enacted § 158. *See* Mendall v. Pleasant Mountain Ski Dev., 159 Me. 285, 191 A.2d 633 (1963).

In the only New Mexico decision, Hines v. St. Joseph's Hosp., 86 N.M. 763, 766, 527 P.2d 1075, 1078 (1974) defendants claimed charitable immunity, but the New Mexico Supreme Court did not reach that argument. South Carolina adopted the rule in Lindler v. Columbia Hosp., 98 S.C. 25, 81 S.E. 512 (1914). *Lindler* applied only to cases where the charitable institution's negligence was the result of acts of its servants selected with care. *Id.* at 28, 81 S.E. at 513. In Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916), the court held it was also contrary to public policy to hold a charitable institution responsible for the negligence of its servants, agents, employees or superior officers selected without due care.

See generally, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 994 (4th ed. 1971). Other forms of the doctrine that have been adopted by states are the imposition of liability where it is apparent the assets of the charity will not be depleted by the plaintiff's recovery, such as where there is liability insurance. *See, e.g.*, Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943). Some courts deny liability to recipients of benefits of the charity, but allow recovery to others. *E.g.*, Alabama Baptist Hosp. Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1933). Others have abolished charitable immunity in connection with hospitals, but allow it to remain in connection with other charities. *E.g.*, Rabon v. Rowan Mem. Hosp., 269 N.C. 1, 152 S.E.2d 485 (1967).

19. Belton v. Richland Mem. Hosp., 236 S.C. 446, 211 S.E.2d 241 (1975). *See also* Justice Littlejohn's dissent in *Fitzer*.

20. Eiserhardt v. State Agric. & Mech. Soc'y., 235 S.C. 305, 311-12, 111 S.E.2d 568, 572 (1959).

21. Jeffcoat v. Caine, 261 S.C. 75, 80, 198 S.E.2d 258, 260 (1973).

which have acted in reckless disregard of the plaintiff's rights.[22] The decision in *Fitzer* merely deals the final blow to an already antiquated doctrine.[23]

Ronald A. Herring

B. Sovereign Immunity Retained

In *Belue v. City of Spartanburg*,[24] the South Carolina Supreme Court held that a landowner could not sue a city for the damage to his property and business caused by a broken water main because his allegations of negligence and nuisance were repugnant to the longstanding rule of sovereign immunity.[25] The court also held that the flooding of the landowner's property was not a prohibited taking of private property for public use as contemplated by the South Carolina Constitution.[26] This ruling keeps South Carolina in a small minority of states that have refused to modify or abolish the doctrine of sovereign immunity by judicial decision.[27]

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22. Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 487, 234 S.E.2d 873, 876-77 (1977). Subsequent to *Brown*, the legislature abolished the doctrine with regard to hospitals, but limited recovery to a maximum of $100,000. S.C. CODE ANN. § 44-7-50 (Supp. 1980).

23. Organizations that have relied on charitable immunity for protection in the past should obtain adequate liability insurance and should consider incorporation to protect individual members from liability. The unincorporated charitable institution is considered an unincorporated association and may be sued and proceeded against under the name by which it is known. S.C. CODE ANN. § 15-5-160 (1976). Process may be served on any agent of the unincorporated association. S.C. CODE ANN. § 15-9-330 (1976). If a judgment against the unincorporated association results, "any property of the association and the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment." S.C. CODE ANN. § 15-35-170 (1976). *See also* Elliott v. Greer Presb. Church, 181 S.C. 84, 186 S.E. 651 (1936); Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729, *cert. denied*, 349 U.S. 953 (1955).

24. 276 S.C. 381, 280 S.E.2d 49 (1981).

25. *Id.* at 383, 280 S.E.2d at 49-50.

26. *Id.* at 383, 280 S.E.2d at 50.

27. For jurisdictions that have modified the traditional doctrine by judicial decision, *see* Platt Bros. v. City of Waterbury, 72 Conn. 531, 45 A. 154 (1900); Mayor of Dalton v. Wilson, 118 Ga. 100, 44 S.E. 830 (1903); Lundahl v. City of Idaho Falls, 78 Idaho 338, 303 P.2d 667 (1956); Eastern Ill. State Normal School v. City of Charleston, 271 Ill. 602, 111 N.E. 573 (1916); Borell v. Cumberland Tel. & Tel. Co., 133 La. 630, 63 So. 247 (1913); Higginson v. Treasurer of Boston, 212 Mass. 583, 99 N.E. 523 (1912); McLeod v. City of Duluth, 174 Minn. 184, 218 N.W. 892 (1928); Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966); Brown v. Board of Trustees 303 N.Y. 484, 104 N.E.2d 866 (1952); Memphis Power and Light Co. v. City of Memphis, 172 Tenn. 346, 112 S.W.2d 817 (1937); Stock-

A water main belonging to the City of Spartanburg burst and flooded the plaintiff's property.[28] The plaintiff sued,[29] claiming that the city was liable for negligently maintaining the water main, creating a public nuisance by installing and maintaining a water main which burst, and taking the plaintiff's property for public use without compensation.[30] The city demurred on the ground that the complaint failed to state a claim upon which relief could be granted. The trial judge sustained the demurrer on the counts of negligence and nuisance because of the city's sovereign immunity[31] and ruled against the plaintiff's claim that his property had been taken without compensation on the grounds that the flooding was of a temporary nature.[32] The plaintiff appealed the trial judge's granting of the demurrer.

On appeal, the plaintiff argued that section 5-7-70 of the South Carolina Code, which waives a city's immunity to suit for personal injury or property damage resulting from a "defect in any street . . . or by reason of a defect or mismanagement of anything under the control of the corporation within the limits of any city or town. . .,"[33] waived defendant's immunity. The South Carolina Supreme Court ruled, however, that because the plaintiff's action was not based upon an actual defect in a street, his action was not within the scope of section 5-7-70.[34] The court

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bridge v. State Highway Bd., 125 Vt. 366, 216 A.2d 44 (1965); Hewett v. City of Seattle, 62 Wash. 377, 113 P. 1084 (1911); Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 P. 710 (1925). For jurisdictions that have abolished sovereign immunity by judicial decision, *see* Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969); Muskopf v. Corning Hosp. Dist. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Evans v. County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971); Pittman v. City of Taylor, 398 Mich. 41, 247 N.W.2d 512 (1976); Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975); Jones v. State Highway Comm'n., 593 S.W.2d 580 (Mo. App. 1979); Willis v. Department of Conserv. and Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970); Thacker v. Board of Trustees of Ohio State Univ., 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); Cords v. State, 62 Wis. 2d 42, 214 N.W.2d 405 (1974).

28. Record at 2-3.

29. *Id.* Plaintiff sought the return of $7,600 for the cost of repairing his parking lot, cleaning and replacing carpeting in his store building, replacing damaged goods in his photography shop, and for loss of business.

30. S.C. CONST. art. I, § 17 provides: "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

31. Record at 7.

32. *Id.* at 7-8.

33. S.C. CODE ANN. § 5-7-70 (1976).

34. 276 S.C. at 383, 280 S.E.2d at 50.

also summarily rejected the plaintiff's claim that the bursting water main constituted an actionable public nuisance.[35] Finally, the court, relying on *Kline v. City of Columbia*,[36] ruled that by failing to allege "a positive, affirmative, aggressive act on the part of the municipality," the plaintiff had not shown that his property was unconstitutionally taken.[37] On these grounds, the supreme court upheld the demurrer granted by the trial judge.[38]

Under the doctrine of sovereign immunity, neither a state[39] nor a municipal subdivision of a state[40] can be sued for its torts in its own courts without its consent. Many states, however, distinguish between acts that are public and governmental in nature and those that are private and proprietary, allowing tort claims for the latter types of acts.[41] The South Carolina Supreme Court has consistently refused to recognize this distinction[42] and has indicated that suit against the state for a tortious act or omission can be maintained only when (1) the legislature has waived the state's immunity by statute;[43] (2) the party normally entitled to immunity has maintained a nuisance;[44] or (3) there has been an unconstitutional taking of private property.[45] Although the language of section 5-7-70 of the South Carolina Code suggests a broad waiver of immunity for the negligent acts of a municipality, South Carolina courts have narrowly construed this section to allow recovery only for injuries caused by an actual defect in a street.[46] *Belue* typifies this restrictive ap-

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35. *Id.*

36. 249 S.C. 532, 155 S.E.2d 597 (1967).

