

Spring 1989

## Liabilities of Sellers and Lessors of Residential Realty in South Carolina

F. P. Hubbard

*University of South Carolina*

Robert L. Felix

*University of South Carolina*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Patrick F. Hubbard & Robert L. Felix, Liabilities of Sellers and Lessors of Residential Realty in South Carolina, 40 S. C. L. Rev. 545 (1989).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# SOUTH CAROLINA LAW REVIEW

---

VOLUME 40

SPRING 1989

NUMBER 3

---

## LIABILITIES OF SELLERS AND LESSORS OF RESIDENTIAL REALTY IN SOUTH CAROLINA\*

F. PATRICK HUBBARD\*\*

ROBERT L. FELIX\*\*\*

### TABLE OF CONTENTS

INTRODUCTION . . . . .	546
I. SALES OF RESIDENCES . . . . .	547
A. <i>Introduction and Background</i> . . . . .	547
B. <i>Fraud and Misrepresentation</i> . . . . .	549
1. <i>Existing Fact</i> . . . . .	552
2. <i>Falsity, Half-Truths, and the Duty to             Disclose.</i> . . . . .	554
3. <i>Reliance by the Victim</i> . . . . .	556
C. <i>Negligence</i> . . . . .	560
D. <i>Implied Warranty</i> . . . . .	563

---

\* This article is an expanded and revised version of portions of a forthcoming book by the authors, *THE SOUTH CAROLINA LAW OF TORTS*.

\*\* Professor of Law, University of South Carolina, School of Law. B.A., Davidson College, 1966; J.D., New York University, 1969; LL.M., Yale University, 1973.

\*\*\* James P. Mozingo III Professor of Law, University of South Carolina, School of Law. A.B., 1956, LL.B., 1959, University of Cincinnati; M.A., University of British Columbia, 1962; LL.M., Harvard University, 1967.

1. <i>The Implied Warranty of Habitability and of Workmanlike Construction</i> . . . . .	563
a. <i>The Implied Warranty of Habitability</i> . . . . .	565
b. <i>The Implied Warranty of Workmanlike Construction</i> . . . . .	567
2. <i>Basis of Implied Warranty</i> . . . . .	570
II. LEASES OF RESIDENCES . . . . .	572
A. <i>Obligations of Lessors</i> . . . . .	572
1. <i>General Rule at Common Law</i> . . . . .	572
2. <i>Common-Law Exceptions to the General Rule</i> . . . . .	574
a. <i>Existing or Foreseeable Danger to Those Outside the Premises</i> . . . . .	574
b. <i>Concealed Dangers</i> . . . . .	575
c. <i>Premises Open to the Public</i> . . . . .	575
d. <i>Common Areas Under Control of Lessor</i> . . . . .	576
e. <i>Undertaking</i> . . . . .	577
3. <i>Warranty, Strict Liability in Tort, and a Possible Statutory Duty of Due Care</i> . . . . .	578
4. <i>Foreseeable Misconduct by Third Parties</i> . . . . .	584
B. <i>The Variable Standards of Care Owed to Third Parties by Lessors and Tenants</i> . . . . .	585
1. <i>Background: The Common-Law System of Categories</i> . . . . .	586
2. <i>Persons Off the Premises</i> . . . . .	587
3. <i>Persons on the Premises</i> . . . . .	589
a. <i>Adult Trespassers</i> . . . . .	589
b. <i>Licensees</i> . . . . .	590
c. <i>Invitees</i> . . . . .	591
d. <i>Children</i> . . . . .	593
CONCLUSION . . . . .	594

## INTRODUCTION

Until very recently, the law of South Carolina and other jurisdictions on liability for defects in a home has been characterized by contrasting approaches in the treatment of sales versus leases. Where sales are concerned, the courts have imposed an implied warranty of habitability and of reasonable workmanship

because of the view that such transactions are for the purchase of a home rather than for the underlying realty. Thus, paralleling the general developments in the law of sales of chattels under the Uniform Commercial Code and strict products liability law, courts have abandoned the old doctrine of *caveat emptor* and the completed work rule in order to bring the home buyer within the ambit of a policy of consumer protection. In contrast, comparable development did not take place with regard to leased premises and the doctrine of *caveat lessee* generally prevailed. As a result, the parties were left to their own contractual devices to plan for the risk of personal injury or property damage caused by defective premises. Though recent developments now grant lessees expanded rights, particularly under statutes, the common law approach to lessees contrasts sharply with the treatment of buyers.

This article addresses the contrasting approaches to sellers and lessors of residences.

## I. SALES OF RESIDENCES

### A. Introduction and Background

Early common law in South Carolina treated sales of chattels very differently from sales of realty. When chattels were involved, the doctrine of *caveat venditor* ("let the seller beware"), which is based on the principle that a sound price implies a sound commodity,<sup>1</sup> often was invoked. In contrast, transactions involving real property traditionally were governed by the doctrine of *caveat emptor* ("let the buyer beware"),<sup>2</sup> and a disappointed buyer's remedies were limited.<sup>3</sup> In particular, no implied warranties existed in the sale of real estate, whether improved or not. Moreover, under the "merger doctrine," any contractual warranties or conditions developed in the negotiation for sale were merged into the deed. Deed provisions governed the parties' liabilities unless one party clearly and convincingly demon-

---

1. For a review of early cases, see *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976).

2. See *id.*

3. A traditional exposition of the remedies historically available to the disappointed home buyer in South Carolina is given in *Frasher v. Cofer*, 251 S.C. 112, 160 S.E.2d 560 (1968) (noted in Comment, *Real Property*, 20 S.C.L. Rev. 864 (1968)).

strated that no such merger was intended.<sup>4</sup> In addition, the common law did not impose tort liability for injury to third parties occurring after work had been accepted.<sup>5</sup> Thus, absent fraud<sup>6</sup> or an expressly reserved warranty, the buyer or other injured person was without recourse against the seller or the builder after work had been completed and accepted.

South Carolina has rejected these limits on liability in cases involving the sale of residential buildings. Courts have imposed liability for negligent injury to foreseeable victims and adopted the doctrine of *caveat venditor*.<sup>7</sup> This latter development is consistent with a national trend to impose an implied warranty of habitability in the sale of improved realty for residential purposes on the view that such transactions are for the purchase of a "home" rather than simply real estate.<sup>8</sup> This trend parallels

4. For a discussion of the "merger doctrine," see *Lane*, 267 S.C. at 501-02, 229 S.E.2d at 729-30, and *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984).

5. See *Clyde v. Sumerel*, 233 S.C. 228, 104 S.E.2d 392 (1958) (reviewed in Case Note, *Torts*, 12 S.C.L.Q. 604 (1960)).

6. Fraud superseded the doctrine of *caveat emptor*. See *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986); *Lawson v. Citizens & S. Nat'l Bank*, 259 S.C. 477, 193 S.E.2d 124 (1972); see also *Byrn v. Walker*, 275 S.C. 83, 267 S.E.2d 601 (1980) (structural stability of house); *Cohen v. Blessing*, 259 S.C. 400, 192 S.E.2d 204 (1972) (termites); *May v. Hopkinson*, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986) (termites). Similarly, an "as is" clause in a contract does not constitute an absolute defense to an action for fraud and deceit. See *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980).

7. See *infra* notes 71-127 and accompanying text.

8. See, e.g., *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); *Keys v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). No case, however, has applied strict liability to any vendor who has not constructed the building or been responsible for both its sale and its construction. Cf. *W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS* § 104A, at 721 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; *Mallor, Extension of the Warranty of Habitability to Purchasers of Used Homes*, 20 AM. L.J. 361 (1982). For law review discussion, see *Toole & Habien, The Warranty of Habitability: A Bill of Rights for Homebuyers*, 44 MONT. L. REV. 159 (1983); *Note, Implied Warranties in New Homes and Their Extension to Subsequent Purchasers in Arizona*, 1983 ARIZ. ST. L.J. 113 (1983); *Note, Recovery Under the Implied Warranty of Habitability Theory*, 10 FORDHAM URBAN L.J. 235 (1982); *Note, The Implied Warranty of Habitability — Changing Privity Requirements*, 47 MONT. L. REV. 127 (1986); *Note, Another Look at the Implied Warranty of Habitability in North Carolina*, 64 N.C.L. REV. 869 (1986); *Note, Implied Warranties in New Home Sales — Is the Seller Defenseless?*, 35 S.C.L. REV. 469 (1984); *Note, The Implied Warranty of Habitability in Residential Property Conveyances*, 62 WASH. L. REV. 743 (1987).

developments in the law of chattel sales under the Uniform Commercial Code<sup>9</sup> and strict products liability law.<sup>10</sup> In all these areas, courts have abandoned the doctrine of *caveat emptor* in favor of the doctrine of *caveat venditor* in order to further a policy of consumer protection.

### B. *Fraud and Misrepresentation*

Even when *caveat emptor* applied to sales of residences, South Carolina sellers of real property were liable for fraud, which traditionally has been stated in terms of nine elements:

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.<sup>11</sup>

The plaintiff's complaint must set forth sufficient facts to show that each of these nine elements is present.<sup>12</sup> One recent case held that a motion to dismiss should be granted when the "complaint fails to allege all nine essential elements of fraud."<sup>13</sup>

---

9. See S.C. CODE ANN. §§ 36-2-314, -315, -316, -318, -715(2) (Law. Co-op. 1976).

10. See PROSSER & KEETON, *supra* note 8, at § 104A; RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965) [hereinafter RESTATEMENT]. In South Carolina, strict products liability has been imposed by statute. See S.C. CODE ANN. §§ 15-73-10 to -30 (Law. Co-op. 1976); see also Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735 (1983); Hatfield v. Atlas Enters., 274 S.C. 247, 262 S.E.2d 900 (1980).

11. M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) (citing O'Shields v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d 50 (1974)).

12. See Mutual Savings & Loan Ass'n v. McKenzie, 274 S.C. 630, 266 S.E.2d 423 (1980); Bookhart v. Central Elec. Power Co-op., 222 S.C. 289, 72 S.E.2d 576 (1952). The new South Carolina Rules of Civil Procedure have not changed this requirement. See *infra* note 13; see also H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 114 (1985).

13. See Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988) (complaint omitting essential elements of defendant's intent and plaintiff's ignorance is inadequate and subject to motion to dismiss under S.C.R. Civ. P. 12(b)(6)).

Other cases, however, have indicated that the complaint need not explicitly list the nine elements so long as it sets forth the basis for an action in fraud.<sup>14</sup> Moreover, the supreme court, on occasion, has been very liberal in construing conclusory pleadings,<sup>15</sup> particularly when the defendant has not moved that an allegation be made more definite and certain.<sup>16</sup>

The nine elements of fraud are well settled and are repeated often in South Carolina cases. Nevertheless, one should remember that other jurisdictions<sup>17</sup> and the *Restatement of Torts*<sup>18</sup> have modified the requirements so that more conduct is covered by the broad tort of “misrepresentation.” In addition, some authority indicates that a cause of action for negligent or reckless nondisclosure of land defects exists in South Carolina.<sup>19</sup> One also should remember that equitable and contractual remedies may be available for “constructive fraud”<sup>20</sup> or mistake.<sup>21</sup> Addition-

14. See e.g., *Outlaw v. Calhoun Life Ins. Co.*, 236 S.C. 272, 113 S.E.2d 817 (1960); *Eskew v. Life Ins. Co.*, 190 S.C. 515, 3 S.E.2d 251 (1939); *Smith v. Vandiver*, 149 S.C. 540, 147 S.E. 645 (1929).

15. See, e.g., *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978).

16. See, e.g., *Pilkington v. McBain*, 274 S.C. 312, 314-15, 262 S.E.2d 916, 918 (1980).

17. See PROSSER & KEETON, *supra* note 8, §§ 105-110; 37 AM. JUR. 2d *Fraud & Deceit* § 206 (1968); 37 C.J.S. *Fraud* § 25 (1943).

18. See RESTATEMENT, *supra* note 10, §§ 552-552B (negligent misrepresentation); *id.* § 552C (innocent misrepresentation); *cf. id.* § 402B (strict liability for personal injury caused from misrepresentation by seller of products).

19. See, e.g., *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986). *Pruitt* held that an action for fraud existed when an inadequate foundation existed because a stumped pit had been covered over with fill dirt. In addition the court held: “The doctrine of caveat emptor is also inapplicable in actions based upon negligent or reckless non-disclosure of land defects. See also Restatement of Torts, 2d, § 353, [sic] which rejects, by clear implication, *caveat emptor* in non-disclosure of land defect cases.” *Id.* at 301, 342 S.E.2d at 401.

Section 353 of the RESTATEMENT, *supra* note 10, also was relied upon in *Rogers v. Scyphers*, 231 S.C. 128, 161 S.E.2d 81 (1968), which is discussed *infra* at notes 71-72 and accompanying text.

20. “Constructive fraud” is involved when the defendant has not acted with a knowing or reckless disregard of falsity, but the other elements of fraud are present. See *O’Quinn v. Beach Assocs.*, 272 S.C. 95, 249 S.E.2d 734 (1978); *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 108 S.E.2d 414 (1959); *Greene v. Brown*, 199 S.C. 218, 19 S.E.2d 114 (1942); PROSSER & KEETON, *supra* note 8, § 107, at 745-48; 89 C.J.S. *Trusts* §§ 139-159 (1955). The normal remedies in such a case would be rescission and restitution restoring the parties to the *status quo ante*. See D. DOBBS, *THE LAW OF REMEDIES* (1973); G. PALMER, *THE LAW OF RESTITUTION* (1978); RESTATEMENT (SECOND) OF RESTITUTION §§ 30-33 (Tent. Draft No. 2 1984); RESTATEMENT (FIRST) OF RESTITUTION §§ 160-162 (1937); 66 AM. JUR. 2d *Restitution & Implied Contracts* § 14 (1973); 89 C.J.S. *Trusts*

ally, when a duty of due care is owed, negligent misrepresentation can give rise to a cause of action in South Carolina.<sup>22</sup>

A full discussion of the elements of fraud is beyond the scope of this article. Because of their close relationship to other theories of recovery, however, three aspects of fraud will be discussed in more detail: (1) the requirement of a representation of an existing fact; (2) the duty to disclose; and (3) the victim's reliance. In addition to these specific aspects, two other points concerning fraud should be kept in mind. First, fraud must be

---

§ 139 (1955). In addition to restitution, other equitable doctrines may be appropriate. See *Boardman v. Lovett Enters.*, 288 S.C. 387, 342 S.E.2d 634 (Ct. App. 1986).

21. Two contractual approaches are available. First, the representation by the defendant may constitute a warranty or a contract. In such a case, plaintiffs may seek to enforce the contract by such traditional remedies as damages or specific performance. Plaintiffs also may seek to reform the contract so that it conforms to the representation. See, e.g., *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct. App. 1987) (reformation for unilateral mistake requires fraud and reasonable mistake or some strong indication that enforcement without reformation would be wrongful); D. DOBBS, *supra* note 20, § 9.5. Obviously, if the plaintiff elects to enforce the contract (or otherwise affirms the contract), then he may be required to perform his part of the contract and could be held liable to a counterclaim for any unexcused nonperformance. See *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871 (1955); *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983); see also *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979).

The second contractual approach plaintiffs may take is to seek to avoid or to rescind the contract and be returned to the *status quo ante*. See *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 103-04, 249 S.E.2d 734 (1978); *Bradley v. Hullander*, 272 S.C. 6, 249 S.E.2d 486 (1978); *Burris v. Lake Wylie Marina, Inc.*, 285 S.C. 614, 330 S.E.2d 559 (Ct. App. 1985); RESTATEMENT (SECOND) OF CONTRACTS § 376 (1979). Applying these contractual approaches may raise problems concerning the applicability of the merger doctrine. See *supra* notes 2-6 and accompanying text.

