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TORT LAW

I. PLAINTIFF'S FAILURE TO WEAR A SEAT BELT DOES NOT CONSTITUTE CONTRIBUTORY NEGLIGENCE

In *Keaton v. Pearson*[1] the Supreme Court of South Carolina reversed a trial court's judgment on the ground that the jury should not have been allowed to hear testimony regarding plaintiff's failure to wear a seat belt. In remanding the case for a new trial, the court held that "in the absence of an affirmative statutory duty, a plaintiff's failure to use a seat belt does not constitute contributory negligence or a pre-injury failure to minimize damages."[2]

By reversing the order of the lower court, the supreme court formally rejected the use of the "seat belt defense"[3] in simple automobile collision cases, thus placing South Carolina among the majority of jurisdictions that have considered this issue.[4] The holding also effectively overrules two earlier South Carolina cases, *Sams v. Sams*[5] and *Jones v. Dague*,[6] which strongly indi-

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1. 292 S.C. 579, 358 S.E.2d 141 (1987).

2. *Id.* at 580, 358 S.E.2d at 141.

3. The "seat belt defense" has been described as follows:

> The so-called "seat belt defense" relieves the negligent defendant in an automobile injury case from liability for those injuries to the plaintiff which would not have occurred had plaintiff used an available seat belt. Thus, where a passenger is thrown against the windshield and injured in an accident, he may not recover for those injuries if the defendant shows by expert testimony that use of a seat belt would have prevented the passenger from hitting the windshield.

Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272, 272 n.1 (1980).

4. *See, e.g.*, Insurance Co. of North Am. v. Pasakarnis, 451 So. 2d 447, 450 (Fla. 1984); Note, *supra* note 3, at 272; Comment, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 Mo. L. REV. 968 (1985).

5. 247 S.C. 467, 148 S.E.2d 154 (1966) (in passenger's action against automobile driver for personal injury, court held that the portion of defendant's pleading, asserting that plaintiff's failure to wear a seat belt contributed to the proximate cause of her injuries, should not be stricken).

6. 252 S.C. 261, 166 S.E.2d 99 (1969) (in wrongful death action arising from an automobile accident, court held that the defense of contributory negligence, based on plaintiff's failure to wear an available seat belt, was properly stricken; the court noted, however, that there were no facts that indicated that the wearing of a seat belt would have prevented plaintiff's death).

cated that a seat belt defense would be proper under certain circumstances.[7]

The parties in *Keaton* were involved in a minor automobile collision when Pearson attempted to turn left across Keaton's oncoming lane of traffic. Little property damage resulted from the accident since both vehicles were traveling at less than fifteen miles per hour. Keaton, however, experienced a second collision and was injured when her chin struck the steering wheel.[8]

Over Keaton's objection, the trial judge allowed Pearson to elicit testimony that Keaton had not been wearing a seat belt. The judge also allowed Pearson to introduce expert testimony demonstrating that if Keaton had been wearing her seat belt, the second collision would not have occurred. The trial judge later charged the jury that if they found that Keaton had not been wearing a seat belt, they could consider " 'any causative relationship between [Keaton's] failure to use a seat belt as this impacts upon the issue of contributory negligence and a failure to minimize damages.' "[9]

In rejecting the seat belt defense, the supreme court reasoned that the legislature is the appropriate body to impose a duty on people to wear a seat belt.[10] To support this reasoning, the court relied on several similar holdings from other jurisdictions[11] but merely "recognize[d]" the "suggest[ions]" set forth in *Sams* and *Jones*.[12]

Current law addressing the seat belt defense remains unsettled and confused.[13] Generally, defendants have advanced three possible theories to support the seat belt defense: 1) the plaintiff's failure to use a seat belt constitutes negligence per se, entirely precluding plaintiff from recovery; 2) the plaintiff's nonuse of a seat belt does not comport with the standard of conduct of a reasonable man; therefore, the plaintiff is contributorily negli-

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7. 292 S.C. at 580, 358 S.E.2d at 141.

8. *Id.* Plaintiff suffered from temporomandibular joint dysfunction.

9. *Id.*

10. *Id.*

11. *See* Britton v. Doerhing, 286 Ala. 498, 242 So. 2d 666 (1970); Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973); Schmitzer v. Misener-Bennett Ford, Inc., 135 Mich. App. 350, 354 N.W.2d 336 (1984); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

12. 292 S.C. at 580, 358 S.E.2d at 141.

13. *See* Note, *supra* note 3, at 272 ("[Failure] to use an available seat belt remains an unsettled issue in automobile litigation."); Comment, *supra* note 4, at 968 ("The law in this area remains unsettled despite the courts' increasing familiarity with the issue.").

gent; and 3) by not wearing a seat belt, the plaintiff has failed to mitigate damages and should not be allowed to recover damages that use of a seat belt could have prevented.[14]

The per se theory has been rejected by every court that has considered it.[15] The vast majority of courts also have rejected the contributory negligence theory.[16] Thus, courts that have accepted the seat belt defense overwhelmingly have accepted the mitigation of damages theory.[17]

Because of the supreme court's holdings in *Sams*[18] and *Jones*,[19] commentators previously considered South Carolina a leader in support of the seat belt defense.[20] *Keaton* clearly negates this presumption. The supreme court followed the view that any policy decisions concerning seat belts should be deferred to the legislature.[21] This position is often criticized because courts confuse the seat belt defense with mandatory seat belt usage laws. The basis for this theory is that the seat belt defense creates no mandatory duty to wear a seat belt. Instead, the defense only requires seat belt usage if the plaintiff desires to recover to the full extent of his injuries.[22]

Although the court failed to discuss South Carolina as a

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14. *See* Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); Kircher, *The Seat Belt Defense - State of the Law*, 53 MARQ. L. REV. 172, 173 (1970).

15. Comment, *supra* note 4, at 981.

16. *Id.* at 983 n.132.

17. *E.g.*, Insurance Co. of North Am. v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

18. The *Sams* court held that an "alleged [seat belt] defense should be decided in the light of all of the facts and circumstances adduced upon the trial, rather than being decided simply on the pleadings." 247 S.C. at 470, 148 S.E.2d at 155.

19. The *Jones* court, implying that the issue may be purely factual, stated that "[t]here was a total absence of any fact or circumstance to indicate that the failure of the deceased to fasten her seat belt contributed in any way to the occurrence of the accident or that she would not have been injured in the same manner if the seat belt had been fastened." 252 S.C. at 271, 166 S.E.2d at 103-04.

20. Comment, *The Seat Belt Defense - A Valid Instrument of Public Policy*, 44 TENN. L. REV. 119, 121 (1976).

21. Other theories commonly advanced for the rejection of the seat belt defense include: 1) the plaintiff has no duty to predict the defendant's negligence; 2) since seat belts are not required in all vehicles, the defendant should not be allowed to take advantage of the circumstance that the plaintiff was riding in a car equipped with seat belts; 3) the majority of motorists do not use seat belts; and 4) the seat belt defense would lead to a battle of the experts as to what injuries could have been presented by the use of a seat belt. Amend v. Bell, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977).

22. Comment, *supra* note 4, at 975.

contributory negligence[23] jurisdiction,[24] this factor may have influenced the court's rejection of the seat belt defense. Under the doctrine of contributory negligence, accepting the seat belt defense would completely bar the plaintiff's recovery.[25] Commentators, however, vehemently argue that jurisdictions adhering to the doctrine of comparative negligence[26] should adopt the seat belt defense.[27] The commentators reason that the comparative negligence determination contemplates all relevant factors of an automobile accident; thus, the unbuckled claimant could only suffer a reduction in damages.[28] The adoption of a comparative negligence standard has caused at least three jurisdictions to examine and accept the seat belt defense.[29] Currently, only six

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23. The rule of contributory negligence is simply that "when a plaintiff's negligence contributes to the happening of an accident, he cannot recover damages from a defendant who negligently injures him." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.2, at 4 (2d ed. 1986).

24. Langley v. Boyter, 286 S.C. 85, 332 S.E.2d 100 (1985). The supreme court reversed the court of appeals holding that comparative negligence was applicable in South Carolina, thus maintaining South Carolina as a contributory negligence jurisdiction.

25. Miller, *The Seat Belt Defense Under Comparative Negligence*, 12 IDAHO L. REV. 59 (1975).

26. The term "comparative negligence" is used to describe "any system of law that by some method and in some situations apportions costs of an accident, at least in part, on the basis of the relative fault of the responsible parties." V. SCHWARTZ, *supra* note 23, at 29.

