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Torts

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TORTS LAW

I. No Punitive Damages Allowed Under the Statute Creating Strict Tort Liability

In *Barnwell v. Barber-Colman Co.*[1] the South Carolina Supreme Court held that plaintiffs may not recover punitive damages when their sole claim for relief is under strict liability in tort.[2] The issue came before the supreme court on certification from the United States District Court for the District of South Carolina. The jury had awarded Barnwell $1,000,000 in actual damages and $2,800,000 in punitive damages for the injuries he received when he caught his hand in a piece of textile machinery which allegedly had a defectively designed guard that the defendant had manufactured.[3] The plaintiff tried the case solely under section 15-73-10,[4] in which the legislature created strict liability in South Carolina when it adopted the Restatement (Second) of Torts section 402A.[5] Because section 15-73-10 does not expressly provide for punitive damages, and refers only to compensation for "physical harm caused,"[6] the South Carolina Supreme Court felt bound by the rules of statutory construction to limit the plaintiff's recovery to actual damages.[7]

This decision places South Carolina in a small minority of those jurisdictions that have considered the issue.[8] Courts generally focus on both the policy aspects of awarding punitive damages, which include the inhibition of innovative design by manufacturers that are afraid of increased liability, and whether the purpose of punitive damages to punish is consistent with a no-fault concept of liability.[9] Because South

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1. ___ S.C. ___, 393 S.E.2d 162 (1989).

2. *Id.* at ___, 393 S.E.2d at 164.

3. *Id.* at ___, 393 S.E.2d at 162. The defendant designed this particular guard to move when an object approaches it. This allows the object to pass through the heavy rollers of the warper machine. When the plaintiff attempted to retrieve a pair of scissors that were caught in the warper machine, his hand was drawn into the rollers and was damaged severely. Brief of Plaintiff at 4-5.

4. S.C. Code Ann. § 15-73-10 (Law. Co-op. 1976).

5. Restatement (Second) of Torts § 402A (1965).

6. S.C. Code Ann. § 15-73-10(1) (Law. Co-op. 1976).

7. *Barnwell*, ___ S.C. at ___, 393 S.E.2d at 163.

8. See Justice Finney's dissent for a list of case citations in states that award punitive damages in strict liability. *Id.* at ___ n.1, 393 S.E.2d at 164 n.1.

9. *See, e.g.*, Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 577, *cert. granted*, 97 N.J. 598, 483 A.2d 137, *cert. granted sub nom.* Fischer v. Bell Asbestos

Carolina legislatively adopted strict liability, however, the issue was statutory construction and legislative intent rather than the merits of awarding punitive damages to plaintiffs.

In *Martin v. Fleissner GMBH*[10] the Fourth Circuit Court of Appeals anticipated the South Carolina Supreme Court's denial of punitive damages under section 15-73-10. Although the Fourth Circuit did not reach the issue, it noted that "absent express language, the [South Carolina] state courts will not read an authorization of punitive damages into the statute."[11] South Carolina courts traditionally have refused to allow punitive damages under statutes that do not expressly provide for punitive damages.[12] The courts reason that "[t]o depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret."[13] Thus, while the legislative adoption of strict liability provided immediate relief to consumers, it also restrained the court's ability to interpret flexibly and to develop the doctrine.[14]

The general rule in South Carolina is that the courts must construe strictly a statute that is in derogation of the common law.[15] Thus, the first question is whether section 15-73-10 is part of South Carolina common law. South Carolina did not recognize strict liability until 1974.[16] Justice Finney argued in dissent that the legislature intended the statute to operate under the existing South Carolina tort common law, which favors punitive damages.[17] He also asserted that the legislature did not intend to limit the type of recoverable damages when it codified the Restatement (Second) of Torts section 402A, especially

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Mines, Ltd., 97 N.J. 598, 483 A.2d 137 (1984), *aff'd*, 103 N.J. 643, 512 A.2d 466 (1986); *see also* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976) (general discussion of the objectives of punitive damages and their relation to strict liability).

10. 741 F.2d 61 (4th Cir. 1984).

11. *Id.* at 66.

12. *See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 396-97, 134 S.E.2d 206, 210 (1964) (refused to recognize punitive damages under the Uninsured Motorist Act then codified at S.C. CODE ANN. §§ 46-750.11, -750.14 to -750.18 (1962)); Garrick v. Florida Cent. & Peninsula R.R., 53 S.C. 448, 453-59, 31 S.E. 334, 736-38 (1898) (refused to recognize punitive damages under a statute that provided for damages in proportion to injury).

13. *Laird*, 243 S.C. at 395, 134 S.E.2d at 209 (quoting Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942)).

14. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 805-07 (1976).

15. *See, e.g.*, Steinert v. Lanter, 284 S.C. 65, 66, 325 S.E.2d 532, 533 (1985); Standard v. Shine, 278 S.C. 337, 340, 295 S.E.2d 786, 787 (1982); Major v. National Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976).

16. Hatfield v. Atlas Enters., 274 S.C. 247, 262 S.E.2d 900 (1980).

17. *Barnwell*, __ S.C. at __, 393 S.E.2d at 166 (Finney, J., dissenting).

when other jurisdictions find strict liability compatible with an award of punitive damages.[18]

The majority did not adopt this approach, however, and relied on the language in *Schall v. Sturm, Ruger Co.*[19] in which the supreme court asserted that this statute "brought about a significant change in the law of our state."[20] Furthermore, the court in *Schall* stated that "[i]t is fair to say that an entirely new species of action came into being with the adoption of Restatement 402A by our General Assembly."[21] In *Schall* the court refused to apply section 15-73-10 retroactively in the absence of express language or clear legislative intent.[22] Thus, *Schall* provides that section 15-73-10 is a statute in derogation of the common law and subject to strict interpretation.[23]

Once the court made this determination, it could not extend the statute's application beyond its legislative intent. Although the legislature adopted the comments to section 402A as the legislative intent of section 15-73-10,[24] the comments do not address the issue of punitive damages. Thus, the court must give the words of the statute their plain and ordinary meaning.[25] The pertinent language of section 15-73-10 provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . ."[26] The court determined that the plain

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18. *Id.* at __, 393 S.E.2d at 164-66 (Finney, J., dissenting). The legislature's adoption of the official comments to the Restatement (Second) of Torts section 402A as the legislative intent of section 15-73-10 enhances the credibility of the dissent's argument. *See* S.C. CODE ANN. § 15-73-30 (Law. Co-op. 1976). Montgomery and Owen assert that this allows the court to look to court decisions in other jurisdictions for their interpretations of section 402A. Montgomery & Owen, *supra* note 14, at 812. If the court had adopted this approach, the court would have focused its inquiry on the compatibility of punitive damages and strict liability and the useful function of punitive damages. *See Barnwell*, __ S.C. at __, 393 S.E.2d at 166. (Finney, J., dissenting). One criticism of this approach toward punitive damages is that the cases on which the dissent relied do not interpret section 402A to provide for punitive damages, but allow punitive damages because they are not inconsistent with strict liability and they serve a useful purpose. The majority takes a better approach and relies on the traditional rules of statutory construction and concentrates on the plain and ordinary meaning of the words "for physical harm caused," which are found in section 15-73-10. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).

19. 278 S.C. 646, 300 S.E.2d 735 (1983).

20. *Id.* at 648, 300 S.E.2d at 735.

21. *Id.*

22. *Id.* at 650, 300 S.E.2d at 737.

23. *See id.* at 649, 300 S.E.2d at 736.

24. S.C. CODE ANN. § 15-73-30 (Law. Co-op. 1976).

25. Smith v. Eagle Constr. Co., 282 S.C. 140, 143, 318 S.E.2d 8, 9 (1984).

26. S.C. CODE ANN. § 15-73-10(1) (Law. Co-op. 1976).

meaning of these words limited damages to compensation for physical harm and did not include punitive damages.[27]

In *Laird v. Nationwide Insurance Co.*[28] the court considered a similar issue and determined that damages for "bodily injury" do not include punitive damages. In both *Barnwell* and *Laird* the court distinguished the purpose of actual damages from the purpose of punitive damages. Punitive damages serve as a deterrent and seek to punish the individual, while actual damages seek to compensate the individual for the loss or injury sustained.[29] Relying on this distinction in *Laird*, the court held that damages for "bodily injury" sought only to compensate the victim and do not include punitive damages.[30] The same analysis applies to *Barnwell* because the language in section 15-73-10 that creates liability for "physical harm caused" is indistinguishable from the language the court considered in *Laird*.

The issue in this case is not whether South Carolina should award punitive damages in strict liability, but whether the legislature has provided for their recovery. Although the majority declines to assert their position on punitive damages, they expressly invite the legislature to amend the statute to allow punitive damages.[31] Whether the legislature should amend the statute is beyond the scope of this article, but it is important to note that on two other occasions the legislature has amended a statute that the court determined did not provide for punitive damages.[32]

Although this decision precludes recovery of punitive damages, the decision applies only to actions tried solely under section 15-73-10 and will not limit recovery of punitive damages in products liability actions that are tried under a negligence theory. Thus, the greatest impact of this decision will be on a plaintiff who is contributorily negligent. The plaintiff must forego the possibility of punitive damages to gain the protection of strict liability, in which contributory negligence is not a defense. The impact on other plaintiffs should be minimal, however, for if a plaintiff can demonstrate the reckless and willful conduct to support a punitive damages award under *Rogers v. Florence Printing*

27. *Barnwell*, __ S.C. at __, 393 S.E.2d at 163.

28. 243 S.C. 388, 397, 134 S.E.2d 206, 210 (1964).

29. *Barnwell*, __ S.C. at __, 393 S.E.2d at 163.

30. 243 S.C. at 396-97, 134 S.E.2d at 210 (1964).

31. *Barnwell*, __ S.C. at __, 393 S.E.2d at 164.

32. Following the decision in *Laird*, the legislature amended the Uninsured Motorist Act to allow for punitive damages. *See* S.C. CODE ANN. § 38-77-30(4) (Law. Co-op. 1989). The legislature also amended the Wrongful Death Act to allow for punitive damages following the court's decision in Garrick v. Florida Cent. & Peninsular R.R., 53 S.C. 448, 31 S.E. 334 (1898). *See* S.C. CODE ANN. § 15-51-40 (Law. Co-op. 1976).

Co.,[33] the plaintiff can show negligence to support the underlying tort claim. Thus, unless the legislature acts to amend the statute, a plaintiff must plead and prove negligence before punitive damages will be awarded.

Lorie L. Maring

II. Implied Malice Will Not Support Punitive Damages Award in Malicious Prosecution Suit

In *Goodwin v. Metts*[34] the Fourth Circuit Court of Appeals held that malice may be inferred from lack of probable cause in a malicious prosecution suit, but implied malice will not support a punitive damages award.[35] In a related case, *McKenney v. Jack Eckerd Co.*,[36] the South Carolina Court of Appeals held that the solicitor's entry of a nolle prosequi in favor of a defendant is not the type of sufficient termination required to support a claim for malicious prosecution.[37]

In *Goodwin* James Goodwin and Eddie Hallman sued Lexington County Sheriff James Metts[38] and Deputy Sheriff Vernon Maxwell for wrongful prosecution under 42 U.S.C. § 1983[39] and under state law for malicious prosecution. Goodwin and Hallman alleged that Maxwell and Metts withheld exculpatory evidence during their prosecution for grand larceny. Prior to trial, Maxwell learned that Terry Nelson, the principal witness in the case, provided deputies with a false address and could not be located. Furthermore, Maxwell cleared the case for prosecution even though another man confessed to a string of burglaries including a confession for the crime of which Goodwin and Hallman were accused. Maxwell failed to disclose these facts to the solicitor or to the private attorney retained to prosecute the case.[40] The court held Maxwell liable on both the wrongful prosecution and malicious prosecution claims and held Metts liable on only the malicious prosecution claim. The jury awarded compensatory damages of $60,000 to Goodwin and $90,000 to Hallman. The jury also assessed punitive

33. 233 S.C. 567, 577-78, 106 S.E.2d 258, 263-64 (1958).