37. 276 S.C. at 383, 280 S.E.2d at 50.

38. *Id.* at 384, 280 S.E.2d at 50.

39. Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42 (1939).

40. Abernathy v. City of Columbia, 213 S.C. 68, 48 S.E.2d 585 (1948).

41. *See supra* note 27. Judicial abrogation, however, is subject to partial or total legislative reinstatement. *See, e.g.*, Maule v. Conduit & Found. Corp., 124 N.J. Super. 488, 307 A.2d 651 (1973).

42. Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976).

43. Belton v. Richland Mem. Hosp., 263 S.C. 446, 211 S.E.2d 241 (1975).

44. Teague v. Cherokee County Mem. Hosp., 272 S.C. 403, 252 S.E.2d 296 (1979).

45. Kline v. City of Columbia, 249 S.C. 532, 155 S.E.2d 597 (1967).

46. *See*, Dunn v. Barnwell, 43 S.C. 398, 21 S.E. 315 (1894). The court in *Dunn* held that:

> It is apparent from the title of this act, as well as from the terms used in the body of the act, that the sole purpose was to give a person who had sustained an injury *by reason of a defect in a street*, a right of action to recover damages for such injury. The title of the act is as follows: "An act providing for a right

proach to the statute. Similarly, the court's rejection in *Belue* of the plaintiff's claim of public nuisance is in line with South Carolina precedent.[47] Although the court recognized in *Teague v. Cherokee County Memorial Hospital* that "there is authority for the proposition that a governmental body, though otherwise immune from liability, loses that immunity if the danger which caused the harm is in fact a public nuisance,"[48] it apparently has been unwilling to utilize this approach.

The finding in *Belue* that the accident which caused the plaintiff's loss was not an unconstitutional taking also appears to be in accord with the past decisions of the South Carolina Supreme Court. The court normally will not find an unconstitutional taking absent positive, affirmative, and aggressive state action.[49] To be affirmative and aggressive, the state action must amount to an "actual interference with, or . . . disturbance of, property rights, resulting in injuries which are not merely consequential or incidental."[50] Once a sovereign's actions have been established as "aggressive," the court has been willing to take the "broadest possible view of 'what is a taking' and has construed the least actual 'damage' to be a 'taking.' "[51]

> of action against a municipal corporation for damage sustained by reason of defects in the repair of streets, sidewalks, and bridges within the limits of said municipal corporation," and it is manifest that the purpose thus declared in the title was adhered to in the body of the act. . . .

Id. at 401, 21 S.E. at 316 (emphasis in original). *Accord*, Hollifield v. Keller, 228 S.C. 584, 121 S.E.2d 213 (1961); Furr v. City of Rock Hill, 235 S.C. 44, 109 S.E.2d 697 (1959); Hicks v. City of Columbia, 225 S.C. 553, 83 S.E.2d 199 (1954); Reeves v. City of Easley, 167 S.C. 231, 166 S.E. 120 (1932).

47. *See, e.g.*, Kneece v. City of Columbia, 128 S.C. 375, 123 S.E. 100 (1924). The plaintiff in *Kneece* was entitled to recovery because disagreeable odors from the defendant's incinerator amounted to an unconstitutional taking of property. Although the court did not specifically state this as the basis of its holding, it is clear from the authority cited therein (Faust v. Richland County, 117 S.C. 251, 109 S.E. 151 (1921) and Derrick v. Columbia, 122 S.C. 29, 114 S.E. 857 (1922)) that the premise for granting relief was that there was an unconstitutional taking. For references to this case, *see* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1006 n.87 (1966); Annot., 2 A.L.R.2d. 677, 683 (1948).

48. 272 S.C. 403, 405, 252 S.E.2d 296, 297 (1979).

49. *See* Kline v. City of Columbia, 249 S.C. 532, 155 S.E.2d 597 (1967); Collins v. City of Greenville, 233 S.C. 506, 105 S.E.2d 704 (1958).

50. Gasque v. Town of Conway, 194 S.C. 15, 22, 8 S.E.2d 871, 874 (1940).

51. Kline v. City of Columbia, 249 S.C. at 537, 155 S.E.2d at 599. In *Kline*, the defendant city pulled loose a gas pipe while widening a street and thereby caused an explosion which damaged plaintiff's property. Because of the city's affirmative activity, the court found an unconstitutional taking. *See also* Webb v. Greenwood County, 229

In *Belue*, the South Carolina Supreme Court reaffirmed its alignment with a minority of jurisdictions that refuse to abrogate by judicial decision the doctrine of sovereign immunity. Notably, the dissent in *Belue* argued for the abolition of the doctrine, reasoning that to allow the sovereign "to commit wrongdoing without any responsibility to its victims, while any individual . . . would be called to task in court for such tortious conduct"[52] runs counter to the "basic concept underlying the whole law of torts today that liability follows negligence. . . ."[53] Indeed, the court might have easily mitigated the harshness of the doctrine by construing section 5-7-70 of the South Carolina Code according to its plain meaning rather than following its traditional interpretation.

In light of *Belue*, it seems clear that legislative action will be necessary to limit or abolish the doctrine of sovereign immunity in South Carolina. Until such action is taken, the only available means of circumventing the doctrine is through a narrowly construed statutory waiver and the claim that there has been an unconstitutional taking without compensation.

R. Lewis Johnson

II. CAUSATION-IN-FACT—DES LAWSUITS

In *Ryan v. Eli Lilly & Company*,[54] the District Court for South Carolina rejected four theories proposed by a plaintiff seeking to avoid being required to identify the specific defendant manufacturer who caused her injury. The court held that the plaintiff's inability to identify which defendant manufactured the drug diethylstilbestrol (DES) taken by her mother,[55]

S.C. 267, 92 S.E.2d 688 (1956) in which the South Carolina Supreme Court held:

> South Carolina in its construction of Article I, § 17, Constitution of 1895, does not recognize a distinction between "taking" and "damaging," but holds that a deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a "taking" as though the property were actually appropriated.

Id. at 282, 92 S.E.2d at 694.

52. ___ S.C. at ___, 280 S.E.2d at 52 (quoting Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959)).

53. ___ S.C. at ___, 280 S.E.2d at 52 (quoting *Molitor*, 18 Ill. 2d at 20, 163 N.E.2d at 93)).

54. 514 F. Supp. 1004 (D.S.C. 1981).

55. Diethylstilbestrol is a synthetic estrogen prescribed from 1947 through 1971 to

or show an agreement between the defendant manufacturers as to marketing, manufacturing, testing, or warning, was sufficient to support granting of the defendants' motion for summary judgment. The district court concluded that South Carolina would not likely join the growing movement[56] toward modifying causation-in-fact requirements where DES plaintiffs are involved.

The facts in *Ryan* are nearly identical to hundreds of cases brought by "DES daughters" nationwide. Between 1952 and 1953, the plaintiff's mother took DES during her pregnancy to prevent a threatened miscarriage. The plaintiff later developed a precancerous condition typical of prenatal exposure to the drug. Because she could not identify the specific manufacturer of the pills taken by her mother,[57] the plaintiff was forced to sue eight major producers of DES.[58]

The district court initially found that because the plaintiff could not identify the specific manufacturer, she had failed to satisfy the threshold burden of showing cause-in-fact.[59] The court also concluded that there was no civil conspiracy or "collective efforts" by the drug manufacturers that would relieve the plaintiff of her burden of linking her injuries to a particular manufacturer.[60]

The court in *Ryan* then reviewed and rejected each of the four alternative theories of recovery advanced by the plaintiff:

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prevent threatened miscarriages. In 1971, the FDA ordered use of DES discontinued during pregnancy because female offspring developed vaginal adenosis (a precancerous condition) and clear-cell adenocarcinoma of the vagina and uterus. *See generally*, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978)[hereinafter cited as FORDHAM Comment].

56. Payton v. Abbott Labs., 512 F. Supp. 1031 (D. Mass. 1981); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); Thomas v. Ferndale Labs., 97 Mich. App. 718, 296 N.W.2d 160 (1980); Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980); Lyons v. Premo Pharm. Labs, 170 N.J. Super. 183, 406 A.2d 185 (1979); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

57. Mrs. Ryan could not remember markings, color, size, or shape of the pill. Neither the doctor who prescribed the pills nor the drug store had any records which specified the manufacturer. 514 F. Supp. at 1007.

58. One defendant was dismissed Feb. 20, 1980. *Id.* at n.2.

59. *Id.* at 1007.

