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TORTS

I. STATUTE LIMITING LIABILITY OF CHARITABLE HOSPITAL OVERRULED

In *Hasell v. Medical Society of South Carolina, Inc.*[1] the South Carolina Supreme Court overruled a legislatively imposed liability limit for charitable hospitals. The court based its holding on a 1981 supreme court decision which abolished the doctrine of charitable immunity in South Carolina.[2] The overruling of section 44-7-50 of the South Carolina Code[3] is significant because it leaves uncertain the extent of liability a charitable or governmental hospital may incur. *Hasell* also brings into question the role of the South Carolina Supreme Court in the state's tripartite system of government.

In *Hasell* the plaintiff sued Roper Hospital to recover $750,000 in damages for injuries she allegedly suffered while being treated at the facility.[4] At a pretrial hearing the trial judge relied on the liability limit of section 44-7-50 in striking from the *ad damnum* clause all allegations for actual damages exceeding the sum of $100,000.[5] On appeal Hasell asserted that the trial judge's reliance on section 44-7-50 was misplaced. Hasell contended that section 44-7-50 was overruled by the court's decision to abolish charitable immunity in *Fitzer v. Greater*

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1. 288 S.C. 318, 342 S.E.2d 594 (1986).

2. Fitzer v. Greater Greenville S. C. YMCA, 277 S.C. 1, 282 S.E.2d 230 (1981). For further discussion concerning *Fitzer*, see *Torts, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 215 (1982); Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R.4TH 517 (1983).

3. S.C. CODE ANN. § 44-7-50 (Law. Co-op. 1985). This statute was a response to Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977), which held that a charitable hospital was liable for the tortious conduct of its servants if the aggrieved party could establish that the injury was due to the hospital's heedless and reckless act. One month after this decision the South Carolina General Assembly enacted § 44-7-50 and abrogated the doctrine of charitable immunity as it applied to charitable and governmental hospitals. The legislature did, however, place a $100,000 limit on the amount of actual damages recoverable.

4. Record at 2.

5. Record at 14.

Greenville South Carolina YMCA,[6] and that section 44-7-50 denied Hasell equal protection of the laws because the section treated similarly situated tortfeasors differently.[7]

In side-stepping the difficult constitutional questions associated with liability limits in medical malpractice actions,[8] the court took the novel approach of overruling both section 44-7-50 and prior statutory and case law inconsistent with its holding in *Fitzer*.[9] The court stated that "*Fitzer* rendered charities of all kinds subject to suit to the same extent as all other persons, firms and corporations, allowing recovery of both actual and punitive damages."[10]

The propriety of the court's invalidation of a statute on the premise that the statute is wrong or obsolete, without a determination that the statute is unconstitutional, finds no support in South Carolina precedent.[11] In addition, the court's action seems incongruous in light of the South Carolina Constitution which requires separation of powers between the legislative, judicial, and executive branches of government.[12] Further, other jurisdictions unanimously have held that, absent a finding by the court that some specific constitutional guarantee has been violated, the court has no power to alter or repeal a statute.[13] While the *Fitzer* holding appears to be limited to the invalidation of legislation that modifies a judicially created doctrine,[14] it still places South Carolina in the unique position of establishing, rather

6. 277 S.C. 1, 282 S.E.2d 230 (1981).

7. Brief of Appellant at ii.

8. 288 S.C. at 321, 342 S.E.2d at 594. The Reply Brief of Appellant states that "of the seven state courts that have considered the constitutionality of statutes limiting recovery in medical malpractice actions, five of those have declared such statutes unconstitutional." Brief of Appellant at 1. Although the South Carolina Supreme Court has yet to consider the constitutionality of medical malpractice limitations, the following South Carolina cases represent successful constitutional challenges to legislation providing for differential treatment of tortfeasors: Elam v. Elam, 275 S.C. 132, 268 S.E.2d 109 (1980); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), *cert. denied*, 444 U.S. 1078 (1980); Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

9. 288 S.C. at 321, 342 S.E.2d at 595.

10. *Id.*

11. *See* Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958); O'Hagan v. Fraternal Aid Union, 144 S.C. 84, 141 S.E. 893 (1928).

12. S.C. CONST. art. I, § 8.

13. 16 AM. JUR. 2D *Constitutional Law* § 316 (1979).

14. 288 S.C. at 321, 342 S.E.2d at 595.

than joining, the minority position.

Notwithstanding the propriety of the supreme court's action, the invalidation of section 44-7-50 leaves uncertain the extent of liability that a charitable or governmental hospital may incur. This uncertainty has been compounded by two recently enacted statutes that limit the liability of both charitable organizations[15] and governmental health care facilities.[16] Although charitable hospitals and governmental hospitals were treated as one for the purposes of section 44-7-50, the more recent legislation will require a separate analysis for each type of institution.

In *Hasell* the court clearly intended for the liability of a charitable hospital to be unlimited under the *Fitzer* rationale.[17] Section 33-55-210 of the South Carolina Code, however, generally limits the liability of a charitable organization to $200,000, and the section could be interpreted again to limit the liability of charitable hospitals.[18] Section 33-55-210 applies to, *inter alia*, organizations and corporations that are exempt from income taxation under section 501(c)(3) of Title 26 of the United States Code.[19] In accordance with interpretations issued by the Commissioner of Internal Revenue, charitable hospitals meeting certain qualifications are exempt from the payment of income tax under this section.[20]

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15. S.C. CODE ANN. § 33-55-210 (Law. Co-op. Supp. 1985).

16. South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986).

17. 288 S.C. at 321, 342 S.E.2d at 595.

18. Section 33-55-210 reads, in pertinent part, as follows:

> Any person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may only recover in any action brought against the charitable organization for the actual damages he may sustain in an amount not exceeding two hundred thousand dollars . . . .

S.C. CODE ANN. § 33-55-210 (Law. Co-op. Supp. 1985). Section 33-55-210 went into effect on June 28, 1984, approximately three years after the court's decision in *Fitzer*. The court in *Hasell* noted the existence of this section, stating that "a statute enacted two years after the injury cannot be used to deny appellant rights which she enjoyed at the time of the injury." 288 S.C. at 321, 342 S.E.2d at 595.

19. S.C. CODE ANN. § 33-55-200 (Law. Co-op. Supp. 1985) provides the following definition for a charitable organization:

> " 'Charitable organization' means any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code . . . ."

20. Rev. Rul. 56-185, 1956-1 C.B. 202, as modified by Rev. Rul. 69-545, 1969-2 C.B. 117.

The better argument concerning the applicability of section 33-55-210 to charitable hospitals, however, is that these institutions would not qualify under the liability limits of that section. Historically, both the legislature and the judiciary have treated charitable hospitals as distinct from other charitable organizations with regard to charitable immunity.[21] Also, the language of section 33-55-230 of the South Carolina Code implies that the subject areas covered under section 33-55-210 are different from those previously covered under section 44-7-50.[22] Regardless of how the court decides the issue of applicability, any injury incurred after *Fitzer*, but before the enactment of section 33-55-210, is actionable without liability limits.[23]

The South Carolina Tort Claims Act,[24] while clarifying the liability of county and state owned medical facilities, did not address liability limits for charitable hospitals. Under the Act, the liability of a government health care facility[25] is limited to $250,000 per person and $500,000 per occurrence as of July 1, 1986.[26] The liability of a governmental health care facility for torts occurring prior to the effective date of the Tort Claims Act, however, is less clear. Although *Hasell* removed the liability limits afforded to a charitable hospital by section 44-7-50,[27] the doctrine of sovereign immunity may preclude the liability of governmental health care institutions for torts occurring before July 1, 1986.[28] Because *Hasell* explicitly addressed only "charitable"

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21. *See supra* note 3 and accompanying text. *See generally* Annotation, *supra* note 2.

22. S.C. CODE ANN. § 33-55-230 (Law. Co-op. 1987) provides as follows: "The provisions of §§ 33-55-200 through 33-55-230 are supplemental and in addition to the provisions of Section 3 of Act 182 of 1977 and shall not be deemed to have repealed or otherwise modified that provision of law."

23. 288 S.C. at 321, 342 S.E.2d at 595.

24. S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986).

25. S.C. CODE ANN. § 15-78-30(j) (Law. Co-op. Supp. 1986) reads in part:

> "Governmental health care facility" means one which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance and which is tax-exempt under state and federal laws as a governmental entity and from which no part of its net income from its operation accrues to the benefit of any individual or nongovernmental entity. . . .

26. The liability limits of the Tort Claims Act are codified in S.C. CODE ANN. § 15-78-120(a) (Law. Co-op. Supp. 1986).

27. 288 S.C. at 321, 342 S.E.2d at 595.

28. Prior to the enactment of § 44-7-50, the South Carolina Supreme Court held that the doctrines of both charitable and sovereign immunity barred recovery against

immunity, this interpretation seems plausible.[29]

The impact of the court's decision to overrule section 44-7-50 is important because it leaves uncertain a previously settled area of law. Although it is clear that the General Assembly is free to limit again the liability of a charitable hospital,[30] the level of liability to which these institutions will be subjected in the interim between *Hasell* and new legislation is less certain. The few remaining governmental and charitable health care facilities[31] would be well advised to increase their levels of liability coverage to safeguard against the uncertainty in this area.

James H. Lucas

II. Social Host Not Liable to Injured Third Party at Common Law

On an issue of first impression, the South Carolina Court of Appeals held in *Garren v. Cummings and McCrady, Inc.*[32] that a social host is not liable at common law to a third party for gratuitously serving alcohol to an intoxicated adult guest who negligently injures that third party.[33] The court reasoned that the proper course for a third party harmed by an intoxicated guest is to sue the guest directly.[34]

Slider, an employee of the defendant Cummings and McCrady, allegedly became intoxicated from alcohol served at a company office party. While driving home after the party, Slider

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county hospitals for personal injuries caused by their employees. Belton v. Richland Memorial Hosp., 263 S.C. 446, 211 S.E.2d 241 (1975). Although the court overruled sovereign immunity in McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), the abolition only applied unconditionally to cases filed after July 1, 1986.

29. "*Fitzer* rendered *charities* . . . subject to suit to the same extent as all other persons, firms, and corporations, allowing recovery of both actual and punitive damages." 288 S.C. at 321, 342 S.E.2d at 595 (emphasis added).

30. *Cf.* 285 S.C. at 256, 329 S.E.2d at 748 (discussion of the legislature's role in establishing liability limits for political subdivisions after the abolition of sovereign immunity).

31. According to statistics provided by the South Carolina Department of Health and Environmental Control, only 15 of the 70 general hospitals in South Carolina are charitable, while 17 are county or state owned. Over the past five years, the number of private hospitals has increased 27% in South Carolina.

32. 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986). This case has not been appealed to the supreme court.

33. *Id.* at 349, 345 S.E.2d at 509.

34. *Id.* at 350, 345 S.E.2d at 510.

crossed the center line and collided with the automobile of the plaintiff Garren, who was injured.[35] Garren sued Cummings and McCrady, alleging *respondeat superior* and social host liability for negligence.[36] The trial court found Slider was outside the scope of employment at the time of the accident and granted the defendant summary judgment on the issue of *respondeat superior*; the plaintiff did not appeal this issue.[37] The defendant demurred to the allegation of social host liability, but the trial judge held that "sufficient legal basis exists in . . . South Carolina to allow . . . [recovery on this] cause of action."[38]

In reversing the lower court, the court of appeals distinguished its holding in *Christiansen v. Campbell*[39] in which the court had found that a licensed vendor has a civil duty not to serve alcohol to an intoxicated patron.[40] In *Christiansen* the plaintiff alleged that a bartender continued to sell beer to him despite the plaintiff's obvious inebriation. After departing the bar on foot, the plaintiff was struck by an automobile; the patron later sued the bartender for negligence.[41] The court in *Christiansen*, however, predicated its holding upon a statute[42] and not the common law. In addition, the alcohol was furnished by sale and not gratuitously as in *Garren*. Last, the *Christiansen* defendant owed a duty only to the intoxicated patron,[43] not to a

35. *Id.* at 349, 345 S.E.2d at 509.

36. Record at 1.

37. *Id.* Since the issue of *respondeat superior* was not before the court of appeals, an employer's liability for injuries caused by an employee who has become intoxicated at company parties remains undecided. The weight of authority, however, suggests that employers will not be held accountable. *See* DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1976); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970); Meany v. Newell, 367 N.W.2d 472 (Minn. 1985); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975). *But cf.* Chastain v. Litton Sys. Inc., 694 F.2d 957 (4th Cir. 1982) (remanded for determination of whether drunken driver was within scope of employment).

38. Record at 14.

39. 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985).

40. *Id.* at 168, 328 S.E.2d at 354.

41. *Id.* at 166, 328 S.E.2d at 353.

42. The applicable statute provides in pertinent part: "No holder of a permit authorizing the sale of beer . . . shall knowingly . . . [s]ell beer or wine to any person while such person is in an intoxicated condition . . . ." S.C. CODE ANN. § 61-9-410(2) (Law. Co-op. 1976). South Carolina has no dram shop statute. It should be noted that a case cited by the court of appeals in *Garren*, supporting the view that there was no cause of action in negligence against a social host at common law, did find a cause of action for reckless or wanton conduct. Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980).

43. 285 S.C. at 168, 328 S.E.2d at 354. Unlike the claim in *Garren*, the plaintiff was

third party.

The court of appeals supported its holding in *Garren* on policy grounds: "A change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations [and is] best conducted by the legislature using all of the methods it has available to it to invite public participation."[44] Indeed, the legislatures of both California and Minnesota have abrogated state court recognition of social host liability.[45]

In *Garren* the court of appeals aligned South Carolina with the majority of jurisdictions[46] which hold that "it is not a tort at common law to . . . give intoxicating liquor to ordinary able-bodied men."[47] The reasoning frequently offered for this rule is that the "drinking of the liquor, not the furnishing of it, is the proximate cause of the injury."[48] Nevertheless, two state supreme courts recently extended liability to social hosts purely upon a common-law negligence theory. The New Jersey case of *Kelly v. Gwinnell*[49] involved a social host who served liquor in

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the intoxicated party in *Christiansen*.