22. According to some authority, plaintiffs may recover for negligent misrepresentation, particularly under circumstances indicating that they are owed a duty to avoid mistake or a duty of due care. See, e.g., *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (consultant preparing report owes duty of care to persons "directly" and foreseeably injured by misstatements of fact in the report); *Gordon-Gallup Realtors v. Cincinnati Ins. Co.*, 274 S.C. 468, 471, 265 S.E.2d 38, 40 (1980) (insurer had duty to defend suit for negligent misrepresentation); *Garret v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987) (one undertaking to act as investment adviser must use due care); *Winburn v. Insurance Co. of N. Am.*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985); *Pittman v. Galloway*, 281 S.C. 70, 313 S.E.2d 632 (Ct. App. 1984); *Henson v. Bell Fed. Savings & Loan Ass'n*, 280 S.C. 354, 312 S.E.2d 586 (Ct. App. 1984); RESTATEMENT, *supra* note 10, §§ 552-552B. Cf. *Serino v. Dun & Bradstreet, Inc.*, 267 F. Supp. 396 (D.S.C. 1967); *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986) (liability for negligent failure to purchase insurance). In South Carolina, the central issue in negligent misrepresentation is whether the defendant owes a duty of due care. For a general discussion of this issue, see *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986).



shown by clear, cogent, and convincing evidence.<sup>23</sup> Nevertheless, because of the difficulties involved in proving fraud in terms of such elements as the seller's intent and knowledge, rules concerning admission of evidence are very liberal.<sup>24</sup> Second, fraud also may be used as a defense to a legal action;<sup>25</sup> for example, fraud in the making of a contract could bar a subsequent suit for breach of that contract. When the defendant uses fraud as a defense, he must allege the elements in his answer and support them with clear, cogent, and convincing evidence.<sup>26</sup>

### 1. Existing Fact

In order to be actionable in fraud, the representation must be a statement (or a set of actions)<sup>27</sup> that concerns an *existing fact*. Thus, the following normally are not actionable:

- (1) mere "puffing" or "sales-talk";<sup>28</sup>
- (2) statements of opinion,<sup>29</sup> except where a special relation-

23. See, e.g., *M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

24. See *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971); *Shumpert v. Service Life & Health Ins. Co.*, 220 S.C. 401, 413-14, 68 S.E.2d 340, 346 (1952); *Henderson v. Capital Life & Health Ins. Co.*, 199 S.C. 100, 18 S.E.2d 605 (1942); *Halsey v. Minnesota-South Carolina Land & Timber Co.*, 174 S.C. 97, 116, 177 S.E. 29, 37 (1934); *Finance Corp. v. Kristiansen*, 153 S.C. 168, 150 S.E. 652 (1929); *Continental Jewelry Co. v. Kerhulas*, 136 S.C. 496, 134 S.E. 505 (1926); *Aldridge v. Watts Mill*, 131 S.C. 222, 127 S.E. 213 (1925); *Suber v. Parr Shoals Power Co.*, 113 S.C. 317, 102 S.E. 335 (1920); *Border State Lumber Co. v. Edwards*, 103 S.C. 391, 88 S.E. 537 (1915); *Gist v. McJunkin*, 31 S.C.L. (2 Rich.) 154 (1845). Proving that the defendant knew the representation was false and that the defendant intended for the plaintiff to rely on the representation may be difficult. See *supra* note 11 and accompanying text.

25. See 37 AM. JUR. 2D *Fraud & Deceit* §§ 222, 337-341 (1968).

26. See *Byars*, 237 S.C. at 554, 118 S.E.2d at 327.

27. See *Carter v. Boyd Constr. Co.*, 255 S.C. 274, 279, 178 S.E.2d 536, 539 (1971); *Chisolm v. Gadsden*, 32 S.C.L. (1 Strob.) 220 (1847); PROSSER & KEETON, *supra* note 8, § 106, at 736; RESTATEMENT, *supra* note 10, § 525 comment b; 37 AM. JUR. 2D *Fraud & Deceit* § 42 (1968); 37 C.J.S. *Fraud* § 9 (1943). Deliberate concealment of material facts is a misrepresentation. See *infra* note 46 and accompanying text.

28. See *Miller v. Premier Corp.*, 608 F.2d 973, 981 (4th Cir. 1979); 37 AM. JUR. 2D *Fraud & Deceit* § 54 (1968); 37 C.J.S. *Fraud* § 13 (1943). This aspect of fraud overlaps with issues involving the reasonableness of the victim's reliance on the representation. See *infra* notes 54-70 and accompanying text. PROSSER & KEETON, *supra* note 8, § 109, at 757, notes that denying liability for "puffing" is akin to a privilege to lie, and therefore, courts have been generous in allowing "puffing" cases to go to the jury.

29. See *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 227 S.E.2d 189 (1976); *Williams v. Bruce*, 110 S.C. 421, 96 S.E. 905 (1918); *Winburn v. Insurance Co. of N. Am.*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985); PROSSER & KEETON, *supra* note 8, § 109; RE-

ship exists or the opinion involves factual matters;<sup>30</sup>

(3) predictions of future events,<sup>31</sup> unless the prediction is simply a lie or is based upon special knowledge;<sup>32</sup>

(4) promises (followed by breach of contract),<sup>33</sup> as opposed to: (1) a knowing or reckless misrepresentation about one's intention to perform the contract which conduct may constitute "fraud in the inducement" of the contract,<sup>34</sup> or (2) a "breach of contract with fraudulent intent";<sup>35</sup>

---

STATEMENT, *supra* note 10, §§ 538A, 539, 542-543; 37 AM. JUR. 2d *Fraud & Deceit* §§ 45-56 (1968); *see also* Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979).

30. *See* RESTATEMENT, *supra* note 10, §§ 538A, 539; 37 AM. JUR. 2d *Fraud & Deceit* §§ 49-53 (1968); 37 C.J.S. *Fraud* § 10 (1943).

31. *See* Whitman v. Seaboard Airline Ry., 107 S.C. 200, 92 S.E. 861 (1917); *see also* Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979); 37 AM. JUR. 2d *Fraud & Deceit* §§ 57-59 (1968).

32. *See* Miller v. Premier Corp., 608 F.2d 973, 981 (4th Cir. 1979); 37 AM. JUR. 2d *Fraud & Deceit* § 59 (1968); 37 C.J.S. *Fraud* § 11 (1943).

33. *See* Woodward v. Todd, 270 S.C. 82, 86, 240 S.E.2d 641, 643 (1978); Vann v. Nationwide Ins. Co., 257 S.C. 217, 185 S.E.2d 363 (1971); Dailey v. American Inst. of Mkts. Sys., Inc., 256 S.C. 550, 553, 183 S.E.2d 444, 446 (1971); Moye v. Wilson Motors, Inc., 254 S.C. 471, 480, 176 S.E.2d 147, 152 (1970); Davis v. Upton, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967); Willard v. Chrysler Corp., 248 S.C. 42, 46, 148 S.E.2d 867, 868 (1966); Page v. Pilot Life Ins. Co., 192 S.C. 59, 64, 5 S.E.2d 454, 455 (1939); Winburn v. Insurance Co. of N. Am., 287 S.C. 435, 440, 339 S.E.2d 142, 145 (Ct. App. 1985); Emerson v. Powell, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984); PROSSER & KEETON, *supra* note 8, § 109; Torts, *Annual Survey of South Carolina Law*, 8 S.C.L.Q. 135 (1955); 37 AM. JUR. 2d *Fraud & Deceit* §§ 57-67 (1968); 37 C.J.S. *Fraud* § 11 (1943).

34. Fraud in the inducement of a contract exists when one promises to do an act in the future, but has no intention of performing the act. Such fraud is actionable as with any other fraud. *See* Buzhardt v. Cromer, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978); Davis v. Upton, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967); Willard v. Chrysler Corp., 248 S.C. 42, 148 S.E.2d 867 (1966); Page v. Pilot Life Ins. Co., 192 S.C. 59, 64-65, 5 S.E.2d 454, 456 (1939); Branham v. Wilson Motor Co., 188 S.C. 1, 198 S.E. 417 (1938); Cook v. Metropolitan Ins. Co., 186 S.C. 77, 84, 194 S.E. 636, 639 (1938); Ford v. Ball, 178 S.C. 111, 117, 182 S.E. 319, 321 (1935); PROSSER & KEETON, *supra* note 8, § 109; RESTATEMENT, *supra* note 10, § 530; 37 AM. JUR. 2d *Fraud & Deceit* §§ 26-40, 68-72 (1968).

35. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985), summarizes the three elements of breach of contract with fraudulent intent as follows:

(1) *A breach of contract.* In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement.

(2) *Fraudulent intent relating to the breaching of the contract and not merely to its making.* Fraudulent intent is normally proved by circumstances surrounding the breach.

(3) *A fraudulent act accompanying the breach.* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

*Id.* at 53-54, 336 S.E.2d at 503-04 (citations omitted).

(5) statements of law,<sup>36</sup> except when one deliberately takes advantage of the ignorance of others<sup>37</sup> or when a “factual” matter actually is involved<sup>38</sup> — for example, when a seller or lessor knows “as a fact” that he is mistating zoning restrictions.<sup>39</sup>

## 2. *Falsity, Half-Truths, and the Duty to Disclose*

In determining whether “falsity” exists, two types of issues often arise. First, some cases involve ambiguities and “half-truths” — a statement that is literally true but, in the context of

---

The fraudulent act, referred to in the third element,

is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. . . . Fraud, in this sense, “assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.”

Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986) (citation omitted) (quoting Sullivan v. Calhoun, 117 S.C. 137, 108 S.E.2d 189 (1921)).

Since a breach of contract is an element of the cause of action, an “action for breach of contract accompanied by fraudulent act is an action *ex contractu*, not *ex delicto*[:]” however, it partakes of elements of both contract and tort.” Peeples v. Orkin Exterminating Co., 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964) (citation omitted). A separate action for fraud may be brought for the fraudulent act. See *id.* Given this overlap, the plaintiff must elect one cause of action; however, timing of the election depends upon the circumstances. See Riddle v. Pitts, 283 S.C. 387, 324 S.E.2d 59 (1984).

If a breach of contract is accomplished by a fraudulent intent and accompanied by a fraudulent act, then punitive damages may be recovered. See Ateyeh v. Volkswagen of Florence, Inc., 238 S.C. 101, 341 S.E.2d 378 (1986); Peeples v. Orkin Exterminating Co., 244 S.C. 173, 135 S.E.2d 845 (1964); Moody v. Stem, 214 S.C. 45, 55, 51 S.E.2d 163, 166-67 (1948); McCullough v. American Workmen, 200 S.C. 84, 20 S.E.2d 640 (1942); Holland v. Spartanburg Herald-Journal Co., 166 S.C. 454, 466, 165 S.E. 203, 207 (1932); Givens v. North Augusta Elec. & Improvement Co., 91 S.C. 417, 424, 74 S.E. 1067, 1070 (1912); Prince v. State Mut. Life Ins. Co., 77 S.C. 187, 57 S.E. 766 (1907); Welborn v. Dixon, 70 S.C. 108, 115, 49 S.E. 232, 234 (1904); Scott v. Mid-Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987); Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985).

36. See Moody v. Stem, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1949); First Nat'l Bank v. United States Fidelity & Guar. Co., 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945); Koon v. Pioneer-Pyramid Life Ins. Co., 175 S.C. 117, 121, 178 S.E. 503, 504 (1935); 37 AM. JUR. 2D *Fraud & Deceit* §§ 73-80 (1968); 37 C.J.S. *Fraud* § 55 (1943).

37. See Moody v. Stem, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1949) (Oxner, J., concurring); Koon v. Pioneer-Pyramid Life Ins. Co., 175 S.C. 117, 121-22, 178 S.E. 503, 504 (1935); 37 C.J.S. *Fraud* § 55 (1943).

38. See 37 AM. JUR. 2D *Fraud & Deceit* §§ 78-80 (1968).

39. See National Conversion Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621, 298 N.Y.S.2d 499, 246 N.E.2d 351 (1969).

the situation involved, can result in a misrepresentation. The general rule is that such a statement is a false misrepresentation when its maker knows that the statement may be interpreted in a false way.<sup>40</sup> Second, some cases address the question of whether silence can constitute a "false representation." In other words, does a defendant have a duty to disclose facts? Absent such a duty, nondisclosure is not fraudulent.<sup>41</sup> Normally, the parties to a transaction do not owe any duty of disclosure to one another.<sup>42</sup> Exceptions to this rule include: when a party has a fiduciary relationship;<sup>43</sup> when a party knows material facts that cannot be discovered by the other party;<sup>44</sup> or when fair dealing would require disclosure.<sup>45</sup> In addition, deliberate concealment can constitute misrepresentation.<sup>46</sup>

These rules have been applied in a number of cases involving sales of residences. For example, a developer that has used unsuitable land-fill materials has a duty to disclose this condi-

40. See *Thermoid Rubber Co. v. Bank of Greenwood*, 1 F.2d 891, 894 (4th Cir. 1924); PROSSER & KEETON, *supra* note 8, § 106, at 736-37; RESTATEMENT, *supra* note 10, §§ 527, 529; 37 AM. JUR. 2d *Fraud & Deceit* § 183 (1968); 37 C.J.S. *Fraud* § 17 (1943).

41. See *Jacobson v. Yashchik*, 249 S.C. 577, 155 S.E.2d 601 (1967); *Gordon v. Fidelity & Casualty Co.*, 238 S.C. 438, 450, 120 S.E.2d 509, 515 (1961); *Warr v. Carolina Power & Light Co.*, 237 S.C. 121, 127, 115 S.E.2d 799, 802 (1960); *Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 437, 23 S.E.2d 372, 376 (1942); PROSSER & KEETON, *supra* note 8, § 106; RESTATEMENT, *supra* note 10, § 551; 37 AM. JUR. 2d *Fraud & Deceit* §§ 144-176 (1968); 37 C.J.S. *Fraud* §§ 15 (1943).

42. See *supra* note 41; see also PROSSER & KEETON, *supra* note 8, § 106; 37 AM. JUR. 2d *Fraud & Deceit*, §§ 144-176; 37 C.J.S. *Fraud* §§ 15-16 (1943).

43. See *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (normal banker-depositor arrangement does not create fiduciary relationship); *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); 37 AM. JUR. 2d *Fraud & Deceit* §§ 146, 149 (1968).

44. See *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986) (inadequate landfill case; subdivider concealed condition from ignorant purchaser); *Lawson v. Citizens & S. Nat'l Bank*, 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972) (*Lawson II*) (inadequate land-fill); *Lawson v. Citizens & S. Nat'l Bank*, 255 S.C. 517, 180 S.E.2d 206 (1971) (*Lawson I*) (insect infestation); *May v. Hopkinson*, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986) (deliberate concealment of termite damage).

45. See *Hester v. New Amsterdam Casualty Co.*, 268 F. Supp. 623 (D.S.C. 1967) (rescission for unilateral mistake); *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980); *Gardner v. Nash*, 225 S.C. 303, 309, 82 S.E.2d 123, 127 (1954); see also *supra* notes 19-20 and accompanying text. Cf. *Scott v. Mid Carolina Homes, Inc.*, 293 S.C. 191, 199, 359 S.E.2d 291, 296 (Ct. App. 1987) (rescission for unilateral mistake).

46. See *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986); *Landvest Ass'n v. Owens*, 276 S.C. 22, 274 S.E.2d 433 (1981); *Lawson v. Citizens & S. Nat'l Bank*, 259 S.C. 477, 193 S.E.2d 124, 128 (1972); RESTATEMENT, *supra* note 10, § 550; 37 AM. JUR. 2d *Fraud & Deceit* §§ 144-176 (1968); 37 C.J.S. *Fraud* § 15 (1943).

tion to a purchaser because the purchaser cannot reasonably discover the condition.<sup>47</sup> Similarly, a seller must inform a buyer about termite damage known to the seller if the damage is not discoverable upon reasonable inspection.<sup>48</sup>

### 3. *Reliance by the Victim*

In order to establish a fraud claim, the victim must rely on the misrepresentation.<sup>49</sup> Thus, ignorance of falsity is an element of the tort of fraud.<sup>50</sup> If the plaintiff knew that the misrepresentation was false, then she has no cause of action because her conduct could not have been in reliance on the truth of the statement.<sup>51</sup> Similarly, no reliance exists when the plaintiff would have undertaken the transaction regardless of whether the representation was true; in that situation, the cause of action for fraud must fail.<sup>52</sup> Finally, when the plaintiff, despite the inducement, only did what he was legally required to do in any event, he was not “fraudulently induced to do so.”<sup>53</sup>

In addition to the requirement of actual reliance, the plaintiff also must have a “right” to rely on the misrepresentation. In

47. See *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986) (inadequate landfill case; subdivider concealed condition from ignorant purchaser); *Lawson v. Citizens & S. Nat'l Bank*, 259 S.C. 477, 485, 193 S.E.2d 124 (1972) (*Lawson II*) (inadequate landfill).