27. *See, e.g.*, Hoglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1 (1974); Miller, *The Seat Belt Defense Under Comparative Negligence*, 12 IDAHO L. REV. 59 (1975); Sullivan, *The Seat Belt Defense Should be Resurrected Under Pure Comparative Negligence*, 61 MICH. B.J. 560 (1982).

28. Hoglund & Parsons, *supra* note 27, at 14.

29. In Hutchens v. Schwartz, 724 P.2d 1194 (Alaska 1986), the Alaska Supreme Court held that in a simple automobile collision, evidence of the failure to wear a seat belt is relevant for damage reduction. The court noted that under a comparative negligence standard, "all relevant factors [must be considered] in arriving at the appropriate damage award and non-use of a seat belt is a relevant factor for apportioning damage." *Id.* at 1199.

The Supreme Court of Michigan accepted the seat belt defense in Lowe v. Estate Motors, Ltd., 428 Mich. 439, 410 N.W.2d 706 (1987), because of that court's adoption of a comparative negligence standard. Previously, Michigan law was governed by two court of appeals cases, Selmo v. Baratono, 28 Mich. App. 217, 184 N.W.2d 367 (1970), and Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969), which had rejected the seat belt defense when it was used to prove contributory negligence. The court in *Lowe* noted that "comparative negligence never allows an otherwise liable defendant to entirely 'avoid' liability and thus 'escape' the duty of due care." 428 Mich. at 460, 410 N.W.2d at 714. Thus, the court held that this "significant difference" warranted the admissibility of seat belt evidence.

states, including South Carolina and the District of Columbia, still adhere to the contributory negligence standard.[30]

An important issue that remains unanswered by *Keaton* is what effect the decision will have in the area of products liability. The defendant in *Keaton* argued that introduction of a seat belt defense differed greatly in a products liability action from that in a simple automobile collision case. In "crashworthiness" products liability cases,[31] the overall interior safety of the car should be considered in assessing the motorist's protection from the second collision.[32] Naturally, the plaintiff's use or nonuse of an available seat belt impacts on the overall interior safety of the car. The great majority of jurisdictions, whether for or against the seat belt defense, do not distinguish between products liability and collision actions in these instances.[33] Hence, although declining to address the issue, the court probably would reject the seat belt defense in products liability actions as well.

In light of *Keaton*, the seat belt defense likely will not reemerge in South Carolina common law without action from the legislature. The recent enactment of the Department of Transportation's Occupant Crash Protection Rule,[34] however, may force the legislature to consider a mandatory seat belt usage law.[35] Until that time, injured South Carolinians will suffer no

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In Law v. Superior Court, 157 Ariz. 147, 755 P.2d 1135 (1988), the Supreme Court of Arizona also accepted the seat belt defense in lieu of that state's adoption of a comparative negligence standard. The court rejected the reasoning of an earlier court of appeals case, Nash v. Kamrath, 21 Ariz. App. 530, 521 P.2d 161 (1974), in which the court had disallowed any seat belt evidence because of the harsh consequences associated with the contributory negligence standard. The *Law* court held that comparative negligence eliminated the problems encountered under contributory negligence because "an adverse finding on nonuse does not bar recovery but merely reduces the damages in proportion to the contributing factor." 157 Ariz. at ____, 755 P.2d at 1139.

30. V. SCHWARTZ, *supra* note 23, § 1.5(E), at 25.

31. "The term 'crashworthiness' . . . means the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident." Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1370 n.1 (E.D. Va. 1978).

32. Brief of Respondent at 6.

33. *See, e.g.*, Honda Motor Co. v. Marcus, 440 So. 2d 373, 377 (Fla. Dist. Ct. App. 1983); Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986).

34. 49 C.F.R. § 571.208 (1985). This rule would require all American-made cars to be equipped with automatic protection devices, such as airbags, unless states accounting for two-thirds of the nation's population enact mandatory seat belt usage laws before April 1, 1989.

35. Note, *The Seat Belt Defense and North Carolina's New Mandatory Usage*

legal penalty for a failure to "buckle up."

James F. Rogers

II. LANDOWNER'S DUTY OF CARE OWED TO INVITEES ON HIS PROPERTY AND ON ADJACENT PROPERTY

In *Israel v. Carolina Bar-B-Que, Inc.*[36] the South Carolina Court of Appeals was faced with novel questions regarding a landowner's duty of care owed to invitees on his property and on adjacent property. The questions involved the liability of the landowner on whose property a tree with a rotten limb was growing and the liability of the adjacent landowner on whose land the limb fell. In the particular fact situation in *Israel*, the adjacent landowner was not liable; under a different fact pattern, however, the court's analysis could invoke liability on both landowners.

On April 3, 1982, Charlotte Israel was sitting in her car in the parking area of a drive-in restaurant, Carolina Bar-B-Que, Inc. (BBQ). Andrew Berry owned the property adjacent to this parking area. A large limb of a tree located on Berry's property fell onto Israel's car in the BBQ lot. Israel's car was "in effect, totally destroyed."[37] The tree from which the limb fell was located about twenty-five to thirty feet from the property line between Berry and BBQ. Smaller oak trees were located on Berry's property between the larger oaks and the BBQ parking lot. These smaller oaks were "described as being bushy,"[38] making it impossible to see the rotten limb in the large oak tree from the BBQ parking lot.

Israel sued Berry and BBQ for injuries sustained as a result of the tree limb falling on her car. The jury awarded Israel a $80,000 verdict against both defendants, but the verdict was reduced to $60,000 on postverdict motions for a new trial *nisi*.[39] On appeal the court affirmed the verdict against Berry but reversed against BBQ.

The court first addressed the issue of Berry's liability and

Law, 64 N.C.L. REV. 1127, 1128 (1986).

36. 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987).

37. *Id.* at 284, 356 S.E.2d at 125.

38. *Id.*

39. *Id.*

noted that, under common law, there would be no liability for a fallen limb.[40] The modern approach, however, is to impose a duty on the landowner to "exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on his premises."[41] This rule, which simply imposes on a landowner the duty to exercise due care to prevent a risk of harm from decayed trees, seems reasonable.

Berry was in charge of the property and visited it approximately fifteen times each week.[42] By a reasonable inspection of the property, Berry could have detected the rotten limb and taken precautionary measures that would have prevented Israel's injury. Berry was in the best position to discover the defective limb and to take steps to alleviate the risk of subsequent damage the limb might cause. The court followed the modern trend by adopting this rule.[43] The result the court reached was fair, just, and well-reasoned.

Next, the court addressed the question of BBQ's liability. The court found that Israel was "BBQ's invitee."[44] Under South Carolina law, since Israel was an invitee, BBQ had a "duty . . . to exercise due care to keep the premises in reasonably safe condition and give warning of any latent perils."[45] Thus, as the court correctly stated, "in the absence of negligence on the part

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40. *Id.* at 287-88, 356 S.E.2d at 125 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 57, at 391 (5th ed. 1984)).

41. *Id.* at 288, 356 S.E.2d at 127 (citing Mahurin v. Lockhart, 71 Ill. App. 3d 691, 693, 390 N.E.2d 523, 525 (1979)).

42. *Id.* at 289, 356 S.E.2d at 127.

43. *See, e.g.*, Dudley v. Meadowbrook, Inc., 166 A.2d 743, 744 (D.C. 1960) ("landowner should be held to the duty of common prudence in maintaining his property, including trees thereon, in such a way as to prevent injury to his neighbor's property"); Cornett v. Agee, 143 Ga. App. 55, 237 S.E.2d 522 (1977) (tree located on defendant's lot fell, and the fall was caused by visible rot as well as by high winds; defendant was liable to plaintiff for destruction of plaintiff's property); Rowe v. McGee, 5 N.C. App. 60, 66, 168 S.E.2d 77, 81 (1969) ("where the defendants knew that the tree on their property was decayed and liable to fall and to damage the property of [plaintiffs], we think and hold that the defendants were under a duty to eliminate the danger"); Barker v. Brown, 236 Pa. Super. 75, 81, 340 A.2d 566, 569 (1975) ("possessor of land in or adjacent to a developed or residential area is subject to liability for harm caused to others outside of the land by a defect in the condition of a tree thereon, if the exercise of reasonable care by the possessor: (a) would have disclosed the defect and the risk involved therein, and (b) would have made it reasonably safe by repair or otherwise").

44. 292 S.C. at 289, 356 S.E.2d at 128.