44. 289 S.C. at 350-51, 345 S.E.2d at 510.

45. In Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the court recognized the liability of social hosts. The cause of action was subsequently abolished by the legislature in CAL. CIV. CODE § 1714(c) (West 1985). Similarly, in Minnesota, the court's imposition of social host liability in Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972), premised upon a statutory violation, prompted the state legislature to delete the words "or giving" from the law. MINN. STAT. § 340.95 (1980); *accord* Gady v. Coleman, 315 N.W.2d 593 (Minn. 1982).

46. *See* Chastain v. Litton Sys., Inc., 527 F. Supp. 527 (W.D. N.C. 1981), *vacated on other grounds*, 694 F.2d 957 (4th Cir. 1982); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985); Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985); Settlemyer v. Wilmington Veterans Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984); Johnson v. Paige, 47 Or. App. 1177, 615 P.2d 1185 (1980); Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983). *See generally* 48(A) C.J.S. *Intoxicating Liquors* § 444 (1981 & Supp. 1986); 45 AM. JUR. 2D *Intoxicating Liquors* §.553 (1969 & Supp. 1986). For a comprehensive overview of liquor liability in all fifty states, see Ling v. Jan's Liquors, 237 Kan. 629, 648-51, 703 P.2d 731, 739-42 (1985).

47. 285 S.C. 164, 169, 328 S.E.2d 351, 355 (Ct. App. 1983). Courts are more inclined to find culpability when a minor is involved. Liability, however, is usually based upon a statute and not the common law. *See, e.g.*, Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985); Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). Although the South Carolina appellate courts have not considered liability when minors are involved, see S.C. CODE ANN. § 61-9-410(1) (Law. Co-op. 1976) which forbids the sale of alcohol to minors.

48. 285 S.C. at 169, 328 S.E.2d at 355.

49. 96 N.J. 538, 476 A.2d 1219 (1984).

his home to an intoxicated adult guest. While driving home, the guest drove his vehicle into the automobile of a third party; the injured third party sued both the guest and the social host. The New Jersey Supreme Court found the social host liable to the plaintiff.[50] Unlike the development in California and Minnesota, where the legislatures abrogated the judicially created cause of action, the New Jersey Legislature appears prepared to agree with the supreme court's ruling.[51] Furthermore, in *McGuiggan v. New England Telephone & Telegraph Co.*[52] the Supreme Court of Massachusetts held that negligent social hosts may be held liable at common law for injuries to guests and third parties.[53] Nonetheless, the decision in *Garren* seems fair when one compares the relative financial positions of the licensed vendor and the social host. The vendor can pass increased insurance costs to his customers. It also seems unfair to hold a social host liable merely for giving what is usually considered a gift. Tort goals of adequate compensation and accident prevention, however, favor

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50. *Id.* at 541, 476 A.2d at 1220. The New Jersey Supreme Court and the South Carolina Court of Appeals both used policy bases to support converse holdings. *Compare id.* at 545, 476 A.2d at 1222 ("the imposition of such a duty by the judiciary seems . . . fully in accord with the [s]tate's policy . . . [that of] the reduction of drunken driving") *with* 289 S.C. at 350-51, 345 S.E.2d at 510 (social host liability is a decision for the legislature).

51. A bill has passed second reading in the New Jersey Senate which affirms social host liability. S. 1152 & 545, 204th N.J. Leg., 2d Sess. (1986) provides as follows:

> [A] third party may recover damages from a social host when the following three factors are present: a. the social host willfully and knowingly provides alcoholic beverages either (1) to a social guest who is visibly intoxicated in his presence; or (2) to a social guest who is visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and b. the social host provides alcoholic beverages to a social guest under circumstances that create a reasonably foreseeable risk of harm to others and the host fails to exercise reasonable care and diligence to avoid the foreseeable risk; and c. the injury arises out of an accident caused by the negligent operation of a vehicle by a social guest who was provided alcoholic beverages by a social host.

The bill provides that no social host will be liable for damages to a social guest, or the guest's estate, heirs, or assigns sustained as a result of the social host's willful and knowing provision of alcoholic beverages.

52. 398 Mass. 152, 496 N.E.2d 141 (1986). *See generally* Linkmark, *View of Social Host Liability Expanded in Mass.*, NAT'L LAW J., Sept. 8, 1986, at 5 (discussing *McGuiggan* and sister cases).

53. 398 Mass. at 162, 496 N.E.2d at 146. *See also* Langemann v. Davis, 398 Mass. 166, 495 N.E.2d 847 (1986) (applying the *McGuiggan* test to a minor guest). *Cf.* Worchester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 496 N.E.2d 158 (1986) (social host liability is contained within the general coverage of certain homeowners' policies).

social host liability. To the innocent motorist or pedestrian who sustains serious injury from a drunken driver, it makes little difference whether the alcohol was provided free of charge; the victim has suffered a loss and needs compensation in either case. Moreover, as New Jersey's post-*Gwinnell* experience illustrates, social hosts might respond to increased liability by adopting precautionary measures in an effort to prevent their guests from incurring or inflicting serious injury.[54]

The court of appeals' holding in *Garren* sets a broad precedent based upon a narrow factual situation. Apparently, any extension of liability to social hosts will now require a supreme court decision, a legislative enactment,[55] or a statutory violation.[56]

Warren Moise

III. Social Fraternity Liable for Causing Initiate's Death

In *Ballou v. Sigma Nu General Fraternity*[57] the South Carolina Court of Appeals held a social fraternity liable for causing a new member to die from acute intoxication during initiation rites.[58] Thus, South Carolina joins the growing trend of imposing a stricter accountability for alcohol-related injuries.[59]

The cause of action arose during "hell night," a mandatory initiation party in which Sigma Nu's active brothers informally inducted new members, or pledges, into the fraternity. All participants understood that the pledges "would be pretty much ex-

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54. Six months after *Gwinnell*, a survey of 75 New Jersey employers revealed that 60% had devised new rules regarding alcohol at holiday office parties. Sullivan, *Jersey Hosts Keeping Drunks From Driving*, N.Y. Times, Dec. 30, 1984, § 1, at 16, col. 2-3. *See generally* Comment, *Social Hosts and Drunken Drivers: A Duty To Intervene?*, 133 U. Pa. L. Rev. 867, 873-94 (1985) (discussing various theories of liability and suggesting a duty to intervene).

55. The writer is unaware of any legislation pending in the South Carolina General Assembly addressing social host liability.

56. *Cf.* S.C. Code Ann. § 61-9-410 (Law. Co-op. 1976) (forbids sale of beer or wine to minors). *But see* Cantor v. Anderson, 126 Cal. 3d 124, 178 Cal. Rptr. 540 (1986) (statute exculpating social hosts does not apply when hosts serve alcohol to intoxicated guests possessing exceptional mental or physical disabilities).

57. 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986).

58. *Id.* at 142, 352 S.E.2d at 489.

59. *See generally* Bender, *Tort Liability for Serving Alcohol: An Expanding Doctrine*, 46 Mont. L. Rev. 381 (1985).

pected to do a good bit of drinking."[60] Throughout the evening, the active brothers supplied Ballou and the other inductees alcohol and pressured the pledges to drink heavily. Shortly before midnight, a pledge and three Sigma Nu members noticed Ballou lying unconscious on a couch; his pale skin color and unresponsiveness concerned them. Although the four discussed taking Ballou to the campus infirmary, they left him unattended and found him dead the next morning. An autopsy revealed that he died from acute alcohol intoxication.[61] Ballou's father subsequently brought a wrongful death action against Sigma Nu General Fraternity, the local chapter's parent organization, alleging negligence and recklessness. The jury awarded $200,000 actual damages and $50,000 punitive damages to the plaintiff. Sigma Nu appealed the judge's denial of motions for a directed verdict and judgment *non obstante veredicto*.

To recover in negligence a plaintiff must show the following: (a) A duty of care owed by the defendant; (b) a breach of that duty by a negligent act or omission; and (c) damages proximately caused by the breach.[62] The court of appeals held that Sigma Nu owed a duty to Ballou under several theories of tort liability. Initially, the court found a special relationship[63] existed between Sigma Nu and Ballou, its pledge. For support the court cited *Easler v. Hejaz Temple of Greenville*[64] in which the South Carolina Supreme Court held that an unincorporated fraternal organization owed a duty not to harm new members during initiation ceremonies.[65]

In addition to owing a duty based on its special relationship to its initiate, Sigma Nu owed a duty to Ballou because the fraternity brothers' coercive acts were primarily responsible for creating Ballou's dangerous state of intoxication. The active members, therefore, had a duty to take reasonable measures to help

60. 291 S.C. at 143, 352 S.E.2d at 491.

61. Ballou's blood alcohol level was .46. *Id.* at 145, 352 S.E.2d at 492.

62. Crowley v. Spivey, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985).

63. " 'Whether the relation between two persons is such as gives rise to a duty to use care is a pure question of law for the court to determine.' " 291 S.C. at 146, 352 S.E.2d at 492 (quoting 57 AM. JUR. 2D *Negligence* § 36, at 384 (1971)); *accord* Griffin v. Blankenship, 248 N.C. 81, 102 S.E.2d 451 (1958); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950). *Cf.* RESTATEMENT (SECOND) OF TORTS § 314 (recognizing that special relationships give rise to a duty between the parties).

64. 285 S.C. 348, 329 S.E.2d 753 (1985).

65. 291 S.C. at 146, 352 S.E.2d at 492.

Ballou and to prevent any further harm.[66] In spite of this, "[t]he evidence reasonably suggests . . . that after [Ballou] became hopelessly drunken as a result of consuming an excessive amount of the alcohol so furnished him, Sigma Nu became aware of his perilous condition but did not afford him the assistance his condition demanded."[67]

Upon finding that Sigma Nu owed a duty of due care to Ballou, the court of appeals rejected the fraternity's contention that Ballou's voluntary consumption of alcohol, and not Sigma Nu's furnishing of it, was the proximate cause of his death.[68] The court cited *Christiansen v. Campbell*[69] in which it held that the sale of alcohol to an already intoxicated man can be the proximate cause of any injuries sustained by the buyer.[70] Therefore, the jury in *Sigma Nu* might have found that the active brothers proximately caused Ballou's death by providing him with alcohol when he was already inebriated and then prompting him to consume even more.[71] Moreover, the failure of the

66. *Id.* at 147, 352 S.E.2d at 493. The creation of risk theory provides that "if the defendant's own negligence has been responsible for the plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 377 (5th ed. 1984) [hereinafter PROSSER & KEETON]; 65 C.J.S. *Negligence* § 63, at 857 (1966). This duty applies, a fortiorari, to intentional torts.

67. 291 S.C. at 146, 352 S.E.2d at 493. The quoted passage undoubtedly refers to the three active members' failure to aid Ballou after discovering him pale and unresponsive on the couch.

68. *Id.* at 148, 352 S.E.2d at 494.

69. 285 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985). In *Christiansen* a bartender continued to sell alcohol to a customer who was visibly intoxicated. A car struck the patron while he was leaving the nightclub on foot. Unlike the holding in *Sigma Nu*, the duty in *Christiansen* arose under a statute which forbade the sale of alcohol to intoxicated patrons: "We therefore hold a violation of section 61-9-410 . . . can give rise to a cause of action . . . ." 285 S.C. at 168, 328 S.E.2d at 354.

70. *Id.* at 170, 328 S.E.2d at 355. *Christiansen*, in turn, relied upon a nineteenth century slave case, Harrison v. Berkley, 32 S.C.L. 525 (1 Strob. 1847). The courts in *Christiansen* and *Harrison* dealt with alcohol sold by a vendor. The *Sigma Nu* court apparently extended this reasoning to alcohol provided gratuitously. *See also* Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956) (unlawful sale of liquor to intoxicated man, coupled with knowledge that he had bet to consume the entire bottle, was proximate cause of death); McCue v. Klein, 60 Tex. 168 (1883) (inducing one who is intoxicated to drink to excess is proximate cause of death).

71. 291 S.C. at 149, 352 S.E.2d at 494. Because of the fraternity members' coercive behavior on "hell night" and the award of punitive damages, the court noted that the jury necessarily had found an intentional tort was committed. Therefore, any contributory negligence on Ballou's part would not bar recovery. *Id.* at 150, 352 S.E.2d at 495; *accord* Jowers v. Dupriest, 249 S.C. 506, 154 S.E.2d 922 (1970) (contributory negligence

fraternity members to assist Ballou after they discovered him unconscious could also have been deemed a proximate cause of his death.[72]

Although the court in *Sigma Nu* held the local fraternity chapter culpable for Ballou's death, the plaintiff had the further obstacle of proving that an agency relationship existed between the national association and the local branch. The court found such a relationship by reasoning that even though the local chapter may not have had express authority to include hazing and excessive drinking in its initiation ritual, it nonetheless acted within the scope of apparent authority on "hell night."[73] The

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no defense if defendant's torts are willful). In addition, the jury could have found that although Ballou voluntarily assumed the known risk of hazing and intoxication, he did not "incur the risk of the dangers created by Sigma Nu's . . . promoti[on] of *extreme* intoxication." 291 S.C. at 151, 352 S.E.2d at 495 (emphasis added); *see* Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979); RESTATEMENT (SECOND) OF TORTS § 283 comment d (1965). Finally, the court refused to apply the last clear chance doctrine. 291 S.C. at 157, 352 S.E.2d at 498. This theory stems from the English case of Davies v. Mann, 152 Eng. Rep. 588 (1842), and provides that a "plaintiff might, by proper care, have avoided [the accident]." PROSSER & KEETON, *supra* note 66, at 463. *See generally* MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

72. 291 S.C. at 149, 352 S.E.2d at 494; *see* Ibach v. Jackson, 148 Or. 92, 35 P.2d 672 (1934); *see also supra* note 67 and accompanying text. Although his fraternity brothers did not take Ballou to the campus infirmary, a pledge did turn his face downward to prevent him from choking on his own vomit. Thus, the issue of the South Carolina Good Samaritan Act arose. S.C. CODE ANN. § 15-1-310 (Law. Co-op. 1976) [hereinafter Samaritan Act]. The Samaritan Act reads as follows:

> Any person, who in good faith gratuitously renders emergency care at the scene of an accident or emergency to the victim thereof, shall not be liable for any civil damages for any personal injury as a result of any act or omission by such person in rendering the emergency care . . . except acts or omissions amounting to gross negligence or willful or wanton misconduct.