60. *Id.* at 1008.

concert of action, alternative liability, enterprise liability, and market share liability. Concert of action[61] was rejected because there was no evidence of any agreement or common plan among manufacturers not to adequately test or warn of known dangers.[62] The court disallowed alternative liability[63] because all suppliers of DES had not been joined as defendants.[64] Enterprise liability was found[65] "repugnant to the most basic tenets of tort law,"[66] apparently based upon the court's belief that this theory would make manufacturers insurers not only of their own products, but any similar products. Lastly, the court dismissed market share liability,[67] reasoning that it would be a "rejection of over one hundred years of tort law which required . . . a matching of defendant's conduct and plaintiff's injury. . . ."[68] Because the plaintiff could not sustain the burden of proving proximate cause without these theories, the court granted the defendants' motion for summary judgment.

Reaction in other jurisdictions to the theories rejected by

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61. The theory of concert of action imposes joint and several liability on persons who pursue, actively participate in, or encourage in any way a common plan to commit a tortious injury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971), RESTATEMENT (SECOND) OF TORTS § 876 (1979).

62. 514 F. Supp. at 1016. The district court refused to accept a parallel course of action as evidence of such a plan.

63. Alternative liability holds those defendants who act negligently toward the plaintiff and who fail to show that they did not cause the plaintiff's injury jointly and severally liable for his injuries. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); RESTATEMENT (SECOND) OF TORTS § 433B(3)(1965).

64. 514 F. Supp. at 1016 (quoting comment h to § 433B(3), RESTATEMENT (SECOND) OF TORTS (1965)).

65. The enterprise liability theory holds manufacturers of a generically similar product who follow deficient industry-wide safety standards jointly and severally liable for injuries caused by the product. *See* Hall v. E. I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), FORDHAM Comment, *supra* note 55 at 965; Note, *Industry-Wide Liability: Solving the Mystery of the Missing Manufacturer in Products Liability Law*, 38 WASH. & LEE L. REV. 139 (1981).

66. 514 F. Supp. at 1017.

67. *Id.* at 1018. Market share liability holds each manufacturer liable based upon its share of the market for the product. It is imposed when the plaintiff is unable to identify a specific defendant and instead seeks to recover from those manufacturers whose output constitutes a substantial share of the market. *See* Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); Note, *A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement*, 42 U. PITT. L. REV. 669 (1981).

68. 514 F. Supp. at 1018, (quoting Sindell v. Abbott Labs., 26 Cal. 3d at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting)).

the *Ryan* court has been inconsistent.[69] No court has accepted enterprise liability. Only the California Supreme Court has recognized market share liability.[70] That court considered the theory a modification of alternative liability, since there was a substantial likelihood that the manufacturer was before the court.[71] Two courts have acknowledged that application of the alternative liability theory to DES litigation was novel, but found support in traditional state law for the theory itself.[72] Similarly, only two courts have recognized the concert of action theory. The New York Supreme Court found evidence "in abundance" of conscious parallel activity by the drug companies from which a "tacit understanding" may be inferred.[73] However, at least five courts other than *Ryan* have also rejected the theory.[74] Perhaps the reason for the inconsistent treatment of DES cases goes beyond the fact that the theories are novel expansions of traditional tort law. There also appears to be a remarkable difference in the interpretation of substantially similar underlying facts.[75] The court in *Ryan* acknowledged that the same history had been set forth in detail in other cases.[76] Yet while the New York court found the evidence implicating the manufacturer to be overwhelming,[77] the *Ryan* court concluded that virtually the same evidence proved "that no defendant entered into any agreement or even cooperated with any other drug company in the licensing, manufacturing, marketing, or promotion of stilbestrol for

69. 436 N.Y.S.2d at 630.

70. Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980). However, the court in *Ferrigno* used the concept to determine allocation of liability among the defendants, 175 N.J. Super. at 573, 420 A.2d at 1316.

71. Sindell v. Abbott Labs., 26 Cal. 3d at 611-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

72. Ferrigno v. Eli Lilly & Co., 175 N.J. Super. at 565-67, 420 A.2d at 1312-13 (1980); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 77, 289 N.W.2d 20, 27 (1979).

73. Bichler v. Eli Lilly & Co., 79 A.D.2d 317, ___, 436 N.Y.S.2d 625, 633 (1981). The *Abel* court also accepted this argument.

74. Payton v. Abbott Lab., 512 F. Supp. 1031 (D. Mass. 1981); Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980); Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185 (1979).

75. Although there are factual differences in each case, the facts upon which this issue turns are generally undisputed, *see* FORDHAM Comment, *supra* note 55, at 975-78.

76. 514 F. Supp. at 1008.

77. 79 A.D.2d at ___, 436 N.Y.S.2d at 633.

the use that the plaintiff claims produced her injuries."[78] Reconciliation of these differences seems impossible.

The *Ryan* court's treatment of statistics is even more puzzling. Some authorities assert that Lilly and five or six other principal manufacturers produced over 90% of the DES market.[79] Expert testimony in one case put Lilly's market share at 45%.[80] However, the *Ryan* court stated that it was just as likely that the actual manufacturer was absent when Lilly and seven other major companies were in court.[81] To reach this conclusion, the court compared the eight defendants before it with the total number of potential defendants, estimated at 118. If these eight companies do, in fact comprise 90% of the market, however, comparing eight with 118 is little more than a subtle manipulation of figures, which could result in a substantial distortion of truth.

A major concern of those courts that have accepted one of the "novel" theories appears to be that an innocent plaintiff should not be deprived of her cause of action merely because she cannot identify the specific manufacturer who has caused her injury, especially when the practices of all manufacturers have substantially contributed to her inability to make such an identification.[82] These courts have been willing to allow a limited expansion of established principles of tort liability where traditional evidentiary requirements seem insurmountable. The primary concern of the courts that have rejected the same theories appears to be that such an expansion of traditional law will make manufacturers liable, not only for their own, but for any similar product.[83] Some intermediate appellate courts[84] and fed-

78. 514 F. Supp. at 1014.

79. FORDHAM Comment, *supra* note 55, at 977; Sindell v. Abbott Labs., 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

80. 79 A.D.2d at ___, 436 N.Y.S.2d at 627 n.1.

81. 514 F. Supp. at 1007.

82. *See* FORDHAM Comment, *supra* note 55, at 993; Bichler v. Eli Lilly & Co., 79 A.D.2d at ___, 436 N.Y.S.2d at 630; Sindell v. Abbott Labs., 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144; Ferrigno v. Eli Lilly & Co., 175 N.J. Super. at 568, 420 A.2d at 1314.

83. *E.g.*, Ryan v. Abbott Labs., 514 F. Supp. at 1017; Sindell v. Abbott Labs., 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141; Namm v. Charles E. Frost & Co., 178 N.J. Super. at 33, 427 A.2d at 1128.

84. *E.g.*, Namm v. Charles E. Frost & Co., 178 N.J. Super. at 34, 427 A.2d at 1128.

eral courts[85] have concluded that extensive shifts in the law should be left to the higher courts or the legislature. *Ryan* adopts the position that these shifts should not be made at all.

Patricia B. Kinard

III. Abrogation of the Locality Rule

Until recently, South Carolina courts followed the so-called "locality rule" that required plaintiffs to prove negligence in medical malpractice cases by producing an expert who was competent to testify that the defendant failed to exercise the degree of skill typically exercised by other physicians practicing in the same or similar localities.[86] In *King v. Williams*,[87] the South Carolina Supreme Court abrogated the locality rule and adopted a standard of care not bound by geographical restrictions. The court held that the degree of care to be observed is that of an average, competent practitioner acting in the same or similar circumstances.[88] Abrogation of the rule follows the modern trend.[89]

The defendant in *King*, a general practitioner, treated the plaintiff's left foot, which had been injured in an automobile accident.[90] The foot did not heal while in a cast or during the nine months after the cast was removed. At the plaintiff's insistence, the defendant referred him to orthopedic specialists who diag-

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85. *E.g.*, Payton v. Abbott Labs., 512 F. Supp. at 1040.

86. Before *King*, a member of the medical profession in South Carolina was bound only to possess and exercise the degree of skill and learning that was "ordinarily possessed and exercised by members of his profession in good standing in the *same general neighborhood or in similar localities*." Bessinger v. DeLoach, 230 S.C. 1, 7, 94 S.E.2d 3, 6 (1956)(referring to dentists)(emphasis added).