48. See *Cohen v. Blessing*, 259 S.C. 400, 402-03, 192 S.E.2d 204, 205 (1972) (insect infestation); *Lawson v. Citizens & S. Nat'l Bank*, 255 S.C. 517, 180 S.E.2d 206 (1971) (*Lawson I*) (insect infestation); *May v. Hopkinson*, 289 S.C. 549, 556, 347 S.E.2d 508, 513 (Ct. App. 1986) (deliberate concealment of termite damage).

49. See *Flowers v. Price*, 190 S.C. 392, 3 S.E.2d 38 (1939); *Williams v. Haverty Furniture Co.*, 182 S.C. 100, 104, 188 S.E. 512, 513 (1936); see also *Griffin v. Heinitsch*, 309 F. Supp. 1028 (D.S.C. 1970); RESTATEMENT, *supra* note 10, § 537; 37 AM. JUR. 2D *Fraud & Deceit* §§ 223-235 (1968); 37 C.J.S. *Fraud* § 29 (1943). But see *Frist v. Gallant*, 240 F. Supp. 827 (D.S.C. 1965) (recovery allowed for fraud when perjury resulted in judicial decision that harmed plaintiff).

50. See *supra* note 11 and accompanying text.

51. See *Moorhead v. First Piedmont Bank & Trust Co.*, 273 S.C. 356, 256 S.E.2d 414 (1979); see also *Shaw v. Great Atl. & Pac. Tea Co.*, 115 F.2d 684 (4th Cir. 1941); RESTATEMENT, *supra* note 10, §§ 541, 548.

52. See *Warren v. Peeples*, 183 S.C. 238, 190 S.E. 740 (1937); *Thackston v. Shelton*, 178 S.C. 240, 182 S.E. 436 (1935).

53. See *M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank*, 275 S.C. 381, 385, 271 S.E.2d 414, 416 (1980). While the principle concerning legal duty expressed in the text is reasonable and well established, its application can result in occasional differences in opinion and questionable results. See, e.g., *id.* at 385-89, 271 S.E.2d at 416-18 (Littlejohn, J., dissenting); RESTATEMENT (SECOND) OF CONTRACTS §§ 251, 252, 252 illustration 1 (1979).

other words, the reliance must be "legitimate" or "reasonable."<sup>54</sup> One source of difficulty concerning the reasonableness of the victim's reliance arises when the victim could have discovered the falsity. In such cases the court is forced to balance two competing policies. As stated by the South Carolina Supreme Court in *Thomas v. American Workmen*:<sup>55</sup>

The policy of the Courts is, on the one hand, to suppress fraud, and on the other, not to encourage negligence and inattention to one's own interest. Either course has obvious dangers. But the unmistakable drift is toward the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary.

In developing this "just doctrine," the court noted in *J.B. Colt Co. v. Britt*:<sup>56</sup>

Conceding that there are serious difficulties in the way of testing the conduct of a defrauded person by the application of the standard prescribed to determine the existence of negligence, viz., the due care of the man of ordinary reason and prudence, since the victim of fraud may be not the less but the more entitled to relief because he is incapable of exercising the care of the man of ordinary sense and prudence, and granting that mere negligence or inadvertent failure to exercise due care, when such failure is induced by a fraudulent representation of the adversary, should not on principle debar the negligent party from asserting a right to relief on the ground of fraud, nevertheless, if, under the facts of the particular case, the conduct of the party who pleads fraud may soundly be held to have amounted to a reckless or conscious disregard of his duty

---

54. The legitimacy of reliance overlaps considerably with the materiality of the representation. See RESTATEMENT, *supra* note 10, § 538. Legitimacy also overlaps with the requirement of "existing fact" because, for example, a reasonable person would not rely on "puffing." See *supra* notes 28-33 and accompanying text. As indicated *infra* in note 68, the standard for measuring the legitimacy of reliance should be distinguished carefully from the standard relevant to the determination of whether a duty to disclose exists.

55. 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941). See 37 AM. JUR. 2D *Fraud & Deceit* § 247 (1968). Dean Prosser notes that the requirement that reliance be reasonable also serves as a way to corroborate plaintiff's claim. See PROSSER & KEETON, *supra* note 8, § 108, at 749-50.

56. 129 S.C. 226, 123 S.E. 845 (1924). For a different test, see Unlimited Servs., Inc. v. Macklen Enters., Inc., No. 1287 Davis Adv. Sh. No. 3 (S.C. Ct. App. Feb. 6, 1989) ("normally prudent person" test).

to avail himself of the opportunity and means at hand to protect his own interests, there would seem to be no valid reason for not applying the principle, recognized in this jurisdiction, that where one is injured by a willful wrong and his own willful or reckless misconduct has contributed to his injury as a proximate cause, he should not be permitted to recover. . . . [W]hat conduct constitutes a reckless or conscious failure to exercise such prudence, will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc.<sup>57</sup>

Thus, South Carolina is in accord with the general rule<sup>58</sup> that the victim has a right to rely so long as he is not reckless or grossly negligent. Since the defendant has engaged in either knowing or reckless misconduct, this rule has considerable appeal. Even if the victim is reckless, such recklessness must cause the reliance.<sup>59</sup>

Although legitimacy of reliance is a jury issue to be resolved in terms of the unique facts of each case,<sup>60</sup> several typical examples should illustrate the application of this rule. First, in absence of a fiduciary relationship,<sup>61</sup> it is reckless for a literate person to sign a contract or to rely on another's interpretation of a document without reading it himself<sup>62</sup> unless there is no mean-

57. *Id.* at 234-35, 123 S.E. at 848.

58. See PROSSER & KEETON, *supra* note 8, § 108; 37 AM. JUR. 2D *Fraud & Deceit* § 250 (1968); 37 C.J.S. *Fraud* §§ 28-39 (1943). But see RESTATEMENT, *supra* note 10, §§ 540-545A.

59. See, e.g., *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957) (no liability for failure to search title when that search would not have revealed inadequacies).

60. See *Elders v. Parker*, 286 S.C. 228, 332 S.E.2d 563 (Ct. App. 1985); *Starkey v. Bell*, 281 S.C. 308, 313, 315 S.E.2d 153, 158 (Ct. App. 1984).

61. See *supra* note 43 and accompanying text; see also *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986).

62. See *Burwell*, 288 S.C. 34, 340 S.E.2d 786; *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 239 S.E.2d 76 (1977); *Doub v. Weathersby Breeland Ins. Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977); *Lundy v. Palmetto State Life Ins. Co.*, 256 S.C. 506, 183 S.E.2d 335 (1971); *Moye v. Wilson Motors, Inc.*, 254 S.C. 471, 176 S.E.2d 147 (1970); *Maw v. McAlister*, 252 S.C. 280, 166 S.E.2d 203 (1969); *Parnell v. United Am. Ins. Co.*, 246 S.C. 26, 142 S.E.2d 204 (1965); *Gordon v. Fidelity & Casualty Co.*, 238 S.C. 438, 120 S.E.2d 509 (1961); *Reid v. George Washington Life Ins. Co.*, 234 S.C. 599, 109 S.E.2d 577 (1959); *Branham v. Capital Life & Health Ins. Co.*, 220 S.C. 67, 66 S.E.2d 451 (1951); *O'Connor v. Brotherhood of R.R. Trainmen*, 217 S.C. 442, 60 S.E.2d 884 (1950); *Souba v. Life Co.*, 187 S.C. 311, 197

ingful opportunity to do so.<sup>63</sup> An illiterate person or a person suffering from physical or financial difficulties, however, justifiably and reasonably may trust a salesman's statements about the contents of a contract even though it is, perhaps, imprudent to trust the salesman's representations.<sup>64</sup> Similarly, if purchasers of vending machines could *easily* determine that the locations of the machines were unsatisfactory, then their lack of investigation may be considered reckless, and they cannot recover for fraud.<sup>65</sup> On the other hand, if the purchaser of a business could not easily determine the existence and contents of business records, he can recover for fraud even if he did not investigate

---

S.E. 826 (1938); *Able v. Equitable Life Assurance Soc'y*, 186 S.C. 381, 195 S.E. 652 (1938); *Dukes v. Life Ins. Co.*, 184 S.C. 500, 193 S.E. 36 (1937); *Hood v. Life & Casualty Ins. Co.*, 173 S.C. 139, 175 S.E. 76 (1934); *Frierson v. Inter-Ocean Casualty Co.*, 168 S.C. 178, 167 S.E. 232 (1933); *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924). *But see* *South v. Sherwood Chevrolet, Inc.*, 277 S.C. 372, 287 S.E.2d 490 (1982); *Stevens v. Plantation Pipe Line Co.*, 260 S.C. 390, 196 S.E.2d 117 (1973); *Grayson v. Fidelity Life Ins. Co.*, 114 S.C. 130, 103 S.E. 477 (1920) (reasonableness of reliance without reading document over a nine-year period held to be jury issue even though no evidence of illiteracy or other infirmity); *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (suit for fraudulent breach of contract allowed even though plaintiff knowingly signed a financing agreement containing blanks where dollar amounts would be entered).

63. *See, e.g., Hutto v. Southern Farm Bureau Life Ins. Co.*, 259 S.C. 170, 191 S.E.2d 7 (1972); *Outlaw v. Calhoun Life Ins. Co.*, 236 S.C. 272, 113 S.E.2d 817 (1960); *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 290, 328 S.E.2d 916, 919 (Ct. App. 1985) (policy so "confusing, if not incomprehensible," that reasonable person could not ascertain his rights by reading it).

64. *See Brown v. All Am. Life & Casualty Co.*, 271 S.C. 442, 247 S.E.2d 812 (1978) (insurance release secured by taking advantage of financial and physical condition of insured); *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965); *Weatherford v. Home Fin. Co.*, 225 S.C. 313, 82 S.E.2d 196 (1954); *Shumpert v. Service Life & Health Ins. Co.*, 220 S.C. 401, 68 S.E.2d 340 (1951); *Thomas v. American Workmen*, 197 S.C. 178, 14 S.E.2d 886 (1941); *Crosby v. Metropolitan Life Ins. Co.*, 167 S.C. 255, 166 S.E. 266 (1932); *Baldwin v. Postal Tel. Cable Co.*, 78 S.C. 419, 57 S.E. 67 (1907); *Austin v. Independent Life & Accident Ins. Co.*, 296 S.C. 156, 370 S.E.2d 918 (Ct. App. 1988); *see also Fudge v. Physicians Ins. Co.*, 125 F. Supp. 653 (D.S.C. 1955).

65. *Jones v. Cooper*, 234 S.C. 477, 109 S.E.2d 5 (1959). *See Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 252 S.E.2d 889 (1979); *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 204 S.E.2d 50 (1974); *Williams v. Bruce*, 110 S.C. 421, 96 S.E. 905 (1918); *Columbia Sav. Bank & Trust Co. v. True*, 108 S.C. 56, 93 S.E. 389 (1917); *Whitman v. Seaboard Air Line Ry.*, 107 S.C. 200, 92 S.E. 861 (1917); *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984); *see also Hester v. New Amsterdam Casualty Co.*, 287 F. Supp. 957 (D.S.C. 1968), *aff'd in part, rev'd in part*, 412 F.2d 505 (4th Cir. 1969). *But see South v. Sherwood Chevrolet, Inc.*, 277 S.C. 372, 374-77, 287 S.E.2d 490, 491 (1982) (Harwell, J., dissenting) (jury verdict upheld despite facts strongly indicating plaintiff's "reckless disregard"); *RESTATEMENT, supra* note 10, § 540.



the records.<sup>66</sup> Accordingly, when the seller's agent makes representations based on assertions of special knowledge about the house being sold, the buyer justifiably can rely on the representation when the truth about the condition of the house is not reasonably ascertainable.<sup>67</sup>

Based on the principles noted above, a home buyer may have some duty to inspect the house for defects prior to buying it. When the buyer could not be expected to discover the defects easily, the seller may be liable for fraud if the seller is aware of the hidden defects and the buyer's problems of discovery, but does not inform the buyer.<sup>68</sup> Likewise, when the seller deliberately conceals a defect, he is liable for fraud if the buyer could not be expected to discover the concealed defect.<sup>69</sup> Conversely, when the buyer could easily discover a concealed defect, he likely would not have an action for fraud.<sup>70</sup>

### C. Negligence

In *Rogers v. Scyphers*<sup>71</sup> South Carolina recognized a negligence action for personal injuries brought against the builder-vendor of a new house. The supreme court held that one in the business of building and selling new houses is liable for personal

66. See *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 227 S.E.2d 189 (1976); *accord* *Byrn v. Walker*, 275 S.C. 83, 267 S.E.2d 601 (1980); *Tallevast v. Herzog*, 225 S.C. 563, 83 S.E.2d 204 (1954). Cf. *Elders v. Parker*, 286 S.C. 228, 332 S.E.2d 563 (Ct. App. 1985) (widow allowed to recover for fraud when her credulity and romantic involvement made her easy prey). For discussion of the defendant's duty of disclosure, see *supra* notes 41-48 and accompanying text.

67. See *Byrn v. Walker*, 275 S.C. 83, 88, 267 S.E.2d 601, 603-04 (1980).

68. See *supra* notes 44, 47-48. One should note that the seller's duty of disclosure is based on the seller's awareness that a defect cannot be discovered by *reasonable* inspection. See *supra* notes 41-48 and accompanying text. In contrast, the standard for legitimacy of the buyer's reliance is *gross negligence or recklessness*. See *supra* notes 56-59 and accompanying text.

69. See *supra* notes 46, 47-48 and accompanying text. For discussion of distinction between standard for determining the existence of duty of disclosure by seller and for determining the legitimacy of reliance, see *supra* note 68.

70. See *supra* notes 54-55, 65 and accompanying text.

71. 251 S.C. 128, 161 S.E.2d 81 (1968) (noted in Comment, *Real Property—Liability of Builder-Vendor After Conveyance*, 20 S.C.L. Rev. 868 (1968)). The plaintiff, the purchaser's wife, alleged she was injured when she fell on a defectively installed, folding attic staircase. The defendant was engaged in the construction of a small subdivision, and an independent contractor had done the work in question. See generally Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383 (1969).

injuries sustained as a result of defective construction caused by the builder's negligent failure to discover or to disclose defects.<sup>72</sup> In permitting the purchaser's wife to recover, the court also disposed of any requirement of privity. The court held that the tort liability of a builder-vendor for negligent construction after acceptance extends to the purchaser and others who foreseeably will occupy the premises.

The defendant in *Rogers* was both the builder and the seller of the house involved. Logically, a person who was only a builder or only a seller also would owe a duty of due care to persons who foreseeably might be injured by negligence. Furthermore, South Carolina authority supports recovery for negligence by persons who are negligent in designing a building or in supervising its construction.<sup>73</sup>

A more difficult problem arises when the victim of negligence suffers "pure economic loss" rather than injury to person or property. Such pure economic loss is involved, for example, when negligence has resulted in a flaw in the house, such as peeling paint on the exterior siding. As will be discussed below, reason exists to believe that such loss may be recoverable, but there are also contrary indications.

Two supreme court cases support the view that pure economic loss is recoverable. *Terlinde v. Neely*<sup>74</sup> involved claims for economic loss caused by substantial settlement of the foundation of the plaintiff's house.<sup>75</sup> The court held that the plaintiff, a

---

72. In imposing a duty of reasonable disclosure, the *Rogers* court relied on RESTATEMENT, *supra* note 10, § 353. See 251 S.C. at 133, 161 S.E.2d at 83. Section 353 provides:

(1) A vendor of land who . . . fails to disclose . . . any condition . . . which involves unreasonable risk to persons on the land is subject to liability to the vendee . . . if (a) the vendee does not know or have reason to know of the condition . . . and (b) the vendor knows or has reason to know of the condition . . . .

Some decisions from other jurisdictions cited by the court were some based on implied warranty, but the court found that the issue of implied warranty was not raised in *Rogers*.

73. See, e.g., *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); *Avent v. Proffitt*, 109 S.C. 48, 95 S.E. 134 (1918). *Broome* is discussed *infra* in note 114 and *Hill* is discussed in more detail *infra* in note 108.

74. 275 S.C. 395, 271 S.E.2d 768 (1980).

75. As a result of the settlement:

Cracks began to appear in the sheetrock walls of the house; the floor began to

subsequent purchaser, could recover from a builder-seller under both implied warranty<sup>76</sup> and in negligence<sup>77</sup> for such loss. *Brown v. Sandwood Development Corp.*<sup>78</sup> held that the vendor-subdivider of residential lots was liable for breaching an implied warranty of fitness<sup>79</sup> and for negligence for allegedly designing and constructing a concrete dam spillway in an unreasonable manner.<sup>80</sup> The plaintiffs were owners of residential lots surrounding the pond where the spillway was located, and they suffered economic loss when the dam collapsed as a result of inadequacies in the spillway.<sup>81</sup> Although these cases indicate that a negligence cause of action exists for economic loss, they did not explicitly address the issue.