45. *See* Turner v. Sinclair Refining Co., 254 S.C. 36, 42, 173 S.E.2d 356, 359 (1970).

of BBQ there is no liability."[46] The court, while not establishing a per se rule, stated that if BBQ was liable, "such liability has to be premised upon the breach of duty to anticipate a danger which the landowner knew of or should have known of in the exercise of reasonable care."[47]

BBQ did not know, nor could it have known, of the defective condition of the large oaks since any view of the large oaks was blocked by the smaller ones. A reasonable inspection by BBQ would not have uncovered this danger. There was no way for BBQ to anticipate that Israel's property was in danger due to the decayed limb. Based on this reasoning, the court found BBQ not liable.

Carolina Bar-B-Que is a significant case in that the court adopted the modern rule that a landowner has a duty to exercise reasonable care to prevent an unreasonable risk of harm arising from trees located on his premises. The landowner now has an affirmative duty to make reasonable inspections of trees located on his property. The court could extend this line of reasoning to other natural objects located on the landowner's premises. The court also refused to adopt any specific rule with respect to the landowner's liability when a tree limb from adjacent property causes damage to a third party on the landowner's property. The court seemed receptive to the idea that in an invitee situation, if the landowner knew or should have known by the exercise of reasonable care of a danger located on a neighbor's land, the landowner would be liable for damages to a third party for failing to take reasonable steps to make his property safe for invitees. The court, however, did not adopt a per se rule. The court's analysis centered on the duties that BBQ owed to Israel as an invitee.

Luther C. Kissam, IV

III. TORT REMEDY NOW AVAILABLE FOR ECONOMIC LOSS DUE TO ASBESTOS CONTAMINATION

After *City of Greenville v. W.R. Grace & Co.*,[48] plaintiffs

46. 292 S.C. at 289, 356 S.E.2d at 128.
47. *Id.* at 290, 356 S.E.2d at 128.
48. 827 F.2d 975 (4th Cir. 1987), *reh'g denied*, 840 F.2d 219 (1988).

suffering economic loss caused by asbestos contamination have a remedy in tort, even though no actual physical injuries to persons or property have been suffered. The Fourth Circuit Court of Appeals affirmed a verdict for the city of Greenville in a negligence and breach of warranty action against W.R. Grace & Co. Although most courts hold that there is no basis for recovery of purely economic loss in negligence or strict liability,[49] the Fourth Circuit awarded compensation in accordance with the trend allowing such recovery in asbestos contamination and other toxic tort cases. The court reasoned that asbestos contamination endangered the lives and health of the building occupants. In the court's opinion, "this is not the type of risk that is normally allocated between the parties to a contract by agreement."[50]

The city of Greenville and Greenville Water System (hereinafter collectively referred to as "Greenville") sued W.R. Grace & Co. (Grace) to recover the costs of removing and replacing an asbestos fireproofing product, Monokote.[51] Grace had replaced its asbestos-containing Monokote with a new asbestos-free Monokote in 1971; however, the old Monokote was applied to the steel beams of Greenville City Hall in 1971-72.

Among Grace's several contentions on appeal,[52] one contention in particular warrants special consideration. Grace argued that Greenville had suffered only economic loss and, therefore, had no cause of action based on negligence; absent present physical injury to person or property, no recovery in tort could be

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49. *See, e.g.*, Atlas Aluminum Corp. v. Borden Chem. Corp., 233 F. Supp. 53 (E.D. Pa. 1964); Ales-Perati's Foods Int'l v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917 (1985); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931); Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958); Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976); Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

50. 827 F.2d at 978.

51. Following a jury verdict in favor of Greenville, defendant moved for judgment notwithstanding the verdict, which was denied, and defendant appealed. The court of appeals affirmed the district court judgment and awarded the plaintiff $4.8 million upon acceptance of remittitur.

52. Grace argued that the district court erred in denying its j.n.o.v. motion on the grounds that the evidence was insufficient to support a finding that Monokote was defective or that Grace knew of the dangers posed, that the award of compensatory damages was impermissibly speculative and unsupported by evidence, and that the punitive damages award was unsupported by the evidence and tainted by faulty jury instructions. 827 F.2d at 978, 982.

awarded.[53] The court distinguished the cases Grace relied upon and concluded that Greenville could recover the costs of removing the asbestos.[54] The court held that under these circumstances, "South Carolina courts would be willing to extend tort liability to the manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment."[55]

Whether or not to allow recovery under tort theories for purely economic loss has been the subject of much debate and discussion. This issue developed from the expansion of protection accorded personal and tangible property interests in products liability actions, which led to the expansion of recovery to plaintiffs claiming only economic injury.[56] Among the various theories of recovery, "negligence has proved to be among the least fruitful avenues of recovery for economic loss."[57] Indeed, the majority of courts continue to deny negligence recovery for economic or pecuniary loss.[58]

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53. *Id.* at 976-77. In support of its contention, Grace relied on East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), and 2000 Watermark Ass'n v. Celotex Corp., 784 F.2d 1183 (4th Cir. 1986).

54. The court distinguished these cases by pointing out that the defective products injured only themselves. Thus, there was no claim of injury or threat of injury to persons or property. 827 F.2d at 977. In *Grace*, however, there existed a threat of future harm to persons.

55. *Id.* at 978. The court cited the following in support of its decision: Spartanburg County School Dist. Seven v. National Gypsum Corp., No. 83-1744-14, slip op. (D.S.C. July 29, 1985); Greenville County School Dist. v. W.R. Grace & Co., No. 82-3142-14, slip op. (D.S.C. July 29, 1985); Lexington County School Dist. Five v. United States Gypsum Co., No. 82-2072-0, slip op. (D.S.C. April 2, 1984); Spartanburg County School Dist. Six v. National Gypsum Co., No. 83-CP-42-1756, slip op. (S.C. Cir. Ct. Aug. 2, 1984).

56. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 916, 918 (1966).

57. *Id.* at 929. "Historically . . . the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action . . . for fraud and the only contract action has been for breach of a warranty, express or implied. This remains the generally accepted view." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 101, at 708 (5th ed. 1984) (footnote omitted).

58. *See* R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983); County of Westchester v. General Motors Corp., 555 F. Supp. 290 (S.D.N.Y. 1983); States S.S. Co. v. Stone Manganese Marine, Ltd., 371 F. Supp. 500 (D.N.J. 1973); Seely v. White Motor Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) ("distinction . . . between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury"); Radiation Technology, Inc. v. Ware Constr. Co., 445 So. 2d 329 (Fla. 1983); TWA v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284

Conversely, a substantial minority of jurisdictions have allowed recovery in negligence for purely economic loss.[59] Allowance of such recovery is attributable to policy considerations for the extension of manufacturer's liability in products liability cases generally.[60] The courts also consider that economic and other losses are not readily distinguishable.[61] In *Seely v. White Motor Co.*[62] a strong dissent argued that no real distinction can be drawn: " 'Overwhelming misfortunes' *might* occur more often in personal injury cases than in property damage or economic loss cases . . . but this is no reason to draw the line between these types of injury when a more sensible line [may be] available."[63]

The trend allowing for recovery has been recognized in a variety of products liability cases. The specialized area of toxic torts has been one in which courts have readily recognized economic recovery on negligence principles. For example, the Fourth Circuit in *Grace* cited four unpublished cases supporting its ruling that property owners' claims for asbestos contamination of their builders are actionable in tort.[64] Extensive attention was given to this issue in *City of Manchester v. National Gypsum Co.*,[65] in which the city brought an action against the manufacturers and sellers of asbestos products for damages associated with the placement, removal, and replacement of asbestos products in public buildings. The defendant, National Gypsum Co., took the same stance in that case as Grace in arguing that plaintiffs seeking recovery in tort cannot recover purely economic loss.[66] The court proceeded to analyze and justify its ruling in a more in depth, systematic manner than did the Fourth Circuit

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(Sup. Ct. 1955); R. CARTWRIGHT & J. PHILLIPS, PRODUCTS LIABILITY § 2.20, at 181-82 (1986) ("Such losses are considered to be distinct from property damage, which is characterized by its direct, accidental nature" and "to allow such recovery would be emasculate to relevant provisions of the U.C.C.").

59. *See* cases cited *supra* note 49.

60. Note, *supra* note 56, at 950. The policy considerations include deterrence of unreasonably dangerous products, allocation of risk, and freedom of contract under the Uniform Commercial Code.

61. R. CARTWRIGHT & J. PHILLIPS, *supra* note 58, at 209.

62. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

63. *Id.* at 25, 403 P.2d at 155, 45 Cal. Rptr. at 27 (emphasis in original) (Peters, J., concurring and dissenting).