The fraternity members contended that by turning Ballou's face downward, they gratuitously rendered him emergency assistance, and therefore were not liable for subsequently failing to take him to the infirmary. The court declined to apply the Samaritan Act because the jury found willful conduct on the fraternity's part—a ruling supported by the trial record. A few of the Sigma Nu brothers intentionally did not take Ballou to the infirmary because they "didn't want to embarrass [him]." Record at 108; *see also* Record at 143-44.

73. 291 S.C. at 152, 352 S.E.2d at 496. The court stated the following:

> Included within the scope of the agency are "all acts within the apparent scope of the authority conferred on the agent[] by its principal[], as well as those expressly authorized or necessarily implied from express authority [and] all acts within the scope of the authority which the principal held the agent[] out to the world to possess."

Id. (quoting Derrick v. Sovereign Camp, W.O.W., 115 S.C. 437, 442, 106 S.E. 222, 224 (1921) (Cothran, J., concurring)); *see also* RESTATEMENT (SECOND) OF AGENCY § 8 & comment b (1958) (apparent agency is "the power to affect the legal relations of another

national organization required all new members to be inducted by the local chapters; the local fraternity, in turn, required participation in "hell night." "That the local chapter acted within the apparent scope of its authority is shown by [Ballou's] implicit obedience to that authority."[74]

In reaching its decision, the *Sigma Nu* court distinguished *Garren v. Cummings & McCrady, Inc.*[75] in which it refused to hold a social host liable for injuries inflicted upon third parties by the host's intoxicated guests:[76] "Here, the action [did] not involve a third party [and] there is . . . evidence that the party furnishing the alcohol prompted its excessive consumption . . . ."[77]

Sigma Nu used the common law to achieve a result similar to that reached by statute in *Christiansen v. Campbell.*[78] In both cases the court of appeals recognized a duty not to serve alcohol to visibly intoxicated persons. Although *Sigma Nu* involved intentional conduct, authority cited in the opinion seems to indicate that the court might extend the duty to those whose acts are merely negligent.[79] Such an expansion of liability would seem congruent with the legislature's clearly defined policy of reducing alcohol-related accidents.[80] Practitioners should be

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person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third parties." *Id.* § 8, at 30. The manifestations "may be made . . . by signs, by advertising [or] by authorizing the agent to state that he is authorized." *Id.* § 8 comment b, at 31).

74. 291 S.C. at 152-53, 352 S.E.2d at 496; *see* Supreme Lodge of W.L.O.M. v. Kenny, 198 Ala. 332, 73 So. 519 (1916); Easler v. Hejaz Temple of Greenville, 285 S.C. 348, 329 S.E.2d 753 (1985); Mitchell v. Leech, 69 S.C. 413, 48 S.E. 290 (1904).

75. 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986).

76. *Id.* at 351, 345 S.E.2d at 509.

77. 291 S.C. at 149-50, 352 S.E.2d at 494.

78. *See supra* note 69 and accompanying text. Although the plaintiff's amended complaint alleged violation of a statute because Ballou was served alcohol while under the age of twenty-one, Record at 7, the court of appeals did not discuss this issue in the opinion.

79. " 'One whose *negligence* . . . has resulted in an injury to another is under a legal duty . . . to care for such other . . . .' " 291 S.C. at 147, 352 S.E.2d at 493 (emphasis added) (quoting 65 C.J.S. *Negligence* § 63, at 857 (1966)); *see* sources cited *supra* note 66.

80. To reduce the tremendous toll on property damage and human lives, the legislature and courts of South Carolina have, with the exception of *Garren*, consistently followed a sapient course in imposing stricter penalties for alcohol abuse. *See supra* note 69 and accompanying text; *see also* S.C. CODE ANN. § 61-9-410 (Law. Co-op. 1976). For a discussion of the national trend, see Bender, *supra* note 59.

aware, however, that in neither *Sigma Nu*, *Christiansen* nor *Garren* has the court found a provider of alcohol liable to *third persons* injured by the intoxicated consumer.

Warren Moise

IV. Liability of Information Suppliers Expanded

In *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*[81] the supreme court held that when a consultant undertakes to analyze and compare objectively the attributes of commercial competitors, the consultant has a duty to exercise due care with regard to the commercial competitor being critiqued.[82] *Ports Authority* expands the traditional scope of liability imposed on a professional supplier of information.[83]

The case arose when the Georgia Ports Authority contracted with the defendant, Booz-Allen and Hamilton, Inc., a consulting firm, to prepare a comparative report assessing the respective merits of the Savannah port and the Charleston port for commercial traffic. The plaintiffs charged that the consulting firm was negligent in making statements which portrayed the Charleston port as inferior, since reasonable investigation would have proven the statements to be false.[84] The plaintiffs further alleged that the resulting report was highly favorable to the Savannah port, and that when distributed to present and potential domestic and foreign customers, the report caused decreased traffic and economic damages to the Charleston Port.[85] The United States Court of Appeals for the District of Columbia certified to the South Carolina Supreme Court the question of whether any of the plaintiffs could state a valid claim for negli-

81. 289 S.C. 373, 346 S.E.2d 324 (1986).

82. *Id.* at 376-77, 346 S.E.2d at 326. The court refused to extend this duty to individuals who relied on the shipping traffic in the Charleston port for commercial profit. *See infra* note 88 and accompanying text.

83. The scope of the traditional duty of care was stated classically and succinctly in the landmark case of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922), in which the court held a duty of care is owed "not only to him who ordered, but to him also who relied." *Id.* at 242, 135 N.E. at 277; *see* cases cited *infra* note 90.

84. The false information allegedly included facts about dimensions of vessel turning basins, width of channels, range of tide, clearance and channels under bridges, and other technical matters. Brief of Appellant at 3.

85. *Id.*

gence against the consultant who prepared the report.[86]

The supreme court began its analysis by observing that a duty arising from a relationship between two parties must exist before liability may be imposed for negligence. The court noted that the necessary relationship may arise between one who prepares a report pursuant to a contract and third parties who the preparer knows or should know will rely on or be influenced by the information contained in the report.[87] Contrary to this general rule, however, the court held that the consultant owed a duty of due care to a subject of the report—the commercial competitor of the consultant's employer—even though that competitor was a nonreliant third party for whose use the information was not intended. The holding was limited, though, to cases in which the consultant prepares the report "for the purpose of giving one [competitor] a market advantage over the other."[88]

While the *Ports Authority* decision rests on a narrow set of facts, the holding significantly departs from the customary liability imposed on one who prepares a report.[89] The duty of a

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86. The Ports Authority, the Pilots Association, and two chapters of the Longshoremen's Association initially brought suit, alleging negligence, libel, and interference with contract, in federal district court against Booz-Allen and Hamilton, Inc. The court granted summary judgment for the defendant on all three causes of action because the defendant owed no duty to any of these plaintiffs. The plaintiffs appealed only the negligence cause of action and the appellate court certified this question to the South Carolina Supreme Court pursuant to S.C. SUP. CT. R. 46.

87. 289 S.C. at 376-77, 346 S.E.2d at 326. To support these contentions the court cited 57 AM. JUR. 2D *Negligence* § 51 (1971)(emphasis added), which states, *inter alia*, that "at least where the situation is not one fraught with such an overwhelming potential liability as to dictate a contrary result, . . . it has been held that a *reliant* user of information which is represented to be accurate may recover for the negligent misrepresentation if his ultimate use was foreseeable." The court also cited two cases which support the same proposition: Stagen v. Stewart-West Coast Title Co., 149 Cal. App. 3d 114, 196 Cal. Rptr. 732 (1983) (professional supplier of information is liable to those for whose guidance the information is supplied for harm caused them by their reliance on the information if the supplier fails to exercise care in obtaining and communicating the information); Carlotta v. T.R. Stark & Assocs., 57 Md. App. 467, 470 A.2d 838 (1984) (surveyor of disputed boundary line does not owe a duty of care to a nonreliant third-party adjacent landowner).

88. 289 S.C. at 377, 346 S.E.2d at 326. The court denied the existence of a duty owed to the Pilots Association and the chapters of the Longshoremen's Association, reasoning that the relationship between "a consultant and someone distantly affected by his work" was too attenuated. *Id.*

89. Prosser and Keeton conclude that "liability has not in fact been extended much beyond that indicated in [§ 552 of] the Second Restatement of Torts, if any. . . . The plaintiff must have been a person for whose use the representation was intended. . . . Also, if the plaintiff is not an identifiable person for whose benefit the state-

professional who supplies information has been extended previously to those who relied on the report, who were intended to benefit from its preparation, or for whose guidance the information was supplied.[80] The Charleston Ports Authority fit none of

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ment was intended, he must at least have been a member of some very small group of persons for whose guidance the representation was made." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 747 (5th ed. 1984) [hereinafter PROSSER & KEETON] (footnotes omitted). RESTATEMENT (SECOND) OF TORTS § 552(2) (1977) states, in pertinent part, that one's liability for negligent misrepresentation

> is limited to loss suffered (a) by the person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction which he intends the information to influence, or knows that the recipient so intends . . . .

See Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966); *see also* cases cited *infra* note 90.

90. Negligent misrepresentation has been a dynamic area of the law since the classic case of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922), and continuing beyond Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). While *Glanzer* essentially permitted recovery for foreseeable plaintiffs, 233 N.Y. at 239, 135 N.E. at 276, *Ultramares* adopted the restrictive requirement of privity, acknowledging the danger of potentially limitless liability. Chief Justice Cardozo concluded:

> A different question develops when we ask whether they owed a duty to these [plaintiffs] to make [the statement] without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.

255 N.Y. at 179, 174 N.E. at 444. The modern trend, however, has been more of a mix of the two doctrines, allowing recovery to third persons, but to a more restricted class than all foreseeable plaintiffs. The Restatement approach, *supra* note 89, is representative of this trend toward a middle ground. *See also* Rhode Island Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972); First Nat'l Bank v. Small Business Admin., 429 F.2d 280 (5th Cir. 1970); Demuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990 (E.D.N.Y. 1977); Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976); Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985); White v. Guarante, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977). *Cf.* Hochfelder v. Ernst & Ernst, 503 F.2d 1100 (7th Cir. 1974), *rev'd on other grounds*, 425 U.S. 185 (1976) (no common-law duty of defendant accounting firm to defrauded investors of brokerage firm since investors were not of limited class of foreseen plaintiffs and did not rely on the reports prepared by accounting firm); Ingram Indus., Inc. v. Nowicki, 527 F. Supp. 683 (E.D. Ky. 1981) (court went beyond the restrictive privity requirement yet confined liability under the same general principles as those expressed in RESTATEMENT (SECOND) OF TORTS § 552); Seedkem, Inc. v. Safranek, 466 F. Supp. 340 (D. Neb. 1979) (liability of accountants extended to members of limited class whose reliance on representation is specifically foreseen even though members were not themselves foreseen); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968) (accountant held liable in negligence for careless financial misrepresentations relied upon by actually foreseen class of persons; court left open question of whether liability should be extended to full limits of foreseeability). For a critical analysis of various approaches, see

these categories.

In finding a duty of care, the court ignored both authority to which it explicitly referred[91] and valid arguments advanced by the defendant.[92] Since the opinion is essentially devoid of substantive analysis, it is difficult to ascertain upon what reasoning or policy the holding is based. As written, the holding is not supported by the analysis, but actually departs from it. This departure is significant because it seemingly neglects important policy concerns commonly advanced for the limitation of liability in this area.[93] Since information can reach vast numbers of individuals and businesses, the duty to use due care has been limited traditionally to the general rule previously noted.[94] Without these restrictions, liability is potentially limitless.[95]

Ports Authority is an alarming decision because it appears unsupported by either authority or settled policy principles. This expansion of a professional's liability for the negligent preparation of a report is a new cause of action of which practitioners should be aware. Those advising professional suppliers of information should also note the possibility of their clients' increased exposure to negligence liability.[96]

Susan M. Jordan

Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 87-91, 339 S.E.2d 62, 66-69 (1986).

91. *See* cases cited *supra* note 87.

92. The defendant argued that "applying concepts of general negligence liability accepted in South Carolina and elsewhere, a non-relying [sic] third party may not sue in ordinary negligence for the preparation of a report." Brief of Respondent at 27. Indeed, the South Carolina Court of Appeals recognized this principle when it stated in dicta that "[t]he recovery of damages may be predicated upon a negligently-made false statement where a party suffers either injury or loss as a consequence of *relying* upon the misrepresentation." Winburn v. Insurance Co. of North Am., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985) (emphasis added) (citing 65 C.J.S. *Negligence* § 20, at 642 (1966)).

93. *See* 255 N.Y. at 179-80, 174 N.E. at 444.

94. *See* PROSSER & KEETON, *supra* note 89.

95. This was precisely Cardozo's concern in *Ultramares*: "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." 255 N.Y. at 179-80, 174 N.E. at 444.

96. The decision in the instant case concerned two competitors; nonetheless, it is apparent that this decision could have dangerous ramifications if applied to all cases involving market comparisons. Were a report to compare all competitors in a large industry, liability for "a thoughtless slip or blunder," 255 N.Y. at 179, 174 N.E. at 444, could be immense.