Two subsequent cases by the court of appeals, one of which specifically considers the issue of liability for pure economic loss, suggest possible doubt regarding a negligence cause of action for such loss. In *McGann v. Mungo*<sup>82</sup> residents and owners of improved residential lots sued the developer-subdivider for negligence in the design and construction of roads and drainage systems.<sup>83</sup> The court of appeals held: "The question of whether the

---

sink away from the interior walls; doors would not close properly; the brick veneer on the exterior of the house began to crack and separate at the mortar joints; and, upon closer inspection, pillars underneath the house were sinking away from the supporting beams of the floor. An inspection and evaluation by qualified experts indicates that the footings of the house were built on "fill dirt". Estimates to repair the existing damage and remedy all of the cause of the settlement ranged from \$5,916.00 to \$22,978.73.

*Id.* at 399, 271 S.E.2d at 768-69.

76. See *infra* notes 96-97 and accompanying text.

77. See *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770. In allowing "the imposition of tort liability to a third party as a result of contractual obligations despite the absence of privity between the tortfeasor and the third party," the court noted:

The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

*Id.*

78. 277 S.C. 581, 291 S.E.2d 375 (1982).

79. See *infra* notes 98-99 and accompanying text.

80. 277 S.C. 581, 583-84, 291 S.E.2d 375, 376-77 (1982).

81. *Id.* at 585, 291 S.E.2d at 377.

82. 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986).

83. *Id.* at 565, 573-75, 340 S.E.2d at 156, 161. The complaint asserted seven differ-

instant action may be maintained . . . remains, so far as we can tell, one of novel impression in this state. . . . We therefore decline to decide the issue on demurrer.”<sup>84</sup> *McGann* explicitly cites *Sandwood Development*<sup>85</sup> but does not indicate why that case was not determinative.

In *Carolina Winds Owners’ Association v. Joe Harden Builder, Inc.*<sup>86</sup> the court of appeals held that *Terlinde* did not apply when the builder was not also the vendor. In barring plaintiffs’ negligence claim for damages resulting from faulty construction, the court applied the “economic loss rule” quite literally.<sup>87</sup>

## D. Implied Warranty

### 1. The Implied Warranty of Habitability and of

---

ent causes of action. See *id.* at 565, 340 S.E.2d at 156.

84. *Id.* at 574-75, 340 S.E.2d at 161.

85. *Id.* at 574, 340 S.E.2d at 161.

86. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988), *aff’d on rehearing*, No. 25 Davis Adv. Sh. No. 21 (S.C. Ct. App. Nov. 30, 1988), *cert. denied* — S.C. —, — S.E.2d — (1989) (parties had settled). “[T]he builder in *Terlinde* built the house for speculation, not pursuant to a contract for its construction. He placed it in the stream of commerce by initial sale. In our view, *Terlinde* must be limited to its facts. . . . It has no application to this case.” *Id.* at 83, 374 S.E.2d at 903. The court’s holding was based in part on *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986), which held that the implied warranty of habitability was grounded on the sale of a house and that, therefore, a builder who was not also a seller was not liable under this warranty claim. *Arvai* is discussed *infra* at notes 104, 105 and accompanying text. In its Order on Rehearing (S.C. Ct. App. Nov. 30, 1988), the court of appeals refused to reconsider or distinguish *Arvai* because it lacks authority to overrule or change the law as declared by the decisions of the South Carolina Supreme Court. No. 1192 Davis Adv. Sh. No. 25 (S.C. Dec. 24, 1988), at 22.

87. “The ‘economic loss rule’ . . . states that an action will not lie in tort for a product [or construction] defect without a claim of injury to the person or other property of the plaintiff.” *Carolina Winds*, 297 S.C. at 80, 374 S.E.2d at 901. The court dismissed the significance of the *risk* of potential personal injury that has not yet in fact resulted. *Id.* at 86-87, 374 S.E.2d 904. Earlier federal cases interpreting South Carolina law have made the application of the “economic loss rule” turn on this distinction. *Compare* 2000 Watermark Ass’n v. Celotex Corp., 784 F.2d 1183, 1186 (4th Cir. 1986) (South Carolina law would not permit negligence action for defects that only shortened life expectancy of roof and destroyed its aesthetic appeal, resulting in economic loss) *with* City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987) (“We think that the South Carolina courts would be willing to extend tort liability to the [asbestos] manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment, thereby causing damage to the property owner who has installed the harmful product in his building.”).

*Workmanlike Construction*

*Rutledge v. Dodenhoff*<sup>88</sup> involved an action by the purchaser of a new house against the builder-vendor for damages to the house caused by the overflow of a septic tank that allegedly had been designed improperly. The South Carolina Supreme Court held that the doctrine of *caveat emptor* is inapplicable to such a transaction and that “in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation.”<sup>89</sup> Since warranty liability is not based on negligence, due care was irrelevant, and the question of whether the case could have been won in negligence was moot.<sup>90</sup>

Since the defendant in *Rutledge* was both the builder and seller, the court did not need to consider the nature of the warranty in detail. In particular, the opinion did not consider whether the law implied one warranty, which encompasses both workmanlike manner and habitability, or whether two warranties were involved, a warranty of workmanship and a warranty of habitability.

Although subsequent cases have not addressed this issue explicitly, there are three reasons for concluding that two warranties may be involved. First, authority supports an implied warranty of workmanship by a person who only plans and supervises the construction of a building.<sup>91</sup> Second, many cases following *Rutledge* have imposed a warranty of habitability on sellers solely because of their role of being a seller; they have no role in building the house and, therefore, there is no workmanship involved.<sup>92</sup> Third, some policy concerns involved in the cases apply to only one of the two warranties.<sup>93</sup> Because of these

---

88. 254 S.C. 407, 175 S.E.2d 792 (1970).

89. *Id.* at 414, 175 S.E.2d at 795; Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwellings for Loss, Injury or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383 (1969).

90. Liability for breach of an implied warranty, irrespective of the defendant's fault, is an established principle of warranty law. See *Patterson v. Orangeburg Fertilizer Co.*, 117 S.C. 140, 152, 108 S.E. 401, 405 (1921). Cf. S.C. CODE ANN. § 36-2-314 (Law. Cop. 1976) (implied warranty of merchantability); *id.* § 36-2-315 (implied warranty of fitness for particular use).

91. See *infra* note 108 and accompanying text.

92. See *infra* notes 108, 109 and accompanying text.

93. See *infra* notes 105-107 and accompanying text.

reasons, the following discussion considers each warranty separately.

*a. The Implied Warranty of Habitability*

*Rutledge* was followed by *Lane v. Trenholm Building Co.*<sup>94</sup> In *Lane* the doctrine of implied warranty of habitability was applied to the sale of a new house by a subdivision developer that had acquired the house when the builder went out of business. Even though the developer was not the builder, the plaintiff-buyer was entitled to the warranty because the warranty “springs from the sale itself”:

Trenholm placed the house in the stream of commerce and exacted a fair price for it. Its liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.<sup>95</sup>

*Terlinde v. Neely*<sup>96</sup> took this ruling a step further and held that the implied warranty of habitability is not limited by privacy requirements. *Terlinde* involved a suit against a builder-seller by the subsequent purchaser of a three-year-old house that suffered damage because the house footings were built on fill dirt. The court extended the warranty to this plaintiff and stated:

The extension of implied warranties to subsequent purchasers is based upon sound legal and policy considerations. . . . Common experience teaches that latent defects in a house will not manifest themselves for a considerable period of time, likely as alleged in this case, after the original purchaser has sold the property to a subsequent unsuspecting buyer. . . . The fact that the subsequent purchaser did not know the home builder, as did the original purchaser, does not negate the reality of the “holding out” of the builder’s expertise and reliance which occurs in the market place.<sup>97</sup>

The warranty of habitability is subject to two limitations.

---

94. 267 S.C. 497, 229 S.E.2d 728 (1976) (defective septic tank).

95. *Id.* at 503, 229 S.E.2d at 731.

96. 275 S.C. 395, 271 S.E.2d 768 (1980).

97. *Id.* at 397-98, 271 S.E.2d at 769. The warranty extended “to subsequent home purchasers for a reasonable amount of time.” *Id.* at 399, 271 S.E.2d at 770.

First, it only applies to improved realty.<sup>98</sup> The warranty, however, is not limited to houses; it has been applied to sales of improved residential realty involving only such improvements as a dam and spillway.<sup>99</sup> Second, the doctrine only applies to the original seller who put the home in the stream of commerce. It does not apply necessarily to builders,<sup>100</sup> nor does it apply to later owners,<sup>101</sup> who, in effect, are selling a used house.

This second limitation was developed initially in *Cohen v. Blessing*,<sup>102</sup> which involved a suit against the seller of a used house. The court limited the doctrine of *caveat venditor* to the sale of new houses and refused to impose an implied warranty when an owner-occupant sold a used house. This limit is a typical curb on the expansion of consumer protection and is analogous to courts' reluctance to impose strict tort liability or warranty on persons not in the business of selling the product involved.<sup>103</sup> A similar reluctance exists when used goods are involved.<sup>104</sup>

The limitation of the warranty to *sellers* of new houses was adopted in *Arvai v. Shaw*,<sup>105</sup> which barred an action against the

98. See *Jackson v. River Pines, Inc.*, 276 S.C. 29, 274 S.E.2d 912 (1981) (plaintiff claimed that defendant sold him a lot composed of soil that would not support a septic tank system).

99. See *Brown v. Sandwood Dev. Corp.*, 277 S.C. 581, 291 S.E.2d 375 (1982). Cf. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986).

100. See *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986); see also *infra* notes 105-107, 110-112 and accompanying text.

101. See *Cohen v. Blessing*, 259 S.C. 400, 192 S.E.2d 204 (1972).

102. 259 S.C. 400, 192 S.E. 204 (1972). The result when a person has extensively renovated an older home is unclear, particularly when the person who renovated the home is in such business.

103. See, e.g., S.C. CODE ANN. §§ 15-73-10, 36-2-104(1) (Law. Co-op. 1976); RESTATEMENT, *supra* note 10, § 402A. But see *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976) (seller liable for breach of implied warranty of habitability even though he "may not have been a merchant"). Not only fraud, but also possibly negligence, would be available as a cause of action against the seller of a used house, at least for injury to person or property. See *supra* notes 19, 22, 47-48, 71-87 and accompanying text.

104. See S.C. CODE ANN. § 36-2-314 comment 3 (Law. Co-op. 1976) ("A contract for the sale of second hand goods . . . involves only such obligation as is appropriate to such goods."). The extent of the warranty for used goods is the same as with the "as is" disclaimer. *Id.* § 36-2-316; Annotation, *Liability for Representations and Express Warranties in Connection With Sale of Used Motor Vehicle*, 36 A.L.R.3d 125 (1971) (express warranties). As to strict liability for used goods, see Annotation, *Strict Liability in Tort: Liability of Seller of Used Product*, 53 A.L.R.3d 337 (1973) (strict liability).

105. 289 S.C. 161, 345 S.E.2d 715 (1986). See also *Roundtree Villas Ass'n, Inc. v.*

builder, who was not the seller. The reason for this limitation is that

the implied warranty of habitability has its roots in the *execution of a contract for sale*. Indeed, in *Lane* we held that the warranty springs from the sale. The determining factor is not whether the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce. Holding the custom builder liable under an implied warranty, where he is not also involved in the sale of the house, would be incompatible with the law of warranty.<sup>106</sup>

The original occupant in *Arvai* was the first seller. As a result, one conceivably may argue that *Arvai* does not apply when a builder constructs a house or housing complex for a developer who never was intended to be an occupant. In such a case, the developer could be viewed as a mere conduit or middleman; the builder, therefore, could be said to have a role "in the sale of the house."<sup>107</sup>

#### *b. The Implied Warranty of Workmanlike Construction*

The warranty of workmanlike manner is grounded on the builder's expertise. Therefore, it applies regardless of whether

---

4701 King's Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) (contract lender who is not active in building enterprise is not liable for defects in construction under doctrine of *caveat venditor*); McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986) (absent allegation that defendant-developer sold houses or other improvements, property owners' complaint failed to state cause of action for breach of implied warranty); Holder v. Haskett, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984) (warranty of habitability not applicable to developer and realtor who, though financially involved with the builder, were not parties to the contract for the sale of the house and had not received any of the purchase price paid for the house). Cf. Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (corporate sales and marketing agent was indistinguishable from developer or contractor when evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinctions between the corporations and their activities").

106. *Arvai v. Shaw*, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986) (emphasis added). The house in *Arvai* was built, not for speculation as in *Terlinde*, but pursuant to plans and specifications provided by the original owner. The court, however, found this distinction not determinative of whether an implied warranty of habitability attaches. See *id.* at 164, 345 S.E.2d at 717.

107. Cf. *Utz v. Moss*, 31 Colo. App. 475, 503 P.2d 365 (1972) (implied warranty of workmanlike construction extends to first purchaser when builder knows that developer-seller will not occupy home).



the builder of a structure is the seller.<sup>108</sup> When the builder is also the seller, cases implying a warranty explicitly refer to his expertise as the basis of the warranty.<sup>109</sup>

Although a builder, and probably other craftsmen, is liable for breach of the warranty of workmanship, exactly to whom the duty is owed is unclear. More precisely, even though some cases contain broad language indicating a general rejection of privity,<sup>110</sup> they do not specify whether privity acts as limit on plaintiffs who may recover under this warranty. Resolution of this issue is important because *Arvai* holds that the warranty of habitability is limited to the original seller of the home; builders who do not inject the house into the stream of commerce have not been held liable under this theory.<sup>111</sup> On the other hand, builders would be liable to subsequent purchasers if the warranty of workmanship is not limited by the doctrine of privity.

108. See *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). The plaintiff — owner of the land and the building, a frozen food locker plant — sued the defendant for negligently designing and supervising construction of the plant. In affirming a verdict for the plaintiff, the court relied in part on the theory of an implied warranty of proper workmanship:

It seems to be well settled that where “a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use, and, if a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view. . . .” These principles have been applied to building contracts.

*Id.* at 271, 64 S.E.2d at 888 (citations omitted) (quoting 17 C.J.S. *Contracts* § 329 (1955)).

109. See, for example, *Rutledge v. Dodenhoff*, 254 S.C. 407, 414, 175 S.E.2d 792, 795 (1970), in which the court notes: “The seller holds himself out as an expert in such construction and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder.” See also *Terlinde v. Neely*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980), in which the court observed more broadly: “The fact that the subsequent purchaser did not know the home builder, as did the original purchaser, does not negate the reality of the ‘holding out’ of the builder’s expertise and reliance which occurs in the market place.”

110. See, e.g., *Terlinde*, 275 S.C. at 398, 271 S.E.2d at 769-70 (“[I]n recent cases] we indicated the concept of privity is no longer viable in this jurisdiction.”). In *Carolina Winds Owners Ass’n v. Joe Harden Bldrs., Inc.*, 297 S.C. 74, 374 S.E.2d 897, *aff’d on rehearing*, No. 25 Davis Adv. Sh. No. 21 (S.C. Ct. App. Nov. 30, 1988), *cert. denied*, — S.C. —, — S.E.2d — (1989), the court of appeals, in its Order on Rehearing, noted that the question whether the builder’s warranty of workmanlike manner should be extended “to a home buyer who is not a party to the construction contract from which the warranty arises” had not been raised at trial and therefore was not preserved on appeal. No. 1192 Davis Adv. Sh. No. 25 (S.C. Dec. 24, 1988), at 22.

111. See *supra* notes 100, 105-106 and accompanying text. *But see supra* note 107.

At least one court has adopted this approach when the builder knows that the developer, who contracts with the builder, will not be the first occupant.<sup>112</sup>

The warranty of workmanship overlaps considerably with the concept of negligence since both are phrased in terms of reasonable craftsmanship.<sup>113</sup> In many cases, a plaintiff might be able to recover under either theory. In other situations — for example, because of differences in statute of limitations<sup>114</sup> or

---

112. See *Utz v. Moss*, 31 Colo. App. 475, 503 P.2d 365 (1972).

113. See *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). This case is discussed *supra* note 108.

114. Since no specific statute of limitations is established for breach of warranty of habitability, general limitations provisions for personal injury, wrongful death, property damage, and breach of contract actions must be used. See S.C. CODE ANN. § 15-3-530 (Law. Co-op. 1976). The general limitation period for such actions recently was reduced from six years to three years as part of the South Carolina Tort Reform Act, Act No. 432 (approved April 5, 1988), amending South Carolina Code sections 15-3-530 to -535. See *id.* The South Carolina version of the Uniform Commercial Code § 2-725 contains a specific six-year limitations provision and does not appear to have been affected by the Tort Reform Act. See *id.* § 36-2-725.