87. 276 S.C. 478, 279 S.E.2d 618 (1981).

88. *Id.* at 482, 279 S.E.2d at 620 (1981).

89. *See* Annot., 37 A.L.R. 3d 420, 426-30 (1971 & Supp. 1980); W. Prosser, Handbook of the Law of Torts 164 (4th ed. 1971). Although the locality rule has apparently been applied almost exclusively in the context of medical malpractice suits, at least one court has employed the rule in a legal malpractice action. *See* Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1978). Despite the South Carolina Supreme Court's recent approval of attorney specialization in the fields of Estate Planning and Probate Law, Taxation Law, and Family and Matrimonial Law, *see* S.C. Sup. Ct. Rules, Rules on Lawyer Competence, Rule 3, South Carolina attorneys who perform professional services in a specialized field without the aid of a specialist may, in light of *King*, be held to a uniform, national standard of care.

90. The defendant physician first examined the foot at Loris Hospital the day following the accident. He x-rayed only the ankle region and diagnosed the injury as a severe ankle sprain. 276 S.C. at 480, 279 S.E.2d at 619.

nosed a fracture-dislocation of the foot that required corrective surgery.[91] The plaintiff then initiated an action against the defendant for his negligent diagnosis and treatment. The trial judge, over the defendant's objections, ruled that a Florida physician was qualified to pass judgment on the degree of skill exercised by the defendant.[92] On appeal, the supreme court held that, although the geographic proximity of a physician's practice is one of various considerations, the traditional "locality rule" has no present day vitality.[93]

The court noted that the locality rule was based on the assumption that a small town physician lacked not only the opportunity for learning and keeping abreast of advances in the profession, but also the ability to offer his patients the care and treatment provided by modern medical facilities. It was therefore considered unfair to require that small town physicians be held to the same standard of care as their better equipped urban colleagues.[94] The court in *King* observed, however, that the advance of required higher education, the wide dissemination of medical information, and the increased access to adequate medical facilities have gradually eroded the logic of the locality rule.[95] Furthermore, the practical difficulties inherent in finding local physicians willing to testify on the plaintiff's behalf[96] and in allowing a local standard of care below that which patients are entitled to expect[97] led the court to discard the rule and adopt a

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91. King suffered a 30% disability. *Id.*

92. *Id.* at 482, 279 S.E.2d at 619. Before *King*, it was necessary for a plaintiff to obtain an expert who could testify that he was familiar with the standard of care in the defendant's locality or similar localities. Annot. 37 A.L.R.3D 420, 423 (1971). Of course, expert testimony is not required when the common knowledge or experience of laymen enables them to infer causation and a lack of proper care. In *King*, the court noted that affirmance of the verdict in that case was not dependent upon expert testimony; the jury might reasonably have inferred that the plaintiff's injury was proximately caused by the defendant's negligence. *Id.* at 483, 279 S.E.2d at 620.

93. 276 S.C. at 482, 279 S.E.2d at 620.

94. *Id.* at 481-82, 279 S.E.2d at 619.

95. *Id.* at 481, 279 S.E.2d at 620.

96. This reluctance has been referred to as the "conspiracy of silence." Comment, *Medical Malpractice—The "Locality Rule" and the "Conspiracy of Silence,"* 22 S.C.L. REV. 810, 817-20 (1970).

97. As the Washington Supreme Court observed in *Pederson v. Dumouchel*:

> The fact that several careless practitioners might settle in the same place cannot affect the standard of diligence and skill which local patients have a right to expect. Negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence. No degree of antiquity can give

standard set forth by the Washington Supreme Court in *Pederson v. Doumouchel*:[98] "The degree of care which must be observed is, of course, that of an average competent practitioner acting in the same or similar circumstances. In other words, local practice within geographic proximity is one, but not the only factor to be considered."[99] The locality rule was first articulated over one hundred years ago by the Massachusetts Supreme Court in *Small v. Howard*.[100] The court in *Small* held that a country surgeon was bound to exercise only that level of skill possessed by other physicians and surgeons of ordinary ability and skill practicing in the same locality in which he practiced.[101]

Because of its narrowness, the "same locality" rule was subject to early attacks.[102] A number of courts held that the rule was not applicable to specialists[103] and others abrogated the rule when uniform injuries required well known treatment.[104] Some courts liberalized the rule by finding the appropriate standard of care to be that practiced by physicians in the general vicinity or locality.[105] Other courts broadened the rule even further by holding a member of the medical profession to the standard observed by members of his profession in good standing in either the defendant's locality or a similar locality.[106]

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sanction to usage bad in itself.

72 Wash. 2d 73, 78, 431 P.2d 973, 977 (1967).

98. 72 Wash.2d 73, 431 P.2d 973, 977 (1967).

99. *Id.* at 79, 431 P.2d at 978.

100. 128 Mass. 131 (1880).

101. *Id.* at 132. The court in *Small* used the language "similar locality" in formulating its rule but considered only the standard of care prevailing in the defendant's own locality in applying the rule. The only states that have applied this strict rule in recent years are Louisiana, Myer v. St. Paul Mercury Indemnity Co., 225 La. 618, 73 So.2d 781 (1953); Samuels v. Doctors Hospital, Inc., 414 F. Supp. 1124 (W.D. La 1976) (applying Louisiana law) and Nevada, Lockhart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961).

102. *See, e.g.*, Viita v. Dolan, 132 Minn. 128, 135-37, 155 N.W. 1077, 1081 (1916).

103. *E.g.*, Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1968); Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191 (1979).

104. *E.g.*, Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970); Rucker v. High Point Memorial Hosp., 285 N.C. 519, 206 S.E.2d 196 (1974).

105. *E.g.*, Ardoline v. Keegan, 140 Conn. 552, 102 A.2d 352 (1954); Willard v. Norcross, 86 Vt. 426, 85 A. 804 (1913).

106. *E.g.*, Lewis v. Johnson, 12 Cal. 2d 558, 86 P.2d 99 (1939); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956). The South Carolina Supreme Court adopted this view in Bessinger v. DeLoach, 230 S.C. 1, 94 S.E.2d 3 (1956). The RESTATEMENT adopted a position similar to *Bessinger* but included trades as well as professions. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

Applying the broader "similar locality" rule, however, also proved problematic. Some courts held that whether a locality was "similar" depended on the socioeconomic similarities between that locality and the defendant's.[107] Many courts, however, focused on the geographical proximities of the areas.[108] In *Kapuschinsky v. United States*,[109] the South Carolina District Court, interpreting the South Carolina locality rule, stated: "[I]t would seem that the community is not necessarily restricted to the geographical area in proximity to the alleged tortfeasor, but would extend to other locales similarly situated."[110]

In 1968, the Massachusetts Supreme Court delivered the most significant blow to the "locality rule" in *Brune v. Blinkoff*.[111] In *Brune*, the court completely overruled *Small* and stated that "the medical profession should no longer be Balkanized by . . . varying geographic standards in malpractice cases. . . . The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession."[112]

The South Carolina Supreme Court's abrogation of the locality rule in *King* follows the trend in other jurisdictions. Because the rule is no longer justified, its abrogation represents a realistic and progressive step that will eliminate unwarranted disparity in the standard of care to which physicians are held and broaden the sources from which plaintiffs may seek expert witnesses.

Ronald A. Herring

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107. *E.g.*, Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931).

108. *See, e.g.*, Viita v. Dolan, 132 Minn. 128, 155 N.W. 1077 (1916); Sinez v. Owens, 33 Cal. 2d 749, 205 P.2d 3 (1949).

109. 248 F. Supp. 732 (D.S.C. 1966).

110. *Id.* at 743-44.

111. 354 Mass. 102, 235 N.E.2d 793 (1968).

112. *Id.* at 108, 235 N.E.2d at 798.

IV. MEDICAL MALPRACTICE

A. Cause of Action for Wrongful Birth in South Carolina

In *Phillips v. United States*,[113] the United States District Court for South Carolina held that South Carolina law would allow the parents of a child born with Down's syndrome[114] to sue for wrongful birth.[115] The district court also held that section 2680(h) of the Federal Tort Claims Act (FTCA)[116] did not bar the cause of action.[117]

The infant in *Phillips* was born with Down's syndrome at Charleston Naval Regional Medical Center, where his mother had been an outpatient throughout her pregnancy. Although Mrs. Phillips had noted a positive family history of Down's syndrome on a prenatal questionnaire,[118] the attending physician did not advise her of the possible risk to her offspring or recommend genetic testing during the pregnancy.[119] The Phillips

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113. 508 F. Supp. 544 (D.S.C. 1981).