34. 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1812 (1990).

35. *Id.* at 166.

36. 299 S.C. 523, 386 S.E.2d 263 (Ct. App. 1989).

37. *Id.* at 524, 386 S.E.2d at 264.

38. Metts's liability is predicated on the South Carolina Sheriff's Statute. S.C. Code Ann. § 23-13-10 (Law. Co-op. 1989) (sheriff is responsible for a deputy's neglect of duty or misconduct in office).

39. (1982).

40. *Goodwin*, 885 F.2d at 159-60.

damages of $175,000 against Maxwell.[41] The Fourth Circuit Court of Appeals sustained the award of compensatory damages, but reversed the award of punitive damages.[42]

In South Carolina, it is well established that malice may be implied by lack of probable cause in a malicious prosecution suit.[43] At least twenty other jurisdictions also allow a jury to infer malice from lack of probable cause.[44] Thus, the decision in *Goodwin* is well supported by South Carolina courts and by courts in other jurisdictions.

The *Goodwin* opinion, however, is novel for its treatment of punitive damages in a malicious prosecution suit. No prior South Carolina case has dealt with the issue of punitive damages in this context. In reversing the award of punitive damages, the Fourth Circuit borrowed the distinction between actual and implied malice from South Carolina libel and slander case law.[45] Implied malice "is a presumption of law and dispenses with the proof of malice . . . ."[46] By contrast, "actual malice or malice in fact is not presumed and must be proved."[47] Although implied malice is sufficient to support an award of actual damages, an award of punitive damages requires actual malice.[48] The Fourth Circuit's holding in *Goodwin* is a logical extension of South Carolina law. The opinion follows the reasoning of other courts that have required actual malice, rather than implied malice, to support a punitive damages award in the context of a malicious prosecution suit.[49] Although *Goodwin* creates no dramatic changes in South Carolina law and is only persuasive authority, it provides guidance about how South Carolina courts might deal with the issue of punitive damages in future malicious prosecution suits.

In *McKenney v. Jack Eckerd Co.*[50] the South Carolina Court of Appeals held that entry of a nolle prosequi by the solicitor is not the

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41. *Id.* at 160.

42. *Id.* at 166-67.

43. Ruff v. Eckerds Drugs, Inc., 265 S.C. 563, 566-67, 220 S.E.2d 649, 651 (1975); Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965); Margolis v. Telech, 239 S.C. 232, 238, 122 S.E.2d 417, 419 (1961); Elletson v. Dixie Home Stores, 231 S.C. 565, 571, 99 S.E.2d 384, 389 (1957); Melton v. Williams, 281 S.C. 182, 185, 314 S.E.2d 612, 614 (Ct. App. 1984).

44. *See* 54 C.J.S. *Malicious Prosecution* § 40, at 564 nn. 88-90 (1987).

45. *Goodwin*, 885 F.2d at 165-66.

46. Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 913 (1968) (quoting 33 AM. JUR. *Libel and Slander* § 111 (1941)).

47. *Id.*, 158 S.E.2d at 914.

48. *Id.*

49. *See* Bradshaw v. State Farm Mut. Auto. Ins. Co., 157 Ariz. 411, 421-22, 758 P.2d 1313, 1323-24 (1988); Harris v. Lewis State Bank, 482 So. 2d 1378, 1385 (Fla. Dist. Ct. App. 1986); Lee v. Southland Corp., 219 Va. 23, 27, 244 S.E.2d 756, 759 (1978).

50. 299 S.C. 523, 386 S.E.2d 263 (Ct. App. 1989).

type of termination of a criminal proceeding that will support a claim for malicious prosecution.[51] Eckerd caused a warrant to be issued charging McKenney with issuing a fraudulent check after McKenney's bank erroneously dishonored McKenney's check.[52] McKenney sued Eckerd for malicious prosecution. The established rule in South Carolina is that entry of nolle prosequi will not support an action for malicious prosecution.[53] South Carolina's rule appears to be at odds with the rule in most jurisdictions that an entry of nolle prosequi is a termination sufficiently favorable to an accused to support a malicious prosecution claim if the reasons for the entry indicate the innocence of the accused and its entry is not based on a procedural or technical defect.[54] Sections 659, 660, and 661 of the Restatement (Second) of Torts express the majority view. Section 659 specifically states the majority rule.[55] Sections 660 and 661 discuss circumstances when a termination other than by acquittal is not sufficient to support a claim for malicious prosecution.[56] These two sections maintain that a termination of criminal proceedings will be insufficient to support a claim for malicious prosecution if the reasons for the termination do not indicate the innocence of the accused. A number of cases from other jurisdictions

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51. *Id.* at 524, 386 S.E.2d at 264.

52. *Id.*

53. Harrelson v. Johnson, 119 S.C. 59, 111 S.E. 882 (1922) (discharge by magistrate after preliminary investigation will support malicious prosecution suit); Mack v. Riley, 282 S.C. 100, 102, 316 S.E.2d 731, 732 (Ct. App. 1984).

54. *See* 54 C.J.S. *Malicious Prosecution* § 56 (1987).

55. "Criminal proceedings are terminated in favor of the accused by . . . the formal abandonment of the proceedings by the public prosecutor . . . ." RESTATEMENT (SECOND) OF TORTS § 659 (c) (1977). Comment e provides:

> The usual method by which a public prosecutor signifies the formal abandonment of criminal proceedings is by the entry of a nolle prosequi, either with or without the leave of the court as the criminal procedure of the jurisdiction in question provides . . . . In either case, unless new proceedings are instituted, the formal abandonment of the proceedings by the public prosecutor is a final termination in favor of the accused, except under the conditions stated in §§ 660 and 661.

Id. § 659 comment e.

56. Section 660 provides:

> A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if
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> (a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused; or
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> (b) the charge is withdrawn or the prosecution abandoned because of misconduct on the part of the accused or in his behalf for the purpose of preventing proper trial; or
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> (c) the charge is withdrawn or the proceeding abandoned out of mercy.

Id. § 660.

have expressly stated or impliedly indicated that if the accused consents to or procures the entry of a nolle prosequi, the termination is not sufficient to support a malicious prosecution claim.[57] This restriction is unfair to a person accused of a crime because to preserve a civil cause of action the person must object to the abandonment of criminal charges against him. If an accused fails to object to the entry of a nolle prosequi, he loses his right to bring a malicious prosecution claim. Furthermore, because a nolle prosequi can be entered at anytime prior to trial, jeopardy may not have attached. This leaves the accused without the protection of either the double jeopardy clause or a civil cause of action. An accused, therefore, could be subject to repeated harassment without any means of redress. The value of this requirement is doubtful, especially when the accused person is innocent.

In citing the majority rule, the *McKenney* opinion does not mention the requirement that the entry of a nolle prosequi be over the objection of the accused.[58] Perhaps the court of appeals is suggesting that the supreme court adopt the majority rule without the objection requirement. Indeed, the Restatement does not require the accused to object to the entry of nolle prosequi.[59] The Restatement view appears to be the sounder view. Perhaps the supreme court, given the proper case, will choose to adopt it.

Stephen P. Stewart

III. General Standard of Negligence Applies in Determining a Vehicle Owner's Duty to Inspect a Mechanic's Repairs

In *Carter v. R.L. Jordan Oil Co.*[60] a negligence action, the South Carolina Supreme Court reversed the court of appeals' grant of a motion for directed verdict[61] on an evidentiary issue, which raised an inference that the question of negligence should have been presented to the jury.[62] In dicta the supreme court expressly rejected the court of

57. *See* 1 F. Harper, F. James & O. Gray, The Law of Torts § 4.4, at 418-20 n.5 (2d ed. 1986). *See also* 54 C.J.S. *Malicious Prosecution* § 56 (1987).

58. McKenney v. Jack Eckerd Co., 299 S.C. 523, 524, 386 S.E.2d 263, 264 (Ct. App. 1989).

59. *See* Restatement (Second) of Torts §§ 659-60 (1986).

60. 299 S.C. 439, 385 S.E.2d 820 (1989) (per curiam).

61. *Id.* at 440, 385 S.E.2d at 820.

62. *Id.* Carter alleged that Jordan's driver negligently failed to perform the pre-trip inspection recommended in the operator's manual. The court of appeals held that another driver's testimony of his own pre-trip inspection was not relevant to prove the owner's negligent pre-trip inspection of a trailer. Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 447-49, 365 S.E.2d 324, 331-32 (Ct. App. 1988), *rev'd*, 299 S.C. 439, 385 S.E.2d 820

appeals' three-part test for concluding that a vehicle owner could rely on a mechanic's repairs without further inspection by the owner and reaffirmed the well-established general standard for the determination of negligence.[63]

Samuel Carter was injured when a wheel assembly from a truck owned by R.L. Jordan Oil Company broke loose and struck his van. The wheel assembly was held in place by a nut, which was secured by a cotter pin. Almost four months prior to the accident, a mechanic removed the wheel assembly to repair the trailer's brakes. The mechanic installed a used cotter pin instead of installing a new pin when he reassembled the wheels. The evidence showed that the wheel separated because the weakened cotter pin broke.[64]

At trial Carter alleged that Jordan failed to inspect the mechanic's invoices and the mechanic's work on the trailer.[65] The court of appeals held that the owner of a motor vehicle has no duty to inspect the work of mechanics after they complete maintenance or repairs if:

> (1) the work is of a kind within the competence of the ordinary mechanic performing that type of work; (2) the defect in the work is not of a character that would make it apparent to a person of ordinary prudence in the owner's position; and (3) the owner reasonably relies on the competence of the mechanic as a sufficient assurance that the vehicle is safe to operate.[66]

In establishing the three-part test, the court of appeals recognized that the operator of a motor vehicle has a duty to make a reasonable inspection of the vehicle to discover conditions that might present an unreasonable risk of harm to others.[67] The court reasoned, however, that the ordinary prudent owner does not possess the mechanical skills necessary to maintain a motor vehicle in a reasonably safe operating condition and, therefore, would have a qualified mechanic service his

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(1989). The supreme court reversed, holding that the driver's testimony could support an inference of the practices of both the driver involved and other Jordan drivers. *Carter*, 299 S.C. at 440, 385 S.E.2d at 820.

63. *Carter*, 299 S.C. at 441, 385 S.E.2d at 820.

64. *Carter*, 294 S.C. at 438-40, 365 S.E.2d at 326-27 (court of appeals' opinion).

65. *Id.* at 445-47, 365 S.E.2d at 330-31. The trial judge dismissed Carter's cause of action against Jordan for negligent hiring. *Id.* at 446 n.2, 365 S.E.2d at 331 n.2. Carter also sued the mechanic for negligent repair of the trailer. The jury returned a general verdict against Jordan and the mechanic for actual and punitive damages. The court of appeals affirmed the verdict against the mechanic, but reversed the verdict against Jordan. In Carter's suit against the manufacturer, the trial court directed a verdict for the manufacturer. *Id.* at 439, 365 S.E.2d at 327.

66. *Id.* at 445, 365 S.E.2d at 330.