The time limit under the general statute of limitations runs from the time the wrong was discovered or should have been discovered. See S.C. CODE ANN. §§ 15-3-530 to -545 (Law. Co-op. 1976); *Dillon County School Dist. No. 2 v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.) (defective building construction design case; South Carolina courts have adopted the “discovery” rule); *Brown v. Sandwood Dev. Corp.*, 277 S.C. 581, 291 S.E.2d 375 (1982) (adopting the “discovery” rule). The discovery rule was adopted judicially in *Mills v. Killian*, 273 S.C. 66, 70, 254 S.E.2d 556, 558 (1979) (discovery rule represents “the more equitable and rational view”). For elaboration of the rule, see *Brown v. Sandwood Dev. Corp.*, 277 S.C. 581, 291 S.E.2d 375 (1982) (defective spillway), and *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (defective pistol). This rule now is prescribed specifically by statute for personal injury cases. See S.C. CODE ANN. § 15-3-535 (Law. Co-op. 1976).

When contract actions are involved, the traditional rule of commercial law was that the limitation period ran from the passage of title from the seller to buyer, typically at the time of tender and acceptance of the product. No “discovery rule” existed in the traditional context, and the South Carolina Code appears to follow this approach in the general statute of limitations. See S.C. CODE ANN. §§ 15-3-535 to -545 (Law. Co-op. 1976). Now, however, the South Carolina version of the Uniform Commercial Code changes this approach for commercial sales of goods and provides that “[a] cause of action accrues when the breach is or should have been discovered.” *Id.* § 36-2-725.

Statutes of limitations should be distinguished from so-called “statutes of repose.” The latter prescribe an action at a given time after sale of the product or completion of work or the like. In 1978 the supreme court declared that a statute of repose applicable to architects and engineers violated the equal protection clause. See *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978). A special statute of repose for medical malpractice has been upheld, however. See *Hoffman v. Powell*, No. 23027, Davis Adv. Sh. No. 13, at 14 (S.C. June 5, 1989); see also *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987) (special statute of limitation upheld). Recently, the South Carolina General Assembly enacted a statute of repose narrowly restricted to building and construction cases. See 1986

damages recoverable<sup>115</sup> — only one theory may be available.

## 2. *Basis of Implied Warranty*

Judicial adoption of the implied warranty of habitability and workmanship has been supported on two grounds. The first ground is authority and precedent. *Rutledge*, for example, relied in part on a modern trend:

The decided trend of modern decisions is to restrict the application of caveat emptor and to hold it inapplicable to sales where the vendor is also the builder of a new structure. These decisions hold that a builder-vendor may be held liable for loss or damage caused by a defective condition in the building on the theory of breach of an implied warranty of workmanship and fitness for intended use.<sup>116</sup>

*Lane* relied on the well-established principle of *caveat venditor*, which applies when sales of chattels are involved: “[T]his State has consistently rejected caveat emptor and adopted the civil law rule of caveat venditor as part of the common law of South Carolina.”<sup>117</sup> This rule was regarded as applicable to homes because

the essence of the transaction is the sale of a house and not a transfer of a parcel of land. A house is the sale of a product, similar to the sale of personalty. Once the court recognizes the essence of the transaction is the sale of a product with a clearly defined proposed use, there is little reason to apply ancient doctrines of real property law which are inconsistent with the current and historical treatment of sales of personalty in this

---

S.C. Acts 2765, No. 412 (codified as amended at S.C. CODE ANN. §§ 27-40-10 to -940) (Law. Co-op. Supp. 1988) (amending S.C. CODE ANN. §§ 15-3-640, -660, -670 (Law. Co-op. 1976)); see also Annotation, *Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations Upon Action Against Architect or Engineer for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property*, 93 A.L.R.3d 1242 (1979); see generally Note, *Products Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs Are Winning*, 26 ARIZ. L. REV. 363 (1984); Annotation, *Validity and Construction of Statute Terminating Right of Action for Product-Caused Injury at Fixed Period After Manufacture, Sale, or Delivery*, 25 A.L.R.4th 641 (1983).

115. See *supra* notes 74-86 and accompanying text for discussion of whether “pure economic loss” is recoverable in negligence.

116. *Rutledge v. Dodenhoff*, 254 S.C. 407, 413, 175 S.E.2d 792, 795 (1970).

117. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 502, 229 S.E.2d 728, 730 (1976).

State.<sup>118</sup>

The second reason to support the implied warranty is that this approach is consistent with a number of relevant policies. Identifying policies in any clear-cut way is impossible because policies, by nature, are vague and overlapping.<sup>119</sup> Nevertheless, in general, two distinctive policy concerns can be identified. One should note that these two policy concerns are not new; courts have applied them for years. In the context of modern conditions, however, these policies indicate that *caveat venditor* is the best rule.<sup>120</sup>

The first policy concern discussed in the cases is the inequality of the parties. In particular, the courts stress that the builder has superior expertise and that the buyer-occupant must rely on that expertise.<sup>121</sup> This concern applies most obviously in cases when the warranty of workmanship is involved. This policy, however, may not be limited to builders, craftsmen, and professionals such as architects and engineers. A developer-seller also could be held to a level of expertise in supervising, constructing, and marketing the houses.

The second concern is that a home today is more than a piece of realty. The buyer is concerned with receiving a habitable "home for his family,"<sup>122</sup> and in order to do so, he is likely to have "invested his life savings and executed a 20, 30, or 40 year mortgage."<sup>123</sup> Both the buyer and seller know that "the essence of the transaction is the purchase of a habitable dwelling and that a knowledgeable inspection by the buyer is impossible."<sup>124</sup> In this context, the parties' reasonable expectation is that the buyer will receive a habitable residence.<sup>125</sup> Given this expectation, it is fair to apply the principle that a "sound price implies

---

118. *Id.* at 501, 229 S.E.2d at 730.

119. See PROSSER & KEETON, *supra* note 8, §§ 3-4; M. SHAPO, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984).

120. See *Lane*, 267 S.C. at 502, 229 S.E.2d at 730; *Rutledge*, 254 S.C. at 413, 175 S.E.2d at 795.

121. See *Terlinde v. Neely*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980); *Rutledge*, 254 S.C. at 413-14, 175 S.E.2d at 795.

122. See *Lane* 267 S.C. at 503, 229 S.E.2d at 731.

123. *Id.*

124. *Rutledge*, 254 S.C. at 414, 175 S.E.2d at 795.

125. See *Lane*, 267 S.C. at 503, 229 S.E.2d at 731; see also *Rutledge*, 254 S.C. at 414, 175 S.E.2d at 795.

a sound commodity” and imply a warranty of habitability.<sup>126</sup> Similarly, a buyer reasonably might expect that the builder has performed in a workmanlike manner and, therefore, has implied a warranty of workmanship.<sup>127</sup>

## II. LEASES OF RESIDENCES

### A. Obligations of Lessors

#### 1. General Rule at Common Law: Caveat Lessee

The traditional rule concerning leased property is that the landlord has no duty to use due care to ensure that the premises are safe.<sup>128</sup> Instead, the rule has been *caveat lessee*, which effectively means that the tenant is responsible for the premises.<sup>129</sup> This rule is subject to a number of exceptions, which are dis-

126. See *Lane*, 267 S.C. at 502, 229 S.E.2d at 731.

127. See *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Rutledge*, 254 S.C. 407, 175 S.E.2d 792; *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951).

128. See PROSSER & KEETON, *supra* note 8, § 63, at 434-35; RESTATEMENT, *supra* note 10, §§ 355-356; Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by a Dangerous Condition of the Premises*, 64 A.L.R.3d 339 (1975); 49 AM. JUR. 2d *Landlord and Tenant* §§ 767-772 (1970). South Carolina cases follow this approach. South Carolina authorities are discussed *infra* at notes 132-136 and accompanying text. For a rejection of the traditional rule and the imposition of liability based on negligence, see *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973).

129. See *Marks v. Industrial Life & Health Ins. Co.*, 212 S.C. 502, 48 S.E.2d 445 (1948); PROSSER & KEETON, *supra* note 8, § 63, at 434; 49 AM. JUR. 2d *Landlord and Tenant* §§ 981-989 (1970). In South Carolina, the law governing sales and leases of chattels is otherwise. For discussion of the early departure in South Carolina from the common-law doctrine of *caveat emptor* in the sale of chattels and the adoption of the civil law maxim that a sound price warrants a sound commodity, see *Lane v. Trenholm Bldg. Co.*, 275 S.C. 395, 271 S.E.2d 768 (1980), discussed *supra* notes 94-95, 117-118. As to leases of personal property, the South Carolina Court of Appeals recently held that a lease of personal property includes implied warranties of sound quality and fitness for use. See *C. Ray Miles Constr. Co. v. Weaver*, 296 S.C. 466, 373 S.E.2d 905 (Ct. App. 1988).

[I]t is clear that the implied warranty alleged in the instant case has long been recognized in South Carolina as a matter of common law. Although implied warranties were most often recognized in connection with contracts of sale . . . , [t]here is no logical reason for any distinction between contracts of sale and leases insofar as the recognition of implied warranties is concerned.

*Id.* at 472-73, 373 S.E.2d at 908. *But cf.* *D&D Leasing Co. v. Gentry*, No. 23029, Davis Adv. Sh. No. 15 (S.C. June 10, 1989) (legislature did not intend “true leases” to be covered by Uniform Commercial Code sales article).

cussed below.

In addition to the situations involved in these exceptions, the landlord also may have a duty of due care based upon some special relationship apart from his status as landlord. For example, a college has a special relationship with students, and the duties from this relationship are distinct from those that might arise from the college's status as a landlord who rents the student a dormitory room. Because of this relationship, when a college is a lessor, it must use due care to make dormitories safe<sup>130</sup> even though landlords ordinarily do not have a duty to make the premises safe.<sup>131</sup>

The traditional rule imposing on the tenant the responsibility for the safety of the premises has been explained in terms of the theory that a lease is viewed as a conveyance to the lessee of an estate in land (with the lessor retaining only a reversionary interest) and, thus, as a transfer of control of the premises.<sup>132</sup> Under this theory the tenant "controls" the premises and, therefore, is rightfully responsible for their condition.<sup>133</sup> On the other hand, the traditional rule has been criticized for ignoring the realities of modern urban leases and for placing inadequate weight on the concern for safety.<sup>134</sup> Also, the tenant has, at most, only as much control as an owner, yet *caveat venditor* applies to the sale of homes. Because of these criticisms, some jurisdictions have either abandoned the traditional rule or limited it by ex-

---

130. See, e.g., *Duarte v. State*, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979); *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (Mass. 1983). It should be noted that college dormitory arrangements generally are not treated as leases. See, e.g., S.C. CODE ANN. § 27-40-120(1) (Law. Co-op. 1976); *Cook v. University Plaza*, 100 Ill. App. 3d 752, 427 N.E.2d 405 (1981).

131. See *infra* notes 132-136 and accompanying text.

132. See *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 366-67, 162 S.E. 329, 331 (1932); PROSSER & KEETON, *supra* note 8, § 63, at 434-35; Note, *Personal Injuries to the Tenant: The Landlord's Liability Therefor*, 10 S.C.L. REV. 307 (1958).

133. See *Hatfield v. Palles*, 537 F.2d 1245 (4th Cir. 1976). *Hatfield* explicitly argues that the rule "rests upon the inability of the landlord to control the actions of the tenant and those entering under the tenant have no right to expect the landlord to be responsible to them." *Id.* at 1247-48 n.1. Ability to control the tenant (as opposed to the premises), however, often is irrelevant to safety measures. For example, a landlord clearly can control whether the electrical wiring is adequate in most cases. The argument concerning what rights the visitor and tenant might have, of course, is question-begging since the issue is whether either has a right to expect the landlord to use due care.

134. See, e.g., *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973); PROSSER & KEETON, *supra* note 8, § 63, at 435, 446.

pansive applications of the exceptions.<sup>135</sup>

Thus far, South Carolina courts have followed the traditional rule and have not imposed a duty on the lessor to use due care unless one of the exceptions to the traditional rule is applicable.<sup>136</sup> The South Carolina Legislature, however, by enacting the Residential Landlord and Tenant Act,<sup>137</sup> has imposed a number of changes on the common-law duties of landlords.<sup>138</sup> These provisions may impose liability on landlords either for breach of warranty or for lack of due care.<sup>139</sup>

## 2. Common-Law Exceptions to the General Rule

### a. Existing or Foreseeable Danger to Those Outside the Premises

When persons outside the premises are subjected to an unreasonable risk because of the premises' condition at the time of lease or because of the contemplated use by the tenant, the les-

---

135. See Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by Dangerous Condition of Premises*, 64 A.L.R.3d 339 (1975); 47 AM. JUR. 2d *Landlord and Tenant* §§ 767-772 (1970). Some jurisdictions have imposed strict liability on landlords. See, e.g., *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985). South Carolina, however, has rejected strict liability. See *infra* notes 164-172 and accompanying text.

136. See *infra* notes 140-160 and accompanying text; *Sheppard v. Nienow*, 254 S.C. 44, 173 S.E.2d 343 (1970); *Conner v. Farmers & Merchants Bank*, 243 S.C. 132, 132 S.E.2d 385 (1963); see also *Hatfield v. Palles*, 537 F.2d 1245 (4th Cir. 1976); Note, *Personal Injuries to the Tenant; The Landlord's Liability in Tort Therefor*, 10 S.C.L. REV. 307 (1958); *Torts, Annual Survey of South Carolina Law, 1963-1964*, 17 S.C.L. REV. 151 (1965). In addition, the Supreme Court explicitly has refused to extend warranty theory or strict liability in tort theory to leased apartments. See *infra* notes 164-174 and accompanying text.

137. S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. Supp. 1988). For an excellent general discussion of the Act, see Wilcox, *A Lawyer's Guide to the South Carolina Residential Landlord and Tenant Act*, 39 S.C.L. REV. 493 (1988).

138. Most of these changes involve a conceptual shift to treating the lease like a contract with mutually dependent covenants. The Act imposes legal duties on landlords to comply with health and safety codes, to maintain the premises in a habitable condition, and to provide essential services. See S.C. CODE ANN. § 27-40-440 (Law. Co-op. 1976). Breach of one of these duties can be used as the basis for the tenant's terminating the lease, seeking damages, or injunctive relief, or defending or counterclaiming in an action by the landlord for rent or possession. See S.C. CODE ANN. §§ 27-40-610 to -640 (Law. Co-op. 1976).

139. The potential impact of this act on tort law is discussed *infra* at notes 176-198 and accompanying text.

sor has been held to a duty of due care.<sup>140</sup> The justification for this exception is that the landlord should be aware of the risk and that the victims, being off-premises, are in no way relying on the lessee and are unable to correct the condition. Consequently, no reason exists to frustrate the right of the public to reasonable safety by allowing lessors to shift their responsibility to lessees.<sup>141</sup>

### b. *Concealed Dangers*

When the lessor knows or should know that a dangerous condition is not obvious to the lessee, then the lessor must use due care to disclose and warn the lessee of that latent condition.<sup>142</sup> Consequently, lessors will be as liable for personal injuries that result from the dangerous conditions as they would be if they were in control of the premises, that is, as if there were no lease involved. In addition, lessors may be liable for fraud or misrepresentation for economic injury resulting from the concealed defect.<sup>143</sup>

### c. *Premises Open to the Public*

When the lessor knows that the premises are to be open to the public, the public policy of protecting persons who are not a party to the lease<sup>144</sup> indicates that the lessor should be responsible for ensuring that the premises are reasonably safe for the public at the time of the transfer of possession. Consequently, a lessor must use due care to discover and remedy unreasonably dangerous conditions if he has reason to expect that the lessee will not remedy such problems prior to admitting the public.<sup>145</sup>

---

140. See PROSSER & KEETON, *supra* note 8, § 63, at 437; RESTATEMENT, *supra* note 10, §§ 379-379A; 49 AM. JUR. 2D *Landlord and Tenant* §§ 898-913 (1970).