64. 827 F.2d at 978.

65. 637 F. Supp. 646 (D.R.I. 1986).

66. *Id.* at 649.

and held in the plaintiff's favor.[67] The court reasoned that it was "somewhat artificial to try to characterize the damage plaintiff claims as either . . . physical damage to its property or economic damage."[68] Whether or not plaintiff suffered physical harm was predicated on the nature of the defect and the manner in which the damages occurred.[69]

As in *City of Manchester*, Grace's products posed a substantial risk of personal injury to those people who occupied the building in which the product was located. The manufacturer should bear the responsibility for guarding against such threats of personal harm and property damage and the cost of replacing the product to eliminate the risk.[70] Thus, the Fourth Circuit's award of damages to the plaintiff in this instance is correct.

Several questions will emanate from this decision and probably will arise in future litigation. Is there any justifiable distinction between economic losses and other losses? Will the manufacturer be held responsible for any loss remotely resembling an "injury" to property or person if such recovery is allowed for mere negligence? Will allowing recovery for purely economic losses in tort have any effect on an individual plaintiff's ability to sue for actual physical harm which results in the future?

The questions are limitless, and one can anticipate the influx of claims in the field of toxic torts, an area of the law already inundated with thousands of claims by property owners, individuals, and the like:

> [F]ear has been expressed that a general liability for negli-

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67. The court began its analysis by assuming that New Hampshire did not allow recovery in tort, but in contract, for purely economic loss. Then the question became whether the plaintiff had made a sufficient allegation of "property" damage so as to state a claim in tort. *Id.*

68. *Id.* The court cited several toxic tort cases that address this issue: Pearl v. Allied Corp., 566 F. Supp. 400 (E.D. Pa. 1983); Cinnaminson Township Bd. of Educ. v. U.S. Gypsum, 552 F. Supp. 855 (D.N.J. 1982); Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977). 637 F. Supp. at 650.

69. *City of Manchester*, 637 F. Supp. at 651; *see also* Pennsylvania Glass Sand v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981).

70. The court in *Pennsylvania Glass Sand* noted that "[t]his does not mean . . . that every prayer for relief that seeks the cost of repairing a damaged product entails the type of economic loss traditionally encompassed within warranty law." 652 F.2d at 1169; *accord* Town of Hooksett School Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 131 (D.C.N.H. 1984) ("That the measure of the Plaintiff's damages is economic does not transform the nature of his injury into a strictly economic loss.").

> gently-inflicted economic loss will expose the merely careless defendant to "liability in an indeterminate amount . . . to an indeterminate class"; the possible economic loss that may foreseeably and "proximately" result form any negligent act may be so varying as to create . . . liability inordinate to the wrongfulness of the defendant's conduct or to the value of the interest sought to be protected.[71]

The court established a sound rule of law, allowing recovery for economic loss when a substantial threat of harm to persons or property is present, but any attempt to apply this rule blindly, without thoroughly considering the facts and circumstances, may result in a great injustice to the merely negligent defendant.

Lynda G. Wilson

IV. "STEP IN THE DARK" RULE OF CONTRIBUTORY NEGLIGENCE REJECTED IN PERSONAL INJURY SUIT

Blanton v. Stokes Manufactured Homes[72] presented a novel issue to South Carolina courts. For the first time they were asked to interpret the "step in the dark" rule of contributory negligence. The court of appeals' decision should have significant impact on future personal injury suits when the injury has occurred, at least in part, because of improper lighting.

Blanton, the plaintiff, was an independent contractor engaged by Stokes Manufactured Homes (Stokes), the defendant, to clean newly delivered mobile homes in preparation for potential buyers. Blanton was injured after entering a darkened mobile home from the bright outdoors to begin cleaning; she tripped over a bundle of roofing shingles that she could not see on the floor. At trial Stokes argued the "step in the dark" rule[73]

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71. Note, *supra* note 56, at 944-45 (footnotes omitted).

72. 293 S.C. 156, 359 S.E.2d 94 (Ct. App. 1987).

73. The Florida Supreme Court defined the "step in the dark" rules as follows:

> A person who comes into an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any special stress of circumstances, in proceeding further, without first finding out where he is going and what may be the obstructions to his safe progress. Violation of that rule is contributory negligence as a matter of law.

Rubey v. William Morris, Inc., 66 So. 2d 218, 220 (Fla. 1953) (citations omitted).

upon its directed verdict and postverdict motions. The motions were overruled, and Stokes appealed from a jury verdict for the defendant. The court of appeals affirmed.

The court expressly rejected the defendant's proposed rule, finding it broad and unqualified. Instead, it turned for guidance to a general summary of the pertinent law contained in *American Law Reports Third*.[74] The summary lists several factors bearing on the issue of contributory negligence, leading the court to believe, erroneously, that the determination of the applicability of a "step in the dark" rule properly was left for the jury.

If the court had read further in the annotation it would have discovered the following passage:

> In addition to this general rule, [cited by the *Blanton* court] the courts in a number of cases have made other statements or set forth special rules as to proceeding in the dark as contributory negligence.
>
> The most famous rule is the step-in-the-dark rule. . . .
>
> The step-in-the-dark rule is not an absolute rule of law. It is merely a specialized example of certain circumstances in which reasonable minds can not differ on the standard of care to be exercised by a plaintiff.[75]

In other words, absent special circumstances, a plaintiff proceeding in the dark is contributorily negligent as a matter of law, and the issue of contributory negligence is submitted to a jury only in cases when the facts do not fit squarely within the rule or somehow render the rule inapplicable.[76] Case law supports the proposition that the "step-in-the-dark" rule raises an inference of negligence that may then be rebutted by evidence to create a factual issue.[77]

The Minnesota Supreme Court separated the rule into three essential elements: (1) plaintiff must enter an area which is unfamiliar to him; (2) the area must be in total darkness or at least the plaintiff must be unable to see; and (3) there must be an absence of special circumstances that would prevent application

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74. Annotation, *Premises Liability: Proceeding in the Dark Across Interior Premises as Contributory Negligence*, 28 A.L.R.3D 605, 614 (1969).

75. *Id.* at 616 (footnotes omitted).

76. *Id.* at 616-17.

77. *See, e.g.*, Posin v. A.B.C. Motor Court Hotel, 45 Ohio St. 2d 271, 344 N.E.2d 334 (1976).

of the rule.[78]

In the case at bar, the premises were unfamiliar. Although Blanton had cleaned other mobile homes, she had never cleaned the particular one involved in this case, and floor plans for the homes varied.[79] The second element is also satisfied, according to Blanton's own testimony.

Finally, there were no special circumstances to prevent application of the rule. The court placed undue weight on the fact that previously the roofing shingles always had been stored in the closet, so that Stokes, therefore, had a duty to warn. In doing so, the court underplayed other key facts such as Blanton's failure to wear her glasses, without which she is not licensed to drive,[80] and her discovery, more than once, of furniture scattered and turned upside down in the mobile homes.[81] Blanton's prior experience should have given her ample reason not to proceed without investigation, assistance, or, at the very least, waiting until her eyes adjusted to the dark.

It is not clear from the court's language whether it intended to reject the notion of a "step in the dark" rule altogether or merely to reduce its potency to a matter of fact for the jury, which ultimately produces the same result. If appealed, the supreme court should recognize the error of the court of appeals in denying Stokes' motions and find Blanton contributorily negligent as a matter of law.

Kim Scimé

V. CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO SUBMIT ISSUE OF TELEVISION LIBEL AND SLANDER TO JURY

In *Wilhoit v. WCSC, Inc.*[82] the South Carolina Court of Appeals addressed a novel issue in the area of television libel and slander. The court held that the plaintiff was defamed when the defendant aired a film clip of the plaintiff along with a broadcast announcing the embezzlement sentencing of someone other than

78. Mourning v. Interlachen Country Club, 280 Minn. 94, 97, 158 N.W.2d 244, 246 (1968).

79. Record at 22.

80. *Id.* at 15-16.

81. *Id.* at 9.

82. 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987).

the plaintiff. In finding defamation, the court adhered to well-established principles followed in a majority of jurisdictions.