67. *Id.* at 444-45, 365 S.E.2d at 330 (citing S.C. CODE ANN. §§ 56-5-4410, -5320 (Law. Co-op. 1976)).

vehicles.[68] Furthermore, the ordinary owner does not have the knowledge to make an adequate inspection, especially if it requires disassembly of the vehicle. Therefore, the court concluded, the owner has a right to rely on a qualified mechanic's work without further inspection.[69]

The supreme court, however, rejected the court of appeals' "rigid test" and reaffirmed the well-established general standard for the determination of negligence.[70] The general standard of negligence is the failure to exercise due care. Due care is the care a reasonably prudent person would exercise under the circumstances.[71]

The court of appeals recognized the vehicle owner's duty to make a reasonable inspection, and the second part of the test incorporates this inspection. Under the three-part test, the owner would not be held liable if a reasonable inspection failed to uncover the defect. The test, therefore, merely precluded the jury from requiring a more detailed inspection specifically for the purpose of discovering defects in a mechanic's work. *Carter* demonstrates that although the reasonably prudent owner will not, in most circumstances, be expected to inspect the work of a mechanic, the supreme court is unwilling to remove this question from the jury.

The result of *Carter* is that one of the circumstances that juries may consider in determining what is a reasonable inspection is whether the vehicle has recently been serviced by a mechanic. Thus, in addition to facts that are normally relevant in determining what constitutes a reasonable inspection, such as the dangerousness of cargo to be transported, factors pertaining to the mechanic's work may now become relevant. For example, certain defects are more likely than others to cause serious harm. It may be that the reasonably prudent person would inspect the work done on the brakes but not on the vehicle's electrical system. Juries also might want to consider the ease with which the inspection can be done. Although some defects are visible,[72] others may require elaborate disassembly in order to be revealed. The interval between the time the mechanic completed the work and the time the defect appeared may also be relevant. If the defect could not possibly be

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68. *Id.* at 445, 365 S.E.2d at 330.

69. *Id.* at 446, 365 S.E.2d at 330.

70. Carter v. Jordan Oil Co., 299 S.C. 439, 441, 385 S.E.2d 820, 820 (1989) (per curiam).

71. *See, e.g.*, Thomas v. Atlantic Greyhound Corp., 204 S.C. 247, 253, 29 S.E.2d 196, 198 (1944).

72. Carter alleged that the driver could have seen that the cotter pin was broken if he had checked the bearing oil level in the wheel hub, a procedure recommended by the owner's manual as part of the routine pre-trip inspection. *Carter*, 294 S.C. at 447-48, 365 S.E.2d at 331 (court of appeals' opinion).

detected immediately after the work was completed, the owner may not be required to continue to inspect the work periodically. For example, in *Carter*, assuming that the defect could have been discovered only when the cotter pin broke and that the owner was not required to inspect the invoices, the defect would not have become apparent until some time during the following four months.

Also relevant is whether the owner has the mechanical knowledge necessary to detect the defect. This may result in some questionable verdicts, as the *Carter* case demonstrates. In *Carter* the jury assessed punitive damages of $40,000 against the mechanic and $160,000 against Jordan. The unfairness of the verdict in light of the mechanic's active negligence and Jordan's passive negligence may have motivated the court of appeals to devise the three-part test. The *Carter* decision, however, is consistent with previous South Carolina cases[73] and the general view is that members of a jury, as representatives of the community, are uniquely qualified to recognize a breach of the proper standard of care.

Jennifer J. Aldrich

IV. OWNER OF STOLEN CAR NOT LIABLE FOR INJURY OR DAMAGE ALTHOUGH HE LEFT THE KEYS IN THE CAR'S IGNITION

In *Johnston v. Pittman*[74] the South Carolina Court of Appeals held as a matter of law that even though a van driver negligently left his keys in the ignition, this was not the proximate cause of an accident in which a thief stole the van and drove it negligently. The court based its holding on *Stone v. Bethea*,[75] a 1968 decision of the South Carolina Supreme Court. In *Stone* the court ruled that the thief's negligent driving of a car superseded the car owner's negligence and the owner could not be held liable for the thief's negligent driving.[76] The *Johnston* opinion reflects the difficulties present in deciding "key in the ignition" cases. In a footnote, the court of appeals invited the supreme court to grant certiorari and take a second look at this issue in South Carolina.[77]

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73. *See, e.g.*, Wilson v. Marshall, 260 S.C. 271, 195 S.E.2d 610 (1973).

74. 298 S.C. 390, 380 S.E.2d 850 (Ct. App. 1989).

75. 251 S.C. 157, 161 S.E.2d 171 (1968).

76. *Id.* at 164, 161 S.E.2d at 174-75.

77. *Johnston*, 298 S.C. at 393 n.1, 380 S.E.2d at 852 n.1. "[W]e have no authority to reconsider the decision of the Supreme Court in *Stone* . . . . Still, the Supreme Court . . . may want to grant certiorari in this case and reconsider its decision in Stone . . . ." *Id.*

On April 25, 1986, Elizabeth A. Johnston was injured severely when her car collided with a van driven by Nathan Pittman, an escapee from the State Department of Youth Services. Pittman had stolen the van, which belonged to Made Rite Foods, Inc. (Made Rite). Made Rite entrusted the van to Robert W. Chandler who managed Made Rite's daily operations, which included the delivery of Made Rite products to neighborhood convenience stores. James R. Godd, Chandler's agent, was operating the van on the day Pittman stole it.[78] Godd parked the van in front of a Majik Market convenience store and left the keys in the ignition while he made a delivery. Pittman stole the van when Godd was inside the store. Shortly after the theft, Pittman drove the van into Johnston's automobile.[79]

Mrs. Johnston sued Godd, Chandler, and Made Rite for the negligence of Godd, who was Chandler and Made Rite's agent. She alleged that Godd was negligent when he failed to remove the keys from the unattended van, failed to take proper precautions for securing the van, and failed to maintain proper surveillance of the unattended van.[80] The trial court held that Godd's actions, as a matter of law, were not the proximate cause of Johnston's injuries and granted summary judgment for the defendants. The court of appeals affirmed the trial court's decision and based its holding on the South Carolina Supreme Court's ruling in *Stone*.[81]

In *Stone* the owner of a laundry business returned to his store at 8:30 p.m., parked his car in an alley, and left the keys in the ignition. While the owner was in the shop, a thief stole the car and caused the accident that injured Stone. Stone sued the owner of the car to recover for the injuries he sustained in the accident. At the close of the testimony, however, the trial court granted the car owner's motion for a directed verdict.[82] The supreme court affirmed the trial court and stated that "to allow recovery would do violence to the rule of proximate cause . . . ."[83]

Johnston argued on appeal that *Stone* does not stand for the proposition that a car owner's liability in South Carolina has been decided as a matter of law, but that the questions of owner negligence and proximate cause must turn on the facts of each case.[84] The court of appeals disagreed, and relied on an observation made by Chief Judge

78. *Id.* at 391, 380 S.E.2d at 851.
79. *Id.*
80. *Id.*
81. *Id.* at 392, 380 S.E.2d at 851.
82. Stone v. Bethea, 251 S.C. 157, 160, 161 S.E.2d 171, 173 (1968).
83. *Id.*
84. Brief of Appellant at 7.

Sanders in an earlier case, *Accordini v. Security Central, Inc.*.[85]

In *Accordini* Judge Sanders interpreted the holding in *Stone* as "although it might be foreseeable a car would be stolen if keys were left in its ignition, it was not foreseeable a car would be driven negligently after it was stolen."[86] In a footnote, the *Accordini* court observed, "The weight of American authority on 'keys in the car' cases seems to be changing." The court then cited statistics which indicated that the accident rate for stolen cars is approximately two hundred times the normal accident rate.[87] In *Johnston* the court of appeals noted the *Accordini* footnote and the apparent change in tenor among American courts, but stated that "we have no authority to reconsider the decision of the Supreme Court in *Stone* . . . ."[88] The court suggested, however, that "the Supreme Court, in light of the authority cited by Judge Sanders in his [*Accordini*] footnote, may want to grant certiorari in this case and reconsider its decision in *Stone* . . . ."[89]

Parties have litigated extensively the issue of owner liability in "key in the ignition" cases throughout the United States.[90] Most courts have refused to impose liability on the owner of the vehicle.[91] Courts have held that (1) the negligence of the owner was not the proximate cause of the plaintiff's injury because the thief's negligence broke the chain of causation between the owner's negligence and the injury;[92] (2) the owner had no common law duty to the injured plaintiff;[93] and (3) while it may be foreseeable that a car with the key in the ignition

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85. *Johnston*, 298 S.C. at 392, 380 S.E.2d at 851-52 (quoting Accordini v. Security Cent., Inc., 283 S.C. 16, 20, 320 S.E.2d 713, 715 (Ct. App. 1984)).

86. *Accordini*, 283 S.C. at 20, 320 S.E.2d at 715. In *Accordini* the plaintiffs' burglar alarm malfunctioned and a thief stole certain property. The plaintiffs sued the security company for negligence. Unlike a "key in the ignition" case, the court found that it was foreseeable that property would be stolen if an alarm failed. The *Accordini* court held that the defendant's reliance on *Stone* was misplaced. *Id.* at 18-20, 320 S.E.2d at 714-15.

87. *Id.* at 20 n.2, 320 S.E.2d at 715 n.2 (citing Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909 (1969)).

88. *Johnston*, 298 S.C. at 393 n.1, 380 S.E.2d at 852 n.1.

89. *Id.*

90. *See generally* Annotation, *Liability of Motorist Who Left Key in Ignition for Damage or Injury Caused by Stranger Operating the Vehicle*, 45 A.L.R.3D 787 (1972)(comprehensive review of case law on owner liability in "key in the ignition" cases).

91. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 313-14 (6th ed. 1984 & Supp. 1988) (the majority of courts have refused on a variety of grounds to hold the owner liable).

92. *See, e.g.*, Surratt v. Petrol, Inc., 160 Ind. App. 479, 312 N.E.2d 487 (1974); Kalberg v. Anderson Bros. Motor Co., 251 Minn. 458, 88 N.W.2d 197 (1958); Joyce v. M & M Gas Co., 672 P.2d 1172 (Okla. 1983).

93. *See, e.g.*, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).

would be stolen, the owner could not foresee the plaintiff's injury.[94] The current trend among courts is to review the facts of each case for "special circumstances" that would make it reasonable to impose liability on the owner who, by simply removing the keys from the car, could have prevented serious harm to innocent third parties.[95] Courts are willing generally to allow the jury to decide issues of duty, foreseeability, and proximate cause.[96]

In some states the owner's liability may be determined by a statute that requires owners to remove the ignition key from an unattended motor vehicle. Only one jurisdiction with this type of statute, however, has held that leaving the keys in the car is negligence per se so that an owner's liability is absolute.[97] Other jurisdictions that have enacted these statutes have held that a violation of the statute is evidence of negligence.[98] Section 56-5-2570 of the South Carolina Code provides that "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake . . . ."[99] Thus, the plaintiff in *Stone* charged that the defendant had violated the South Carolina statute. The supreme court, however, found that the violation of the statute, as a matter of law, was only a remote cause of the injury. The court consequently did not hold the defendant liable.[100] In cases such as *Stone* and *Johnston*, in which a state statute has been violated, the plaintiff must show that he is in the class of persons that the legislature enacted the statute to protect.[101] As a practical matter, this is difficult: although the statutes may have been enacted to prevent car thefts, they were not intended to protect persons injured by the negligence of thieves.[102]

Because the South Carolina Court of Appeals held that the defendants in *Johnston* were not negligent as a matter of law, the court refused to follow the example of most courts across the country. They did so not because they believed that the trial court's grant of sum-

94. *Id. But see* Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970)

95. *See, e.g.*, Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1969); Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630 (Minn. 1978).

96. *See, e.g.*, Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467 (Fla. 1978); Gates v. Owen Chevrolet Co., 294 So. 2d 179 (Miss. 1974); Hill v. Yaskin, 75 N.J. 139, 380 A.2d 1107 (1977); Zinck v. Whelan, 120 N.J. Super. 432, 294 A.2d 727 (App. Div. 1972); Lichter v. Fritsch, 77 Wis. 2d 178, 252 N.W.2d 360 (1977).

97. Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944).

98. *See, e.g.*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

99. S.C. CODE ANN. § 56-5-2570 (Law. Co-op. 1976).

100. Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968).

101. *See* RESTATEMENT (SECOND) OF TORTS § 286 comment f (1965).

102. *See id.*

mary judgment yielded a correct result but because they were bound by the precedent of *Stone*.[103] The court of appeals' decision in *Johnston* reasoned that the unforeseeable, intervening acts of the thief cut off the owner's liability, but the *Johnston* court noted that Mrs. Johnston had failed to introduce any "empirical data regarding the accident rate for thieves."[104] Perhaps the court's partial agreement with *Accordini* would have yielded a different result despite *Stone* if Mrs. Johnston had presented more statistical evidence to support her claim of foreseeability. Issues of foreseeability, proximate cause, and the intervening negligence of subsequent tortfeasors are issues appropriately decided on the facts of each case. In holding as a matter of law that an owner is not liable, the South Carolina courts reject the nationwide trend to look closely at the special circumstances of each "key in the ignition" case.

Anne Frances Bleecker

V. NEW TORT LIABILITY FOR RESIDENTIAL LANDLORDS IN SOUTH CAROLINA

In *Watson v. Sellers*[105] the South Carolina Court of Appeals held that a tenant can sue in tort for personal injuries proximately caused by a landlord's breach of a duty that arises out of the South Carolina Residential Landlord and Tenant Act (RLTA).[106] Though *Watson* represents a significant departure from prior South Carolina court decisions, it follows modern judicial thought and the needs of modern society.[107]

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103. *Johnston*, 298 S.C. at 393 n.1, 380 S.E.2d at 852 n.1.

104. *Id.*

105. 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989).

106. S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. Supp. 1989). The RLTA is modeled after the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 427-508 (1972), but some differences exist. The RLTA "governs most residential rental agreements entered into or renewed on or after July 8, 1986." Wilcox, *A Lawyer's Guide to the South Carolina Landlord and Tenant Act*, 39 S.C.L. REV. 493, 495 (1988). The RLTA places the duties on a residential landlord to (1) comply with applicable building and housing codes that materially affect health and safety, (2) repair and do whatever reasonably is necessary to put and keep the premises in a fit and habitable condition, (3) keep common areas reasonably safe, (4) keep common areas reasonably clean if the premises contain more than four dwelling units, (5) make running water, hot water, and heat available, and (6) maintain facilities and appliances in reasonably good and safe working order. *See* S.C. CODE ANN. § 27-40-440 (Law. Co-op. Supp. 1989). The RLTA applies only to residential dwelling units. *Id.* § 27-40-110. A dwelling unit is a structure "used as a home, residence, or sleeping place." *Id.* § 27-40-210(3).

107. *See* Berger, *The New Residential Tenancy Law—Are Landlords Public Utili-*

Betty Watson rented a mobile home from Barbara Sellers. Watson sued Sellers when she sustained serious physical injuries because the wooden stairs to the front door of her trailer collapsed under her.[108] At trial, the judge instructed the jury on two alternative theories. The first instruction was that a tenant may recover in tort for a violation of a duty imposed on the landlord by the RLTA.[109] Alternatively, the trial judge instructed the jury that a landlord who negligently undertakes to make repairs may be liable for the injuries that are caused by the negligent repairs.[110] The jury returned a general verdict for Watson, and Sellers appealed to the South Carolina Court of Appeals for relief.[111]

The South Carolina Court of Appeals relied on its recent decision in *Rayfield v. South Carolina Department of Corrections*[112] to determine whether the RLTA creates a cause of action for the breach of a landlord's duty. According to *Rayfield*, a violation of a statute is negligence per se[113] if the plaintiff shows that the statute's purpose is to prevent the type of harm that the plaintiff has suffered, and that the plaintiff is a member of the particular class of persons that the statute is designed to protect.[114] The court relied on *Rayfield* and reviewed the RLTA's preamble, which states that the Act is "to provide for landlord obligations, liability and remedies."[115] Section 27-40-20 of the RLTA provides that its purpose also is to "modernize" and "revise" South

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ties?, 60 NEB. L. REV. 707, 708-15 (1981). "It can be fairly said that a revolution of rather major proportions has occurred." *Id.* at 715.

108. *Watson*, 299 S.C. at 427, 385 S.E.2d at 370.

109. *Id.* at 437, 385 S.E.2d at 375.

110. *Id.* at 427, 385 S.E.2d at 370.

111. *Id.*

112. 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), *cert. denied*, 298 S.C. 204, 399 S.E.2d 133 (1989). For an analysis of the *Rayfield* decision, see Case Comment, *Court Defines Test for Imposing Tort Liability on Public Officials for Alleged Breach of Statutory Duty*, 41 S.C.L. REV. 211 (1989).

113. The term negligence per se indicates that a plaintiff does not need to prove the duty owed by the defendant. Rather, the plaintiff only needs to show the existence of a statute and that the defendant's conduct violated that statute. *See Rayfield*, 297 S.C. at 103-04, 374 S.E.2d at 914-15. In some jurisdictions the violation of a housing code is relevant evidence of negligence. *See* Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489, 499-500 (1971) (citing relevant cases). In other jurisdictions violation of a housing code is irrelevant in determining whether a landlord is negligent. *Id.*

114. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914-15. Federal courts follow a similar approach. Under Cort v. Ash, 422 U.S. 66 (1975), a private remedy is implicit in a statute if the plaintiff is within the class of persons for whose benefit the legislature passed the statute, if some implicit or explicit indication of legislative intent is present, and if the implication of a remedy is consistent with the underlying legislative scheme. *Watson*, 299 S.C. at 434, 385 S.E.2d at 373 (quoting *Cort*, 422 U.S. at 78).

115. 1986 S.C. Acts 336.

Carolina landlord-tenant law.[116] Further, section 27-40-50 states that "remedies . . . must be so administered that an aggrieved party may recover appropriate damages."[117] Finally, section 27-40-610 provides that "[a] tenant may recover actual damages . . . for any noncompliance by the landlord with . . . section 27-40-440."[118] Given these statutory provisions, the court concluded that the legislature intended "to create a cause of action in favor of the tenant and against the landlord for failure, after notice, to keep in good repair."[119]

The *Watson* court also had an alternative basis for its holding. In *Conner v. Farmers and Merchants Bank*[120] the South Carolina Supreme Court adopted the rule that a landlord who undertakes to make repairs and does so negligently is liable for the injuries that are proximately caused by the negligent repairs.[121] The *Watson* court held that even if the RLTA did not create a private cause of action, the jury's verdict could be upheld under the *Conner* rule.[122] Thus, the court found against Sellers on both grounds.

Though the *Watson* decision represents a dramatic change from pre-RLTA landlord-tenant law, it is a well-reasoned application of the express language of the RLTA and the *Rayfield* decision. Because the *Watson* court recognized a tort action only when the landlord has notice of an unsafe condition,[123] however, the courts presumably will apply common-law rules when the landlord does not have notice of the unsafe condition.

Before the RLTA, "[l]andlords generally . . . enjoyed broad protection under South Carolina law for personal injuries suffered by a tenant on the leased premises."[124] Under the traditional rule the landlord owes no duty to keep the premises safe for the tenant.[125]

Although under the general common-law rule a landlord owed no

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116. S.C. CODE ANN. § 27-40-20 (Law. Co-op. Supp. 1989).

117. *Id.* § 27-40-50(a).

118. *Id.* § 27-40-610(b).

119. *Watson*, 299 S.C. at 436, 385 S.E.2d at 374.

120. 243 S.C. 132, 132 S.E.2d 385 (1963).

121. *Id.* at 139-40, 132 S.E.2d at 388-89.

122. 299 S.C. at 438, 385 S.E.2d at 375.

123. *Id.* at 436, 385 S.E.2d at 374.

124. Wilcox, *supra* note 106, at 529. *See also* Hubbard & Felix, *Liabilities of Sellers and Lessors of Residential Realty in South Carolina*, 40 S.C.L. REV. 545, 572 (1989).

125. Timmons v. Williams Wood Prods. Corp., 164 S.C. 361, 365, 162 S.E. 329, 331 (1932). *See also* Young v. Morrisey, 285 S.C. 236, 239, 329 S.E.2d 426, 428 (1985); Hubbard & Felix, *supra* note 124, at 572; Wilcox, *supra* note 106, at 529; Note, *Personal Injuries to the Tenant: The Landlord's Liability Therefor*, 10 S.C.L. REV. 307 (1958); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 434-35 (5th ed. 1984) [hereinafter PROSSER & KEETON] (general discussion of the rule that the landlord owes no duty).

duty to protect the tenant from personal injuries, the courts began to develop exceptions that, in many jurisdictions, began to swallow the general rule.[126]

The *Watson* court recognized a notable exception to the common-law rule that a landlord who undertakes to make repairs must do so with due care.[127] This exception is based on the principle that one who undertakes to perform an act must do so with due care.[128] South Carolina courts distinguish between nonfeasance and misfeasance when they consider this exception. If a landlord agrees to make repairs and fails to do so, his only liability is based on contract theories.[129] If the landlord's negligent repairs proximately cause a tenant's injuries, however, the tenant can maintain an action in tort.[130]

The policies of the RLTA reflect the significant attributes of modern residential landlord-tenant relationships. First, the residential tenant lacks significant bargaining power as he encounters form contracts that frequently are on a "take it or leave it" basis.[131] Second, the residential tenant lacks expertise when he deals with experienced landlords and "is often not capable of discovering defects in complex wiring, heating and electrical systems."[132] Third, the residential tenant

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126. PROSSER & KEETON, *supra* note 125, § 63, at 435.

127. 299 S.C. at 437-38, 385 S.E.2d at 375. *See also* Conner v. Farmers and Merchants Bank, 243 S.C. 132, 139-40, 132 S.E.2d 385, 388-89 (1963); RESTATEMENT (SECOND) OF PROPERTY § 17.7 (1977); RESTATEMENT (SECOND) OF TORTS § 362 (1965); Hubbard & Felix, *supra* note 124, at 577-78; Wilcox, *supra* note 106, at 529 n.139; Note, *supra* note 125, at 314-15. The majority of jurisdictions recognize this exception to the common-law rule. *See* PROSSER & KEETON, *supra* note 125, § 63, at 445.

128. *See* PROSSER & KEETON, *supra* note 125, § 63, at 445; Hubbard & Felix, *supra* note 124, at 577.

129. Young v. Morrissey, 285 S.C. 236, 239-40, 329 S.E.2d 426, 428 (1985). *See also* Timmons v. Williams Wood Prods. Corp., 164 S.C. 361, 371-72, 162 S.E. 329, 332-33 (1932) (landlord agreed to fix door hinges but did not undertake to fix them); Hubbard & Felix, *supra* note 124, at 577; Wilcox, *supra* note 106, at 529. A tenant can recover for personal injuries sustained as a result of a breach of contract only when "such consequential losses were foreseeable because they were within the contemplation of the parties." Hubbard & Felix, *supra* note 124, at 578.

130. *See supra* note 127 and accompanying text. Other exceptions to the common-law rule require the landlord to (1) use due care to maintain the common areas of the premises, (2) ensure that the premises are reasonably safe at the time he transfers control, if the landlord knows that the tenant will hold the premises open to the public, (3) use due care to warn the tenant if the landlord knows or should know of a dangerous condition, and (4) use due care to warn outsiders or to correct the condition when conditions on the premises pose a foreseeable danger to those outside of the premises. Hubbard & Felix, *supra* note 124, at 574-77. *See also* PROSSER & KEETON, *supra* note 125, § 63.