141. See PROSSER & KEETON, *supra* note 8, § 63, at 437; RESTATEMENT, *supra* note 10, §§ 379 comment g, 379A comment d.

142. See *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 365, 162 S.E. 329, 333 (1932); PROSSER & KEETON, *supra* note 8, § 63; RESTATEMENT, *supra* note 10, § 358; 49 AM. JUR. 2D *Landlord and Tenant* §§ 787-792 (1970).

143. See *supra* notes 43-48 and accompanying text.

144. See PROSSER & KEETON, *supra* note 8, § 63, at 438; 49 AM. JUR. 2D *Landlord and Tenant* § 783 (1970).

145. See PROSSER & KEETON, *supra* note 8, § 63, at 437-40; 49 AM. JUR. 2D *Landlord and Tenant* §§ 782-786 (1970).



Maintenance of the premises subsequent to the transfer, however, is normally the duty of the lessee unless some other exception applies.<sup>146</sup>

Application of this rule involves a number of distinctions.<sup>147</sup> For example, since the landlord's duty is based on the knowledge that the public will be using a certain area, the landlord is not responsible for injuries incurred outside that area.<sup>148</sup> Not all these distinctions are supported by sound policy. For example, it may be arbitrary to distinguish between persons such as customers in a store, who are in a public area pursuant to the purposes of the lease, and other persons who are also lawfully on the premises, such as the tenant's family members. Neither the patrons nor the family members have a possessory interest in the real estate. Nevertheless, the general rule appears to be that such other persons lawfully on the premises are *not* owed a duty of due care by the lessor.<sup>149</sup> Perhaps in time this type of artificiality will yield to the more reasonable approach adopted in other areas of premises liability.<sup>150</sup>

#### *d. Common Areas Under Control of Lessor*

One reason sometimes given for the lack of the lessor's duty is that he has surrendered control of the premises to the

---

146. See PROSSER & KEETON, *supra* note 8, § 63, at 439-40; 49 AM. JUR. 2D *Landlord and Tenant* § 786 (1970).

147. In addition to the distinction discussed in the text, the application of this rule involves numerous other distinctions. See PROSSER & KEETON, *supra* note 8, § 63, at 437-40; RESTATEMENT, *supra* note 10, § 359; 49 AM. JUR. 2D *Landlord and Tenant* §§ 782-785 (1970).

148. See PROSSER & KEETON, *supra* note 8, § 63, at 439 n.70; RESTATEMENT, *supra* note 10, § 359 comment f; 49 AM. JUR. 2D *Landlord and Tenant* § 784 (1970); Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises*, 17 A.L.R.3D 873 (1968).

149. See *Hatfield v. Palles*, 537 F.2d 1245 (4th Cir. 1976); PROSSER & KEETON, *supra* note 8, § 63, at 439 n.71; RESTATEMENT, *supra* note 10, § 359 comment e; 49 AM. JUR. 2D *Landlord and Tenant* § 784 (1970); Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to the Tenant's Invitees for Defects in Leased Premises*, 17 A.L.R.3D 873 (1968).

150. See, e.g., *Taylor v. Palmetto Theatre Co.*, 204 S.C. 1, 28 S.E.2d 538 (1943). In *Taylor* a fireman's status was determined by the place in which he was injured — a place open to business invitees. Consequently, he was treated as an invitee who was owed a duty of due care rather than as a licensee, the normal status of a fireman at that time. See *infra* notes 248-252 and accompanying text for discussion of invitees and licensees in this context.

lessee.<sup>151</sup> Consequently, the lessor, rather than the lessee, has a duty to use due care to maintain common areas, such as hallways, that remain under the lessor's control.<sup>152</sup>

### e. Undertaking

Consistent with the general rule that a person who undertakes to perform an act must use due care, a lessor must use due care if he attempts to make the premises safe.<sup>153</sup> When a landlord merely promises to repair but actually does not do anything, the result is less clear. The old common-law approach, which South Carolina appears to follow,<sup>154</sup> imposes only a contractual duty on the landlord.<sup>155</sup> Liability in such a case could only be based on "negligence on the part of the lessor in making repairs, and not a failure to make repairs as promised."<sup>156</sup> Consequently, personal injuries for breach were not recoverable unless special circumstances enabled the court to conclude that

151. See *supra* notes 132-133 and accompanying text.

152. See *Sickora v. Metropolitan Life Ins. Co.*, 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) (dictum) (no negligence shown); *Daniels v. Timmons*, 216 S.C. 539, 59 S.E.2d 149, cert. denied, 342 U.S. 841 (1950); *Binnicker v. Adden*, 204 S.C. 487, 492, 30 S.E.2d 142, 145 (1944); *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 373-74, 162 S.E. 329, 333-34 (1932); *Medlock v. McAlister*, 120 S.C. 65, 112 S.E. 436 (1922); PROSSER & KEETON, *supra* note 8, § 63, at 440-43; RESTATEMENT, *supra* note 10, §§ 360-361; 49 AM. JUR. 2d *Landlord and Tenant* §§ 805-827 (1970). The South Carolina Residential Landlord and Tenant Act also imposes a duty to maintain common areas. See S.C. CODE ANN. § 27-40-440(a)(3) (Law. Co-op. Supp. 1988). The possible application of this act to an action for personal injuries is discussed *infra* at notes 176-198 and accompanying text.

153. See *McQuillen v. Dobbs*, 262 S.C. 386, 204 S.E.2d 732 (1974); *Conner v. Farmers & Merchants Bank*, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963); *Brown v. National Oil Co.*, 233 S.C. 345, 358, 105 S.E.2d 81, 87 (1958); see also *Edwards, Inc. v. Arlen Realty Dev. Corp.*, 466 F. Supp. 505, 509-10 (D.S.C. 1978); PROSSER & KEETON, *supra* note 8, § 63, at 445-46; RESTATEMENT, *supra* note 10, § 362; Note, *Personal Injuries to the Tenant: The Landlord's Liability in Tort Therefor*, 10 S.C.L. REV. 307 (1958); 49 AM. JUR. 2d *Landlord and Tenant* §§ 793-798 (1970). In *Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984), a lender was held to owe a duty of due care to a condominium association when it voluntarily undertook to repair common areas.

154. See, e.g., *Shaw v. Still*, 259 S.C. 377, 192 S.E.2d 206 (1972); *Sheppard v. Niennow*, 254 S.C. 44, 173 S.E.2d 343 (1970); *Pendarvis v. Wannamaker*, 173 S.C. 299, 175 S.E. 531 (1934); *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 162 S.E. 329 (1932).

155. See PROSSER & KEETON, *supra* note 8, § 63, at 443; 49 AM. JUR. 2d *Landlord and Tenant* § 850 (1970).

156. *Conner v. Farmers & Merchants Bank*, 243 S.C. 132, 139, 132 S.E.2d 385, 388 (1963).

such consequential losses were foreseeable because they were within the contemplation of the parties.<sup>157</sup>

The current rule in most jurisdictions appears to be that in order to promote safety and protect the right of reasonable reliance on a promise of safety precautions, the promising lessor is potentially liable in tort as well as contract.<sup>158</sup> A similar result was reached in one South Carolina case which held that when an express warranty of habitability had been granted, the lessee could recover damages for a fire resulting from faulty wiring.<sup>159</sup> This case is consistent with the South Carolina rule allowing recovery personal injuries in a breach of contract action if the injuries are a foreseeable consequential loss — for example, if the tenant's safety was a particular concern of the agreement.<sup>160</sup>

### 3. *Warranty, Strict Liability in Tort, and a Possible Statutory Duty of Due Care*

The limited protection for tenants granted by the system

157. See, e.g., *Timmons v. Williams Wood Prods. Co.*, 164 S.C. 361, 371-72, 162 S.E. 329, 332-33 (1932). The landlord in *Timmons* agreed to fix the hinges on a door, but had not undertaken to do so. The door fell off and struck the plaintiff, who was the infant child of the tenant. The court concluded that these facts were not sufficient to show that, when the contract of letting was entered into, and the contemporaneous covenant to repair made, either the landlord, or the tenant, or any member of the latter's family, then had any notice or knowledge of the unsafe condition of the demised premises sufficient to warrant a judicial declaration that damages for personal injuries were reasonably within contemplation of the parties.

*Id.* at 372, 162 S.E. at 333.

158. See PROSSER & KEETON, *supra* note 8, § 63, at 443-45; RESTATEMENT, *supra* note 10, § 357; 49 AM. JUR. 2D *Landlord and Tenant* § 851 (1970).

159. See *Holmes v. Rosner*, 289 S.C. 287, 290, 346 S.E.2d 37, 38 (Ct. App. 1986). *Holmes* also held that damages for personal injury are not recoverable for "breach of an express warranty to maintain the premises in a safe condition." *Id.* at 289-90, 346 S.E.2d at 38. The basis for granting a recovery for one warranty but not the other is unclear, particularly since breach of the warranty of safe condition would seem the more likely basis for granting recovery for personal injuries. See *Timmons v. Williams Wood Prods. Co.*, 164 S.C. 361, 374, 162 S.E. 329, 334 (dictum indicated that recovery for personal injury allowed for breach of covenant to keep premises safe).

160. See, e.g., *Young v. Morrissey*, 285 S.C. 236, 239, 329 S.E.2d 426, 429 (1935) ("Absent an express warranty or fraudulent concealment, . . . [the landlord] is not liable for any defect in the leased premises."); *Timmons v. Williams Wood Prods. Co.*, 164 S.C. 361, 374, 162 S.E. 329, 334 (1932) (a review of cases by the court indicated that an action for personal injuries is allowed "when the covenant is to keep the premises safe during the term").

discussed above contrasts sharply with the extensive protection granted by South Carolina law to consumers when the sale of goods or homes is involved.<sup>161</sup> Some states have reduced or eliminated this contrast by strengthening tenants' protection by imposing some theory of strict liability.<sup>162</sup> Courts in other states, including South Carolina, have continued to use the traditional common-law approach of *caveat lessee*.<sup>163</sup>

In *Young v. Morrissey*<sup>164</sup> the plaintiff attempted to persuade the court to reject this common-law approach and to impose either an implied warranty of habitability or strict liability in tort on a defendant who was the builder-lessor of an apartment complex. The plaintiff in *Young* was suing for damages resulting from the death of two guests in the complex<sup>165</sup> who had died in a fire caused by defective wiring.<sup>166</sup> Since the wiring had been installed by an independent contractor, the builder-lessor was not responsible for the negligence,<sup>167</sup> nor had the defendant been negligent in supervising construction or in maintaining the premises.<sup>168</sup> The South Carolina Supreme Court refused to hold the landlord strictly liable in tort.<sup>169</sup> The court also held that leases did not involve an implied warranty of habitability such as that imposed in the sale of a residence.<sup>170</sup>

The refusal to extend protection to lessees similar to that extended to purchasers of products was defended on grounds of public policy. The court noted that there were "numerous compelling reasons for refusing to impose strict liability on landlords."<sup>171</sup>

---

161. See *supra* notes 71-73, 88-89, 94 and accompanying text.

162. See, e.g., *Becker v. IRM Corp.*, 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116 (1985).

163. See, e.g., *Borders v. Roseberry*, 216 Kan. 486, 488-89, 532 P.2d 1366, 1369 (1975) (landlord of single family house under no duty to repair known condition; general rule of "no duty" modified by series of exceptions). For comprehensive treatments, see Browder, *The Taming of a Duty - The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability*, 1975 WIS. L. REV. 19 (1975).

164. 285 S.C. 236, 329 S.E.2d 426 (1985).

165. See *id.* at 239, 329 S.E.2d at 428.

166. See *id.*

167. See *id.* at 242, 329 S.E.2d at 429.

168. See *id.* at 242-43, 329 S.E.2d at 429-30.

169. See *id.* at 239-41, 329 S.E.2d at 428-29.

170. See *id.* at 241, 329 S.E.2d at 429.

171. See *id.* at 240, 329 S.E.2d at 428.

(1) A landlord is not engaged in mass production whereby he places his product — the apartment — in a stream of commerce exposing it to a large number of consumers; (2) he has not created the product with a defect which is preventable by greater care at the time of manufacture or assembly; (3) he does not have the expertise to know and correct the condition, so as to be saddled with responsibility for a defect regardless of negligence; (4) an apartment includes several rooms with many facilities constructed by many artisans with differing types of expertise, and subject to constant use and deterioration from many causes; (5) it is a commodity wholly unlike a product which is expected to leave a manufacturer's hands in a safe condition with an implied representation upon which the consumer relies; (6) the tenant may expect that at the time of letting there are no hidden dangerous defects known to the landlord of which the tenant has not been warned, but he does not expect that all will be perfect in his apartment for all the years of his occupancy; (7) to apply strict liability would impose an unjust burden on property owners; how can a property owner prevent a latent defect or repair when he has no way of detecting it? And if he can't prevent the defect, why should he be liable? . . .

This Court has rejected the insurer concept in numerous similar settings. . . . Nor do we hold landlords insurers of the safety of tenants and guests from injuries caused by latent defects.<sup>172</sup>

A full analysis of this reasoning is beyond the scope of this article. One should note, however, that these reasons raise many questions because they do not seem entirely appropriate to the facts. For example:

(1) The landlord in *Young* built, owned, and operated a large apartment complex. As a result, he had as much expertise and ability to prevent defects as a product manufacturer, and like a manufacturer, he placed his "product" in the stream of commerce where it affected many persons.

(2) Tenants do not expect "perfect" apartments, but one reasonably may assume that they do not expect them to burn suddenly.

---

172. *Id.* at 240-41, 329 S.E.2d at 428-29 (quoting from *Dwyer v. Skyline Apartments, Inc.*, 123 N.J. Super. 48, 301 A.2d 463 (Ct. App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973)).

(3) Chattels, like apartments, are subject to constant use and deterioration from many causes.

(4) Being liable for unreasonably dangerous product defects is not the same thing as being an insurer.

The reasons for refusing to imply a warranty also raise questions. The court gave several justifications for treating the lease of an apartment differently from the sale of a home: "The instant case involves [1] a lease rather than a sale, [2] personal injuries to a guest rather than property loss to the purchaser, and [3] an apartment used by many lessors [sic] rather than a new house."<sup>173</sup> These reasons, however, do not support a distinction between leasing and buying. The first and third "reasons" are simply restatements of the fact that a lease rather than a sale is involved. The second reason is particularly questionable since courts and legislatures usually place greater emphasis on liability for personal injury than for economic injury.<sup>174</sup>

*Young* did not consider the validity of the distinctions between leases of products and leases of realty. Such a consideration may be necessary in the future because the South Carolina Court of Appeals has held that a lessor of a chattel impliedly warrants that the chattel is reasonably fit for the purposes for which it will be used.<sup>175</sup>

*Young's* rejection of strict liability and of the warranty of habitability may have been reversed by the legislature by the adoption of the South Carolina Residential Landlord and Tenant Act.<sup>176</sup> The basic thrust of the Act is to treat a lease like any other contract and to impose a number of new obligations on landlords,<sup>177</sup> including duties to comply with safety codes,<sup>178</sup> to "do whatever is reasonably necessary to put up and keep the premises in a fit and habitable condition,"<sup>179</sup> and to maintain

---

173. *Id.* at 241, 329 S.E.2d at 429.

174. See, e.g., *supra* notes 74-86 and accompanying text (liability in negligence for "pure economic" loss); see also S.C. CODE ANN. §§ 15-73-10 to -30 (Law. Co-op. 1976) (strict liability in tort for personal injury from defective product); *id.* § 36-2-719(3) (special treatment under U.C.C. for personal injury resulting from breach of warranty).

175. See *C. Ray Miles Const. Co. v. Weaver*, 296 S.C. 466, 373 S.E.2d 905 (Ct. App. 1988). For a discussion of this case, see *supra* note 129 and accompanying text.

176. S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. Supp. 1988).

177. See *id.*; Wilcox, *A Lawyer's Guide to the South Carolina Residential Landlord and Tenant Act*, 39 S.C.L. REV. 493 (1988).

178. See S.C. CODE ANN. § 27-40-440(a)(1) (Law. Co-op. Supp. 1988).

179. *Id.* § 27-40-440(a)(2).

certain facilities and appliances “in reasonably good and safe working order and condition.”<sup>180</sup> The Act does not explicitly provide for recovery of damages for personal injury or property damage when landlords breach these warranties. Nevertheless, such damages may be recoverable under either a contract theory or a tort theory.