V. ACTION ARISING BEFORE JULY 1, 1986 NOT BARRED BY SOVEREIGN IMMUNITY

In *Moore v. Berkeley County*[97] the South Carolina Supreme Court reaffirmed that governmental entities will be denied the defense of sovereign immunity "in any case . . . which arose prior to July 1, 1986, provided that the governmental entity was covered by liability insurance."[98] Thus, the court clarified *McCall v. Batson*,[99] in which it had held governmental entities immune to suits *filed* before that date.[100]

The dispute in *Moore* arose from a diving injury at Durnham Creek, a boat landing leased to Berkeley County and improved by the South Carolina Department of Wildlife and Marine Resources.[101] Moore brought suit to recover for injuries which rendered him a quadriplegic[102] and alleged, *inter alia*, that the defendants were negligent in failing to warn of dangerous diving conditions.[103] Citing *McCall*,[104] the defendants moved for summary judgment on the basis of sovereign immunity, as neither had been insured at the time of the accident.[105] At the motion hearing on October 28, 1985, Moore requested a dismissal without prejudice under South Carolina Rule of Civil Procedure 41(a)(2).[106] The Wildlife Department and Berkeley County

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97. 290 S.C. 43, 348 S.E.2d 174 (1986).

98. *Id.* at 45, 348 S.E.2d at 176.

99. 285 S.C. 243, 329 S.E.2d 741 (1985). In *McCall* the supreme court eliminated sovereign immunity as a defense in South Carolina. Since that decision, the general assembly has enacted the South Carolina Tort Claims Act, thereby affirming *McCall*. S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986); *see infra* notes 109-113 and accompanying text.

100. 285 S.C. at 246, 329 S.E.2d at 743.

101. Record at 1.

102. *Id.* at 15.

103. *Id.* at 3-4.

104. *Id.* at 25.

105. *Id.* at 7, 10.

106. S.C.R. CIV. P. 41(a)(2). The rule provides that a plaintiff is allowed a voluntary dismissal as a matter of right in most situations. When the dismissal would result in prejudice to the defendant, however, the matter becomes one for the court's discretion. *Cf.* Harmon v. Harmon, 257 S.C. 154, 184 S.E.2d 553 (1971); Marlow v. Marlow, 284 S.C. 155, 325 S.E.2d 703 (Ct. App. 1985). Both cases were decided under the old circuit court rules but the supreme court stated in *Moore* that Rule 41(a)(2) would be interpreted similarly to the circuit court rule. 290 S.C. at 44 n.1, 348 S.E.2d at 175 n.1. Although the

opposed the motion claiming that, if dismissal without prejudice were allowed, Moore could refile subsequent to July 1, 1986, and could, therefore, preclude the defendants from asserting sovereign immunity. The judge, however, refused the defendants' claim of prejudice[107] and dismissed the case without prejudice. The Wildlife Department and Berkeley County appealed.

In reviewing the circuit court's decision, the supreme court found no abuse of discretion in the dismissal without prejudice. The court reasoned that since the defendants had been uninsured at the time of the accident, they could continue to assert sovereign immunity should Moore decide to refile after July 1, 1986.[108] The defendants, therefore, suffered no legal prejudice.[109]

The effect of *Moore* seems clear: even if a party did not file a lawsuit before *McCall*'s deadline of July 1, 1986, the claim still will be valid if it *arose* before that date.[110] Less certain is how the decision meshes with the South Carolina Tort Claims Act (Act).[111] Adopting the original language of *McCall*,[112] the Act allows recovery against the government on claims *filed* before July 1, 1986,[113] provided the government has liability insurance coverage. Thus, it appears that a plaintiff whose cause of action against an insured governmental entity originated before July 1, 1986, will now find himself in an anomalous situation. He is permitted to sue under *Moore* because his claim *arose* before that date; however, under the Act his complaint is barred because his

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trial record is unclear as to whether dismissal was granted as a matter of right or by discretion, the supreme court's analysis apparently centered on the latter.

107. Record at 24.

108. 290 S.C. at 45, 348 S.E.2d at 176.

109. Even if the defendants had been insured, the plaintiff might have been denied recovery under the Act because governmental entities still enjoy sovereign immunity in a broad range of activities. *Compare* Record at 4 (plaintiff's complaint) *with* S.C. CODE ANN. §§ 15-78-60(a)(15) (Law. Co-op. Supp. 1986) (government entities not liable for absence of warnings, signs, or guard rails) *and* 15-78-60(a)(16) (Law. Co-op. Supp. 1986) (government departments not liable for activities at parks, playgrounds, or areas open for recreational purposes) *and* 15-78-60(a)(26) (Law. Co-op. Supp. 1986)(governmental entities not liable for activities at boating ramps).

110. *See supra* note 99 and accompanying text.

111. S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986). The Act became effective after *McCall* but before the decision in *Moore*. *Moore*, however, was only an interpretation of *McCall* and expressed no opinion about the Act. *See* 290 S.C. at 45 n.2, 348 S.E.2d at 176 n.2.

112. S.C. CODE ANN. § 15-78-20(a) (Law. Co-op. Supp. 1986).

113. S.C. CODE ANN. § 15-78-20(c) (Law. Co-op. Supp. 1986).

claim will be *filed* after the deadline. Apparently, another supreme court opinion or a legislative amendment now will be required to harmonize *Moore* and the Act.

Although abrogation of sovereign immunity by the judiciary has engendered some inconsistencies, the supreme court's decision to uproot the outmoded doctrine in South Carolina has resulted in benefits which outweigh disadvantages. Whatever its effect upon the Act, the result in *Moore* seems equitable because it favors the victim in claims against insured defendants. Practitioners must be aware, however, of the present uncertainty surrounding the word "filing" in the Act and should be prepared for future judicial or legislative measures seeking to resolve the controversy.

Warren Moise

VI. LIBEL

A. Public Official Required to Prove Falsity in Libel Action

In *Beckham v. Sun News*[114] the South Carolina Supreme Court held that a public official first must prove the falsity of an allegedly defamatory statement before he may recover from a media defendant for libel. The decision apparently brings the state in line with the United States Supreme Court's recent ruling in *Philadelphia Newspapers, Inc., v. Hepps*[115] and its earlier holding in *Cox Broadcasting Corp. v. Cohn.*[116]

In *Beckham* the plaintiff, Thomas Beckham, was an undercover police officer with the Horry County Police Department. While employed by the police department, Beckham and his supervisor, Mike Foreman, participated in a stake-out at a location where they believed marijuana was stored. To obtain a search warrant, both men executed affidavits asserting probable cause for the search. At a subsequent hearing Foreman offered testimony based on his affidavit, but Beckham refused to testify. Beckham later told police that the information in both affidavits was false. As a result of Beckham's admission, both men were fired from the police department. The police department issued

114. 289 S.C. 28, 344 S.E.2d 603, *cert. denied*, __ U.S. __, 107 S. Ct. 646 (1986).
115. __ U.S. __, 106 S.Ct. 1558 (1986).
116. 420 U.S. 469 (1975).

a news release stating Foreman had given false testimony and that Beckham was an "active participant" in the furnishing of false information. The *Sun News* published a report that both Foreman and Beckham had testified falsely at the preliminary hearing.

Beckham subsequently brought this action for libel against the *Sun News* and the Sun News Publishing Company. At trial the jury awarded Beckham $1,000,000 actual damages and $2,500,000 punitive damages. Upon the defendant's motion, however, the trial judge reduced the punitive damages to $1,000,000. The *Sun News* appealed the verdict and claimed on appeal that the trial judge erred in charging the jury that, in a libel action, the defendant has the burden of proving the truth of the matter published as a defense. The newspaper claimed public officials must prove falsity as an element of their case, and the defendants do not have the burden to prove truth. The South Carolina Supreme Court agreed and reversed the lower court's ruling.

Historically, South Carolina courts have presumed any allegedly libelous material to be false and printed with malice.[117] In fact, in 1914 the supreme court held that the plaintiff must simply allege the falsity of the statement in his complaint with no showing of proof.[118] Truth was an affirmative defense which the defendant had to plead and prove.[119] In 1964, however, the United States Supreme Court in *New York Times v. Sullivan*[120] interpreted the first amendment to require that a public official suing for libel must plead and prove actual malice. For a statement to rise to the *Sullivan* "actual malice" level the defendant must have made the statement with knowledge of falsity or with reckless disregard for whether it was false.[121] The South Carolina Supreme Court subsequently adopted the *Sullivan* standard

117. Pierce v. Inter-Ocean Casualty Co., 148 S.C. 8, 145 S.E. 541 (1926).

118. Nunnamaker v. Smith, 96 S.C. 294, 80 S.E. 465 (1914).

119. Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976); Dauterman v. State-Record Publishing Co., 249 S.C. 512, 154 S.E.2d 919 (1967). In 1952 the supreme court held that it was prejudicial error for the judge to charge that the plaintiff had the burden of proving falsity. Herring v. Lawrence Warehouse Co., 222 S.C. 226, 235, 72 S.E.2d 453, 456 (1952).

120. 376 U.S. 254 (1964).

121. *Id.* at 279-80.

in *Oswalt v. State Record Co.*[122]

Neither the United States Supreme Court nor the South Carolina Supreme Court, however, determined which party in a *Sullivan*-type case must establish the accuracy or untruthfulness of the allegedly defamatory statement. This ambiguity led to inconsistent applications of the *Sullivan* standard because the outcome of a case often hinged upon which party had to bear the burden of proof. Although a plaintiff could not necessarily show the falsity of a statement, a defendant also could find it difficult to prove truth by a preponderance of the evidence; the media were therefore in a precarious position.

The United States Supreme Court sought to resolve this troubling ambiguity first in *Cox Broadcasting*[123] and later in *Hepps*.[124] In *Cox Broadcasting* the Court held that a public official or public figure must prove the falsity of an allegedly defamatory statement before he may proceed to show actual malice.[125] The *Hepps* Court held that protection of first amendment free speech guarantees also requires private individuals whose defamation claims are based on statements dealing with "matter[s] of public concern" to prove falsity.[126]

The South Carolina court's holding in *Beckham* brings the state into conformity with the Supreme Court's decision in *Cox Broadcasting* and requires "public officials"[127] and public figures to shoulder the burden of proving falsity in defamation cases. The South Carolina court did not specifically recognize the Supreme Court's mandate that this standard also should apply to private individuals suing over statements dealing with matters

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122. 250 S.C. 492, 158 S.E.2d 204 (1967).

123. 420 U.S. 469 (1975).

124. — U.S. —, 106 S.Ct. 1558 (1986).

125. 420 U.S. at 490.

126. — U.S. —, 106 S.Ct. at 1563.

127. In McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980), the Supreme Court of South Carolina held that a police officer is a "public official" within the *Sullivan* standard, and a publication concerning a police officer is constitutionally privileged absent a showing it was made with actual malice. *Id.* at 284, 270 S.E.2d at 125. In defining what public employees are included in the *Sullivan* "public official" standard, the court stated as follows:

> Simply speaking, the status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context.

Id.

of public concern. This is true even though the South Carolina court decided *Beckham* approximately two weeks after the Supreme Court's decision in *Hepps*. Thus, the full incorporation of the high Court's mandate regarding the burden of proving truth or falsity in a defamation case must await a similar case in South Carolina.

Pamela C. Meade

B. Invasion of Privacy Judgment Against Media Defendant Upheld

In *Hawkins v. Multimedia, Inc.*[128] the South Carolina Supreme Court upheld a jury verdict against a media defendant for invasion of privacy. The supreme court affirmed the imposition of liability because the newspaper article at issue was not of public interest and the defendant failed to introduce evidence of consent to its publication.[129] The significance of this decision lies in the impact that the court's treatment of the issue of consent could have on the media and in the court's failure to address the applicability of first amendment protections.

Hawkins involved a story concerning teenage pregnancies published in one of Multimedia's newspapers.[130] A sidebar article identified the plaintiff, Hawkins, as the teenage father of an illegitimate child. Testimony introduced at trial indicated that prior to the publication of the article, Hawkins reluctantly had admitted paternity of the child to Multimedia's reporter. The reporter told Hawkins that the information would be used in a "survey" article. The reporter, however, did not ask permission to use Hawkins' name in the article.[131] After Multimedia's publication of the story, Hawkins brought a successful suit based on invasion of privacy and a jury awarded him both actual and punitive damages.[132] The supreme court affirmed the trial court's verdict.[133]

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128. 288 S.C. 569, 344 S.E.2d 145, *cert. denied*, __ U.S. __, 107 S.Ct. 658 (1986).

129. *Id.* at 571, 344 S.E.2d at 146.

130. The trial court acknowledged that the subject of teenage pregnancy is of legitimate public interest. Record at 140.

131. *Id.*

132. The jury found Multimedia liable to Hawkins for $1,500 actual and $25,000 punitive damages. Record at 146.

133. Multimedia petitioned for writ of certiorari to the Supreme Court of the

Multimedia asserted error in the trial judge's charge to the jury that a minor could not consent to an invasion of privacy.[134] On review the supreme court declared that Multimedia had the burden of showing consent. This burden would be satisfied when "the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice."[135] The court did not reach the question of whether a minor can consent to an invasion of privacy because Multimedia failed to introduce any evidence of Hawkins's consent.[136]

The statement by the court that there was no evidence of consent is noteworthy in light of the testimony Multimedia offered to show implied consent of Hawkins to the publication.[137] The managing editor of Multimedia's newspaper testified that it was the newspaper's policy for a reporter to tell an interviewee that she worked for the newspaper and that she was working on a story.[138] If the interviewee then talked with the reporter, the newspaper assumed it had consent to publish the information obtained.[139] Based upon the *Hawkins* court's ruling that Mul-

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United States on the following questions:

> 1. In an action for invasion of privacy, do the First and Fourteenth Amendments to the United States Constitution require that the trial judge determine in the first instance whether the publication was privileged because it involved a matter of public interest?
> 2. In such an action, do the First and Fourteenth Amendments to the United States Constitution require the plaintiff to prove the absence of public interest and a variant of "actual malice" and to do so by clear and convincing evidence?
> 3. In such an action, if the general subject of the publication admittedly deals with a matter of public interest, is there a privilege under the First and Fourteenth Amendments to the United States Constitution to identify a participant in a case history used to illustrate the general subject of the publication?