131. Backman, *The Tenant As a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 3 (1980).

132. Dutenhaver, *Nonwaiver of the Implied Warranty of Habitability in Residen-*

usually is unable to repair unsafe conditions himself.[133] Finally, and most importantly, the residential tenant enters into the property transaction to meet his personal needs, but the landlord is primarily interested in investment profits.[134] Accordingly, the landlord should bear the burden of personal injuries for unsafe premises as a cost of doing business. Thus, the *Watson* decision is sound for these policy reasons. *Watson*, however, leaves three questions unanswered: (1) to what leases does the decision apply; (2) of what significance is the notice requirement in *Watson*; and (3) can a tenant waive the protection that *Watson* affords.

First, the *Watson* court viewed the RLTA as an abrogation of the common law and followed the maxim that statutes which abridge the common law must be strictly construed.[135] Hence, the *Watson* decision should apply only to residential leases rather than to commercial leases.

Second, the *Watson* court held that a landlord must have notice of an unsafe condition before he is liable in tort for breach of a duty under the RLTA.[136] Because the RLTA does not grant expressly a cause of action to recover for personal injuries, it does not require that the landlord be notified of the unsafe condition. A notice requirement, however, is consistent with other provisions of the RLTA that clearly condition tenant remedies upon notice to the landlord.[137] Consequently, it is logical to conclude that an act that conditioned other remedies on notice to the landlord would also condition an implied remedy on notice.

A notice requirement also will reach equitable results. For example, the purchaser of a rental unit will not be liable for injuries that are caused by conditions that he has had no opportunity to cure. Further-

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tial Leases, 10 LOY. U. CHI. L.J. 41, 51 (1978). Even if the tenant has the capability to discover unsafe conditions, because of his lack of bargaining power, he usually is unable to obtain either a repair or a lower rental rate. *See id.*

133. *See id.* at 46.

134. Backman, *supra* note 131, at 4.

135. 299 S.C. at 433, 385 S.E.2d at 373.

136. *Id.* at 438, 385 S.E.2d at 375.

137. *See, e.g.*, S.C. CODE ANN. § 27-40-610(a) (Law. Co-op. Supp. 1989) (tenant can terminate the rental agreement for the landlord's material noncompliance with the RLTA that affects health and safety after the tenant gives the landlord notice of the noncompliance and fourteen days to cure the noncompliance). Moreover, under section 27-40-630, the RLTA gives the tenant certain remedies if the landlord does not provide essential services, but the tenant must deliver a written notice to the landlord. These provisions indicate that tenant remedies under the RLTA are conditioned upon the tenant giving the landlord an opportunity to cure his noncompliance. *Id.* § 27-40-630(a) (tenant remedies in case the landlord does not provide essential services are dependent on written notice to the landlord).

more, if a holder of a mortgage forecloses on rental property, the courts would not impose liability for personal injuries that are sustained as a result of conditions that the mortgagee had no opportunity to cure.[138] The notice requirement, however, will not unfairly shield landlords. Under the RLTA, a landlord has notice if he (1) has actual knowledge of the condition, (2) has received notification of the condition, or (3) should have known of the condition from all of the facts and circumstances known to him at the time.[139] Thus, if a landlord is aware of facts that would lead a reasonable landlord to infer that the conditions were unsafe, the landlord has notice of the unsafe conditions. Because of the other notice requirements in the RLTA and the equitable results that a notice requirement will reach, the notice requirement of *Watson* is a favorable rule.

Courts in other jurisdictions also have required that the landlord have notice of an unsafe condition before tort liability will be imposed.[140] For example, in *Firth v. Marhoefer*[141] a Florida statute imposed a duty on landlords to keep common areas safe and reasonably clean. The court held that in order to impose tort liability for a violation of the statute, "it is necessary to prove that the landlord had actual or constructive knowledge or notice of the existence of the dangerous condition for a time sufficient for it to be remedied."[142] *Shroades v. Rental Homes, Inc.*[143] arose under a version of the Uniform Residential Landlord and Tenant Act which is similar to the RLTA, and contained a fact situation similar to *Watson*. The Ohio Supreme Court held that in addition to showing that the landlord breached his statutory duty, a plaintiff also must show "that the landlord received notice of the defective condition of the rental premises, that the landlord knew of the defect, or that the tenant has made reasonable, but unsuccessful attempts to notify the landlord."[144] Thus, the South Carolina Court of Appeals in *Watson* has joined other jurisdictions that recognize the importance of granting the landlord an opportunity to act reasonably before the court imposes liability for an unreasonable act.

One final issue that arises from the *Watson* decison is whether a landlord can contractually limit his liability by having the tenant waive

138. Under the RLTA, the definition of a landlord includes a mortgagee in possession. *Id.* § 27-40-210(8).

139. *Id.* § 27-40-240(a).

140. *See, e.g.*, Shirkey v. Crain & Assocs. Management Co., 129 Ariz. 128, 629 P.2d 95 (Ct. App. 1981); Ward v. Watson, 524 A.2d 1108 (R.I. 1987); Tedder v. Raskin, 728 S.W.2d 343 (Tenn. Ct. App. 1987).

141. 406 So. 2d 521 (Fla. Dist. Ct. App. 1981).

142. *Id.* at 522.

143. 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

144. *Id.* at 25-26, 427 N.E.2d at 778.

any right to sue for the landlord's failure to comply with the RLTA. Under section 27-40-330(a)(1), a rental agreement cannot provide that the tenant agrees to waive any rights and remedies under the RLTA.[145] Furthermore, section 27-40-330(a)(3) of the RLTA states that a rental agreement cannot contain a provision that "agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability of the costs connected therewith."[146] This language does not refer to liability that arises under the specific provisions of the RLTA, but refers to liability that arises under "law." This apparently would include implied remedies that are created by judicial decision. Therefore, a landlord should not be permitted to limit his liability through an exculpatory clause in the lease.

Under the RLTA if a landlord deliberately uses a prohibited term in the rental agreement, he is liable for the tenant's attorney's fees plus an amount not to exceed the tenant's security deposit.[147] Moreover, if the landlord uses a prohibited term maliciously, the tenant can recover up to three month's rent plus attorney's fees.[148] Accordingly, the landlord should think twice before he attempts to avoid his duties and exculpate himself through contract.

Watson v. Sellers is a sound decision that is consistent with *Rayfield*, with the specific language of the RLTA, and with the basic policies that prompted the RLTA. Although these policies prompted changes to South Carolina residential landlord-tenant law, the same policies do not apply to commercial leases. Accordingly, basic common-law principles should cover commercial leases. Moreover, the court's requirement that the landlord have notice of the unsafe condition is an equitable rule that is consistent with the RLTA. Finally, a landlord should not be able to contract out of the protection that *Watson* now gives to the South Carolina residential tenant. Although this change may place a greater financial burden upon the landlord, he should bear this burden as a cost to engage in the residential leasing business.

Mac D. Heavener, III

145. S.C. CODE ANN. § 27-40-330(a)(1) (Law. Co-op. Supp. 1989).

146. *Id.* § 27-40-330(a)(3).

147. *Id.* § 27-40-330(b).

148. *Id.* The RLTA does not define malicious conduct. Section 27-40-330(b), however, indicates that the landlord must know that the term is prohibited.

VI. MERCHANT HELD TO OWE A HIGHER DUTY OF CARE TO A PHYSICALLY DISABLED INVITEE

In *Lowrimore v. Fast Fare Stores, Inc.*[149] the South Carolina Court of Appeals held that a merchant who knew of an invitee's physical disability owed that invitee a greater degree of care. Consequently, the evidence offered at trial by the invitee that the store's floor was slick and caused his fall was sufficient to present a question of fact for the jury on the issue of the merchant's negligence.[150]

Thomas W. Lowrimore, a one-leg amputee, was injured when he slipped and fell in a Fast Fare Store. Lowrimore had been a daily customer at the store. On the morning of the injury, Williams, a Fast Fare employee who knew Lowrimore, was mopping the floor with a cleaner, rather than the plain water he sometimes used. Williams had posted no warning signs.[151]

Before Lowrimore entered the store that morning, he watched Williams mop the floor for several minutes. When Lowrimore entered the store on his crutches, he slipped on the wet floor and fell. Lowrimore testified that as he was falling he heard Williams tell him to "watch out." Lowrimore had been in the store on previous occasions while an employee mopped the floor, but according to his testimony, the floor on those occasions had not been slick and he had never had any problem walking on the wet floor. Lowrimore testified that when he put his hand down to help himself up after he fell, he noticed that the floor felt slick, like it was covered with wax.[152] Lowrimore brought a negligence action against Fast Fare for the personal injuries he sustained as a result of the fall. The trial judge denied Fast Fare's motions for directed verdict and judgment notwithstanding the verdict and entered judgment for Lowrimore. Fast Fare appealed and the court of appeals affirmed.

The court of appeals reviewed the opinions in three South Carolina slip-and-fall cases. The court restated the rule of *Howard v. K-Mart Discount Stores*:[153] "proof that a floor was slick is insufficient to establish negligence; in order to establish negligence, there must be evidence or testimony that the floor was so slick as to constitute an unsafe condition."[154] The court also cited the court of appeals' opinion in *Young v. Meeting Street Piggly Wiggly*.[155] In *Young* the court held

149. 299 S.C. 418, 385 S.E.2d 218 (Ct. App. 1989).
150. *Id.* at 423, 385 S.E.2d 221.
151. *Id.* at 419-20, 385 S.E.2d at 219.
152. *Id.*
153. 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987).
154. *Lowrimore*, 299 S.C. at 421, 385 S.E.2d at 220.
155. 283 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986).

that when customers are likely to track rainwater into a store during rainy weather, the mere presence of such water does not automatically make a merchant liable.[156]

The *Lowrimore* court next cited *Felder v. K-Mart Corp.*,[157] a case similar to *Young*, in which a plaintiff slipped on rainwater that someone tracked in from outside.[158] Although similar to *Young*, the trial court's verdict in *Felder* was upheld on appeal because the witnesses gave conflicting testimony concerning what steps K-Mart took to alleviate the danger created by the presence of the water.[159]

The *Lowrimore* court, relying on *Young* and *Felder* as precedent, established that to prove negligence a plaintiff must show more than the slickness of the floor, or that the floor was wet. The plaintiff must show that the defendant actually was negligent in failing to remove the danger or to warn invitees of it.

The court then set out the duty that the merchant owed to Lowrimore, as an invitee. The court quoted the South Carolina Supreme Court's holding in *Graham v. Whitaker*:[160]

> A person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty. This degree of care must be commensurate with the particular circumstances involved, *including the age and capacity of the invitee.* This duty is an active or affirmative duty. *It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him.*[161]

Using the *Graham* standard, the court of appeals held that to determine the degree of care Fast Fare owed to Lowrimore, Williams's knowledge of Lowrimore's infirmity had to be considered. The court stated: "As a person Williams knew to be disabled physically, Lowrimore was entitled to greater care than those more physically fit than he."[162] The *Lowrimore* opinion marks the first time a court has applied this standard in a case in which the plaintiff slipped and fell while visiting a self-service store.

In *Felder v. K-Mart Corp.*[163] the South Carolina Supreme Court declined an opportunity to hold that a merchant owed an elderly invi-

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156. *Id.* at 510-11, 343 S.E.2d at 637-38.
157. 297 S.C. 446, 377 S.E.2d 332 (1989).
158. *Lowrimore*, 299 S.C. at 422, 385 S.E.2d at 220.
159. 297 S.C. at 450, 377 S.E.2d at 334-35.
160. 282 S.C. 393, 321 S.E.2d 40 (1984).
161. *Lowrimore*, 299 S.C. at 422, 385 S.E.2d at 220 (quoting *Graham*, 282 S.C. at 398, 321 S.E.2d at 43) (emphasis in original).
162. *Id.* at 423, 385 S.E.2d at 221.
163. 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

tee a greater degree of care. In *Felder* the court noted that the plaintiff invitee was eighty-one years old,[164] but did not consider whether the invitee's age affected the duty of care the merchant owed to him.