Juanita Wilhoit testified as a character witness for Barbara Koester, who pleaded guilty to bank embezzlement. A reporter from television station WCSC, Inc. (WCSC) confronted Wilhoit after she testified. Wilhoit told the reporter she was not Koester, but a cameraman nevertheless filmed her with her face covered by her hands. That night, WCSC broadcast the film of Wilhoit simultaneously with the story about Koester's sentencing. The story was aired five times. Wilhoit subsequently sued both WCSC and the reporter for defamation. The jury returned a verdict for the plaintiff of $1 actual damages and $45,000 punitive damages. The court of appeals affirmed.[83]

The court, recognizing these issues of first impression in South Carolina, addressed WCSC's arguments (1) that the broadcast was not of and concerning Wilhoit and (2) that Wilhoit failed to offer any evidence that a third party understood the broadcast to refer to her.

First, the court relied on a West Virginia case in deciding the broadcast *was* of and concerning plaintiff. In *Crump v. Beckley Newspapers, Inc.*[84] a West Virginia court established the principle that libel may be perpetrated not only from written communication but also by publication of pictures and photographs.[85] The *Crump* court stated, " 'Whether a written defamatory statement refers to a particular plaintiff, normally, is a question of fact for a jury.' . . . [E]ven if the alleged defamatory material refers to another, if the implication is one of identity, the plaintiff may recover."[86] Based solely on these principles and on the evidence presented, the South Carolina court held that the issue was properly submitted to the jury,[87] which could then determine whether the broadcast concerned Wilhoit.

With respect to whether the broadcast amounted to a publication to a third party who understood the broadcast to refer to Wilhoit, the court again allowed the question to go to the jury.

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83. *Id.* at 36, 358 S.E.2d at 398.

84. 320 S.E.2d 70 (W. Va. 1983).

85. *Id.* at 80.

86. *Id.* (quoting Neal v. Huntington Publishing Co., 159 W. Va. 556, 223 S.E.2d 792 (1976)). *See also* Peck v. Tribune Co., 214 U.S. 185 (1909); Wandt v. Hearst's Chicago Am., 129 Wis. 419, 109 N.W. 70 (1906).

87. 293 S.C. at 39, 358 S.E.2d at 400.

This decision was based on "circumstantial evidence that a third party could have heard the defamatory remarks and understood them to refer to the plaintiff."[88] Because the broadcast was shown five times, the court upheld the finding of publication to a third party.[89]

By adopting the reasoning of the West Virginia court in *Crump*, the South Carolina Court of Appeals took a logical and consistent step forward in the development of libel and slander law in South Carolina. In addition to the two South Carolina cases cited by the court,[90] there is ample authority in South Carolina and other jurisdictions supporting the direction taken in *Wilhoit*.

Although *Crump* and *Wilhoit* have remarkably similar factual settings,[91] one distinction between the two deserves consideration. The plaintiff was easily recognizable in *Crump*, whereas in *Wilhoit* the plaintiff covered her face with her hands in such a way that she may or may not have been recognizable. This fact was the basis of a major argument advanced by the defendant with respect to whether a third person understood the broadcast to refer to plaintiff—an element necessary in proving defamation.[92]

The court abruptly resolved the issue in respondent's favor, relying on *Duckworth v. First National Bank*,[93] which held that the question of publication may be submitted to a jury upon *cir-*

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88. *Id.* at 40, 358 S.E.2d at 400.

89. *Id.* Additionally, the court addressed the issues of presumed damages, privilege, inadequate jury instructions, and excessive punitive damages and resolved these issues in the respondent's favor. *Id.* at 40-42, 358 S.E.2d at 400-02.

90. The court cited Flowers v. Price, 192 S.C. 373, 6 S.E.2d 750 (1939) (holding that words spoken could properly be construed as charging the plaintiff with the crime of larceny and could have been understood as that by those who were within hearing), and Duckworth v. First Nat'l Bank, 254 S.C. 563, 176 S.E.2d 297 (1970).

91. In *Crump* the plaintiff's photograph was published with an article about problems faced by women coal miners. Although the plaintiff's name was not mentioned in the article, she successfully claimed that the unauthorized publication of her picture in conjunction with the article amounted to defamation. 320 S.E.2d at 70.

92. *See* Kendrick v. Citizens & Southern Nat'l Bank, 266 S.C. 450, 223 S.E.2d 866 (1976). The defendants in *Wilhoit* argued there was no testimony of record by a third party indicating that he understood the broadcast to refer to plaintiff. 293 S.C. at 40, 358 S.E.2d at 400.

93. 254 S.C. 563, 176 S.E.2d 297 (1970). *See also* Pelot v. Davison-Paxon Co., 218 S.C. 189, 62 S.E.2d 95 (1950); Tobias v. Sumter Tel. Co., 166 S.C. 161, 164 S.E. 446 (1932).

cumstantial evidence that a third party *could have heard* the defamatory remarks and understood them to refer to the plaintiff.[94] Although the court reached a correct conclusion, the opinion, on its face, is vague. The court could have clarified its line of reasoning by citing precedent to establish the requisite groundwork, thereby leading logically to the adoption of *Crump*.[95]

Decisions in the majority of jurisdictions lend further support for the reasoning adopted in *Wilhoit*.[96] Many courts have addressed the issue of sufficiency of identification of the plaintiff in a defamatory matter:

> [Courts] [h]ave held that it is not necessary that a person defamed should be named in a defamatory publication if, by intrinsic reference, the allusion is apparent, or if the publication contains matters of description or reference to facts and circumstances from which others may understand that the person complaining is the person referred to, or he is pointed out by extraneous circumstances so that persons knowing him *could* and would understand that he was the person referred to.[97]

The specific cases addressing this issue have held that the question whether a picture is in fact the plaintiff, or is understood to be the plaintiff, is always one for the jury, whether or

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94. 254 S.C. at 570-71, 176 S.E.2d at 301.

95. In an action for defamation, the plaintiff must prove "that the complaining party was the person with reference to whom the defamatory matter was spoken." 266 S.C. at 454, 223 S.E.2d at 868. It must appear that the defamatory words refer to some ascertained or ascertainable person, and that person must be understood by at least one person to be the plaintiff. *See* Neeley v. Winn-Dixie Greenville, Inc., 255 S.C. 301, 178 S.E.2d 662 (1971); Clark v. Creitzburgh, 15 S.C.L. (4 McCord) 491 (1828); 50 AM. JUR. 2D *Libel and Slander* § 645 (1970). As early as 1956, South Carolina courts held that to support an action for libel the plaintiff's name need not be mentioned in writing, it being sufficient that there is a description or reference to him by which he *may be known*. Nash v. Sharper, 229 S.C. 51, 93 S.E.2d 457 (1956). These precedents, along with *Flowers*, 192 S.C. 373, 6 S.E.2d 750 (1939), lay a foundation for the adoption of the *Crump* rule that libel includes defamation through the publication of pictures or photographs that are descriptions of the person they depict.

96. *See* Annotation, *Libel and Slander: Sufficiency of Identification of Plaintiff by Matter Complained of as Defamatory*, 100 A.L.R. 2D 227 (1965). According to the annotation, although it is well established that defamatory material must refer to some ascertained or ascertainable person and that person must be the plaintiff, "there is a division as to the extent to which plaintiff must be identified by matter intrinsic in the publication." *Id.* at 233.

97. *Id.* at 233-34 (emphasis added). *See also* Peck v. Tribune Co., 214 U.S. 185 (1909).

not direct or circumstantial evidence is the basis for jury determination.[98] Thus, this decision is a sound one in that it conforms with the modern trend.

In reaching the conclusion that both issues presented by appellant were properly submitted to the jury, the court legitimately adopted the reasoning used by the West Virginia court in *Crump*. Prior South Carolina decisions, combined with an expansive body of law found in other jurisdictions, support the logical progression that the court made in *Wilhoit* in the area of television libel and slander.