Petition for Writ of Certiorari at i (U.S. Supreme Court Records and Briefs, No. 86-390 (Microform, Inc.)). The petition was denied. — U.S. —, 107 S. Ct. 658 (1986).

134. 288 S.C. at 571, 344 S.E.2d at 146.

135. *Id.*

136. *Id.*

137. *Id.*

138. Record at 124.

139. *Id.* at 125. Multimedia's policy is consistent with the following ruling concerning consent:

> Talking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public. Such communication can be said to anticipate that what is said will be made public since making public is the function of the press, and accordingly such communication can be con-

timedia failed to show any evidence of consent, however, a newspaper cannot assume implied consent to dissemination of information solely because a reporter identifies himself to an interviewee. The media should obtain express consent of an interviewee before publishing names or private facts of a sensitive nature. If a story is clearly one of legitimate public interest, however, express consent is not needed to preclude liability.[140]

Multimedia also asserted error in the refusal of the trial judge to charge the jury that the plaintiff had to show malice by clear and convincing evidence.[141] The supreme court ruled that a plaintiff does not have to show malice to recover general damages in an invasion of privacy action.[142] The court also held that at trial, Multimedia did not properly raise the issue concerning the burden of proof for punitive damages. In so holding, the court avoided addressing the underlying question of whether to extend first and fourteenth amendment protections to a media publication of truthful matters which are not of legitimate public interest.[143] The United States Supreme Court, however, has already extended these first amendment protections to false

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strued as a consent to publicize. Thus if publicity results it can be said to have been consented to. However, if consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent.

Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (footnote omitted).

140. The supreme court did acknowledge the rule that "[t]he right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. Public or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test." 288 S.C. at 571, 344 S.E.2d at 146; *see* Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984); *see also* Meetze v. Associated Press, 230 S.C. 330, 338, 95 S.E.2d 606, 610 (1956) (twelve-year-old girl giving birth to a child deemed to be of public interest). No error was found in submitting the issue of public interest to the jury. 288 S.C. at 572, 344 S.E.2d at 146.

141. 288 S.C. at 572, 344 S.E.2d at 146.

142. *Id.* The court's decision that malice is not an element in this type of invasion of privacy—public disclosure of private facts—did not change the rule in South Carolina, nor did it distinguish it from other jurisdictions.

143. Multimedia proposed that constitutional protections under the first and fourteenth amendments required actual malice to be shown by clear and convincing evidence. The United States Supreme Court, however, has refused to reach the question of "whether truthful publication may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). Therefore, Multimedia's publication of truthful private facts in a sidebar article to illustrate a matter of public interest has not been afforded constitutional protection.

light invasion of privacy actions.[144]

For the South Carolina practitioner, *Hawkins* does not change the law with respect to the public interest privilege, the element of malice, or the first amendment protections in an invasion of privacy cause of action for public disclosure of private facts. After *Hawkins*, however, the media may find it necessary to modify the methods by which it obtains consent to publish matters which are not of legitimate public interest.

Karen Hudson Thomas

VII. PLAINTIFF DOES NOT NEED TO ALLEGE A "SALE" IN A STRICT LIABILITY ACTION

In *Henderson v. Gould, Inc.*[145] the South Carolina Court of Appeals reversed a trial court's decision to strike a cause of action alleging strict liability in tort. The trial court ruled that the plaintiff could not recover under strict liability because the defendant was not a "seller" of the product.[146] In remanding the case for further development of the facts,[147] the court of appeals held that the doctrine of strict liability may be applied even though no "sale" has occurred if the requirements for its application are otherwise met.[148] The decision and reasoning of the court, however, failed to specify the requirements necessary for a recovery in strict liability.

A contractor-employee of Gould employed Henderson in the construction of Gould's new plant. The action arose after Henderson was allegedly injured while he was installing a switchboard manufactured and supplied by Gould. Henderson's complaint alleged in part that "Gould was engaged in the design and manufacture of all types of switchboards . . . *sold* in this state . . . for use by persons employed to install and repair switchboard devices for consumers."[149] In this instance, however, the

144. Time, Inc. v. Hill, 385 U.S. 374 (1967).

145. 288 S.C. 261, 341 S.E.2d 806 (Ct. App. 1986).

146. Record at 30.

147. The court of appeals recognized that the imposition of an actual sale requirement in a strict liability action created a question of novel impression for South Carolina "which could have far reaching effect and should not be decided by way of a motion to strike." 288 S.C. at 269, 341 S.E.2d at 811.

148. *Id.* at 268, 341 S.E.2d at 810.

149. Record at 9 (emphasis added).

switchboard manufactured by Gould was being installed in his own plant; therefore, since the trial court found that the complaint did not allege a sale, the trial judge struck Henderson's breach of warranties cause of action.[150]

Regarding the tort question, the court of appeals sought guidance from *Schall v. Sturm, Ruger Co.*,[151] a 1983 South Carolina Supreme Court decision which held that recovery under section 15-73-10 of the South Carolina Code[152] does not depend upon any rights or duties framed by a "transaction," as it would in a suit for breach of warranty.[153] The *Henderson* court expanded this reasoning and concluded that "a sale is not required for the doctrine [of strict liability] to be applied."[154] In fact, the court appeared to dispose of the actual sale requirement, replacing it with the requirement that the product only be "injected into the stream of commerce."[155]

Section 15-73-10 of the South Carolina Code requires that a defendant engaged in the business of selling a product must sell the product in a defective condition unreasonably dangerous to the user or consumer before he will incur strict liability. The

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150. 288 S.C. at 268, 341 S.E.2d at 810. In affirming the part of the order striking the breach of warranties cause of action, the court concluded that there could be no breach of either express or implied warranties in the absence of a sale or allegation of express warranty.

151. 278 S.C. 646, 300 S.E.2d 735 (1983).

152. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976) reads, in pertinent part:

> (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.

This section is an almost verbatim codification of the RESTATEMENT (SECOND) OF TORTS § 402A (1965). 288 S.C. at 267, 341 S.E.2d at 809.

153. 278 S.C. at 648, 300 S.E.2d at 736. The court emphasized that strict liability does not turn on a transaction, as does warranty, or upon an injury, as does tort, but "is best analogized to a legal status: inchoate at the moment when the product leaves the seller's hands in a defective condition that is unreasonably dangerous; ripe for determination at the instant of injury; and fixed by action and final judgment." *Id.* at 649, 300 S.E.2d at 736.

154. 288 S.C. at 268, 341 S.E.2d at 810. The court cited Link v. Sun Oil Co., 160 Ind. App. 310, 316, 312 N.E.2d 126, 130 (1974), which held, "[t]he word 'sells' as contained in the text of § 402A is merely descriptive, and the product need not be actually sold if it has been injected into the stream of commerce by other means. The test is not the sale, but rather the placing in commerce."

155. 288 S.C. at 268, 341 S.E.2d at 810.

lower court apparently interpreted this section to require that Gould must have been a seller in the transaction at issue.[156] The court of appeals disagreed, holding that the plaintiff need not allege that the manufacturer made a sale in the specific transaction.[157] Henderson, therefore, had to establish that Gould was a seller engaged in the business of selling, but he did not have to allege a particular sale.[158]

While the *Henderson* court reached a foreseeable conclusion regarding the interpretation to be given South Carolina law on strict liability,[159] it nonetheless left a question of interpretation unanswered. The case was remanded for further factual development to determine whether the product was "injected into the stream of commerce" by Gould, but the court gave no guidance in determining when a product has been sufficiently "injected" absent a sale.[160] Practitioners should be alert for subsequent cases that delineate activities sufficient to meet the "injected into the stream of commerce" requirement.[161]

Susan M. Jordan

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156. *Id.* at 265, 341 S.E.2d at 809.

157. *Id.* at 268, 341 S.E.2d at 810.

158. Although the court stated that "it is of no consequence . . . that Henderson's complaint does not allege Gould was a seller," *id.*, the court intended to treat the term "seller" as meaning a seller in the transaction at issue.

159. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 43 (1986), which states the following: "It has been held that a sale is an unnecessary predicate to the imposition of strict liability in tort upon the manufacturer where the manufacturer has placed a defective product in the stream of commerce by other means."

160. 288 S.C. at 268-69, 341 S.E.2d at 811. The court stated that the parties' briefs were devoid of information concerning the extent to which the switchboard was introduced into the stream of commerce. The court, however, did note that "other jurisdictions have held the doctrine of strict liability does not apply where the defendant has kept the product for its own purpose." *Id.* Unfortunately, however, the court let slip an opportunity to define the acceptable scope of injection. The trial court is left on remand to define the limits of the requirement and what other means would satisfy it.

161. Considering the goals and policies of strict tort liability and that South Carolina appears to be following the liberal interpretations of the Restatement (Second) of Torts, a broad interpretation of the "stream of commerce" requirement may well emerge. *See, e.g.*, Schenfeld v. Norton Co., 391 F.2d 420 (10th Cir. 1968) (where grinding wheel was supplied to plaintiff's employer on a trial basis, strict tort liability finding was not dependent on sale); Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964) (manufacturer of defective forklift held liable for injuries even though injured party was an employee of a prospective purchaser of the machine to whom it was lent); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970) (where lacquer, furnished without cost, ignited and caused death of plaintiff's son, court held that actual sale was not required to invoke strict liability doctrine and it was enough that defendant placed product in the stream of commerce).

VIII. MEDICAL MALPRACTICE

A. *Assumption of Risk Applied in Medical Malpractice Action*

On an issue of first impression[162] the South Carolina Supreme Court held in *Faile v. Bycura*[163] that the defense of assumption of risk could preclude recovery by an injured plaintiff in a medical malpractice action.[164] Although the application of assumption of risk to the facts in *Faile* is questionable, the lack of parameters in the opinion concerning the use of the defense may allow for its broader application in other medically related situations.

In *Faile* the plaintiff sued Dr. Blair Bycura for $150,000 in damages for injuries she allegedly suffered while under Bycura's care.[165] Faile alleged her injuries arose from Bycura's decision to treat her heel spurs by cutting the tendons in her feet.[166] Faile did not assert that this procedure was performed negligently, but instead asserted that it was an inappropriate treatment for her particular ailment.[167] Bycura's answer claimed that the procedure was not inappropriate for heel spurs and raised the defense of assumption of risk.[168] At trial, upon Faile's motion, the trial judge struck Bycura's defense because the testimony had not established that Faile knew that the cutting of tendons was

162. Brief of Respondent at 20.

163. 289 S.C. 398, 346 S.E.2d 528 (1986).

164. *Id.* at 399, 346 S.E.2d at 530.

165. Faile specified in the complaint that her feet were continually swollen and sore, that she suffered from stiff toes, that she suffered disfigurement to her feet as a result of the scars left by the operation, and that she incurred medical expenses for doctors and medicine in an effort to combat the problems created by the unnecessary surgery. Record at 5.

166. *Id.* at 4, 5.

167. Within the field of podiatry, there are essentially two schools of thought. One is sanctioned by the American Podiatry Association and the other by the American Academy of Ambulatory Foot Surgeons. The latter organization, of which Bycura was a member, recognizes the cutting of tendons through minimal incision surgery as an appropriate cure for heel spurs. The American Podiatry Association, which possesses by far the greater membership of the two groups, disdains the method used by Bycura. *Id.* at 110-15.

168. *Id.* at 6-7.

a novel approach to the treatment of heel spurs.[169] The jury subsequently awarded Faile $75,000.[170]

On appeal Bycura contended that the trial judge erred in striking the defense because Faile had signed several consent forms stating that she was aware of the complications that could result from the surgery and that the surgery might not correct her problem.[171] Citing, *inter alia*,[172] Faile's testimony at trial that the complications of surgery had been explained to her,[173] the court held that the question of assumption of risk was appropriate for jury consideration.[174]

Assumption of risk traditionally has been catagorized into

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169. *Id.* at 531-32. In concluding that the issue of assumption of risk was inappropriate for jury consideration, the trial judge relied on *King v. Daniel Int'l Corp.* which established the following criterion for the utilization of the defense: "Respondent would have assumed the risk only if she had freely and voluntarily exposed herself to a known danger of which she understood and appreciated the danger." 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982).

170. Record at 567.

171. Brief of Appellant at 14-19.

172. In holding the issue of assumption of risk was appropriate for jury consideration, the court also cited 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 304 (1981) and Easler v. Hejaz, 285 S.C. 348, 329 S.E.2d 753 (1985). *Easler* involved a candidate for admission to an unincorporated association who was injured during a hazing incident. In holding that the candidate was not barred from recovery by the doctrine of assumption of risk, the court reiterated the criterion as established in *King* and found that the plaintiff was not aware of all the dangers associated with the hazing incident. *Id.* at 352, 329 S.E.2d at 756.

61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 304 (1981) reads in part: "Where a person seeks treatment by a *drugless practitioner* or *healer*, he assumes the risk of the method of treatment of the particular school chosen, or at least impliedly adopts that method of treatment as distinguished from the methods employed by other schools." (emphasis added). In *Faile* the rule of § 304 is recited as follows: "When a patient seeks treatment by a particular type of *practitioner*, he may be held to have assumed the risk of the method of treatment of the particular school of thought chosen." 289 S.C. at 399, 346 S.E.2d at 528-29 (emphasis added).

In attempting to create a principle on which to base its holding, the court apparently misstated the law in this area. The quoted portion of § 304 relates specifically to those who subscribe to schools of thought other than those to which physicians subscribe *(e.g.*, healers and chiropractors) and who boast the ability to cure a particular malady in a nontraditional manner. When an individual chooses to seek the assistance of one of these disciplines which operates outside the field of medical science, the individual assumes the risk that the treatment will be ineffective. *See* Nelson v. Dahl, 174 Minn. 574, 219 N.W. 941 (1928); Kirschner v. Keller, 70 Ohio App. 111, 42 N.E.2d 463 (1942). This statement of law should not be applied to differing subdivisions within the field of medical science.