The court of appeals held that Lowrimore set forth sufficient evidence to present a question of fact for the jury on the issue of Fast Fare's negligence. Lowrimore's testimony that he fell on the wet, slick floor would have been insufficient to present a question of fact under the holdings of both *Howard* and *Young*. In *Lowrimore*, however, the court focused on the relationship between the plaintiff and the merchant, and held that sufficient evidence of negligence existed.

First, the court reasoned that Fast Fare owed Lowrimore a greater degree of care, because Williams, Fast Fare's employee, knew of Lowrimore's disability.[165] The court also refused to charge Lowrimore with knowledge of the dangers of an obviously wet floor. The court held that even if Lowrimore could see that the floor was wet, the jury could reasonably have found that to Lowrimore it constituted a "hidden condition and danger of which Williams had knowledge and of which Lowrimore had less or no knowledge . . . ."[166] The court implied that Lowrimore should not be charged with knowledge of the danger of the obviously wet floor because when Lowrimore previously had been in the store, the floors had been wet, but not slick.

The *Lowrimore* opinion departs from the usual rule that invitees normally are required to exert care for their own safety around an obviously wet floor. For example, in reasoning that a court could not base a merchant's liability solely on the presence of a wet floor, the *Young* court cited an Ohio Supreme Court opinion which stated that " 'every one [sic] knows that a damp floor is likely to be a little more slippery that a dry floor . . . .' "[167] The *Young* court then held that the merchant had made reasonable efforts by frequently mopping the floor, posting warning signs, and putting down mats, because an "ordinary reasonable person" would expect the floor to be wet under the rainy circumstances presented by the case.[168] The court of appeals, however, did not charge Lowrimore with knowledge of the dangerous condition of the wet floor, presumably because of his past experiences in the Fast Fare store. The court held that because it did not charge Lowrimore with such knowledge, and because Fast Fare owed Lowrimore a greater duty of care, the jury reasonably could find that evidence of a slick

164. *Id.* at 447, 377 S.E.2d at 333.

165. *Lowrimore*, 299 S.C. at 423, 385 S.E.2d at 221.

166. *Id.*

167. Young v. Meeting St. Piggly Wiggly, 288 S.C. 508, 511, 343 S.E.2d 636, 638 (Ct. App. 1986) (quoting S.S. Kresge Co. v. Fader, 116 Ohio St. 718, 728, 158 N.E. 174, 175 (1927)).

168. *Id.* at 512, 343 S.E.2d at 638.

floor was sufficient to establish Williams's negligence in failing to warn Lowrimore of a hidden danger.[169]

Because the South Carolina Supreme Court has not held that a self-service merchant owes an aged or physically disabled invitee a greater duty of care, and because the court of appeals stressed the particular relationship between the merchant and the invitee, *Lowrimore* should not be read too broadly. Although the court does not make it clear, an obviously disabled invitee, not known by the merchant, might not be given the same high standard of care as the invitee in *Lowrimore*.

Denise Campbell Yarborough

VII. Foreseeable Response Will Not Break Chain of Proximate Causation

In *Wallace v. Owens-Illinois, Inc.*[170] the South Carolina Court of Appeals held that a product defect that creates a hazardous condition may be the proximate cause of injuries sustained even though the party is attempting to rectify the hazardous condition. The court also held that an attempt to remove the hazardous condition is not a voluntary assumption of risk.

In *Wallace* a soft drink bottle exploded while the plaintiff was holding it. Fragments of glass and liquid fell to the kitchen floor, but the explosion did not injure the plaintiff. Five minutes later, as the plaintiff picked up fragments of the broken glass by hand, he slipped on the liquid and seriously injured himself. Wallace sued the bottle manufacturer, the soft drink distributor, and the retailer on theories of negligence, strict tort liability, and breach of an implied warranty of merchantability.[171] The trial court granted summary judgment to all of the defendants because of lack of proximate cause, contributory negligence, and assumption of risk. The court of appeals reversed on all three grounds, and remanded the case for trial on the issues of contributory negligence and assumption of risk.[172]

The defendants argued that the plaintiff's attempt to clean up the bottle in an allegedly negligent manner[173] was a superseding cause and,

169. *Lowrimore*, 299 S.C. at 423, 385 S.E.2d at 222.

170. ___ S.C. ___, 389 S.E.2d 155 (Ct. App. 1989).

171. *Id.* at ___, 389 S.E.2d at 156.

172. *Id.* at ___, 389 S.E.2d at 156-59.

173. The plaintiff admitted that he walked across the floor in smooth leather-soled bedroom slippers, but maintained that he used his best efforts to avoid stepping in the liquid. *Id.* at ___, 389 S.E.2d at 156.

therefore, the bottle's explosion was not the proximate cause of his injuries. In rejecting this argument, the court cited two requirements to use to determine if an intervening cause supersedes the original act. The court stated: "If the intervening acts are (1) set in motion by the original wrongful act and (2) are the normal and foreseeable results of the original act, the final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause."[174]

Pfaehler v. Ten Cent Taxi Co.[175] established the requirement that the intervening act must be set in motion by the original act.[176] In *Pfaehler* a taxi cab driver left an intoxicated passenger alone in the front seat of the cab with the keys in the ignition. The passenger drove the cab away and collided with another automobile, damaged the other automobile, and injured its occupants. The trial court held the cab company liable for damages. On appeal the South Carolina Supreme Court ruled that the original wrongdoer is liable if he set the intervening cause in motion, or if the negligent act operated through the intervening cause to produce the injurious result.[177] In *Pfaehler* the court noted that the cab driver's wrongful act was not just leaving the keys in the ignition, but in creating an opportunity for the intoxicated passenger to steal the car. The car driver's original act of negligence, therefore, set in motion the passenger's intervening act.[178] *Stone v. Bethea*,[179] however, is distinguishable from *Pfaeler*. In *Stone* the defendant left his keys in his car and a thief stole the car. The thief negligently caused an accident which injured a third party. The South Carolina Supreme Court held that the intervening acts of the thief were independent from the defendant's original negligence. The *Stone* court focused on the lack of foreseeability of the theft because the owner parked the car in a well-lighted area directly across from the police station.[180]

In *Driggers v. City of Florence*[181] the plaintiff sued for injuries after she walked through some tall grass to get around a walkway and stepped into an open water meter. The city had no constructive knowledge of the open meter and, therefore, its only negligence was the fail-

174. *Id.* at __, 389 S.E.2d at 157.

175. 198 S.C. 476, 18 S.E.2d 331 (1942).

176. *Id.* at 485-86, 18 S.E.2d at 335.

177. *Id.* at 485, 18 S.E.2d at 335.

178. *Id.*, 18 S.E.2d at 335-36 (court discusses rule on intervening acts).

179. 251 S.C. 157, 161 S.E.2d 171 (1968).

180. *See id.* at 161-62, 161 S.E.2d at 173. The court stated: "One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." *Id.*

181. 190 S.C. 309, 2 S.E.2d 790 (1939).

ure to provide a paved walkway and the failure to keep the grass cut. The South Carolina Supreme Court reasoned that the open water meter was an entirely independent and intervening cause of the injury which superseded the city's negligence.[182] In light of the court's reasoning in these cases the plaintiff's action to clean up the broken bottle in *Wallace* does not appear to be independent from the original wrong. The bottle's defect set in motion the plaintiff's response.[183]

The foreseeability of an intervening action was at issue in *Young v. Tide Craft, Inc.*[184] In *Tide Craft, Inc.* a mechanic attempted to repair a boat's defective steering system by installing spliced cables. The boat's owner subsequently drowned when the steering failed and he was thrown into the water. His widow sued the boat's manufacturer, the retailer, and the repair shop for her husband's wrongful death and conscious pain and suffering. The trial court entered judgment against the manufacturer and absolved the retailer and repair shop of liability.[185] The manufacturer appealed and the South Carolina Supreme Court held that neither the manufacturer nor the retailer could have foreseen the repair shop's intervening acts.[186] The standard of foreseeability must be determined by looking at the natural and probable consequences of the complained of act. Splicing was recognized as an unsafe practice in the trade and the plaintiff produced no evidence that the accident would have occurred had the repairman not spliced the cable.[187]

In *Wallace* the court of appeals emphasized the foreseeability of the plaintiff's intervening act rather than the quality of the act and refused to consider the possibility of a lack of due care by the plaintiff.[188] The court noted that a plaintiff's failure to use due care goes to the issue of contributory negligence and not to proximate cause.[189] While "contributory negligence is an affirmative defense to an action

182. *Id.* at 311-13, 2 S.E.2d at 791-92.

183. *See Wallace*, __ S.C. at __, 389 S.E.2d at 155.

184. 270 S.C. 453, 242 S.E.2d 671 (1978).

185. *Id.* at 453-61, 242 S.E.2d at 671-75.

186. *See id.* at 463-64, 242 S.E.2d at 676-77.

187. *Id.* at 464-66, 242 S.E.2d at 676-77. In *Tide Craft, Inc.* the court noted that the mechanic's actions were extraordinary. *Id.* at 465, 242 S.E.2d at 677. This language has caused one commentator to infer that South Carolina courts view an accident retrospectively and find no proximate cause if the intervening cause appears extraordinary. Fischer, *Products Liability-Proximate Cause, Intervening Cause, and Duty*, 52 Mo. L. REV. 547, 564 (1987). The same commentator notes, however, that there may be little practical significance whether a court views the intervention prospectively or retrospectively. *Id.*

188. __ S.C. at __, 389 S.E.2d at 157 (citing Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962) (test is not the character of the subsequent event)).

189. *Id.*

for negligence . . . . It has no application to an action based on breach of warranty or liability for a defective product."[190] The quality of the intervening act itself, however, is not completely irrelevant. The court of appeals' second requirement is that the intervening act is normal and foreseeable.[191] Thus, intentional or reckless acts by a plaintiff may be considered superseding causes and, therefore, bar recovery.

The court's holding in *Wallace* ultimately may be limited to cases in which the original risk created by the defective product is the same as that risk subsequently encountered by the plaintiff in his remedial acts. In *Wallace* the defect's original risk included the possibility of a slip and fall after the explosion. The court of appeals recognized the foreseeability of slip and fall injuries in exploding bottle cases and then discussed how the plaintiff's intervening acts in *Wallace* did not supersede the original wrong.[192] If the injury to the plaintiff had been unique to his remedial acts, the court may not have found that the defect was the proximate cause of his injury.[193]

The *Wallace* opinion leaves open the question whether proximate cause extends to all remedial actions or to only remedial actions that are in response to a continuing threat. The Eighth Circuit in *Leistra v. Bucyrus-Erie Co.*[194] said that the proper test of superseding cause is to look at whether "the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes."[195] The *Wallace* court found that the liquid and broken glass continued to threaten the safety of the plaintiff and his wife after the

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190. *Id.*

191. *Id.*

192. *Id.* at ___, 389 S.E.2d at 156-57.

193. *See* Leistra v. Bucyrus-Erie Co., 443 F.2d 157 (8th Cir. 1971) (injury sustained in trying to repair a crane was not within the foreseeable risk created by the defect in its manufacture). An important factor in determining whether an intervening force is a superseding cause is whether the "intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence." RESTATEMENT (SECOND) OF TORTS § 442(a) (1965).

194. 443 F.2d 157 (8th Cir. 1971).

195. *Id.* at 162 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 286 (3d ed. 1964)). The same language is found in W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 277-78 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]. Prosser mentions this test in a discussion on the discredited distinction between active causes of harm and mere conditions upon which a cause operates. Prosser states:

> So far as [the distinction] has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes. But even in such cases, it is not the distinction between 'cause' and 'condition' which is important, but the nature of the risk and the character of the intervening cause.