114. Down's syndrome, commonly known as mongolism, is a syndrome of mental retardation associated with physical abnormalities which include retarded growth, laxness of joint ligaments, and broad hands and feet. 508 F. Supp. at 546 n.4 (quoting STEDMAN'S MEDICAL DICTIONARY 1382 (4th unabr. lawyer's ed. W. Dornette 1976)).

115. 508 F. Supp. at 551-552. A wrongful birth claim is a parental action alleging that the physician's failure to advise them of the possibility of birth defects in their offspring precluded an informed decision to terminate the pregnancy. Phillips v. United States, No. 79-551-8,7 & 16 (D.S.C. Dec. 7, 1981)(Subsequent case in which the court addressed the doctor's liability for wrongful birth.) In a companion case, Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1981), discussed at 33 S.C.L. REV. 170 (1981), the court denied the infant plaintiff's claim for wrongful life arising from the same cause of action, holding that there is no cause of action for wrongful life in South Carolina. For a discussion of the distinctions between wrongful life and wrongful birth claims, *see* Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713 (1982).

116. 28 U.S.C. § 2680(h)(1976).

117. 508 F. Supp. at 548.

118. Approximately three to five per cent of all cases of Down's syndrome are caused by inheritance of an abnormal chromosome 14. No. 79-551-8 at 8. A positive family history of Down's syndrome indicates the risk of this type of inheritable Down's syndrome in future offspring. *Id.* at 9.

119. Blood karotyping can be performed on the potential mother and the afflicted family member to determine if the Down's syndrome at issue is inheritable. *Id.* at 9. Amniocentesis, a minimal risk prenatal testing procedure, is used to detect Down's syndrome in a fetus. *Id.* Both of these testing procedures were available at the time of Mrs. Phillips' pregnancy. *Id.* at 10 & 15.

brought an action against the United States alleging that the doctor's failure to advise, counsel and test Mrs. Phillips constituted a breach of his duty as a physician.[120] The defendant moved for summary judgment, claiming that the misrepresentation exception to the FTCA[121] barred the action and that wrongful birth was not recognized as a valid cause of action in South Carolina.[122]

The court first examined the defendant's contention that the claim was barred by the misrepresentation exclusion of the FTCA, and found that the provision was limited to "the traditional and commonly understood legal definition of 'negligent misrepresentation.' "[123] Examining the application of the exclusion in the context of medical malpractice,[124] the court noted two lines of authority: the view that the misrepresentation exclusion never applies to a claim of medical malpractice[125] and another view that in limited situations, the section will apply.[126] Adopting the second position, the court concluded that in most medical situations there is a duty not only to inform a patient of his condition, but an additional duty to render proper care and treatment for that condition.[127] Reading the complaint in *Phillips* to allege "a failure to properly advise, counsel, and test Mrs. Phillips with respect to certain genetic risks," the court held that the claim was not precluded by section 2680(h).[128]

The court also examined the defendant's contention that wrongful birth was not a claim upon which relief could be

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120. The plaintiffs claimed the defendant should have administered an amniocentesis test by which a doctor could determine whether the fetus would be born with Down's syndrome. 508 F. Supp. at 547 n.5.

121. Section 2680 of the FTCA states, in pertinent part: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of . . . misrepresentation. . . ." 28 U.S.C. § 2680(h)(1976).

122. Under the FTCA, the district court must follow "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1976).

123. 508 F. Supp. at 547 (quoting United States v. Neustadt, 366 U.S. 696, 706, the only opinion in which the Supreme Court has interpreted the misrepresentation exclusion of the FTCA).

124. 508 F. Supp. at 547.

125. Ramirez v. United States, 567 F.2d 854 (9th Cir. 1977).

126. Herring v. Knabb, 458 F. Supp. 359 (S.D. Ohio 1978).

127. 508 F. Supp. at 548, (quoting 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS 260.05[3][c](Matthew Bender 1980)).

128. 508 F. Supp. at 548.

granted.[129] The district court considered decisions from other jurisdictions[130] that have confronted similar claims, and found that "the overwhelming majority of the more recent cases" recognized the validity of the cause of action.[131] Analyzing arguments against such a recognition, the court determined that the difficulty in calculating damages was no bar, since any benefits the plaintiffs received from the child's birth could be offset against the detriments that flowed from the defendant's alleged negligence.[132] The court also rejected the policy disfavoring abortions as having dubious merit in light of *Roe v. Wade*[133] and subsequent cases recognizing abortion as a qualified right.[134] Reasoning that the more important policy was against shielding wrongdoers from liability for their negligent acts,[135] the court perceived the plaintiffs' complaint to assert a traditional claim of common-law negligence, and not a new cause of action.[136] As support for this conclusion, the district court pointed to the South Carolina Supreme Court's decision in *Baldwin v. Sanders*,[137] which affirmed the trial court's refusal to grant a demurrer in a "wrongful pregnancy" case.[138]

The district court's reasoning in *Phillips* comports with the analysis of a growing number of both federal and state courts considering similar issues. With only one exception,[139] the application of the misrepresentation exclusion has been held to depend upon whether a complaint alleges failure to properly treat a patient or merely a failure to adequately inform him of his condition.[140] The plaintiff's claim that the doctor negligently

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129. *Id.* Since there was no controlling decision, the district court was obligated to "predict the determination that the state supreme court would reach on the question." *Id. See supra* note 122.

130. *E.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

131. 508 F. Supp. at 549.

132. *Id.* at 549-550, (citing RESTATEMENT (SECOND) OF TORTS § 920 (1977)).

133. 410 U.S. 113 (1973).

134. 508 F. Supp. at 550.

135. *Id.* at 550-551.

136. *Id.*

137. 266 S.C. 394, 223 S.E.2d 602 (1976).

138. 508 F. Supp. at 551-552.

139. 567 F.2d 854.

140. *E.g.*, Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975); Beech v. United

failed to perform the amniocentesis test clearly meets this criteria.

Similarly, other jurisdictions recognizing a claim of wrongful birth have generally dismissed policy arguments against it, and viewed the issue as one of common-law negligence rather than a completely novel cause of action.[141] Such an approach is consistent with the traditional ability of the judiciary to resolve contemporary problems through conventional tort principles. Because the *Phillips* court could only predict the conclusion that the South Carolina Supreme Court would reach if confronted with an identical issue, the fate of such claims in the state courts is still uncertain. The South Carolina court's refusal to dismiss the wrongful pregnancy claim in *Baldwin* however, suggests the likelihood of a similar result.[142]

R. Lewis Johnson

B. Liability for Wrongful Birth in South Carolina

In a subsequent decision, *Phillips v. United States*,[143] the District Court of South Carolina addressed the issue of liability in the Phillips' wrongful birth claim. As required by the Federal Tort Claims Act,[144] the district court sought to determine and apply the substantive law of South Carolina. The court found the defendant liable for breach of the applicable standard of obstetrical care[145] but set aside the issue of damages for future resolution.

The district court found that the defendant had deviated

States, 345 F.2d 872 (5th Cir. 1965); Herring v. Knabb, 458 F. Supp. 359 (S.D. Ohio 1978); Diaz Castro v. United States, 451 F. Supp. 959 (D. Puerto Rico 1978); Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974).

141. *E.g.*, Berman v. Allen, 80 N.J. 420, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 372 (Tex. 1975).

142. Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976).

143. No. 79-551-8 (D.S.C. Dec. 7, 1981).

144. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1976 & Supp. 1981).

145. The court also found the defendant liable in the infant plaintiff's claim for neonatal medical malpractice arising from misdiagnosis of a cardiac defect which the infant exhibited at birth. No 79-551-8 at 27. The defendant's failure to refer the infant to a cardiac specialist when medically indicated was held to be a breach of the applicable standard of pediatric care. *Id.* at 26.

from the applicable standard of obstetrical care[146] by failing to provide adequate genetic counseling and prenatal testing when informed of Mrs. Phillips' positive family history for Down's syndrome.[147] This breach of duty precluded an informed parental decision to terminate the pregnancy[148] and thereby proximately caused the birth of a severely afflicted child.[149] The court did not decide the proper measure of damages, but noted that other courts have allowed compensation for pecuniary loss[150] and emotional anguish.[151]

The court based its analysis on the premise that the wrongful birth claim stated a cause of action "sounding in negligence or medical malpractice."[152] Because of the lack of precedent in South Carolina law,[153] the district court relied on its own decision in the first *Phillips* case[154] to establish wrongful birth as a viable cause of action supported by both the trend of authority[155] and policy considerations. Most persuasive to the court was society's interest "in insuring that genetic testing is properly

146. The court noted South Carolina's rejection of the "locality rule" in King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981), and asserted alternatively that the attending physician's status as a resident specialist would subject the defendant to a national standard of care. No. 79-551-8 at 25. The court accorded greater weight to the expert testimony within that specialty in establishing the standard of care to be implied. *Id.* at 26.