One could argue that the Act imposes *contractual* duties and provides recovery for both economic and personal injuries. The provisions of the Act support such an argument. The Act provides that “the tenant may recover actual damages . . . for any noncompliance by the landlord with the rental agreement” or his statutory duties.<sup>181</sup> The Act also provides that the “remedies provided by this chapter must be so administered that an aggrieved party may recover appropriate damages.”<sup>182</sup> Finally, the Act provides that it “must be liberally construed and applied to promote its underlying purposes and policies,”<sup>183</sup> which include encouraging “landlords and tenants to maintain and improve the quality of housing.”<sup>184</sup>

These provisions could have important consequences on the application of the common-law rule that consequential losses, like personal injuries, are not recoverable for a landlord’s contractual breach unless the breach was within the contemplation of the parties.<sup>185</sup> Two South Carolina cases indicate that because of the statutory duties imposed by the Act, this common-law rule might now permit recovery for personal injuries. One case explicitly held that a tenant could recover for personal injuries caused by a landlord’s breach of an express warranty of habitability;<sup>186</sup> the other case indicates that damages for personal injuries are recoverable either for breach of a statutory duty or for a breach of a covenant to keep the premises safe.<sup>187</sup> Thus, a good argument may be made that tenants could recover for personal injury under the Act.

---

180. *Id.* § 27-40-440(a)(5).

181. *Id.* § 27-40-610(b).

182. *Id.* § 27-40-50.

183. S.C. CODE ANN. § 27-40-20(a) (Law. Co-op. Supp. 1988).

184. *Id.* § 27-40-20(b)(2).

185. See *supra* note 157 and accompanying text.

186. See *Holmes v. Rosner*, 289 S.C. 287, 290, 346 S.E.2d 37, 38 (Ct. App. 1986).

187. See *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 374, 162 S.E. 329, 333 (1932).

There is less reason, however, to believe that the tenant's guests or other third parties probably would be "aggrieved parties" entitled to recover. The literal wording of the Act refers to the *tenant's* right to recover damages.<sup>188</sup> If this language were applied strictly, lack of privity would prevent third parties from recovering under a contractual theory based on the statutory warranties. On the other hand, the statutory requirement of liberal construction,<sup>189</sup> coupled with judicial reluctance to rely upon lack of privity to bar actions for breach of the warranty of habitability in the sale of homes,<sup>190</sup> may provide sufficient reason to extend the Act's protection to third parties.

An alternative theory for recovery is to view the statute as the basis of implying a *tort* duty of due care, breach of which could be the basis of an action for negligence.<sup>191</sup> If such an action were recognized, it would be available to all foreseeable victims.<sup>192</sup> A tort damages claim, however, may not reach "pure economic loss."<sup>193</sup> Even so, this limit should not be a problem in most cases since the tenant has protection for such loss under the Act.<sup>194</sup>

Since the Act does not provide explicitly for a tort cause of action, one must consider the legislative intent. The best guide

---

188. See *id.* § 27-40-610(b). A "tenant" is defined as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." *Id.* § 27-40-210(15).

189. See *supra* notes 183-184 and accompanying text.

190. See *supra* notes 97, 110 and accompanying text. Cf. *Timmons v. Williams Wood Prods. Corp.*, 164 S.C. 361, 162 S.E. 329 (1932). *Timmons* indicates in dictum that "recovery for personal injuries to the tenant, or to a member of his family," are allowed for breach of a statutory duty or for breach of an express covenant to keep the premises safe. *Id.* at 374, 162 S.E. at 333-34 (emphasis added).

191. See *Timmons*, 164 S.C. at 374, 162 S.E. at 333. *Timmons* indicated in dictum that "recovery for personal injuries to the tenant, or to a member of his family, are bottomed [*inter alia*] upon breach of a statutory duty." *Timmons*, however, does not indicate whether this is a tort or contract theory of recovery. The Ohio Supreme Court held that breach of a duty imposed by a statute similar to the South Carolina Landlord and Tenant Act was negligence per se. See *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981). One commentator has argued that a similar approach could be adopted in South Carolina. See Wilcox, *A Lawyer's Guide to the South Carolina Residential Landlord and Tenant Act*, 39 S.C.L. Rev. 493, 531-32 (1988).

192. See *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (in action for negligent construction, the "key inquiry is foreseeability, not privity").

193. See *supra* notes 74-86 and accompanying text for discussion of recoverability of pure economic loss in an action for negligence.

194. See *supra* notes 181-187 and accompanying text.



to legislative intent in this regard is the language of the statute.<sup>195</sup> This language, however, does not explicitly state whether tenants may press a tort claim, so it is necessary to infer the intent.

When one attempts to infer the legislative intent, two contradictory inferred “intents” are equally plausible. First, the legislature could not reasonably impose new statutory duties on landlords without granting a meaningful system of enforcement and remedies. Therefore, one logically may presume that the legislature intended to protect foreseeable victims by providing tort remedies. This inference is logical because tort liability provides an incentive for landlords to keep the premises reasonably safe and furthers the statutory goal of maintaining the quality of rental housing. Conversely, if the legislature had wanted a tort remedy in addition to the contract action, it could explicitly have included one. Since it did not and because it explicitly provided for contractual remedies, one may infer that no tort action exists. Thus, whether an implied tort cause of action exists for breach of the statutory duties is not clear. The builder of a leased residence is subject to an implied warranty of workmanship.<sup>196</sup> As indicated in the earlier discussion of this warranty,<sup>197</sup> however, it is not certain whether other persons, such as tenants or their guests, who are not in privity with the builder, have a cause of action for breach of the warranty. Even if privity is required, a tenant might satisfy the requirement if the builder is also his landlord.<sup>198</sup>

#### 4. *Foreseeable Misconduct by Third Parties*

At one time, even if an exception to the doctrine of *caveat lessee* might have been applicable, courts generally were reluctant to impose on lessors a duty to protect lessees (or others, such as invitees) from foreseeable misconduct by third parties —

---

195. See *G-H Ins. Agency Inc. v. Travelers Ins. Cos.*, 270 S.C. 147, 241 S.E.2d 534 (1978) (duty of good faith); *Christiansen v. Campbell*, 285 S.C. 164, 328 S.E. 351 (Ct. App. 1985) (to determine liability under statute, court looked only to language of statute, not to intent behind its enactment). The South Carolina Legislature does not publish a legislative history.

196. See *supra* notes 91, 108-109 and accompanying text.

197. See *supra* notes 110-112 and accompanying text.

198. See *supra* notes 108-115 and accompanying text.

for example, assault or rape.<sup>199</sup> The current view in some jurisdictions is that although the landlord has no general duty to protect tenants from such misconduct,<sup>200</sup> if an exception applies, such as the duty to use due care to protect tenants in a common area like an entry hall,<sup>201</sup> then the duty of due care encompasses such foreseeable misconduct.<sup>202</sup> There are two reasons why South Carolina may adopt this approach. First, South Carolina courts have held that invitees are entitled to reasonable protection from the foreseeable misconduct of others.<sup>203</sup> Second, the general rule is that tenants and others rightfully using common areas are analogous to invitees.<sup>204</sup>

### *B. The Variable Standards of Care Owed to Third Parties by Lessors and Tenants*

Regardless of whether the lessee or lessor has the duty of maintaining safe premises, one should remember that the duty

---

199. See PROSSER & KEETON, *supra* note 8, § 63, at 442.

200. See *Riley v. Marcus*, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827 (1981) (landlord has no duty to protect tenants when violent acts had not occurred before on the premises and when he was not aware of any risks attendant to the premises that were concealed from tenant).

201. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (landlord has duty to protect tenants in the common areas). The landlord's obligation concerning common areas is discussed *supra*, at notes 151-152 and accompanying text.

202. See PROSSER & KEETON, *supra* note 8, § 63; 49 AM. JUR. 2D *Landlord and Tenant* § 773.5 (2d ed. Supp. 1988); Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331 (1972). Some jurisdictions appear to have extended this duty to protect against forceable misconduct to include a duty to make the lessee's individual apartment unit safe from burglars and rapists, particularly where the lessor has special knowledge of a threat of crime and/or of the inadequacy of the locks. See *Smith v. General Apartment Co.*, 133 Ga. App. 927, 213 S.E.2d 74 (1975), *overruled on other grounds*, *Country Club Apartments, Inc. v. Scott*, 246 Ga. 442, 271 S.E.2d 841 (1980); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 346 A.2d 76 (1975). In addition to the exceptions applicable to the landlord tenant context, the landlord also may owe a duty of due care for other reasons: (1) first, because a special relationship exists, see *supra* note 130 and accompanying text; (2) second, because the lessor has undertaken to fix or improve the safety of the leased premises, see, e.g., *Warner v. Arnold*, 133 Ga. App. 174, 210 S.E.2d 350 (1974); see also *supra* notes 153-160 and accompanying text; (3) third, because the lessor has misrepresented the adequacy of the security system or the safety of the area. See *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (landlord liable to raped tenant when tenant was misled about security measures and had not been warned of man who had raped other tenants); see also *supra* notes 142-143 and accompanying text.

203. See *infra* notes 253-258 and accompanying text.

204. See PROSSER & KEETON, *supra* note 8, § 63, at 440 n.771.

varies with the circumstances. Two circumstances are particularly important. First, one must consider whether the victim is on or off the premises. Second, if the victim is on the premises, his status determines the nature of the duty. The variable duties for varying circumstances will be addressed in this section.

Another important fact to keep in mind is that lessors and tenants are not liable unless they breach the relevant duty. For example, if a duty of due care is involved, that duty only requires that the safety precautions be "reasonable." Thus, if a risk is unforeseeable or if the safety precautions were reasonably adequate, there is no breach of the duty of due care and, therefore, no liability.

### 1. *Background: The Common-Law System of Categories*

At common law owners and occupiers did not owe a duty of due care to every person on or adjacent to their land. The duty varied, particularly according to the status or category of the person entering the land. For example, since trespassers are wrongdoers and their presence may have been unknown, the owner or occupier only owed a duty to refrain from wanton or willful misconduct.<sup>205</sup> As to other persons on the land, such as social guests, the owner or occupier owed a higher duty than that owed to trespassers; this standard, however, still was less than due care.<sup>206</sup> For example, a host had a duty to disclose hidden dangers to his social guests, but did not have to use due care to discover the risks.<sup>207</sup> This lesser standard of care was defended on the grounds that the host received no economic benefit from the social visit; therefore, the social guest was entitled to no greater safety than that enjoyed by the host and his family.<sup>208</sup>

Because of such reasons, as well as *stare decisis*, South Carolina utilizes the traditional common-law system of variable care owed according to different categories of persons on the land.<sup>209</sup> Consequently, this section will discuss the definition of each category or status and the standard of care owed to each.

---

205. See *infra* notes 225-226 and accompanying text.

206. See *infra* notes 230-242 and accompanying text.

207. *Id.*

208. See PROSSER & KEETON, *supra* note 8, § 60.

209. See *Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615 (1986).

One should note that the traditional common-law scheme has been criticized on a number of grounds.<sup>210</sup> For instance, the scheme arguably gives inadequate weight to the importance of accident prevention and spreading accident costs through the widespread practice of homeowners' and tenants' insurance. These criticisms have led some jurisdictions to modify or abandon the status system.<sup>211</sup> On the other hand, a number of jurisdictions recently have refused to abandon or modify the system,<sup>212</sup> and the *Restatement* still uses the traditional common-law approach.<sup>213</sup>

Generally, an owner or occupier is the person having control of the premises.<sup>214</sup> Thus, people who control the premises are subject to liability consistent with the class of people on the premises.<sup>215</sup> Regardless of the category and the standard of care involved, however, the owner or occupier cannot be held liable if he, in fact, does not control the dangerous condition or have the capability to make it safer. For example, an owner or occupier is not liable for injury from a dangerous condition in a road<sup>216</sup> or stream<sup>217</sup> across his property if he does not have the authority to control its condition.

## 2. *Persons Off the Premises*

An owner or occupier must use due care to ensure that persons outside his premises are not injured by activities on the premises or by "artificial conditions" or structures that he constructs or knows to exist on his land.<sup>218</sup> Indeed, under some cir-

210. See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

211. See *Rowland, id.*; PROSSER & KEETON, *supra* note 8, § 62; Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15 (1981); 62 AM. JUR. 2d *Premises Liability* §§ 59-60 (1972).

212. See PROSSER & KEETON, *supra* note 8, § 62 n.7.

213. See generally RESTATEMENT, *supra* note 10, §§ 328E-370 (categorizing liability based upon status of persons on land).

214. See *id.* § 328E; 62 AM. JUR. 2d *Premises Liability* §§ 12-23 (1972). In addition to the owner-occupier, household members and the owner-occupier's agents are subject to the same system of duties. See RESTATEMENT, *supra* note 10, §§ 382-384.

215. See *King v. Daniel Int'l Corp.*, 278 S.C. 350, 296 S.E.2d 335 (1982) (independent contractor liable to employees of owner coming onto premises).

216. See, e.g., *Dunbar v. Charleston & W.C. Ry.*, 211 S.C. 209, 44 S.E.2d 314 (1947).

217. See, e.g., *Byrd v. Melton*, 259 S.C. 271, 191 S.E.2d 515 (1972).

218. See *Humphries v. Union & Glenn Springs R.R.*, 84 S.C. 202, 65 S.E. 202 (1909);

cumstances, an owner or occupier may be held strictly liable to those outside the premises.<sup>219</sup> In addition, an owner or occupier is liable for the conduct of third parties in some situations. For example, he will be liable if he allows third persons to enter the premises and cause injury or if his employees create a dangerous condition.<sup>220</sup>

On the other hand, where natural conditions were involved — such as a tree or an embankment — there was no common-law duty of due care unless the owner or occupier created or altered the natural condition.<sup>221</sup> The result was that a tree might have fallen on a neighbor's house without liability so long as nothing had been done to alter its natural growth. This rule has been criticized as inappropriate to modern urban conditions because it provides no incentive to prevent such injury.<sup>222</sup> As a result of such criticisms, many states, including South Carolina,<sup>223</sup> have rejected the common-law rule and imposed a duty of due care for the protection of persons off the premises regardless of

---

PROSSER & KEETON, *supra* note 8, § 57; RESTATEMENT, *supra* note 10, §§ 364-371; 62 AM. JUR. 2d *Premises Liability* §§ 5-11. At times the application of this rule appears questionable. For example, the result in *Cromer v. Hutto*, 276 S.C. 499, 280 S.E.2d 202 (1981), seems contrary to this rule since the court appears to have held that the operator of a parking lot had no duty to protect persons off-premises from the foreseeable risk of a person's losing control of his automobile and, thus, injuring pedestrians walking by the lot. In *Mahle v. Wilson*, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984), the court of appeals held that an owner did not have an affirmative duty to adopt safety measures to protect persons on the public highway adjacent to its property. While this statement of the law is unobjectionable, the case does not address the issue of the possible existence and scope of the duty to insure safe access to an invitee. See *infra* notes 253-258 and accompanying text.

219. See *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960) (holding liable a ditch excavator engaging in dynamite blasting even though arguably not negligent); PROSSER & KEETON, *supra* note 8, §§ 76, 78, 90, 91; 62 AM. JUR. 2d *Premises Liability* §§ 8-9 (1972).

220. See PROSSER & KEETON, *supra* note 8, § 57. For an extreme example of an owner's liability for the acts of a rapist who used the abandoned building as a place to commit the rape, see *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985).

221. See PROSSER & KEETON, *supra* note 8, § 57; RESTATEMENT, *supra* note 10, § 363 (nonurban settings).

222. See PROSSER & KEETON, *supra* note 8, § 57, at 391; RESTATEMENT, *supra* note 10, § 363(2) (urban settings).

223. See, e.g., *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct. App.) (urban conditions require due care) (case surveyed in *Torts, Annual Survey of South Carolina Law*, 40 S.C.L. REV. 242 (1988)), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987).

whether natural or artificial conditions are involved.<sup>224</sup>

### 3. *Persons on the Premises*

There are four categories of persons who come on premises — adult trespassers, licensees, invitees, and children — and the standard of care varies for each.