Id. at 278 (footnote omitted).

explosion.[196] It is unclear, therefore, whether a continuing hazardous condition may be a third requirement in South Carolina for a plaintiff's remedial action to be merely a proximate result and not a superseding cause of the original wrong. Although the *Wallace* court took note of the continuing hazardous condition in its discussion of proximate cause, the discussion supported the court's contention that the plaintiff's response was both normal and foreseeable given the circumstances. It does not appear, therefore, that the court of appeals intended to limit its holding in *Wallace* to remedial acts in response to a hazardous condition.

Although the court acknowledged that assumption of risk can be a defense, it held that the plaintiff in *Wallace* had not voluntarily assumed the risk. The court concluded that a plaintiff cannot voluntarily assume a risk if the defendant's conduct has left him no reasonable alternative.[197] The court's position finds support in the Restatement (Second) of Torts. Section 496E(2) of the Restatement states that "[t]he plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another . . . ."[198] The *Wallace* court observed that even though the plaintiff may have been negligent when he attempted to pick up the large pieces of glass, he had no choice but to clean up the spilled liquid. The plaintiff's action, however, goes to the issue of contributory negligence and not assumption of risk.[199]

Jennifer J. Aldrich

VIII. Potential for Repetition May Be Necessary for Recovery Under the South Carolina Unfair Trade Practice Act

In *Dowd v. Imperial Chrysler-Plymouth, Inc.*[200] the South Carolina Court of Appeals held that an automobile dealer violated the South Carolina Unfair Trade Practice Act[201] (SCUTPA) when its salesman misrepresented the history of a car to a potential buyer.[202] In finding a SCUTPA violation, the court of appeals relied on its decision in

196. *Wallace*, ___ S.C. at ___, 389 S.E.2d at 157.
197. *Id.* at ___, 389 S.E.2d at 157-58.
198. Restatement (Second) of Torts § 496E(2)(a) (1965).
199. *See id.* § 496E comment c, illustration 4 (1965).
200. 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989).
201. S.C. Code Ann. §§ 39-5-10 to -560 (Law. Co-op. 1976).
202. 298 S.C. at 443, 381 S.E.2d at 214.

Noack Enterprises, Inc. v. Country Corner Interiors, Inc.,[203] which held that a party may recover under the SCUTPA only for deceptive acts or practices that affect the public interest.[204]

In *Dowd* one of the plaintiffs[205] (Mrs. Dowd) purchased an automobile from the defendant (Imperial) after a salesman told her that the car had been part of a fleet lease. In fact, the dealer had rented the car daily as a Dealer Rent-a-Car. Mrs. Dowd claimed that she would not have bought the car if she had known it was a Dealer Rent-a-Car.[206] Almost immediately after the sale, the car began to have problems. Within two years the car needed seven batteries, three alternators, and two voltage regulators, none of which solved its electrical problem. Mrs. Dowd and her son sued Imperial for fraud and violation of the SCUTPA. At trial the jury found for Imperial on the fraud cause of action and against Imperial on the SCUTPA cause of action. The court of appeals affirmed.[207]

In *Noack* the court of appeals held that to be actionable under the SCUTPA, deceptive acts or practices must affect the public interest and these acts must have the "potential for repetition."[208] Since *Noack*, the court of appeals has required that before a plaintiff can recover under the SCUTPA, the plaintiff must show the deceptive act's public interest impact by showing its potential for repetition.[209]

The South Carolina Supreme Court, however, did not require proof of a deceptive act's public interest impact in *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*.[210] In *Inman* an automobile dealer sold a car as "a new demonstrator" with "all the bugs worked out."[211] After the sale, the buyer learned that the car had been owned previously and sued the dealer for fraud and violation of the SCUTPA.[212] The court held that the dealer's misrepresentations were actionable under the SCUTPA. The court stated that under the SCUTPA a plaintiff does

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203. 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986).

204. *Id.* at 479, 351 S.E.2d at 350.

205. James A. Schultz, Mrs. Dowd's son, was also a party to the action.

206. *Dowd*, 298 S.C. at 441, 381 S.E.2d at 213.

207. *Id.* Apparently the dealer honored its warranty. It is unclear whether plaintiff actually suffered the monetary loss awarded by the jury ($1500), but the court of appeals indicated that the evidence supported the jury's verdict. *See id.* at 442, 381 S.E.2d at 214.

208. Noack Enters., Inc. v. Country Corner Interiors, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986).

209. *See, e.g.*, Key Co. v. Fameco Distrib., Inc., 292 S.C. 524, 526-27, 357 S.E.2d 476, 477-78 (Ct. App. 1987); Barnes v. Jones Chevrolet Co., 292 S.C. 607, 612-13, 358 S.E.2d 156, 159-160 (Ct. App. 1987).

210. 294 S.C. 240, 363 S.E.2d 691 (1988).

211. *Id.* at 241, 363 S.E.2d at 691-92.

212. *Id.*, 363 S.E.2d at 692.

not need to prove that a representation was made with an intent to deceive, but only that the representation had the capacity to deceive.[213] By applying this liberal test, the South Carolina Supreme Court followed the reasoning of cases decided prior to *Noack*.[214] The *Inman* opinion makes no reference to the public interest impact requirement or to the act's potential for repetition. The supreme court noted, however, that the sale of "a repossessed product as new without disclosure, even if the product is as good as new" had been held to be a deceptive trade practice by the United States Supreme Court.[215] The dealer's misrepresentation alone was sufficient proof of a SCUTPA violation to satisfy the *Inman* court.[216]

In *Dowd* the court of appeals addressed facts that closely paralleled those in *Inman*. Both cases involved misrepresentations of an automobile's history by a car salesman. One distinguishing factor, however, was that the salesman in *Inman* did not have a history of making misrepresentations to potential buyers,[217] but in *Dowd* the court noted that the dealer had a policy of misrepresenting its cars to potential buyers.[218] Imperial trained its salesmen to tell potential buyers that a car had been only a fleet lease even when they believed the car was a Dealer Rent-a-Car. In the court's view this dealer policy established the potential for repetition of the deceptive act. The court of appeals discussed *Inman*'s remarkably similar facts and cited its holding of a SCUTPA violation in *Dowd*.[219] The court also held that because of Imperial's policy of misrepresentation the potential existed for repetition and, consequently, "the deceptive trade practice ha[d] the requisite impact on the public interest."[220] It is not clear in *Dowd* whether the court of appeals would have found a SCUTPA violation if the salesman had acted on his own initiative in misrepresenting the history of the automobile.

The court of appeals' reliance on the *Noack* line of cases despite

213. *Id.* at 242, 363 S.E.2d at 692.

214. *See* Clarkson v. Orkin Exterminating Co., 761 F.2d 189 (4th Cir. 1985) (exterminator's negligent inspection did not have sufficient capacity to deceive to be actionable under SCUTPA since homeowner did not rely on the misrepresentation); State *ex rel.* McLeod v. C & L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984) (principal liable under SCUTPA for real estate agent's misrepresentations to potential buyers despite principal's lack of knowledge about agent's wrongdoing).

215. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 242-43, 363 S.E.2d 691, 692 (1988) (citing Federal Track Comm'n v. Colgate Palmolive Co., 380 U.S. 374 (1965)).

216. *See id.*

217. *See id.* at 241, 363 S.E.2d at 692.

218. *Dowd*, 298 S.C. at 441 n.2, 381 S.E.2d at 213 n.2.

219. *Id.* at 443, 381 S.E.2d at 214.

220. *Id.*

the supreme court's liberal language in *Inman* creates an apparent inconsistency under the SCUTPA. Although the supreme court in *Inman* did not reject the *Noack* requirement of a public interest impact, the court chose not to require restrictive standards for proof of a SCUTPA violation.[221] The court of appeals, however, has retained its requirement of an impact on the public interest, which may be proven by showing the act's potential for repetition. Additionally, the court of appeals may have restricted further SCUTPA actions by requiring a plaintiff to prove that a defendant makes a practice of deception to satisfy the public interest impact requirement.

The *Dowd* decision may be read as an attempt by the court of appeals to bring its strict public interest impact standard in line with the broader standard used by the South Carolina Supreme Court in *Inman*. Additionally, by emphasizing the unfair act's potential for repetition in *Dowd*, the court appears to continue its more narrow interpretation of the SCUTPA.

Ultimately, the pro-consumer interpretation of the SCUTPA by South Carolina courts should broaden the application of the public interest impact standard with its potential for repetition requirement.

Karl J. Forrest

IX. ABSENT A SPECIAL DUTY POLICE OFFICERS HAVE NO COMMON LAW DUTY TO CARE FOR INDIVIDUAL MEMBERS OF THE GENERAL PUBLIC

In *Russell v. City of Columbia*[222] the South Carolina Court of Appeals held that police officers have no common law duty "to care for, protect, assist, and provide treatment to citizens who are incapacitated, intoxicated, or seriously injured."[223] The court distinguished police officers' freedom from liability to the public in the practice of their professional duties[224] from their potential liability in performing for private individuals special duties which may arise by statute[225] or circumstance.[226]

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221. *Inman*, 294 S.C. at 242, 363 S.E.2d at 692.

222. ___ S.C. ___, 390 S.E.2d 463 (Ct. App. 1989).

223. *Id.* at ___, 390 S.E.2d at 465.

224. Officers' professional duties include keeping order in the community, taking appropriate measures to prevent crime, bringing criminals to justice, and retaining evidence for use in court. *See id.*

225. Special duties may be imposed on law enforcement officers by statute. *See, e.g.*, S.C. CODE ANN. § 16-5-30 (Law. Co-op. 1976) (statute expressly provides for a private cause of action and thus imposes a private duty on law enforcement officers).

226. It is not certain what constitutes a "circumstance" sufficient to impose a special duty in South Carolina. Patel v. McIntyre, 667 F. Supp. 1131, 1138 n.13 (D.S.C. 1987).

Sebbieleen Russell, the administratrix of her son Gregory Wood's estate, brought a wrongful death action against the City of Columbia and two of its police officers after Wood's accidental death. On September 7, 1985, Wood and his roommate were asked to leave a Columbia restaurant and bar because they were intoxicated. The pair argued in the parking lot over who would drive home. A bartender from the restaurant interceded and threw Wood to the ground. Wood received a laceration to his head. Two Columbia city police officers arrived on the scene, but the restaurant employees did not ask the policemen to arrest Wood. The officers demanded that Wood leave the premises. Shortly thereafter Wood fell from a nearby train trestle and drowned.[227]

Russell premised her negligence complaint against the City and the two officers on three theories.[228] First, she alleged that the officers had a common law duty to protect Wood, a member of the general public who obviously was incapacitated, intoxicated, and injured. Next, she alleged that the Columbia Police Department's manual mandated that its officers follow specific ministerial procedures when dealing with intoxicated individuals, and that the two officers who investigated the incident were negligent because they had failed to follow the procedures. Finally, she alleged that the officers had a duty not to interfere with persons at the scene who were attempting to aid Wood.[229]

To prevail in her wrongful death action Russell had to prove the three essential elements of negligence: (1) that the police officers owed Wood a duty of care; (2) that they breached that duty; and (3) that their breach of duty proximately caused Wood's death.[230] Both the circuit court and the court of appeals denied Russell's claim primarily because they held that the officers owed Wood no legal duty, which eliminated Russell's cause of action.[231]

The circuit court, relying on *Patel v. McIntryre*,[232] granted the defendants' motion for judgment on the pleadings.[233] In *Patel* a deputy

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An example given in another jurisdiction is the promise of police protection to an informant. *See, e.g.*, Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

227. *Russell*, __ S.C. at __, 390 S.E.2d at 464; Record at 4.

228. *Id.* at __, 390 S.E.2d at 465.