147. *See supra* notes 118 & 119.

148. Both parents testified that they would have elected to abort the fetus had they known that it would be born with Down's syndrome. *Id.* at 7. The court considered this testimony to be determinative of the parents' subjective intent, *Id.* at 8, and also noted the fact that Mrs. Phillips later underwent surgery in order to avoid conception of another afflicted child. *Id.* at 7.

149. No. 79-551-8 at 16.

150. *Id.* at 27. *See, e.g.*, Robak v. United States, 658 F.2d 471 (7th Cir. 1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

151. No. 79-551-8 at 27-28. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

152. No. 79-551-8 at 23.

153. The Federal Tort Claims Act requires that the district court follow "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1976). The court asserted that "in the absence of controlling precedents the court must attempt to predict the determination that the state supreme court would reach if confronted with the question." No. 79-551-8 at 22 (citing Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964)).

154. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981)(denying defendant's motion for summary judgment and recognizing wrongful birth as a viable cause of action).

155. No. 79-551-8 at 22. *See supra* cases cited in notes 140 & 141.

performed and interpreted."[156]

Denise Antoine

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Until recently, a showing of some bodily injury caused by a tortfeasor's conduct was a necessary element of all tort actions brought in South Carolina. In *Ford v. Hutson*,[157] however, the South Carolina Supreme Court expressly recognized intentional infliction of emotional distress as an independent cause of action. The court adopted Section 46 of the RESTATEMENT (SECOND) OF TORTS[158] and held that severe emotional distress, caused intentionally or recklessly by extreme and outrageous conduct, is compensable whether or not bodily harm results.[159] South Carolina thus joins a growing number of states that have acknowledged the existence of this tort.[160]

In 1971, the defendant purchased a new house from the plaintiff real estate broker. A number of serious construction defects in the house later became apparent.[161] On several occasions over a period of two years, the defendant rudely and profanely

156. No. 79-551-8 at 23 (quoting Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 696 (E.D. Pa. 1978)).

157. 276 S.C. 157, 276 S.E.2d 776 (1981).

158. RESTATEMENT (SECOND) OF TORTS § 46 (1965). Subsection (1) states: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

159. 276 S.C. at 162, 276 S.E.2d at 778.

160. *See, e.g.*, Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); State Rubbish Collectors Ass'n. v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Delta Fin. Co. v. Ganakas, 93 Ga. App. 297, 91 S.E.2d 383 (1956); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938); Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Agis v. Howard Johnson Co., 371 Mass. 340, 355 N.E.2d 315 (1976); La Salle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961); Mashunkashey v. Mashunkashey, 189 Okla. 60, 113 P.2d 190 (1941); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). *See generally* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Annot., 64 A.L.R.2d 100 (1959).

161. Among the defects were a rotting rear deck, sagging roof line, and faulty air conditioning. 276 S.C. at 163, 276 S.E.2d at 779.

confronted the plaintiff in public places and at social gatherings with demands that the necessary repairs be made.[162] The defendant allegedly entered the plaintiff's home without knocking on at least two occasions and shouted at her in the presence of her guests.[163] Upset by these confrontations, the plaintiff experienced physical and emotional problems, was eventually hospitalized, and was diagnosed to be suffering from depression. The plaintiff brought an action against the defendant in which she alleged intentional infliction of emotional distress; at trial judgment was entered for the plaintiff. The supreme court, in affirming the judgment, expressly acknowledged what recent South Carolina cases[164] have suggested—that intentional infliction of emotional distress is an independent cause of action.

The supreme court reasoned that since it had already impliedly accepted intentional infliction of emotional distress as an actionable tort and had quoted section 46 of the RESTATEMENT (SECOND) OF TORTS to support a recent decision,[165] the time had come to expressly confirm its acceptance of the RESTATEMENT'S rule of liability.[166] The court, citing a recent decision by the Maine Supreme Court,[167] indicated that four elements must be established to maintain a successful action for intentional infliction of emotional distress.[168] First, the defendant must have inflicted severe emotional distress intentionally or recklessly[169] or have been substantially certain that such distress would result.[170] Second, the defendant's conduct must have been "extreme and outrageous" beyond "all possible bounds of decency" and of a kind that is "atrocious and utterly intolerable in a civi-

162. Record, vol. 1, at 60-64, 68; vol. 3, at 425-28.

163. 276 S.C. at 163, 276 S.E.2d at 779.

164. *E.g.*, Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979); 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. ABC Jalousie Co., 251 S.C. 92, 160 S.E.2d 528 (1968).

165. Hudson v. Zenith Engraving Co., 273 S.C. at 770, 259 S.E.2d at 814 (1979).

166. 276 S.C. at 162, 276 S.E.2d at 778.

167. 401 A.2d 148 (Me. 1979).

168. *Id.* at 154.

169. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46, Comment i (1965)). The RESTATEMENT defines "recklessly" as acting "in deliberate disregard of a high degree of probability that the emotional distress will follow." RESTATEMENT (SECOND) OF TORTS § 46, Comment i, (1965).

170. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46, Comment i).

lized community."[171] Third, the plaintiff's emotional distress must have been caused by the defendant's actions. Finally, the emotional distress must have been "severe,"[172] although physical manifestations of distress need not be present. The court observed that while a business relationship such as that in *Ford* may in some cases provide an excuse for otherwise actionable behavior, the relationship is normally only one consideration in determining whether conduct meets the extreme and outrageous standard. The court also ruled that because the plaintiff's claim was based on a new tort that does not depend on traditional torts such as assault or slander for its existence, it was subject to South Carolina's six-year statute of limitations,[173] rather than the two-year statute.[174]

Although in recent decisions the supreme court had indicated a willingness to recognize intentional infliction of emotional distress as an independent tort, those cases also seemed to suggest that a showing of some physical manifestation of injury was necessary to satisfy the requirement that the emotional distress be "severe."[175] In *Padgett v. Colonial Wholesale Distributing Co.*,[176] for example, the court discarded the requirement of physical impact, but required a showing of bodily injury to support an award of damages for emotional distress. The plaintiff in *Padgett* was awarded damages based on a showing that the shock and emotional upset caused by the defendant's conduct precipitated a severe skin ailment. Subsequently, in *Turner v. ABC Jalousie Co.*,[177] the court found a complaint sufficient to avoid a demurrer simply because it alleged that the defendant's tortious conduct had caused physical or bodily injury to the plaintiff. Similarly, in *Bellamy v. General Motors Acceptance*

171. *Id*, (quoting RESTATEMENT (SECOND) OF TORTS § 46, Commend d).

172. *Id.* The RESTATEMENT defines "severe emotional distress" as such "that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

173. S.C. CODE ANN. § 15-3-530(5) (Supp. 1980).

174. 276 S.C. at 167, 276 S.E.2d at 781.

175. Judge Chapman, in Whitten v. American Mut. Liab. Ins. Co., 468 F. Supp. 470 (S.C.D.C. 1970), *aff'd* 594 F.2d 860 (4th Cir. 1979), was "convinced . . . that an allegation of bodily injury or illness must be made before the courts of the State of South Carolina would allow a plaintiff recovery for the infliction of emotional distress." *Id.* at 479.

176. 232 S.C. 593, 103 S.E.2d 265 (1958).

177. 251 S.C. 92, 160 S.E.2d 528 (1968).

Corp.,[178] the plaintiff was only required to show that he had suffered visible physical distress and was hospitalized as a result of the defendant's conduct. In *Rhodes v. Security Finance Corp.*,[179] however, the court denied recovery based on the plaintiff's failure to show physical harm.