#### *a. Adult Trespassers*

An adult who trespasses, that is, who comes on the premises without permission or without a legal privilege,<sup>225</sup> is a wrongdoer and likely is unexpected. Therefore, he is owed a very limited duty. The owner or occupier need not use due care, but merely must refrain from inflicting injury either by intent or by willful or wanton conduct.<sup>226</sup> Some jurisdictions vary this rule and impose a duty of due care as to adult trespassers whose presence is foreseeable and/or acquiesced in — trespassers who continually use a particular, limited area<sup>227</sup> or trespassers who are known to be present.<sup>228</sup> South Carolina has reached a similar result by holding that acquiescence in a pattern of trespassing can be viewed as an implicit grant of permission so that the person coming on the premises is a licensee.<sup>229</sup>

---

224. See, e.g., *Sprecher v. Adamson Cos.*, 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121 (1981).

225. See *Smiley v. Southern Ry.*, 184 S.C. 130, 191 S.E. 895 (1936); *Kershaw Motor Co. v. Southern Ry.*, 136 S.C. 377, 134 S.E. 377 (1926); see also *Silas v. Bowen*, 277 F. Supp. 314 (D.S.C. 1967); PROSSER & KEETON, *supra* note 8, § 393; RESTATEMENT, *supra* note 10, § 329; 67 AM. JUR. 2D *Premises Liability* §§ 55-57 (1972). Whether a person is a trespasser is a jury issue if the facts permit more than one reasonable inference. See *Duke v. Westvaco Dev. Corp.*, 279 S.C. 464, 466, 309 S.E.2d 293, 294 (Ct. App. 1983).

226. See *Nettles v. Your Ice Co.*, 191 S.C. 429, 4 S.E.2d 797 (1939); *Kershaw Motor Co. v. Southern Ry.*, 136 S.C. 377, 134 S.E. 377 (1926); PROSSER & KEETON, *supra* note 8, § 58; RESTATEMENT, *supra* note 10, § 333; 62 AM. JUR. 2D *Premises Liability* §§ 87-96 (1972).

227. See PROSSER & KEETON, *supra* note 8, § 58, at 396-99; RESTATEMENT, *supra* note 10, §§ 334-335; 62 AM. JUR. 2D *Premises Liability* § 94 (1972).

228. See PROSSER & KEETON, *supra* note 8, § 58, at 396-99; RESTATEMENT, *supra* note 10, §§ 336-338; 62 AM. JUR. 2D *Premises Liability* §§ 93, 95 (1972).

229. See *Jones v. Atlanta-Charlotte Air Line Ry.*, 218 S.C. 537, 63 S.E.2d 476 (1951); *Smiley v. Southern Ry.*, 184 S.C. 130, 191 S.E. 895 (1936).

### b. Licensees

A licensee has either the owner's or occupier's consent<sup>230</sup> or some other privilege<sup>231</sup> to visit the premises, but he is there for his own purpose rather than to benefit the owner or occupier.<sup>232</sup> Examples of licensees include social guests<sup>233</sup> and persons given implied consent to cross the land for their own benefit.<sup>234</sup> Under South Carolina statute, however, a person who is given permission to use land for recreational purposes is not a licensee and cannot recover unless gross negligence, willfulness, or malice is involved.<sup>235</sup>

A licensee has permission to enter the premises and is not a wrongdoer; therefore, he is owed a higher duty than a trespasser. On the other hand, since licensees are on the premises for their own benefit, they can be said to accept the premises as they are and may demand no greater safety than their host provides himself.<sup>236</sup> A licensee, thus, is owed something less than a duty of due care. The duty owed to a licensee was summarized in *Neil v. Byrum*<sup>237</sup> as follows:

230. See *Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615 (1986).

231. For further discussion of persons rightfully on land because of a privilege, see *infra* notes 271-273; RESTATEMENT, *supra* note 10, § 345; 62 AM. JUR. 2d *Premises Liability* §§ 38, 102 (1972).

232. See *Smiley v. Southern Ry.*, 184 S.C. 130, 191 S.E. 895 (1937); *Hill v. Broad River Power Co.*, 151 S.C. 280, 148 S.E. 870 (1929); *Mathers v. Seaboard Air Line Ry. Co.*, 67 S.C. 499, 46 S.E. 335 (1903); see also *Frankel v. Kurtz*, 239 F. Supp. 713 (D.S.C. 1965); PROSSER & KEETON, *supra* note 8, § 60, at 414-15; RESTATEMENT, *supra* note 10, § 330; 62 AM. JUR. 2d *Premises Liability* §§ 51-54 (1972).

233. See *Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615 (1986); see also *Frankel v. Kurtz*, 239 F. Supp. 713 (D.S.C. 1965); PROSSER & KEETON, *supra* note 8, § 60.

234. See PROSSER & KEETON, *supra* note 8, § 60, at 413-14.

235. See S.C. CODE ANN. §§ 27-3-40, -60 (Law. Co-op. 1976); see also *id.* §§ 27-3-10 to -70.

236. See PROSSER & KEETON, *supra* note 8, § 60, at 412-14. Both *Smiley v. Southern Ry.*, 184 S.C. 130, 191 S.E. 895 (1937), and *Matthews v. Seaboard Air Line Ry.*, 67 S.C. 499, 46 S.E. 335 (1903), stress this acceptance of the risk of the premises since they require that the licensee know of the risk or that "the owner may properly assume that they enter the premises in full contemplation of the danger, and of their own volition assume the risk." See *Matthews*, 67 S.C. at 512, 46 S.E. at 339 (emphasis added). Since this rule is phrased in terms of what the owner-occupier reasonably may foresee about the licensee (and not in terms of what the licensee knew in fact), the issue clearly involves duty rather than the affirmative defense of assumption of risk, which is phrased in terms of whether the victim actually knew of the risk involved. See, e.g., *Easler v. Hejaz Temple*, 285 S.C. 348, 329 S.E.2d 753 (1985).

237. 288 S.C. 472, 343 S.E.2d 615 (1986).

A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent. The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except:

(a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.

(b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.<sup>238</sup>

As this summary indicates, distinguishing between activities and conditions on the premises is important. Activities must be conducted with a reasonable amount of care for the safety of licensees.<sup>239</sup> The owner or occupier, however, need not change the activities conducted on his premises if risks are obvious to the licensee or if the licensee has been warned.<sup>240</sup> When conditions are involved, the owner or occupier need not use due care to make the premises safe by discovering and correcting unreasonable risks. He only is required to use due care to discover licensees and to warn them of unreasonable risks resulting from those conditions<sup>241</sup> that the owner knows about but that are unknown and not reasonably discoverable by the licensee.<sup>242</sup>

### c. Invitees

An invitee is a person who comes on the premises of another with express or implied permission and for the purpose of bene-

---

238. *Id.* at 473, 343 S.E.2d at 616 (quoting *Frankel v. Kurtz*, 239 F. Supp. 713, 717 (D.S.C. 1965)) (emphasis in original deleted).

239. See *Smiley v. Southern Ry.*, 184 S.C. 130, 191 S.E. 895 (1937); PROSSER & KEETON, *supra* note 8, § 60.

240. See *Smiley*, 184 S.C. 130, 191 S.E. 895; *Matthews*, 67 S.C. 499, 46 S.E. 335; PROSSER & KEETON, *supra* note 8, § 60, at 416-47; RESTATEMENT, *supra* note 10, §§ 341-341A. See *supra* note 236 for discussion indicating why duty, rather than assumption of risk, is involved.

241. See *Frankel v. Kurtz*, 269 F. Supp. 713, 720-21 (D.S.C. 1965) (risk must be considered in terms of the known infirmities of a particular victim).

242. See, e.g., *Smiley*, 184 S.C. 130, 191 S.E. 895; *Hill v. Broad River Power Co.*, 151 S.C. 280, 148 S.E. 870 (1929); *Matthews*, 67 S.C. 499, 46 S.E. 335; see also *Frankel v. Kurtz*, 269 F. Supp. 713 (D.S.C. 1965); PROSSER & KEETON, *supra* note 8, § 60, at 417-18. See *supra* note 236 for discussion indicating why duty, rather than assumption of risk, is involved.



fitting the owner or occupier.<sup>243</sup> Invitees include store patrons,<sup>244</sup> patients in physicians' offices,<sup>245</sup> persons visiting gas stations to use the restrooms or vending machines,<sup>246</sup> and workers invited to work on the premises.<sup>247</sup> Public employees, such as water-meter readers, generally are regarded as invitees.<sup>248</sup> Nevertheless, in many jurisdictions firemen and policemen are considered mere licensees because their presence often is sudden and unexpected.<sup>249</sup> South Carolina appears to follow this approach.<sup>250</sup> This view, however, has been criticized,<sup>251</sup> and other jurisdictions regard firemen and policemen as invitees.<sup>252</sup>

An owner or occupier owes an invitee a duty of due care to discover risks and to take safety precautions to warn of or eliminate unreasonable risks,<sup>253</sup> including the foreseeable risk of criminal conduct by others<sup>254</sup> within the area of invitation<sup>255</sup> on the premises.<sup>256</sup> The duty is only that of due care; if there is no negligence, there is no liability. Thus, for example, recovery may be denied if a reasonable person would not have been aware of the

243. See *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 140 S.E.2d 177 (1965).

244. See *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977).

245. See *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977).

246. See *Parker*, 245 S.C. 275, 140 S.E.2d 177.

247. See *Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979); see also *Honea v. West Va. Pulp & Paper Co.*, 380 F.2d 704 (4th Cir. 1967).

248. See PROSSER & KEETON, *supra* note 8, § 61; 62 AM. JUR. 2D *Premises Liability* § 102 (1972).

249. See PROSSER & KEETON, *supra* note 8, § 61, at 429-32; 62 AM. JUR. 2D *Premises Liability* §§ 103-105 (1972). When it does not matter that the presence is unexpected — for example, if the area is open to the public — then this rule should not apply. See *Taylor v. Palmetto Theatre Co.*, 204 S.C. 1, 28 S.E.2d 538 (1943) (fireman in public area treated as invitee).

250. *Cf. Taylor*, 204 S.C. 1, 28 S.E.2d 538. The fireman in *Taylor* was in an area allegedly open to the public, and thus, he was able to claim the status of an invitee.

251. See PROSSER & KEETON, *supra* note 8, § 61.

252. See *id.*, *supra* note 8, § 61, 432 nn. 52-53. This result was reached in *Taylor*, 204 S.C. 1, 28 S.E.2d 538, because the injury occurred in a place open to the public, and the fireman, therefore, could be regarded as an invitee.

253. See *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977); *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 124 S.E.2d 580 (1962); *Mullinax v. Great Atl. & Pac. Tea Co.*, 221 S.C. 433, 70 S.E.2d 911 (1952); PROSSER & KEETON, *supra* note 8, § 61, at 425-28.

254. See *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977); *Daniel v. Day's Inn of Am., Inc.*, 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987).

255. See *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 140 S.E.2d 177 (1965); PROSSER & KEETON, *supra* note 8, § 61, at 424-25.

256. See *Mahle v. Wilson*, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984).

risk<sup>257</sup> or if the risk was reasonable.<sup>258</sup>

#### d. Children

Special rules apply to children because they often lack the capacity to appreciate danger and to understand the culpable nature of wrongful entry on another's premises.<sup>259</sup> When the premises contain a condition unreasonably dangerous to children, the owner or occupier owes a child the duty of due care<sup>260</sup> even if he is a trespasser<sup>261</sup> or a licensee.<sup>262</sup> While many cases refer to the condition as an "attractive nuisance,"<sup>263</sup> this term can be misleading under current law since the condition need not be a nuisance in the normal usage of the term<sup>264</sup> and it need not have attracted the child.<sup>265</sup> The crucial issue is whether the condition is unusually or unreasonably dangerous to children.<sup>266</sup>

---

257. See *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984); *Munn v. Hardee's Food Sys., Inc.*, 274 S.C. 529, 266 S.E.2d 414 (1980); *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 254 S.E.2d 798 (1979); *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).

258. See *Humphries v. McCrory-McLellan Stores Corp.*, 358 F.2d 901 (4th Cir. 1966).

259. See generally Note, *Trespassing Children in South Carolina*, 17 S.C.L. REV. 376 (1975) (general discussion of a landowner's duty to trespassing children). The special nature of the care owed children in negligence actions was discussed explicitly in *Mahafey v. Ahl*, 264 S.C. 241, 250, 214 S.E.2d 119, 123 (1975).

260. The duty, therefore, is limited to reasonable precautions. If such precautions are taken, no liability exists. See *McLendon v. Hampton Cotton Mills Co.*, 109 S.C. 238, 95 S.E. 781 (1917).

261. See *Lynch v. Motel Enters.*, 248 S.C. 490, 151 S.E.2d 435 (1966).

262. *Id.*; *Sexton v. Noll Constr. Co.*, 108 S.C. 516, 95 S.E. 129 (1918).

263. See *Kirven v. Askins*, 253 S.C. 110, 169 S.E.2d 139 (1969).

264. See *Daniels v. Timmons*, 216 S.C. 539, 550-51, 59 S.E.2d 149, 155, *cert. denied*, 340 U.S. 841 (1950).

265. See *Kirven v. Askins*, 253 S.C. 110, 169 S.E.2d 139 (1969); *Lynch v. Motel Enters.*, 248 S.C. 490, 151 S.E.2d 435 (1966); *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965).

266. See *Kirven v. Askins*, 253 S.C. 110, 169 S.E.2d 139 (1969) (a clod of dirt on construction site is not unreasonably dangerous). *Kirven* suggests that there are two distinct tests — "unreasonably dangerous" and "attractive nuisance". Nevertheless, since an attractive nuisance must be unreasonably dangerous and since an unreasonably dangerous condition need not attract the child, the net result is that the crucial issue in all cases is whether there is unreasonable danger.

Other cases suggest that an important consideration is whether the condition is natural or artificial. For example, in *Byrd v. Melton*, 259 S.C. 271, 191 S.E.2d 515 (1972), the court denied recovery for injury resulting from drowning in a natural stream, noting that the owner had no duty to protect from such natural conditions. The court, however,

In applying this rule, a definition of “child” is necessary. As a general rule, a person under fourteen probably would be regarded as a child in South Carolina while those who are older would be considered adults.<sup>267</sup> If a child under fourteen, in fact, was aware of and did appreciate the risk, then he probably could not recover because he was not a child trespasser unaware of the situation<sup>268</sup> or because the doctrine of assumption of risk would apply.

### CONCLUSION

As indicated in the Introduction, this article is designed primarily to present and contrast the doctrines applicable to the sale or lease of residences. Given the nature of common-law development, areas of uncertainty and conflict typically arise within any doctrinal topic. As a result, this article has had to go beyond doctrinal presentation in two types of situations. First, when the doctrinal discussion involved areas in which the rules and possible developments are unclear — for example, the role of the warranty of workmanship<sup>269</sup> and the impact of the Residential Landlord and Tenant Act<sup>270</sup> — several possible approaches were discussed. Second, in areas when the doctrines appear to be in conflict or appear to be based on questionable grounds — for example, the difference in treatment between the

---

also stressed that the risk “was one which the landowners could not feasibly guard against,” because fences, pipes, or coverings would be an unreasonable expense and the city also had control of the stream. *Id.* at 276-77, 191 S.E.2d at 517; *see also supra* note 239-242 and accompanying text. Thus, whether the condition is natural or artificial is relevant to the reasonableness of the risk; a special duty still should be owed to children even when natural conditions are involved. *Everett v. White*, 245 S.C. 331, 140 S.E.2d 582 (1965), also suggests that a condition must be either artificial or an exposed, obvious risk. Once again, however, these factors appear to be relevant to the reasonableness of the risk rather than a rule or restriction on the duty of care. This focus on the special need to protect children from unreasonable risk is consistent with the general policy of the state. *See Mahaffey v. Ahl*, 264 S.C. 241, 250, 214 S.E.2d 119, 123 (1975).

267. *See McCormick v. Campbell ex rel. Campbell*, 285 S.C. 272, 329 S.E.2d 752 (1985); *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (1982); PROSSER & KEETON, *supra* note 8, § 32, at 181-82; RESTATEMENT, *supra* note 10, § 283A comment c.

268. *See PROSSER & KEETON, supra* note 8, § 59, at 408-10.

269. *See id.* § 63, at 442.

270. *See Riley v. Marcus*, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827 (1981) (landlord has no duty to protect tenants when violent acts had not occurred before on the premises and when he was not aware of any risks attendant to the premises that were concealed from tenant).

liabilities of a builder-seller and a builder-lessee<sup>271</sup> — the discussion briefly indicated the precise nature of the problems involved. Such areas of uncertainty and conflict are not cause for concern because they are typical of common-law development. Indeed, resolution of these problems is the primary way that the law evolves and reflects changes in our views about rules of liability that should be used in particular circumstances.

---

271. See *supra* notes 164-175 and accompanying text.