Lynda G. Wilson

VI. Statute of Limitations for Medical Malpractice Actions Withstands Constitutional Challenge

Section 15-3-545 of the Code of Laws of South Carolina sets forth the statute of limitations for any personal injury action arising out of negligent medical treatment by a licensed health

98. *See* Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948) (jury question as to whether article accompanied by a picture of plaintiff was of and concerning District of Columbia taxi drivers); Ball v. Evening Am. Publishing Co., 237 Ill. 592, 86 N.E. 1097 (1908) (when defendant mistakenly published plaintiff's photograph in connection with an article derogatory to the character of the person having the same surname as plaintiff, court held that a jury question was raised as to whether persons reading the article were led to believe that it referred to plaintiff); Squire v. Press Publishing Co., 58 A.D. 362, 68 N.Y.S. 1028 (N.Y. App. Div. 1901) (jury question as to whether the picture published was in fact plaintiff); Woolf v. Schripps Publishing Co., 35 Ohio App. 343, 172 N.E. 389 (1930) (question for jury was not whether the publication referred to plaintiff but whether the publication was calculated to lead persons reading it to believe it referred to plaintiff); James v. Fort Worth Tel. Co., 117 S.W. 1028 (Tex. Civ. App. 1909) (held that an article with a photograph should be construed as imputing the billing to plaintiff even though the biller was referred to by a name other than that of the plaintiff). *But see* Brewer v. Hearst Publishing Co., 185 F.2d 846 (7th Cir. 1950) (complaint was dismissed since nothing in the publication or photograph of a man's hands, legs and feet identified the person whose body parts were shown in the photograph); Knickerbocker v. Press Publishing Co., 143 A.D. 138, 127 N.Y.S. 969 (1911) (held that plaintiff could not state a defamation cause of action merely through innuendo that he was the person referred to in the publication, when no one viewing the photograph and reading the article could infer that, as the article stated, plaintiff had just been adopted).

care provider.[99] In *Smith v. Smith*[100] the South Carolina Supreme Court declared this statute of limitations for medical malpractice actions constitutional in the wake of an equal protection attack.[101]

The plaintiff wife in *Smith* had sought treatment from the defendant doctor during her pregnancy. During the course of her pregnancy, the plaintiff had developed two complications[102] that resulted in the stillbirth of her child in September 1978. Subsequently, the plaintiffs, husband and wife, began to question the quality of the defendant's medical treatment. Upon Mrs. Smith's release from the hospital, the plaintiffs consulted an attorney regarding the possibility of a malpractice suit against the defendant. As a result of various difficulties with successive attorneys,[103] the medical malpractice actions against the defendant were not commenced until March 1985, almost seven years from the stillbirth of the plaintiffs' child.[104]

The lower court granted the defendant's motions for summary judgment based on the fact that the statute of limitations had run.[105] The plaintiffs offered three arguments in support of overturning the lower court's ruling:[106] (1) the statute of limita-

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99. Section 15-3-545 of the South Carolina Code provides:

> Any action to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission or operation by any licensed health care provider as defined in Article 2 of Chapter 59 of Title 38 shall be commenced within three years from the date of the treatment, omission or operation giving rise to the cause of action or three years from the date of discovery or when it reasonably ought to have been discovered, not to exceed six years from the date of occurrence.

S.C. CODE ANN. § 15-3-545 (Law. Co-op. Supp. 1987).

100. 291 S.C. 420, 354 S.E.2d 36 (1987).

101. *Id.* at 424-25, 354 S.E.2d at 39.

102. During her pregnancy, the plaintiff began to experience weight loss. In addition, she carried her child a full month beyond the estimated date of delivery. *Id.* at 423, 354 S.E.2d at 38.

103. The Charlotte, North Carolina attorney whom the plaintiffs had initially consulted referred them to a Rock Hill attorney. The Smiths met with the second attorney in the spring of 1980 to discuss the possibility of a malpractice action against Dr. Smith. The plaintiffs again consulted this attorney in September or October 1982. Thereafter, they retained a third attorney in order to assert a claim against their former counsel in Rock Hill for his failure to file a timely action against Dr. Smith. Their claim ultimately resulted in the plaintiffs receiving a $45,000 settlement from the Rock Hill attorney. *Id.* at 423-24, 354 S.E.2d at 38.

104. *Id.* at 424, 354 S.E.2d at 39.

105. *Id.* at 422, 354 S.E.2d at 38.

106. *Id.*

tions, as embodied in section 15-3-545, violated the equal protection clauses of the state and federal constitutions; (2) in the alternative, if the statute was deemed constitutional, then it would not bar the plaintiffs' actions because the cause of action was discovered and the suit was initiated within the statutory limit;[107] and (3) also in the alternative, the parties' contract to render proper medical treatment was breached.[108] The first contention, regarding the constitutionality of section 15-3-545, is one of first impression for the South Carolina Supreme Court and is, therefore, of legal significance.

To support its holding of constitutionality, the court relied upon previous South Carolina equal protection decisions. Citing *Gary Concrete Products v. Riley*,[109] the court stated that in deciding equal protection questions, it would give great deference to the classifications created by the legislature; unless those classifications proved to be arbitrary, the court would sustain them.[110] The court further relied upon *Gary Concrete* to outline the applicable standards for an equal protection analysis under South Carolina law.[111]

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107. The court clearly rejected the plaintiffs' second argument. Section 15-3-545 requires that medical malpractice actions be commenced within "three years from the date of discovery or when it reasonably ought to have been discovered, not to exceed six years from the date of occurrence." *See supra* note 99. Since the plaintiffs had consulted attorneys regarding a potential medical malpractice claim against Dr. Smith as late as the spring of 1980, the court held that the discovery rule barred their lawsuits that were filed in March 1985, beyond the three-year statutory limit. 291 S.C. at 425, 354 S.E.2d at 39.

108. The plaintiffs contend that their breach of contract claim was filed timely within the six-year contract statute of limitations as provided in § 15-3-530(1) of the code. S.C. CODE ANN. § 15-3-530(1) (Law. Co-op. 1976). The court, however, refused to address the merits of this argument and held that § 15-3-545 pertains to all medical malpractice actions, thereby barring the plaintiffs' recovery for breach of contract. *Id.* at 426, 354 S.E.2d at 40.

109. 285 S.C. 498, 331 S.E.2d 335 (1985).

110. 291 S.C. at 424, 354 S.E.2d at 39. In *Gary Concrete*, the court stated:

> The determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary. A statute may be limited to a particular class, provided the limitation established is for a proper public purpose. Although the classification may not be arbitrary and there must be a reasonable relationship between the classification and a proper legislative purpose, a classification will not be sustained against constitutional attack if there is "any reasonable hypothesis" to support it.

285 S.C. at 504, 331 S.E.2d at 338 (citations omitted).

111. 291 S.C. at 424, 354 S.E.2d at 39. The court stated: "The requirements of equal protection are satisfied if 1) the classification bears a reasonable relation to the legisla-

Thus, in order to withstand an equal protection challenge, section 15-3-545 had to survive a two-prong test. The statute must be upheld unless (1) the classification lacks a reasonable relation to a legitimate state interest or (2) the statute arbitrarily discriminates among members of the class.[112] In addressing the first prong of the test, the court recognized that the legislature enacted this shorter statute of limitations in response to the medical malpractice crisis of the 1970s. The legislation was specifically designed to limit lawsuits against health care providers in order to reduce providers' exposure to liability and to guarantee the continued delivery of health care services at a reasonable cost. Accordingly, the court deemed the classification of "licensed health care providers" to be rationally related to a legitimate legislative objective.[113]

Similarly, the court found that the second prong of the equal protection test was satisfied. The statutory definition of "licensed health care provider," as incorporated into section 15-3-545,[114] demonstrated the legislature's intent that the medical malpractice statute of limitations apply to any action brought against any individual even remotely connected with the medical profession regarding any negligent medical treatment. Consequently, it is clear that all members of the class created by this statute of limitations are treated alike under similar circumstances and conditions.[115]

As the court noted, numerous other jurisdictions have upheld the constitutionality of shorter statutes of limitations for medical malpractice actions against equal protection attacks.[116]

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tive purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis." *Id.*

112. Brief of Respondent at 5.

113. *Id.* at 5-6.

114. Section 38-59-110 of the South Carolina Code provides: " 'Licensed health care providers' means physicians and surgeons; directors, officers and trustees of hospitals; nurses, oral surgeons; dentists; pharmacists; chiropractors; hospitals; nursing homes; or any similar category of licensed health care providers." S.C. CODE ANN. § 38-59-110 (Law. Co-op. 1976).

115. Brief of Respondent at 8-9.

116. *See* Sellers v. Edwards, 289 Ala. 2, 265 So. 2d 438 (1972); Hamby v. Neurological Assocs., 243 Ga. 698, 256 S.E.2d 378 (1979) (per curiam); Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom.* Woodward v. Burnham City Hosp., 449 U.S. 807 (1980); Carmichael v. Silbert, 422 N.E.2d 1330 (Ind. App. 1981); Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981); Taylor v. Karrer,

Clearly, South Carolina is in the majority nationwide. The court appears to have relied upon the decision in *Roberts v. Durham County Hospital Corp.*,[117] in which the North Carolina Court of Appeals held that a statute of limitations similar to the South Carolina version was enacted as a legitimate response to the medical malpractice crisis of the 1970s. The court pointed out that health care providers were faced with dramatically increased malpractice insurance rates to such an extent that many medical personnel were forced to cut back or even cease offering their services. The *Roberts* court, therefore, held that the shorter statute of limitations for medical malpractice actions was rationally related to the legislative purpose of lowering malpractice insurance rates and of providing adequate, reasonable medical care to the public.[118]

The plaintiffs in *Smith* contended, however, that the court should not apply the "rational basis" test but instead should apply the higher "strict scrutiny" standard, under which a compelling state interest, rather than a legitimate state interest, must be shown in order to uphold the statute against an equal protection challenge. The plaintiffs argued that their right to sue for damages for personal injury was a "fundamental right."[119] The court, relying on its ruling in *Bauer v. South Carolina State Housing Authority*,[120] rejected the plaintiffs' arguments.