Thus, before *Ford*, the law in South Carolina had evolved to require only a minimal showing of bodily injury to sustain claims of intentional infliction of emotional distress. *Ford* is the first decision in which the court has expressly declared that no showing of bodily harm is necessary for recovery. Indeed, the court in *Ford* declared the plaintiff's evidence of illness and hospitalization[180] nonessential, but noted that when evidence of bodily injury is lacking, the defendant's conduct must be more extreme and outrageous in order to assure that the mental disturbance is genuine and that it meets the severity standard.[181]

Ford clarifies and refines the tort of intentional infliction of emotional distress and brings South Carolina into line with the majority of other jurisdictions. Several aspects of this newly adopted tort, however, remain unclear. Just how shocking behavior must be before South Carolina courts will impose liability in the absence of bodily injury remains to be seen.[182] Moreover, although *Ford* settles the law pertaining to emotional distress suffered by the object of the tortfeasor's conduct, it leaves unaddressed the issue of emotional distress suffered by a bystander who witnesses conduct directed at a third party.[183]

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178. 269 S.C. 578, 239 S.E.2d 73 (1977).

179. 268 S.C. 300, 233 S.E.2d 105 (1977).

180. 276 S.C. at 165-66, 276 S.E.2d at 780.

181. This requirement follows the reasoning of the RESTATEMENT: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965). Also, "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required." *Id.* Comment k.

182. *See* Todd v. South Carolina Farm Bureau, 276 S.C. 284, 278 S.E.2d 607 (1981) in which the supreme court, citing *Ford*, held sufficient to support a cause of action a complaint alleging that plaintiff "suffered from extreme emotional distress, nervousness, worry, loss of sleep, headaches . . . all to his damage. . . ." *Id.* at 289, 278 S.E.2d at 609. The court was careful, however, to note that this conclusion "intimate[s] no opinion as to the ultimate viability of the plaintiff's claim." *Id.*

183. The court in *Ford* adopted only subsection (1) of section 46 of the RESTATEMENT (SECOND) OF TORTS. Subsection (2) pertains to the emotional distress of bystander

VI. TERMINATION OF AT-WILL EMPLOYMENT

The South Carolina Supreme Court may have taken a step toward recognizing a tort for bad faith termination of an at-will employment contract in *Todd v. South Carolina Farm Bureau Mutual Insurance Co.*[184] In a decision concerning pretrial matters only, the court failed to follow a line of South Carolina cases that had upheld the granting of demurrers in cases of at-will employment contracts pursuant to the general, common-law rule that at-will employment contracts may be terminated for any reason or for no reason at all.[185]

The plaintiff in *Todd* was fired from his job as an agent for defendant insurance companies after an investigation of suspicious fire loss claims and of the plaintiff's possible connection with an arsonist. As part of the investigation, the plaintiff was subjected to a voice stress analysis, which was apparently conducted in a manner that violated South Carolina's polygraph laws.[186] In a suit against his former employers and the investigator, the plaintiff alleged bad faith termination of his employment contract. The defendant insurance companies demurred on the ground that South Carolina did not recognize a cause of action for wrongful termination of an employment contract which is terminable at will.[187] The trial judge overruled the demurrer on the ground that the defendants' alleged violation of the public policy embodied in the polygraph laws took the case beyond the simple at-will employment contract issue.[188]

On appeal, the plaintiff argued that because the defendants' conduct was so aggravated, the general rule that at-will contracts may be terminated by either party for any reason or no reason at all should not apply, and asked the court to recognize the so-called "public policy exception."[189] The most conservative

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witnesses to tortious conduct.

184. 276 S.C. 284, 278 S.E.2d 607 (1981).

185. *See, e.g.*, Ross v. Life Ins. Co., 273 S.C. 764, 259 S.E.2d 814 (1979); Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955); Shealey v. Fowler, 182 S.C. 81, 188 S.E.499 (1936); Annot., 62 A.L.R.3D 271 (1975).

186. Brief for Respondent at 9, Brief for Appellant Equifax at 8. South Carolina's polygraph laws are codified at S.C. CODE ANN. § 40-53-10 to -250 (1976).

187. Record at 30.

188. *Id.*

189. Brief for Respondent at 7-8. The public policy exception was established by the landmark decision of Petermann v. International Brotherhood of Teamsters, 174 Cal.

form of this exception limits an employer's right to discharge when the discharge would violate public policy embodied in a state statute.[190] The plaintiff reasoned that because his allegations, if proven true, might subject the defendants to criminal sanctions, the defendants had clearly violated a public policy of the state.[191] The plaintiff also cited a Fourth Circuit case, *deTreville v. Outboard Marine Corp.*,[192] for the proposition that South Carolina does not inflexibly follow the general rule.[193] The court in *deTreville* stated that in South Carolina termination in a manner that is "contrary to equity and good conscience" may be an actionable wrong.[194]

Although in 1979 the South Carolina Supreme Court in *Ross v. Life Insurance Co.*[195] had reaffirmed the general rule that termination of at-will employment contract is not actionable, the court in *Todd* distinguished *Ross* on the ground that because the plaintiff in *Ross* had conceded that his employment contract was terminable at will, demurrer was warranted; the

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App. 3d 184, 344 P.2d 25 (1959). The harsh operation of the general rule on terminability of at-will employment contracts has led to the call for modification of the rule. *See generally* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1 (1979); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

Although *Petermann* was a contract action, some courts have recognized an action in tort for wrongful termination of at-will employment contracts. *See* Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); 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); Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505 (1980); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978). Tort liability is based on establishing a duty on the part of the employer not to engage in conduct toward the employee that contravenes some important public policy.

190. *See supra* note 189, at 1822-23.

191. Brief for Respondent at 7-8.

192. 439 F.2d 1099 (4th Cir. 1971).

193. The trial court in Ross v. Life Ins. Co., 273 S.C. 764, 259 S.E.2d 814 (1979), concluded that the rule in *deTreville* is limited to commercial settings such as franchises, as in *deTreville*, and manufacturer distributor relationships. Record at 15, *Ross*. The trial court in *Todd*, however, regarded *deTreville* as broader in scope and concluded that "[w]hether the principles enunciated in *deTreville* should apply to the type of malicious and aggravated behavior allegedly committed by the defendants is an important question not answered by the court in *Ross*." Record at 31, *Todd*.

194. 439 F.2d at 1100.

195. 273 S.C. at 765, 259 S.E.2d at 815.

plaintiff in *Todd*, however, did not mention in his complaint that his was an at-will contract.[196] Because a "demurrer attacks the four corners of the pleading only," the court concluded that the complaint in *Todd* was not demurrable.[197] However, the complaint in *Ross* did not mention the nature of the plaintiff's employment contract either. In *Ross*, the parties stipulated at the demurrer hearing that the contract was terminable at will; in *Todd*, the issue was raised in the defendants' answer.[198] Thus, the distinction drawn by the court appears to be tenuous. *Ross* was not, however, based on allegations that the defendant, in terminating the employment contract, acted in an "unconscionable or inequitable manner or for unconscionable or inequitable reasons,"[199] and apparently the defendant had not violated a state statute or recognized public policy.

Since the public policy exception to the general rule on terminability of at-will contracts was first recognized in the landmark case of *Petermann v. International Brotherhood of Teamsters*,[200] the exception has been recognized in at least twelve other jurisdictions,[201] and at least two federal judges, including Judge Haynsworth, have noted this trend.[202] Apparently only Florida, Alabama, and the District of Columbia have expressly refused to recognize the public policy exception.[203] In view of the trend toward mitigating the harsh general rule and the call for the South Carolina Supreme Court to recognize the

196. 276 S.C. at 290-91, 278 S.E.2d at 610.

197. *Id.* at 290, 278 S.E.2d at 610.

198. *Id.* at 290, 278 S.E.2d at 609.

199. Record at 15, *Todd*.

200. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

201. Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Scrogan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505 (1980); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

202. deTreville v. Outboard Marine Corp., 439 F.2d 1099, 1100 (4th Cir. 1971); Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 825 (E.D.N.Y. 1980).

203. Hinricks v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1979); Ivy v. Army Times Publishing Co., 482 A.2d 831 (D.C. 1981); Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978).

public policy exception,[204] the court's failure to end the argument in *Todd* at the demurrer stage appears to indicate at least a willingness to consider the question. Perhaps the outrageous conduct of the employer, or the violation of statutory law, or a combination of the two, convinced the court that the time has come to recognize an exception to the general rule that it had affirmed in *Ross*.