173. Record at 65-66.

174. 289 S.C. at 399, 346 S.E.2d at 529-30.

two types—express and implied.[175] In *Faile* the court dealt with the concept of express assumption of risk under which an individual voluntarily consents to confront a known and comprehended danger.[176] The concepts of express assumption of risk and informed consent[177] are closely allied because both require a physician to disclose fully to a patient the salient facts about the procedure the physician proposes to perform.[178] If the patient gives her informed consent to the contemplated procedure, she assumes the known risks inherent in the procedure to which she submits.[179]

The court failed in *Faile*, however, to recognize that assumption of risk by informed consent is not a proper defense when the propriety of a particular method of treatment is at issue.[180] A patient cannot assume the risk of an inappropriate or negligent method of treatment even though the risks of that treatment have been fully explained to her and she voluntarily assents to confront those risks.[181] Under these circumstances, a physician is negligent if he engages in a method of treatment that is not followed by at least a respectable minority of physicians in a particular area of medical specialization.[182]

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175. For a discussion of the differences between express and implied assumption of risk, see generally Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979); Case Comment, *Assumption of Risk Merged with Contributory Negligence*: Anderson v. Ceccardi, 45 OHIO ST. L.J. 1059, 1060-66 (1984).

176. 289 S.C. at 399, 346 S.E.2d at 529.

177. For a discussion of the doctrine of informed consent in South Carolina, see Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984). *See generally* 2 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 22.01 (1986) [hereinafter LOUISELL].

178. *See* 2 LOUISELL, *supra* note 177, at 22.01.

179. *See* 1 *id.* at 9.02.

180. *See* Valdez v. Percy, 35 Cal. 2d 338, 217 P.2d 422 (1950); Los Alamos Medical Center v. Coe, 58 N.M. 686, 275 P.2d 175 (1954); 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 304 (1981). Similarly, exculpatory clauses protecting physicians from liability for their negligence traditionally have been declared void as against public policy. *See* Tunkl v. Regents of the Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977); Note, *Hospital's Exculpatory Release from Liability for Future Negligence Held Invalid*, 11 UCLA L. REV. 639 (1964).

181. *See, e.g.*, Valdez v. Percy, 35 Cal. 2d 338, 217 P.2d 422 (1950); Hales v. Raines, 162 Mo. App. 46, 141 S.W. 917 (1911); Mainfort v. Giannestras, 49 Ohio Op. 440, 111 N.E.2d 692 (1951). *See generally* 1 LOUISELL, *supra* note 177, at 9.02.

182. *See* Leech v. Bralliar, 275 F. Supp. 897 (D. Ariz. 1967); Sims v. Callahan, 269 Ala. 216, 112 So. 2d 776 (1959); Barrette v. Hight, 353 Mass. 268, 230 N.E.2d 808 (1967); Watson v. Clutts, 262 N.C. 153, 136 S.E.2d 617 (1964); Head v. Phillips, 537 S.W.2d 291 (Tex. Civ. App. 1976); Note, *Unnecessary Surgery: Doctor and Hospital Liability*, 61

The defense of assumption of risk, when used correctly, may defeat medical negligence claims under a variety of circumstances. Although some states refuse to apply the concept to any professional negligence situation because of the disparity in knowledge between professionals and their clients,[183] other jurisdictions have allowed assumption of risk, both express[184] and implied,[185] to bar recoveries in a variety of medically related situations. For practitioners, the court's application of assumption of risk to the facts in *Faile* could suggest a broader availability of the doctrine in South Carolina than in other jurisdictions.

James H. Lucas

B. Proximate Cause in Medical Malpractice Action Clarified

In *Sherer v. James*[186] the South Carolina Supreme Court held that the trial judge in a medical malpractice action correctly refused to use section 323(a) of the Restatement (Second) of Torts[187] as a part of the jury charge relating to proximate cause. Reversing the court of appeals,[188] the supreme court held that section 323(a) applied only to the physician's duty of care, if the section applied at all, and that the section did not relate

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GEO. L.J. 807 (1973).

183. *See generally* 1 LOUISELL, *supra* note 177, at 9.02.

184. *See, e.g.*, Gramm v. Boener, 56 Ind. 497 (1877) (a plaintiff's claim of malpractice was denied because the breaking and resetting of plaintiff's arm was at the behest of the plaintiff and against the defendant's advice); Shorter v. Drury, 103 Wash. 2d 645, 695 P.2d 116 (1985) (a claim filed against a physician for the death of plaintiff's wife was barred by assumption of risk because plaintiff refused a transfusion of blood on religious grounds despite the physician's warnings that such a refusal could jeopardize her life).

185. For situations where implied assumption of risk may be a bar to plaintiff's recovery, see generally Annotation, *Patient's Failure to Reveal Medical History to Physician as Contributory Negligence or Assumption of Risk in Defense of Malpractice Action*, 33 A.L.R.4TH 790 (1984); Annotation, *Contributory Negligence or Assumption of Risk as Defense in Action Against Physician or Surgeon for Malpractice*, 50 A.L.R.2D 1043 (1956).

186. 290 S.C. 404, 351 S.E.2d 148 (1986).

187. RESTATEMENT (SECOND) OF TORTS § 323(a) (1965). The section reads as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

188. 286 S.C. 304, 334 S.E.2d 283 (Ct. App. 1985).

to proximate cause.[189]

Twelve-year-old Scott Sherer developed abdominal pain after playing basketball one evening. His mother called Dr. James who attributed the pain to a muscle pull. Later that evening Scott became nauseated and his mother again called Dr. James and reminded the doctor that Scott had a history of testicular problems. Dr. James then diagnosed a stomach virus. The next morning Dr. James called Mrs. Sherer, but there had been no significant change in Scott's condition. The following morning, approximately thirty-six hours after the initial pain, Scott discovered swelling in his left testicle and was taken to Dr. James' office. Dr. James determined that Scott had torsion of the testicle and sent him to a urologist who removed the testicle later that day. Scott brought suit alleging that Dr. James had not properly diagnosed Scott's condition and that the improper diagnosis caused the loss of his testicle. Scott's father appealed from a jury verdict in favor of Dr. James.[190]

Courts originally interpreted section 323(a) as defining the scope of a duty to rescue.[191] In *Hamil v. Bashline*,[192] however, the Supreme Court of Pennsylvania construed the section as a new standard of proof for causation.[193] The *Hamil* court drew a distinction between cases in which a defendant's act sets in motion a force which causes the plaintiff an injury, and cases in which a defendant's act or omission breaches a duty to protect the plaintiff against harm from another source.[194] The court ob-

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189. 290 S.C. at 408, 351 S.E.2d at 150.

190. *Id.* at 405-06, 351 S.E.2d at 149. Scott died after trial from causes unrelated to this case. *Id.* at 405 n.1, 351 S.E.2d at 149 n.1.

191. *See* Note, *Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U.L. REV. 275, 283-85 (1985).

192. 481 Pa. 256, 392 A.2d 1280 (1978).

193. This interpretation originated in the Superior Court of Pennsylvania with Hamil v. Bashline, 224 Pa. Super. 407, 307 A.2d 57 (1973).

194. 481 Pa. at 269-71, 392 A.2d at 1288. The *Hamil* court was not the first to recognize this distinction and the problems it presents a plaintiff. In Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), the court stated the following:

> [W]hen a defendant's negligent action or inaction has effectively terminated a person's chances of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.

served that in cases of the latter variety, the plaintiff rarely can present sufficient expert testimony to show that the defendant's acts or omissions caused the plaintiff's injury to a reasonable degree of medical certainty.[195] The *Hamil* court held, therefore, that section 323(a) relaxes the burden that the plaintiff must meet to get to the jury on the issue of causation.[196] According to *Hamil*, "in a case coming within [section 323(a)], it is not necessary that the plaintiff introduce medical evidence . . . to establish that the negligence asserted resulted in plaintiff's injury."[197] Rather, a plaintiff presents a jury question on the issue of causation when he or she presents expert medical testimony "to the effect that defendant's conduct did, with a reasonable degree of medical certainty, increase the risk that the harm sustained by plaintiff would occur."[198]

Though the South Carolina Supreme Court clearly rejected this relaxed standard,[199] the rejection was not the ground on which it reversed the court of appeals.[200] The court of appeals had seen two defects in the trial court's charge which section 323(a) would have cured: the first defect was that the jury was left with the impression that an act must be the sole cause of injury;[201] the second was that "[n]o portion of the trial judge's

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368 F.2d at 632; *see also* Gardner v. National Bulk Carriers, Inc., 310 F.2d 284, 289 (4th Cir. 1962) (ship-owner who refused to search for seaman who fell overboard was not allowed to challenge the existence of proximate cause of the seaman's death because "there [was] a reasonable possibility of rescue").

195. 481 Pa. at 271, 392 A.2d at 1287. The court stated that "it is often a pretty speculative matter whether the precaution [referring to proper care by a physician] would in fact have saved the victim." *Id.* (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 20.2 (1956)).

196. 481 Pa. at 271-273, 392 A.2d at 1288-89.

197. *Id.* at 273, 392 A.2d at 1288.

198. *Id.*, 392 A.2d at 1289.

199. The court said that it was "unwilling to relax the plaintiff's burden of proof in a medical malpractice case." 290 S.C. at 408, 351 S.E.2d at 151.

200. The plaintiff's ability to present a jury question on the issue of causation was not an issue since the plaintiff *did* reach the jury and lost. Therefore, the supreme court's rejection of *Hamil*'s relaxed standard is technically dictum. Its effect on the law, however, remains unquestioned. As Judge Sanders said in Yeager v. Murphy, "those who disregard dictum, either in law or in life, do so at their peril." 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987).

201. 286 S.C. at 308, 334 S.E.2d at 285. Since the supreme court's opinion reaffirmed the principle that an act need only be *a* proximate cause, 290 S.C. at 407, 351 S.E.2d at 150, the court must have found that the charge did not leave the jury with the wrong impression.

charge dealt with increased risk of harm resulting from a physician's failure to exercise reasonable care in undertaking to render medical services."[202] The supreme court's reversal would seem to imply that the trial court's failure to deal with increased risk of harm was not a "defect" at all.

A jury charge, therefore, does not necessarily have to identify increased risk of harm as competent evidence of causation. To what extent evidence of an increased risk of harm *may* be used by a plaintiff to prove causation is uncertain. Even if a court were to disallow the use of evidence showing increased risk of harm, a plaintiff's expert could use evidence of an increased risk of harm to conclude that the physician's negligence most probably caused the injury.

John C. Few

IX. AGENCY

A. Employee's Assault Within Scope of Employment

In *Crittenden v. Thompson-Walker Co.*[203] the South Carolina Court of Appeals found evidence introduced at trial to be sufficient to support a jury's finding that an employee acted within the scope of his employment when he severely beat a client of the employer.

The plaintiff, Crittenden, contracted with Thompson-Walker Company for the renovation of Crittenden's retail store. After receiving the final bill, Crittenden told the defendant company's president, Thompson, that the bill was excessive and that he would not pay it at that time. Later that day Thompson told Bobby Welch, the foreman of the renovation work, that the company was out of business, and that Welch was, therefore, out of a job. Thompson then went to Crittenden's store to discuss the bill. While Thompson and Crittenden were meeting, Welch arrived at the store and went directly to the office where Thompson, Crittenden, and Crittenden's father were talking.

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202. 286 S.C. at 307, 334 S.E.2d at 284-85. The court of appeals clearly thought this omission constituted error. As the court stated, "[p]roof that a physician's conduct increased a patient's risk of injury by decreasing his chances of recovery will support a finding of proximate cause." *Id.* at 308, 334 S.E.2d at 285.

203. 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986).

Welch conferred briefly with Thompson, asked Crittenden if he intended to pay the bill, and, when he got an unsatisfactory answer, beat Crittenden about the face and body until Crittenden agreed to pay. Crittenden later brought suit against Thompson-Walker Company for assault and battery. Although the jury awarded Crittenden a general verdict on three causes of action,[204] the only issue decided on appeal was whether Thompson-Walker should have been held vicariously liable for Welch's assault on Crittenden.[205] The court of appeals upheld the jury verdict of $75,000 for the plaintiff.[206]The court noted that in *Jamison v. Howard*[207] the South Carolina Supreme Court held the *Jones v. Elbert*[208] test to be the proper test for determining whether a servant's act was within the scope of his employment.[209] The *Jones* test provides that " 'an act is within the scope of a servant's employment where [the act is] reasonably necessary to accomplish the purpose of his employment and is in furtherance of his master's business.' "[210] The test further provides that " '[i]f the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority.' "[211]

The court of appeals' decision in *Crittenden* is perplexing because the court found that the evidence satisfied the *Jones* test in the absence of evidence in the record to support a finding that Welch's acts were "reasonably necessary to accomplish the purpose of his employment."[212] Thus, the question remains

204. The plaintiff alleged that Thompson-Walker was vicariously liable not only for the acts of Welch, but also for the acts of Thompson, who allegedly restrained Crittenden's father during the attack. Record at 35. Crittenden also alleged negligent supervision of Welch. 288 S.C. at 114, 341 S.E.2d at 387.

205. The court of appeals found the evidence sufficient to find the defendant company liable for Welch's actions and, therefore, did not reach the second and third causes of action. 288 S.C. at 114, 341 S.E.2d at 387.

206. *Id.* at 113, 341 S.E.2d at 386.

207. 271 S.C. 385, 247 S.E.2d 450 (1978).

208. 211 S.C. 553, 34 S.E.2d 796 (1945).

209. 288 S.C. at 115, 341 S.E.2d at 387.

210. 211 S.C. at 559, 34 S.E.2d at 799 (quoting Adams v. South Carolina Power Co., 200 S.C. 438, 441, 21 S.E.2d 17, 19 (1942)).