In fact, as the lower court noted, the Fourth Circuit Court of Appeals previously has rejected arguments similar to those proffered by the plaintiffs.[121] In *DiAntonio v. Northampton-Ac-*

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196 Neb. 581, 244 N.W.2d 201 (1976); Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1982), *cert. denied*, 459 U.S. 1016 (1982); Roberts v. Durham County Hosp., 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd per curiam*, 307 N.C. 533, 289 S.E.2d 875 (1983); Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978); Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 565 P.2d 435 (1977).

117. 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd per curiam*, 307 N.C. App. 533, 298 S.E.2d 384 (1983).

118. 56 N.C. App. at 540, 289 S.E.2d at 879.

119. Brief of Appellant at 4.

120. 271 S.C. 219, 246 S.E.2d 869 (1978). The *Bauer* court held:

> Unless some suspect criteria, such as race, is involved, it is elementary that the equal protection provisions are satisfied if the classification bears a reasonable relationship to a legitimate state interest which the Legislature seeks to effect and the constituents of each class are treated alike under similar circumstances and conditions . . . .

Id. at 235-36, 246 S.E.2d at 878.

121. Record at 82.

camack Memorial Hospital,[122] the court of appeals applied the "rational basis" test in upholding differential treatment for medical malpractice litigants. In so doing, the court held that no suspect classification or fundamental right was involved that would necessitate the use of the "strict scrutiny" test.[123] Clearly, as illustrated by precedent, no suspect class was involved in the instant case and no fundamental rights were at issue; therefore, the plaintiffs' arguments for a "strict scrutiny" standard were unfounded.

The supreme court's decision in *Smith v. Smith* places South Carolina in the mainstream of national jurisprudence regarding a shorter statute of limitations for medical malpractice actions. The statute was clearly a legitimate exercise of legislative power in response to a critical issue of public concern and was duly upheld as constitutional by the court.

Andrew F. Lindemann

VII. SOVEREIGN IMMUNITY SHIELDS GOVERNMENTAL ENTITIES FROM TORT CLAIMS ARISING BEFORE JULY 1, 1986

Brabham v. City of Columbia[124] and *Taylor v. Murphy*[125] are the first supreme court decisions to interpret the doctrine of sovereign immunity under the South Carolina Tort Claims Act (Act.)[126] In both cases the court held that sovereign immunity shields an uninsured governmental entity from any tort claim arising before July 1, 1986, regardless of when the suit is filed.[127]

In 1820 *Young v. Commissioners of Roads*[128] became the first South Carolina case to adopt sovereign immunity.[129] Despite criticism, South Carolina courts continued to apply the doctrine until 1985 when the supreme court abolished it in *McCall v. Batson*.[130] According to *McCall*, sovereign immunity

122. 628 F.2d 287 (4th Cir. 1980).
123. *Id.* at 291.
124. 293 S.C. 266, 360 S.E.2d 144 (1987).
125. 293 S.C. 316, 360 S.E.2d 314 (1987).
126. S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986). Since *Brabham* and *Taylor*, the Act has been amended. *See infra* note 151 and accompanying text.
127. 293 S.C. at 267-68, 360 S.E.2d at 144; 293 S.C. at 319, 360 S.E.2d at 316.
128. 11 S.C.L. 215 (2 Nott & McC. 537) (1820).
129. *See* 285 S.C. at 255, 329 S.E.2d at 747 (Appendix A).
130. *Id.* at 246, 329 S.E.2d at 742-43. Sovereign immunity will not bar recovery in

would not "apply to any case *filed* after July 1, 1986."[131] Shortly thereafter, the South Carolina General Assembly essentially codified *McCall* in the South Carolina Tort Claims Act.[132] The Act reinstated sovereign immunity for any cause of action arising before July 1, 1986, provided "that sovereign immunity [would] not bar recovery in any case *filed* on or before July 1, 1986, if the defendant maintained liability insurance coverage."[133]

Two months after the Act took effect, however, the supreme court "clarified" *McCall* in *Moore v. Berkely County*.[134] Although *McCall* suggests that the sovereign immunity defense may be avoided by filing the claim after July 1, 1986, *Moore* held that sovereign immunity will bar a claim for any incident that arose prior to July 1, 1986, unless the defendant maintained liability insurance coverage.[135]

Unfortunately, the plaintiff in *Brabham* was prevented from suing the defendant, City of Columbia (City), despite his good faith reliance on *McCall*.[136] Two weeks after the 1985 *McCall* decision, Brabham was injured when a City vehicle struck his automobile.[137] Before the year ended, Taylor and Mobley, in two unrelated accidents, also were injured in automobile collisions with City vehicles.[138] Filing their claims before the Act took effect,[139] Taylor and Mobley sued the City under the South Caro-

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any case "*filed* on or before July 1, 1986, provided the defendant has liability insurance coverage." *Id.*, 329 S.E.2d at 743 (emphasis added). Recovery is limited to the extent of such coverage. *Id.*

131. *Id.* (emphasis added).

132. *See* S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1986); *see also* 293 S.C. at 317, 360 S.E.2d at 315 ("[The Act codifies] the *McCall v. Batson* ruling."). Unlike *McCall*, however, the Act allowed recovery for any tort claims arising, rather than filed, after July 1, 1986. *See* S.C. CODE ANN. § 15-78-40 (Law. Co-op. Supp. 1986).

133. S.C. CODE ANN. § 15-78-20(c) (Law. Co-op. Supp. 1986) (amended March 16, 1987) (emphasis added).

134. 290 S.C. 43, 348 S.E.2d 174 (1986). For a thorough analysis of *Moore*, see *Torts, Annual Survey of South Carolina Law*, 39 S.C.L. REV. 198 (1987).

135. 290 S.C. at 45, 348 S.E.2d at 176. The court, however, expressed no opinion about the Act. *Id.* at 45 n.2, 348 S.E.2d at 176 n.2.

136. 293 S.C. at 267, 360 S.E.2d at 144; *see also* 293 S.C. at 318, 360 S.E.2d at 314.

137. 293 S.C. at 267, 360 S.E.2d at 144.

138. 293 S.C. at 317, 360 S.E.2d at 315. Taylor was injured on May 23, 1985. Mobley was injured on December 13, 1985. These two cases were consolidated for appeal. *Id.*

139. *Id.* Taylor filed in November of 1985, and Mobley filed his claim in May of 1986. The Act became effective on July 1, 1986. S.C. CODE ANN. § 15-78-20 (Law. Co-op. Supp. 1986). Section 15-78-20(c), which relates to those causes of action arising prior to

lina Governmental Motor Vehicle Act.[140] Relying on the ruling in *McCall*, however, Brabham waited until July 2, 1986, to *file* his claim against the city.[141] Nevertheless, in both cases the court held that the city was entitled to sovereign immunity because the accidents occurred before July 1, 1986, and because the City did not have liability insurance coverage.[142]

In *Taylor* the plaintiffs believed that the Motor Vehicle Tort Claims Act would apply regardless of the confusion of the new Act. The supreme court, however, interpreted the Act as retroactively "repeal[ing] the limited exception to sovereign immunity formerly contained in the Governmental Motor Vehicle Torts Claims Act."[143] Accordingly, unless the governmental entity maintained liability insurance coverage at the time of the alleged incident, the Act absolutely reinstated sovereign immunity for those causes of action that arose prior to July 1, 1986.[144] Therefore, because the City did not maintain liability insurance coverage at the time of the accident, the Act barred recovery.[145]

Brabham argued that *McCall* eliminated sovereign immunity as a defense for any tort claim filed after July 1, 1986.[146] Nevertheless, the supreme court, in accordance with *Moore*, held that the date the *incident occurred*, not the date of *filing*, determined the applicability of the sovereign immunity defense.[147] Therefore, since the accident occurred in May 1985, over a year before the Act took effect, sovereign immunity barred Brabham's suit.[148]

After *Brabham* and *Taylor*, the General Assembly amended the South Carolina Tort Claims Act (Amended Act).[149] The original Act apparently allowed a governmental entity to assert the sovereign immunity defense for an incident occurring prior to July 1, 1986 — even when the entity maintained liability insur-

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July 1, 1986, became effective on June 3, 1986. *Id.* (History).