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VII. STRICT LIABILITY IN SERVICE TRANSACTIONS

In *DeLoach v. Whitney*,[205] the South Carolina Supreme Court declined to extend the doctrine of strict liability in tort to include the negligent installation of a nondefective product. This decision places South Carolina in line with the majority of jurisdictions that have considered whether pure service transactions[206] should be subject to strict tort liability.[207]

Plaintiff DeLoach won four new tires from the defendant's tire company and had them mounted on his vehicle at the defendant's place of business. One of the defendant's employees failed to replace a deteriorated valve stem on the right front tire. The valve stem was not a part of the new tire and was not sup-

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204. *Contracts, Annual Survey of South Carolina Law*, 32 S.C.L. REV. 54, 67 (1980).

205. 275 S.C. 543, 273 S.E.2d 768 (1981).

206. Pure service refers to those service transactions in which the service is of prime importance and the product is incidental. *See generally*, Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1047-50 (1980); Sales, *The Service-Sales Transaction: A Citadel under Assault*, 10 ST. MARY'S L.J. 13 (1978); Note, *Application of Strict Liability to Repairers: A Proposal for Legislative Action in the Face of Judicial Inaction*, 8 PAC. L. J. 865 (1977); Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 SW. L. J. 575 (1974).

207. *See, e.g.*, Johnson v. William C. Ellis & Sons Iron Works, 604 F.2d 950 (5th Cir. 1979)(no strict liability for failure to warn of defects not created by servicer, applying Mississippi law); Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972)(service of airplane landing gear, applying New Jersey law); Lemley v. J & B Tire Co., 426 F. Supp. 1378 (W.D. Pa. 1977)(installation of brake shoes); Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113 (Alaska 1980)(failure of repairer to discover faulty weld); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975)(repair work on airplane); Nickel v. Hyster Co., 97 Misc. 2d 770, 412 N.Y.S.2d 273 (Sup. Ct. 1978)(repair of forklift). *But see* Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973)(strict liability applicable to mechanical and administrative hospital services).

plied by the defendant.[208] Six weeks later, the plaintiff was severely injured when the rupture of the valve stem caused him to lose control of his car. The plaintiff instituted an action against the owner of the company sounding in strict liability in tort[209] and the defendant moved for a directed verdict on the ground that no sale of a product had occurred. The trial judge, denying the defendant's motion, construed South Carolina's strict liability statute to cover the sale of services.[210] Although the jury returned a verdict for the defendant, the lower court granted the plaintiff a new trial on other grounds.[211] The defendant appealed the trial judge's denial of its motion for a directed verdict on the issue of strict liability.

The South Carolina Supreme Court ruled that the defendant's motion for a directed verdict should have been granted as a matter of law and held that strict liability does not apply to a service transaction in which no defective product is supplied or used.[212] The court also rejected the plaintiff's argument that the complete tire assembly, consisting of the tire, rim, and valve stem, should be recognized as a product for the purpose of im-

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208. Record at 2.

209. The plaintiff also brought and subsequently dropped causes of action in breach of warranty and negligence. The warranty action was dropped because the defendant had not sold the deteriorated valve stem. The record does not show why the negligence action was dropped.

210. Record at 39-40. S.C. CODE ANN. § 15-73-10 (1976) provides as follows:

> (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.

Section 15-73-20 of the South Carolina Code recognizes assumption of risk as a defense against strict liability, and § 15-73-30 incorporates the comments to 402A as legislative intent. For a discussion of the statute and its application, *see* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

211. The trial judge granted a new trial based on the conduct of the plaintiff's attorney in his closing argument to the jury. Record at 103.

212. 275 S.C. at 545-46, 273 S.E.2d at 769-70.

posing strict products liability.[213]

The court relied on *Hoover v. Montgomery Ward & Co.*[214] in which a plaintiff was injured in an automobile accident approximately three weeks after the defendant department store mounted a new tire on the plaintiff's car. The accident was purportedly caused by the installer's failure to tighten the lug nuts holding the tire to the hub.[215] The plaintiff alleged that the defendant had supplied a defective "product" in its failure to properly mount the tire on her automobile and that the defendant should have been held strictly liable.[216] The Oregon Supreme Court, however, reasoned that the store had not actually supplied a defective product and refused to extend strict liability to the installation.

Although the South Carolina Supreme Court arrived at essentially the same holding as the Oregon Court, *DeLoach* is a more compelling case for the application of strict liability. In *Hoover* there was no product, only alleged human error. In *DeLoach*, however, the tire assembly, of which the deteriorated valve stem was an integral part, arguably was a "product" sold by the defendant. Moreover, policies underlying the doctrine of strict liability[217] are relevant to the facts in *DeLoach*. Not only

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213. *See* Brief for Respondent at 22. The definition of "product" has expanded considerably since the incorporation of strict liability into the RESTATEMENT (SECOND) OF TORTS. From the inclusion of only food and products for intimate bodily use, "product" now extends to automobiles, furniture, and even packaging and containers. RESTATEMENT (SECOND) OF TORTS § 402A, Comments d, h (1966). The South Carolina Supreme Court characterized the sale of a house as a sale of a product in Lane v. Trenholm Bldg. Co., 267 S.C. 497, 501, 229 S.E.2d 728, 730 (1976).

214. 270 Or. 498, 528 P.2d 76 (1974).

215. The cause of the accident was disputed. The defendant contended that the plaintiff failed to control her vehicle while passing another car. *Id.* at 499, 528 P.2d at 76.

216. *Id.* at 499-503, 528 P.2d at 77. The plaintiff also brought a cause of action in negligence. The jury, however, found for the defendant on this issue. *Id.* at 499-500, 528 P.2d at 76-77.

217. The generally accepted policies are as follows:

(1) Sellers are in a better position to identify risks and take action to reduce those risks;

(2) Sellers can better absorb and spread the costs of accidents;

(3) Through advertising, the manufacturer-seller induces the public to rely on its expertise and skill.

Montgomery & Owen, *supra* note 210, at 809-10. *See generally* Henderson, *supra* note 206, at 1039-42; Reynolds, *Strict Liability for Commercial Services—Will Another Citadel Crumble?*, 30 OKLA. L. REV. 298 (1977); Note, *supra* note 206, at 873-74; Comment, *supra* note 206, at 583-89.

was the defendant in a better position than the plaintiff to discover and replace the faulty valve stem, but it was also better able to allocate the risk by obtaining insurance against the loss. Most importantly, the plaintiff relied on the reputation of the defendant's business and on the skill and expertise of his employees. Despite these strong policy considerations, the South Carolina Supreme Court declined to find the defendant in *DeLoach* liable.

Although courts have been reluctant to extend strict liability to pure service transactions, some have applied the doctrine to sale-service hybrid transactions.[218] In the typical hybrid transaction, a service is rendered and a product is either consumed or supplied during the course of the service. While the South Carolina Supreme Court has not ruled directly on the subject, dictum in *DeLoach* indicates that the court would recognize a strict liability cause of action in a sale-service hybrid transaction in which a defective product was supplied or used.[219]

At this time, it appears clear that South Carolina will not recognize a cause of action in strict liability in tort unless a defective product is present in the transaction, whether the transaction is one of sales or services. Expansion of strict liability in this area will depend on the court's interpretation of "product" and the further evolution of that term.

Judy G. Meffert

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218. Decisions allowing strict liability include: O'Laughlin v. Minn. Natural Gas Co., ___ Minn. ___, 253 N.W.2d 826 (1977) (subcontractor supplied and installed floor furnace that injured the plaintiff); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971)(contractor liable for installation of defective gas fitting in course of remodeling home); Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969)(beauty parlor liable for application of defective permanent wave solution). *But see* Magrine v. Krasnica, 53 N.J. 259, 250 A.2d 129 (1969)(dentist's defective hypodermic needle broke off in patient's jaw); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968)(optometrist fitting contact lenses). Those cases not imposing strict liability frequently concern professionals. *See generally* Henderson, *supra* note 206, at 1050-56; Sales, *supra* note 206, at 25-36.

A fierce controversy has developed in cases regarding the sale of impure blood. Although the sale of blood is considered a service rather than a sale of goods, some courts have applied strict liability. In South Carolina, the issue is governed by § 44-43-10 of the South Carolina Code, which states: "Certain warranties shall not be applicable to transfers of human tissues and blood." *See generally* Annot., 45 A.L.R.3D 1364 (1972).

219. 275 S.C. at 545, 273 S.E.2d at 769.