211. 211 S.C. at 558, 34 S.E.2d at 798-99 (quoting Cantrell v. Claussen's Bakery, 172 S.C. 490, 493, 174 S.E. 438, 440 (1934)); *see also* 288 S.C. at 115, 341 S.E.2d at 387.

212. The only testimony relating the necessity of the act to Welch's authority was presented by the defense to show lack of necessity or authority. Record at 141-42.

whether the "reasonably necessary" criterion is actually part of the operative test. Judge Bell apparently attempted to make assault cases fit the "reasonably necessary" part of the test when he stated that "under the [*Jones*] test, it is not . . . necessary that the assault should have been made as a means or for the purpose of performing the work the servant was employed to do."[213] Whether this statement is limited to assault cases or whether it pertains to other acts as well is not clear from the opinion.[214]

Apparently, the central question in the South Carolina scope of employment test is whether the servant acted in furtherance of his master's business.[215] The court of appeals, however, paid particular attention in *Crittenden* to the facts of the case and used the language of prior cases inconsistently to support the conclusion deemed equitable.[216] Although this case-by-case approach provides little guidance to trial judges and attorneys, it may produce the best results. Careful use of the language in *Jones* may give the courts a reason to decide in one's favor.

John C. Few

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213. 288 S.C. at 115, 341 S.E.2d at 387. As authority for this statement, Judge Bell cited two California cases, Fields v. Sanders, 29 Cal. 2d 834, 180 P.2d 684 (1947), and Carr v. William C. Crowell Co., 28 Cal. 2d 652, 171 P.2d 5 (1946), in which the California Supreme Court used the same sentence in a different context.

214. In Morris v. Mooney, 288 S.C. 447, 343 S.E.2d 442 (1986), decided two months after *Crittenden*, the South Carolina Supreme Court held that acts of adultery were not within the scope of employment because the "acts . . . were not reasonably necessary to accomplish any purpose of [the] employment." *Id.* at 448, 343 S.E.2d at 443. It is apparent from the facts of *Morris*, however, that the adulterous acts also were not "in furtherance of the master's business." Therefore, although the court ostensibly relied on the "reasonably necessary" requirement, the actual grounds for the holding are not clear. The South Carolina courts have not relied on the "reasonably necessary" requirement to hold an act to be outside the scope of employment if the act was not also "in furtherance of the master's business" since Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964) (employee playing a joke acted outside scope of employment).

215. In *Crittenden* the court stated that "if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." 288 S.C. at 116, 341 S.E.2d at 387.

216. Of course, the reality is that scope of employment will most often be a jury question. As the court stated in *Crittenden*, "[i]f there is doubt as to whether the servant . . . was acting at the time within the scope of his employment, the doubt will be resolved against the master, at least to the extent of requiring the question to be submitted to the jury for determination." *Id.* at 116, 341 S.E.2d at 387.

B. *Co-Agents Not Allowed to Impute Negligence to Principal in Suit by Principal Against Agents*

In *South Carolina Insurance Co. v. James C. Greene & Co.*[217] the South Carolina Court of Appeals refused to allow an agent, sued by his principal for negligence, to impute to the principal the negligence of a co-agent in order to establish the principal's contributory negligence.[218] This holding, upon a question of first impression in South Carolina, is consistent with the doctrine of imputed contributory negligence and places South Carolina in the majority of jurisdictions that have addressed this issue.

The insurance company in *Greene* brought an indemnity action against two of its agents to recover the amount of a judgment settlement. The company alleged that the two agents acted negligently by failing to forward to the company lawsuit papers filed against the company and delivered to the agents. The company asserted that because of this failure, a default judgment was entered against it. Following a settlement of the judgment for $130,000, the company sued the agents for indemnification.[219]

The defendant agents answered the company's complaint by raising contributory negligence as a defense. Each defendant alleged that the other defendant was an agent of the insurance company and that the negligence of each should be imputed to the company under the doctrine of *respondeat superior*. On the motion of the company, the circuit court struck the defenses of imputed contributory negligence,[220] and the defendants appealed.

In affirming the lower court,[221] the court of appeals followed the majority rule established in the Wisconsin case of *Zulkee v. Wing*.[222] The court of appeals reasoned that the purpose of im-

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217. 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

218. For a discussion of this topic, see Annotation, *Imputation of Contributory Negligence of Servant or Agent to Master or Principal, In Action by Master or Principal Against Another Servant or Agent for Negligence in Connection with Duties*, 57 A.L.R.3D 1226 (1974).

219. 290 S.C. at 175, 348 S.E.2d at 619.

220. Record at 26.

221. 290 S.C. at 189, 348 S.E.2d at 627.

222. 20 Wis. 408 (1866); *accord* Oxford Shipping Co. v. New Hampshire Trading

puted contributory negligence would not be served by allowing a servant to assert the defense against his injured master. The court noted:

> If *respondeat superior* were applied to the case of a master injured by his servants, the reason for the rule would be subverted, since it would deny the injured party any recovery and let those guilty of negligence go free. This result stands the doctrine on its head: imputed liability is designed to provide a remedy where none exists, not to cut off a remedy which is otherwise available.[223]

Earlier South Carolina decisions refusing to extend the doctrine of imputed contributory negligence in various situations further influenced the court's reasoning.[224]

Imputed negligence "had its origin in considerations of public policy, convenience, and justice . . . . [Being of artificial creation, the doctrine] must in particular cases yield to reason and practical consideration."[225] As recognized by the court, *respondeat superior* allocates a servant's negligence to the master because the master "is normally in a better position than the servant to respond in damages."[226] Reason and practical considerations support the court's decision in *Greene* because imputed negligence loses its justification in a situation in which the party injured by the negligent servant is the master.[227] In a

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Corp., 697 F.2d 1 (1st Cir. 1982); Buhl v. Viera, 328 Mass. 201, 102 N.E.2d 774 (1952); Brown v. Poritzky, 30 N.Y.2d 289, 283 N.E.2d 751, 332 N.Y.S.2d 872 (1972). *Contra* Insurance Co. of North Am. v. Anderson, 92 Idaho 114, 438 P.2d 265 (1968); Capitola v. Minneapolis, St. P. & Sault Ste. Marie R.R., 258 Minn. 206, 103 N.W.2d 867 (1960).

223. 290 S.C. at 186-87, 348 S.E.2d at 626.

224. *Id.* at 187-88, 348 S.E.2d at 626. In McJunkin v. Waldrep, 225 S.C. 73, 76, 81 S.E.2d 284, 285 (1954), the South Carolina Supreme Court ruled that the negligence of one member of a joint enterprise may not be imputed to the other members in a lawsuit between the members. Similarly, in Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 368-69, 345 S.E.2d 709, 710 (1986), the supreme court held that members of a condominium association could bring a negligence action against the association; the negligence of one member would not be imputed to the other members to bar a suit.

225. 58 AM. JUR. 2D *Negligence* § 456 (1971).

226. 290 S.C. at 183, 348 S.E.2d at 623.

227. One commentator has observed:

> The great weight of authority confines the doctrine of imputed negligence to [situations involving a claim against someone who is an outsider to a special relationship], and refuses to impute the defendant's negligence to the plaintiff when the action is, for example, by master against servant . . . . There is no shadow of excuse for the minority rule, and it is probably nothing more than a

Greene situation, imputing the servant's negligence to the master does not serve the underlying policy—to provide recovery where it otherwise would not be provided. Instead, a remedy would be denied to one who should be permitted to recover.

The *Greene* decision is an extension of an established South Carolina rule regarding the master-servant relationship. In *Bell v. Clinton Oil Mill*[228] the supreme court noted that when the master becomes liable because of his relationship with his servant, the master frequently has a right of recovery over against the servant who committed the wrong.[229] *Bell* indicates that a servant cannot impute his own negligence to his master in order to bar the master's indemnification recovery. *Greene* represents a logical extension of the *Bell* holding: if one agent cannot escape liability to his principal, then two agents cannot escape merely because each can demonstrate the negligence of the other.

With *Greene* the South Carolina Court of Appeals resolved an important issue in the law of agency, placing the state in line with the majority view. The decision is a clear indication of the disfavor with which courts view the doctrine of imputed contributory negligence in South Carolina. The court of appeals demonstrated that it will not extend this doctrine unless there are strong policy reasons to do so.

Anthony M. Emanuel

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judicial *faux pas.*

F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS, § 23.7 (2d ed. 1986). *See generally*, 289 S.C. 367, 345 S.E.2d 709 (1986), 225 S.C. 73, 81 S.E.2d 284 (1954). In both cases plaintiffs were not outsiders to the special relationship.

228. 129 S.C. 242, 124 S.E. 7 (1924).

229. *Id.* at 256, 124 S.E. at 12. The Restatement of Agency also states this proposition:

> Where a master, hurt by the combined negligence of his servant and a third person, brings an action against the third person, it is sometimes said that "the negligence of the servant is imputed to the master." This fictitious method of statement in such cases *does not prevent the servant from being liable to the master.*

RESTATEMENT (SECOND) OF AGENCY § 415 comment b (1959) (emphasis added).

C. *Negligence of Unincorporated Association Not Imputed to Members*

In *Murphy v. Yacht Cove Homeowners Association*[230] the South Carolina Supreme Court held that the negligence of an unincorporated condominium association is not necessarily imputed to its members.[231] Consequently, a member may sue an association in tort for a failure to maintain the common elements.[232]

The Murphys alleged that the association negligently allowed surface water to run under the foundation of their condominium, causing moisture problems and cracking a foundation wall.[233] Yacht Cove argued that since the association was a joint enterprise in which each member was both principal and agent for the other members, the negligence of each member must be imputed to every other member.[234] Yacht Cove, therefore, alleged that the Murphys could not maintain a negligence action against the association.[235] Yacht Cove's position was consistent with the general rule of unincorporated association liability:[236] first, because it is unincorporated, an association is not a legal entity; and second, each member actually controls the operation of the association.[237]

The supreme court, however, rejected Yacht Cove's argument. The court had held in *Queen's Grant Villas Horizontal*

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230. 289 S.C. 367, 345 S.E.2d 709 (1986).

231. *Id.* at 369, 345 S.E.2d at 710.

232. *Id.* This right of action is available in addition to any contract action which may be available. *Id.*

233. Record at 1.

234. 289 S.C. at 368, 345 S.E.2d at 709.

235. *Id.* Though the South Carolina appellate courts have expressed doubt as to the future of contributory negligence in South Carolina, the rule is still in effect. *See* Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985).

236. 6 AM. JUR. 2D *Associations and Clubs* § 31 (1963).

237. Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal. 2d 781, 785, 371 P.2d 987, 990, 22 Cal. Rptr. 211, 214 (1962). Many courts have drawn a distinction between those unincorporated associations for which the general rule was developed and modern labor unions and condominium associations. *See id.*; White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971); Record at 30-31. As the California Court of Appeal stated in *White*, "[a] condominium, like a labor union, has a separate existence from its members. Control of a condominium, like control of a labor union, is normally vested in a management body over which the individual member has no direct control." 17 Cal. App. 3d at 830, 95 Cal. Rptr. at 263.

Property Regimes I-V v. Daniel International Corp.[238] that a homeowner could sue the regime for its failure to pursue a recovery from a builder for alleged construction defects.[239] *Queen's Grant*, the *Murphy* court said, "necessarily implies that an association can be sued by the unit owners for its failure to discharge its duties."[240] As further support for its holding, the *Murphy* court cited section 27-31-170 of the South Carolina Code,[241] which allows an association, through its governing body, to sue a member of the association for failure to comply with the bylaws or other rules.[242] In addition, the court cited *Bouchette v. International Ladies Garment Workers' Union*,[243] in which it held that section 15-5-160 of the South Carolina Code,[244] which allows an unincorporated association to be sued in its own name, necessarily implies that such an association may sue in its own name.[245] The *Murphy* court concluded that "since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure."[246]

The authority cited in *Murphy* leaves little doubt that an unincorporated association in South Carolina is a legal entity for purposes of litigation. The possibility remains, however, that an association's negligence can be imputed to its members under the proper circumstances.[247] In *White v. Cox*,[248] for example, the California Court of Appeal placed two limitations on its recognition of a member's right to sue an unincorporated condominium association. First, the association must maintain a separate existence from its members; and second, the member must not directly control the operations of the association.[249] In the event

238. 286 S.C. 555, 335 S.E.2d 365 (1985).
239. *Id.* at 556, 335 S.E.2d at 366.
240. 289 S.C. at 368, 345 S.E.2d at 710.
241. S.C. CODE ANN. § 27-31-170 (Law. Co-op. 1976).
242. *Id.*
243. 245 S.C. 586, 141 S.E.2d 834 (1965).
244. S.C. CODE ANN. § 15-5-160 (Law. Co-op. 1976).
245. 245 S.C. at 591, 141 S.E.2d at 835.
246. *Id.*
247. *Murphy* would not be binding outside the area of condominium associations because the court's holding was apparently derived entirely from implications from and interpretations of condominium law. 259 S.C. at 368-69, 345 S.E.2d at 710.
248. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).
249. *Id.* at 829, 95 Cal. Rptr. at 262. In other words, the association must not be of the type for which the general rule was developed. *See supra* note 236.

that a condominium association, or any other unincorporated association, should fail to meet one of the limits in *White*, reason supports imputing negligence to the members, just as it supports not imputing negligence on the facts of *Murphy*.

John C. Few

D. Family Purpose Doctrine Expanded

In *Campbell v. Paschal*[250] the South Carolina Court of Appeals held a father liable for the consequences of his minor daughter's accident which occurred while she was driving her brother's automobile. This holding extended the family purpose doctrine to situations in which the head of the household is not the title owner of the vehicle involved in an accident.

The car that Paschal's daughter was driving at the time of the accident belonged solely to her brother, who had left the car with his parents. The brother gave his father authority to regulate the use of the car and Paschal gave his daughter permission to use the automobile to run an errand for the family. The trial court held the father liable for his daughter's accident under the family purpose doctrine.