140. *See* S.C. CODE ANN. §§ 15-77-210 to -250 (Law. Co-op. 1976 & Supp. 1986) (repealed July 1, 1986).

141. 293 S.C. at 267, 360 S.E.2d at 144. *See supra* note 130 and accompanying text.

142. 293 S.C. at 267-68, 360 S.E.2d at 144; 293 S.E.2d at 319, 360 S.E.2d at 314.

143. 293 S.C. at 318, 360 S.E.2d at 316.

144. *Id.* at 319, 360 S.E.2d at 316.

145. *Id.*

146. 293 S.C. at 267, 360 S.E.2d at 144.

147. *Id.* at 267-68, 360 S.E.2d at 144. *See supra* note 130 and accompanying text.

148. 293 S.C. at 267-68, 360 S.E.2d at 144.

149. S.C. CODE ANN. §§ 15-78-10 to -190. (Law. Co-op. Supp. 1987).

ance coverage — unless the claim was *filed* before that date.[150] The Amended Act has resolved this problem by deleting this filing requirement, thus removing the last vestige of doubt concerning the use of that term.[151]

Brabham and *Taylor* clearly indicate that sovereign immunity will bar a claim, whether based on common law or a statutory right, when the incident occurred prior to July 1, 1986, and the defendant did not maintain liability insurance coverage. Therefore, filing the complaint after July 1, 1986, will not defeat the Act's clear mandate. In the future, hopefully, similar confusion can be avoided prior to the filing of three lawsuits and the enactment of a statutory amendment.

G. Scott Lutz

VIII. NEW STANDARD OF PROOF FOR SLIP AND FALL CASES INVOLVING WAXED FLOORS

In *Howard v. K-Mart Discount Stores*[152] the South Carolina Court of Appeals reviewed the standard of proof necessary to show negligence on the part of a merchant for a patron's slip and fall on a waxed floor. The court held that a merchant is not liable in negligence to a customer for failure to warn or place mats in areas where the customer slipped and fell, absent any evidence of negligent material or application of wax on the floor area.[153]

On December 24, 1984, the plaintiff Dorothy G. Howard slipped and fell as she entered a store owned and operated by defendant K-Mart Discount Stores (K-Mart) and sustained injuries to her left leg and hip.[154] Howard subsequently filed suit against K-Mart, alleging in part that the defendant was negligent for failing to place mats on the floor, for waxing the floor to a "glass like slickness," and for failing to warn of these latent

150. *Id.* § 15-78-20(c) (Law. Co-op. Supp. 1986). For a complete discussion of the problem with the 1986 Act, see *Torts*, *supra* note 134, at 199-200.

151. The Amended Act now states that "sovereign immunity will not bar recovery in any cause of action arising or accruing on or before [July 1, 1986] if the defendant maintained liability insurance coverage." S.C. CODE ANN. § 15-78-20(c) (Law. Co-op. Supp. 1987).

152. 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987).

153. *Id.* at 138, 359 S.E.2d at 83.

154. *Id.* at 136, 359 S.E.2d at 82.

hazards.[155] A jury returned a verdict in favor of the plaintiff for $1,000 actual damages and $1,000 punitive damages.[156] K-Mart appealed from the trial court's denial of its motions for directed verdict, judgment *non obstante veredicto*, and a new trial.[157] On appeal K-Mart contended that evidence of the plaintiff's fall and of the freshly waxed floors was insufficient to raise a jury question on the issue of negligence.[158] The court agreed and reversed the verdict.[159]

In South Carolina, it is well settled that a merchant does not insure the safety of its customers but, rather, owes its customers the duty to exercise ordinary care to keep its premises in a reasonably safe condition.[160] When a party seeks to recover because of a fall on the merchant's premises, however, the plaintiff has the burden to prove that the merchant's negligence proximately caused the plaintiff's injury. Negligence is not shown by simply proving that an incident or injury occurred; instead, the plaintiff must produce reasonable evidence showing some breach of duty owed him by the merchant.[161]

The court noted that Howard did not allege that she had slipped and fallen as a result of any water, debris, or other foreign substance being on the floor.[162] The court further noted that the plaintiff's burden of proof for showing a merchant's negligence for a slippery wax finish on its floors differs from that in a typical slip and fall case, in which the plaintiff must show that the merchant had actual or constructive knowledge of a foreign substance on the floor.[163] In a slippery wax floor case, the

155. *Id.*

156. *Id.*

157. *Id.*

158. Brief of Appellant at 3.

159. 293 S.C. at 134, 359 S.E.2d at 82.

160. *See, e.g.*, House v. European Health Spa, 269 S.C. 644, 239 S.E.2d 653 (1977); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Young v. Meeting Street Piggly Wiggly, 288 S.C. 508,343 S.E.2d 636 (Ct. App. 1986). The respondent based her argument entirely on this premise. Brief of Respondent at 9-11.

161. Orr v. Saylor, 253 S.C. 155, 169 S.E.2d 396 (1969). Note that the doctrine of *res ipsa loquitur* does not apply in South Carolina. Gilliland v. Pierce Motor Co., 235 S.C. 268, 111 S.E.2d 521 (1959).

162. 293 S.C. at 136, 359 S.E.2d at 82. The plaintiff has testified that there was a light rain falling when she entered the store; however, she also testified that there was neither water nor any foreign substance on her shoes or the floor. Record at 9-12.

163. 293 S.C. at 134, 359 S.E.2d at 82.

plaintiff must show that "the owner was negligent in the materials used to wax the floor or in the manner of application, which constituted the proximate cause of the injury which could not have been avoided by the plaintiff through the exercise of ordinary care."[164] Concluding that the plaintiff had proved nothing more than that she had slipped and fallen on a freshly waxed floor, the court found that K-Mart could not be held liable for failing to warn or place mats in the area where the plaintiff fell.[165]

In establishing the burden of proof necessary to find a merchant liable for the negligent waxing of its floors, the South Carolina Court of Appeals relied exclusively upon decisions from other jurisdictions, particularly cases from Georgia and North Carolina having facts similar to those in *Howard*.[166] In fact, the courts in a majority of jurisdictions have held that a merchant is not liable in negligence simply because the plaintiff fell on a freshly waxed floor.[167]

Therefore, *Howard v. K-Mart Stores* is instructive as to the plaintiff's burden of proof in a slip and fall case involving allegations of a slippery, waxed floor being the cause of the fall. The practitioner must produce evidence of the negligent methods and materials used by the merchant in waxing and maintaining its floor. The *Howard* court indicated that the plaintiff's burden of proof may be satisfied by offering the following types of evidence: evidence of defective materials or negligent methods of applications, evidence that the previous waxing had been defectively performed, or evidence of an accumulation of wax where the plaintiff fell.[168] In establishing this new standard, the deci-

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164. *Id.* at 136-38, 359 S.E.2d at 82-83. The court stressed that the mere fact that the floor was waxed, not the fact that the plaintiff did indeed slip and fall, indicates negligence on the part of the defendant merchant. *Id.* at 137, 359 S.E.2d at 82.

165. *Id.* at 138, 359 S.E.2d at 83.

166. *See* Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980); Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967); Case v. Cato's, Inc., 252 N.C. 224, 113 S.E.2d 320 (1960).

167. *See, e.g.*, Sanderson v. Safeway Stores, Inc., 161 Colo. 271, 421 P.2d 472 (1967); Kinchen v. J.C. Penney Co., 426 So. 2d 681 (La. Ct. App. 1982); Noel v. Buchholz, 411 S.W.2d 155 (Mo. 1967); Asmussen v. New Golden Hotel Co., 80 Nev. 260, 392 P.2d 49 (1964); De La Croix v. Sanders, 219 Or. 494, 347 P.2d 966 (1959); Bowser v. J.C. Penney Co., 354 Pa. 1, 46 A.2d 324 (1946); Rogers v. Collier, 223 S.W.2d 560 (Tex. Civ. App. 1949).

168. 293 S.C. at 138, 359 S.E.2d at 83. *See also* Brief of Appellant at 7-8.

sion in *Howard v. K-Mart Stores* places South Carolina in the mainstream of slip and fall jurisprudence.

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