In affirming the trial court's decision, the court of appeals rejected Paschal's argument that the head of the household must *own* the vehicle to be liable under the family purpose doctrine.[251] Because the requirement of ownership had never been specifically at issue in South Carolina prior to this case, the court referred to the genesis of the doctrine[252] and to decisions

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250. 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986).

251. *Id.* at 7-9, 347 S.E.2d at 896-97. Paschal relied on the definition of the family purpose doctrine that limits liability to situations in which "the head of the family owns, furnishes *and* maintains a vehicle for the general use, pleasure and convenience of the family." Lollar v. Dewitt, 255 S.C. 452, 456, 179 S.E.2d 607, 608 (1971) (emphasis added); *see also* Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976); Sweatt v. Norman, 283 S.C. 443, 322 S.E.2d 478 (Ct. App. 1984). The court of appeals, however, relied on an earlier South Carolina Supreme Court case which stated: " 'A necessary requisite to the imposition of liability under the family purpose doctrine . . . is that the head of the family own, maintain *or* furnish the automobile . . . for general family use . . .'." 290 S.C. at 7, 347 S.E.2d at 896 (quoting Porter v. Hardee, 241 S.C. 474, 477, 129 S.E.2d 131, 132 (1963)).

252. The family purpose doctrine has its genesis in agency and is based on the theory that one "who has made it his business to furnish a car for the use of his family is liable as principal or master when such business is

of other jurisdictions.[253] The court determined that merely furnishing the vehicle is sufficient to invoke the family purpose doctrine.[254] Therefore, because Paschal controlled the use of the car and furnished it to his daughter, the court imposed liability on him for the accident caused by his daughter while she was driving the car.

Practitioners in South Carolina should be aware that the family purpose doctrine is now applicable to situations in which the head of the household does not hold title to the automobile, but merely furnishes or controls use of the vehicle.

Karen Hudson Thomas

X. ELEMENTS OF OUTRAGE CLARIFIED

In *Roberts v. Dunbar Funeral Home*[255] Frances Roberts, a widow, alleged that the bill collection methods of a funeral home in connection with her husband's funeral were outrageous and caused her emotional distress. The court of appeals, in affirming a voluntary nonsuit, held that Roberts failed to prove the ele-

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being carried out by a family member using the vehicle for its intended purpose, the family member thereby filling the role of agent or servant."

290 S.C. at 8, 347 S.E.2d at 897 (quoting Annotation, *Comment Note—Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles*, 8 A.L.R.3D 1191, 1196 (1966)); *see also* Norwood v. Parthemos, 230 S.C. 207, 95 S.E.2d 168 (1956).

253. 290 S.C. at 8, 347 S.E.2d at 897; *see* Pesqueira v. Talbot, 7 Ariz. App. 476, 481, 441 P.2d 73, 78 (1968) (family purpose doctrine rests on a "furnishing test" not on ownership of the vehicle); Tolbert v. Murrell, 253 Ga. 566, 568, 322 S.E.2d 487, 489 (1984) ("owner" defined for purposes of the family purpose doctrine as "one who owns an auto, controls its use, has some property interest in it or supplies it"); Smith v. Simpson, 260 N.C. 601, 611, 133 S.E.2d 474, 479 (1963) (liability depends on control and use, not on owner or driver).

254. Support for this result can be found in Herman v. Magnuson, 277 N.W.2d 445, 456 (N.D. 1979), which held that "the head of the household must *furnish*, but need not own, the vehicle for the use, pleasure, and business of himself or a member of his family." 277 N.W.2d at 458 (emphasis in original). The complete range of factual patterns sufficient to satisfy the element of "furnishing" cannot be exhausted in this survey. Consideration, however, should be given to the following factors:

> [W]ho paid for the car, who had the right to control the use of the car, the intent of the parties who bought and sold the car, the intent of the parents and the child as to who, between them, was the owner of the car, to whom the seller made delivery of the car, who exercised property rights in the car from the date of its purchase to the date of the accident, and any other evidence that bears on the issue of who is the owner in fact.

Id. at 459.

255. 288 S.C. 48, 339 S.E.2d 517 (Ct. App. 1986).

ments of the tort of intentional infliction of emotional distress by outrageous conduct (outrage).[256] The court's decision is consistent with the principles and elements of this tort as recognized in the Restatement (Second) of Torts and in case law.

In *Roberts* the plaintiff entered into a contract with the defendant, Dunbar Funeral Home, for burial services for her husband. After Roberts signed the contract and left the defendant's office, the funeral home demanded collateral before proceeding with the funeral.[257] Roberts returned to the funeral home where her sister, with the consent of Dunbar's employee, issued a check to serve as collateral.[258] The following day, however, Dunbar informed Roberts that the check could not serve as collateral and that other collateral would be required.[259] Roberts then returned to the funeral home to execute the deed to her home as collateral. Upon her arrival, Dunbar told Roberts to return the following morning before the funeral to execute the deed. Roberts returned on the day of the funeral as instructed, but Dunbar arrived late. Furthermore, after his arrival, Dunbar refused to accept payment in full offered by the plaintiff's brother. Roberts then executed the deed, which Dunbar accepted as collateral, and the funeral took place several minutes late. After the funeral another brother of the plaintiff paid for the funeral and Dunbar returned the plaintiff's deed to her.

The plaintiff claimed that the defendant's actions caused her nerve disorders, headaches, and a skin rash, all of which required treatment. The trial court granted Dunbar's motion for a nonsuit because Roberts failed to show that Dunbar acted intentionally or recklessly toward her.[260]

The court of appeals relied upon *Ford v. Hutson*[261] in which

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256. The court also rejected Roberts' claim of invasion of privacy. *Id.* at 53, 339 S.E.2d at 520.

257. Dunbar required collateral because Roberts did not have burial insurance. *Id.* at 50, 339 S.E.2d at 518.

258. The defendant's employee, Mrs. Dunbar, suggested that the plaintiff issue a check that could be held for 90 days. The plaintiff's sister told the agent that she did not have sufficient funds to cover the amount. *Id.* at 50 n.1, 339 S.E.2d at 519 n.1.

259. The check was not sufficient collateral because it was a "three party check." *Id.* at 50, 339 S.E.2d at 519.

260. Record at 98.

261. 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981). In *Ford* the South Carolina Supreme Court adopted the rule of liability set forth in the RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46(1) states the following: "One who by extreme and outra-

the South Carolina Supreme Court held that a plaintiff must prove four elements to recover for the tort of outrage:

> [A] plaintiff must show (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency "and must be regarded as atrocious, and utterly intolerable in a civilized community"; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that "no reasonable man could be expected to endure it."[262]

The court of appeals held that Roberts failed to present evidence that Dunbar acted intentionally or recklessly toward her in such a manner as to cause distress. Further, the court found that there was sufficient evidence that Roberts' distress was, in fact, caused by the death of her husband and not by Dunbar's actions.[263]

The *Roberts* decision is consistent with the rule of liability set forth in *Ford* and is in line with similar cases from other jurisdictions which have adopted section 46 of the Restatement (Second) of Torts.[264] In assessing an outrage cause of action, the court is to make an initial determination of the existence of both

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geous 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." 276 S.C. at 162, 276 S.E.2d at 778. *See generally Torts, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 236 (1982) (discussion of South Carolina's recognition of the tort of outrage).

262. 288 S.C. at 51, 339 S.E.2d at 519 (quoting 276 S.C. at 162, 276 S.E.2d at 778).

263. *Id.* at 52, 339 S.E.2d at 519.

264. A question of fact regarding outrageousness existed in each of the following outrage cases that stemmed from funerals: Cates v. Taylor, 428 So. 2d 637 (Ala. 1983) (refusal by owner of cemetery plot to allow burial 30 minutes before the funeral); Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976) (defendant funeral home made false statements concerning the condition of the deceased's body to the deceased's family and the defendant also failed to comply with family requests); Rubin v. Matthews Int'l Corp., 503 A.2d 694 (Me. 1986) (defendant failed to deliver gravestone in time for the funeral despite its repeated assurances of such timely delivery); Whitehair v. Highland Memorial Gardens, Inc., 327 S.E.2d 438 (W. Va. 1985) (defendant mishandled several bodies while moving burial plots). Although *Roberts* was the first South Carolina outrage case involving a funeral, the cases above show the types of actions that can support submission to the jury.

outrageousness[265] and emotional distress.[266] Only after the court decides that reasonable men could differ over the existence of these elements is the case to go to the jury.[267] The conclusion of the court of appeals that insufficient evidence existed to prove the elements of outrage appears sound. Evidence presented at trial indicated that Dunbar's actions were business motivated[268] and not intentional or reckless acts initiated to cause distress. As the court recognized, the acts may have been insensitive, but not so severe as to reach a level "beyond all possible bounds of decency . . . and utterly intolerable in a civilized community."[269] Likewise, the court found no evidence tending to establish a causal connection between these acts and the plaintiff's distress, especially in light of the plaintiff's grief over the loss of her husband.[270] The plaintiff's own testimony supported the conclusion that her husband's death caused her distress.[271] In short, the evidence did not warrant submission of the case to the jury.

This decision shows that a plaintiff must make a strong showing of each element of the tort of outrage in order to avoid a nonsuit. The rationale behind this tort is to provide "the basis for achieving situational justice [as opposed to] emotional tranquility."[272] The four requirements of outrage, combined with the

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265. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984); RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965); *see also* Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985); Corder v. Champion Rd. Mach. Int'l Corp., 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984).

266. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

267. *Id.* § 46 comment h.

268. In *Ford* the court stated as follows: "A business relationship may sometimes justify one's conduct and make that conduct excusable or at least less culpable, but it is at most a factor to be considered . . . by the jury." The *Ford* court found sufficient evidence for the jury to decide the issue of outrageousness; thus, the jury had to determine whether the business relationship factor justified the defendant's conduct. In *Roberts*, however, the court found the evidence insufficient to warrant a jury determination of outrageousness; thus, the business relationship issue never reached the jury. 276 S.C. at 166, 276 S.E.2d at 780.

269. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

270. It may be easier to show that the conduct of the defendant caused the plaintiff's emotional distress if the plaintiff has not previously suffered from emotional distress. U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098 (Ala. App.), *cert. denied*, 415 So. 2d 1102 (Ala. 1982). It is rare, however, for an action in outrage to fail solely because of lack of proof of a causal connection between the defendant's acts and the plaintiff's distress. Garrett, *Cause of Action for Intentional Infliction of Emotional Distress*, 7 CAUSES OF ACTION 663, 696 (W. Winbourne ed. 1985).

271. 288 S.C. at 52, 339 S.E.2d at 519-20.

272. Givelber, *The Right to Minimum Social Decency and the Limits of Even*

screening function of the court, promote this concept.

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XI. EXPERT NOT NEEDED IN HOSPITAL FALL CASE

In a case of first impression in South Carolina, the supreme court held in *Rewis v. Grand Strand General Hospital*[273] that expert testimony is not required to establish negligence when a patient sues for injuries received after falling from a hospital bed. The court held that the subject matter of the suit was within the average layman's common knowledge or experience; therefore, no special knowledge was necessary to evaluate the defendant's conduct.[274]

During the night of December 10, 1983, while a patient at the Grand Strand General Hospital, the plaintiff, Rewis, fell off the foot of her bed and broke her hip. Rewis' husband and son testified that the hospital denied them permission to stay with Rewis overnight, even though the nurses knew that Rewis was subject to "black-out" spells.[275]

Rewis sued for negligence and won a jury verdict. The hospital appealed the trial court's decision and claimed Rewis failed to prove her fall was foreseeable and proximately caused by an act of the hospital. The hospital also claimed that Rewis' failure to offer expert testimony addressing the standard of care required of a hospital under similar circumstances precluded recovery.[276]

The supreme court affirmed the trial court's decision on all counts. The court recognized that a plaintiff in a medical malpractice case must establish by expert testimony the reasonable standard of care and the defendant's failure to conform to it.[277] The court also recognized, however, that if the subject matter is of common knowledge or experience such that no special learning is required to evaluate the defendant's conduct, then expert

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Handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 75 (1982).

273. 290 S.C. 40, 348 S.E.2d 173 (1986).

274. *Id.*

275. *Id.*

276. *Id.* at 42, 348 S.E.2d at 174.

277. *Id.*

testimony is not necessary.[278] The court cited the widely accepted rule that expert testimony generally is not necessary to help jurors evaluate a defendant's conduct in a fall case.[279] The court found this rule applicable in *Rewis* and reasoned that issues surrounding a fall from a hospital bed are not technical matters outside the comprehension of a layman. The court held, therefore, that the common knowledge or experience of the jurors was sufficient to enable them to infer a lack of proper care and a causal link to Rewis' fall.[280]

At least twenty jurisdictions, holding that expert testimony is required in malpractice suits, but not in simple negligence suits against hospitals, agree with the reasoning of the South Carolina court.[281] Additionally, a number of jurisdictions have ruled specifically that expert testimony is not needed to support an action in negligence for injuries sustained in a hospital fall.[282] Expert testimony is deemed necessary in some jurisdictions, however, to establish the causal link between the fall and a subsequent condition or alleged injury.[283]

Rewis is important, not because it follows the generally accepted rule regarding expert testimony, but rather because it establishes the rule to be followed in cases in this state. Practitioners now know that expert testimony is not required to establish negligence in a hospital fall case.

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278. *Id.*

279. *Id. see* Annotation, *Necessity of Expert Evidence to Support Action Against Hospital for Injury to or Death of Patient*, 40 A.L.R.3D 515 (1971).

280. 290 S.C. at 42, 348 S.E.2d at 174; *see* Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1986).

281. *See* Annotation, *supra* note 279, at 523-24.

282. Stevenson v. Alta Bates, Inc., 20 Cal. App. 2d 303, 66 P.2d 1265 (1937); Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 101 N.W.2d 167 (1960).

283. 251 Iowa 375, 101 N.W.2d 167; Kayser v. Cleveland Clinic Found., 19 Ohio App. 2d 47, 249 N.E.2d 835 (1969).