229. The court dismissed Russell's final allegation that the officers' negligent failure to interfere proximately caused Wood's death because Russell failed to plead sufficient facts to establish the cause of action. *See id.* at __, 390 S.E.2d at 466-67.

230. *See* South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 176, 348 S.E.2d 617, 620 (Ct. App. 1986) (court lists elements of negligence and notes that without a breach of duty there is no negligence).

231. *Russell*, __ S.C. at __, 390 S.E.2d 465.

232. 667 F. Supp. 1131 (D.S.C. 1987).

233. Record at 23-26.

sheriff came upon a motorist who had run off the road into a field. The motorist claimed that he had missed a road sign. The deputy never realized that the driver was intoxicated, so he helped the driver get back on the road. Later that night the intoxicated driver was involved in a head-on collision in which he and three others died and several people were seriously injured. The *Patel* court held that the deputy, who had failed to stop the drunk driver, was not liable for a breach of duty and noted that the "duty to enforce the law is a public duty for the breach or nonperformance of which [law enforcement officers] are liable only to the public in the absence of a statute or circumstances imposing a private duty."[234]

Likewise in *Russell* the court of appeals held that the officers had no common law duty to act.[235] The crux of the court's opinion was that "[a]n affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance."[236] Although the court refused to impose a common law duty on police to aid intoxicated or seriously injured persons,[237] the court did note that if the officers had undertaken to render aid to Wood, they would have assumed a duty to exercise reasonable care, which may have subjected them to liability.[238]

Some jurisdictions recognize a legal duty to care for the intoxicated or seriously injured. For example, the Massachusetts Supreme Judicial Court held in *Irwin v. Town of Ware*[239] that two police officers who failed to remove an intoxicated driver from a roadway were liable in negligence to a person later injured by the drunk driver. The *Irwin* court gave special attention to the officers' failure to act when they could foresee that harm would follow from their inaction. The court also concluded that an act is not discretionary simply because the act requires an officer to make a judgment call in the exercise of his duty.[240]

As public officials, police officers are charged with "certain affirmative duties not shared by private citizens."[241] Their official duties may be classified as either ministerial or discretionary. Ministerial duties are "absolute, certain, and imperative, involving merely execution of a

234. 667 F. Supp. at 1138 (footnote omitted).

235. ___ S.C. ___, 390 S.E.2d at 465.

236. *Id.* (citing Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988), *cert. denied*, 298 S.C. 204, 379 S.E.2d 133 (1989).

237. *Id.*

238. *Id.* at ___ n.6, 390 S.E.2d 465 n.6.

239. 392 Mass. 745, 467 N.E.2d 1292 (1984).

240. *Id.* at 752-54, 467 N.E.2d at 1298.

241. *Russell*, ___ S.C. at ___, 390 S.E.2d at 465.

specific duty arising from fixed and designated facts."[242] Discretionary duties require personal deliberation and individual judgment.[243] In South Carolina courts historically have held that public officials are immune from liability in the exercise of their discretionary duties, but not in performing ministerial duties.[244] Even though the South Carolina Supreme Court abolished sovereign immunity as a defense to public liability,[245] the distinction between discretionary and ministerial duties for law enforcement officers' liability remains.[246]

Russell argued that the police officers' duty to Wood was ministerial and not discretionary.[247] She based her allegation on language in a police department *Procedures and Policy Manual* that gave instructions for dealing with intoxicated persons.[248] Russell described the manual "as analogous to a statute imposing a 'special duty' on a public official."[249] The court, however, viewed the manual as a statement of internal policies and procedures not necessarily intended to benefit specific individuals.[250]

Generally administrative policies and procedures do not impose liability unless they create a special duty. If a policy "is promulgated for the essential purpose of protecting identifiable individuals from a particular kind of harm, then it may create a 'special duty' which gives rise to a cause of action in negligence by an individual who is damaged as a result of a breach of the duty."[251] While recognizing the possibility that the officers may have had a special duty to Wood, the court declined to hold the officers liable because Russell had failed to plead sufficient facts to establish the cause of action.[252]

Russell v. City of Columbia affirms the distinction between the discretionary and ministerial functions of government officers. The court of appeals left open the question of whether the *Procedures and Policy Manual* imposed a special duty on the police officers to assist

242. Jensen v. South Carolina Dep't of Social Servs., 297 S.C. 323, 332, 377 S.E.2d 102, 107 (Ct. App. 1988).

243. *Id.*

244. *See, e.g.*, Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 (1973) (distinction between discretionary and ministerial duties); Milligan v. South Carolina Dep't of Highways, 283 S.C. 59, 320 S.E.2d 505 (Ct. App. 1984) (summary judgment for defendants affirmed because pleadings did not allege ministerial duty).

245. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

246. *See* Patel v. McIntyre, 667 F. Supp. 1131, 1140 (D.S.C. 1987).

247. *Russell*, __ S.C. at __, 390 S.E.2d at 465.

248. *Id.* at __, 390 S.E.2d at 465-66; Russell, however, failed to specify what policies were contained in the manual. *Id.* at __, 390 S.E.2d at 466.

249. *Id.* at __, 390 S.E.2d at 465.

250. *Id.* at __, 390 S.E.2d at 465-66.

251. *Id.* at __, 390 S.E.2d at 466.

252. *Id.*

Wood.[253] If Russell had demonstrated successfully in her pleadings that the manual contained procedures designed to protect persons from the kind of harm suffered by Wood, and that Wood was a member of the class of persons the manual intended to protect, the City and its officers might have been liable for negligence.

Despite judicial abrogation of the doctrine of sovereign immunity in South Carolina, under *Russell* police officers retain a qualified immunity. To hold an officer liable in negligence, one must prove the existence of either a statute or a set of circumstances creating a special duty on the officer to act.

Anne Frances Bleecker

X. STATE EXECUTIVE BRANCH OFFICIALS ENTITLED TO QUALIFIED PRIVILEGE IN EMPLOYEE DEFAMATION SUIT

In *Wright v. Sparrow*[254] the South Carolina Court of Appeals held that a state agency director's communications with two high ranking department supervisors about an employee's performance is qualifiedly privileged. The court granted the agency director's summary judgment motion because the employee failed to establish actual malice, which is required to defeat the qualified privilege as a genuine issue of material fact.

Elizabeth Wright served as Program Coordinator for the Florence Adult Development Center. She allegedly violated several department policies.[255] Walter Sparrow, Executive Director of the Florence County Mental Retardation Board, discussed Wright's employment with several board members and agency directors of the Florence County Mental Retardation Board and with regional executives from the South Carolina Department of Mental Retardation.[256] As a result of these discussions, Sparrow terminated Wright's employment in October 1984.

Wright sued Sparrow. She alleged invasion of privacy, outrage, and defamation in her complaint. The trial court granted Sparrow's motion for summary judgment on all three issues and the court of appeals affirmed.[257]

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253. *Id.*

254. 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989).

255. Record at 34. Wright's termination letter stated that she was terminated for (1) failure to keep client folders current, (2) failure to make bank deposits according to procedure, and (3) failure to provide for the safety of a client.

256. *Id.* at 36.

257. 298 S.C. at 470, 381 S.E.2d at 504.

The appellate court addressed the issues of summary judgment, invasion of privacy, and outrage, but primarily focused on Wright's allegation of defamation.[258] The trial court ruled that Sparrow had absolute immunity from the defamation charge because of his status as a state official. Wright asserted that Sparrow maliciously published false words,

> implying [she] was unfit for employment in the mental retardation service field because she was allegedly negligent, involving the life and safety of a mentally retarded client by locking the client in a classroom unsupervised and by contacting an improper person to aid with an emergency situation involving the client.[259]

In defense Sparrow asserted that he had either an absolute or qualified privileged to make statements about Wright's employment. Assuming the falsity of Sparrow's communications for the summary judgment motion, the trial court held that Sparrow's comments were absolutely privileged. The court of appeals, however, held that the comments were only qualifiedly privileged. The court decided that Wright had failed to establish actual malice and affirmed the trial court's grant of summary judgment.[260]

The law of defamation allows immunity from liability to a person whose communication is privileged. The law protects privileged communications, categorized as either absolute or qualified, because society believes the need for the information excuses any possible defamation.[261]

"When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it is published."[262] Members of the judicial or legislative branch usually enjoy an absolute privilege.[263] The absolute privilege gives the speaker freedom to speak as necessary to accomplish public duties without the chilling effect of potential liability.

South Carolina courts have recognized an absolute privilege apart from the legislative or judicial context.[264] Sparrow asserted that he had

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258. *Id.* at 470-72, 381 S.E.2d at 504-05.

259. *Id.* at 473, 381 S.E.2d at 506.

260. *Id.* at 474, 381 S.E.2d at 507.

261. Johnson v. Independent Life & Accident Ins. Co., 94 F. Supp. 959, 962-63 (E.D.S.C. 1951). "It is the occasion, not the communication, which creates or furnishes the privilege." *Id.* (citation omitted). *See also* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 815-816 (5th ed. 1984).

262. Bell v. Bank of Abbeville, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946).

263. *Johnson*, 94 F. Supp. at 962.

264. *See id.* "South Carolina has applied the doctrine of absolute privilege to several occasions other than those comprising strictly legislative or judicial proceedings." *Id.* (citing Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948) (defamation in will held

absolute immunity because he made his remarks to protect his mentally retarded clients. The court, however, found that the circumstances warranted a qualified privilege but not an absolute privilege.[265]

A qualified privilege allows the speaker to avoid liability if his defamatory remarks are made without actual malice and both parties have a common interest in the subject matter of the allegedly defamatory statement. This common interest may arise from the relationship of the parties.[266] If a defamatory statement is made "in good faith and with proper motives, a defendant may claim a qualified or conditional privilege. The privilege exists if the defendant correctly or reasonably believes that some important interest of his own or a third person is threatened."[267]

The qualified privilege, however, can be lost if statements are made to an improper party.[268] Sparrow's duties as Executive Director included reviewing and discussing employment problems with County Mental Retardation Board members and executives. The statutory powers of the South Carolina Mental Retardation Board include evaluating mental retardation services and employing personnel.[269] Sparrow had a statutory duty to evaluate Wright's performance. He communicated this evaluation in good faith to the proper parties. The court of appeals, therefore, held that Sparrow's statements were qualifiedly privileged.[270]

In *Bell v. Bank of Abbeville*,[271] a case similar to *Wright*, the South Carolina Supreme Court held that members of a bank's board of directors were entitled to qualified immunity when they discussed the personnel problems of one of their bank tellers. In response to several complaints of irregularities, the head cashier, a board member, met with Bell. Two other board members attended this discussion of Bell's alleged improprieties. The two remaining board members later were told the details of the discussion. Bell sued the bank for slander. In defense the bank claimed that the discussions with board members

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privileged)); Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940) (letter from attorney to client held absolutely privileged); State v. Drake, 122 S.C. 350, 115 S.E. 297 (1922) (libel in letter to Masonic Lodge held privileged).

265. Wright v. Sparrow, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989).

266. *See, e.g.*, Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981) (pre-trial settlement negotiations); Conwell v. Spur Oil Co., 240 S.C. 170, 178-82, 125 S.E.2d 270, 274-76 (1962) (employer-employee relationship).

267. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) (citing Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (1955)).

268. *See* Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971) (essential elements of qualified privilege).

269. S.C. CODE ANN. § 44-21-840 (Law. Co-op. 1976).

270. *Wright*, 298 S.C. at 474, 381 S.E.2d at 506.

271. 211 S.C. 167, 44 S.E.2d 328 (1947).

were qualifiedly privileged because it was "a bona fide inquiry by the employer into the alleged misconduct of the employee."[272] The supreme court agreed with the bank and held that the statements were

> uttered in good faith in the pursuit of the business of the bank by and to persons who had a right to hear and consider such statements, at a time and place and in a manner and under circumstances which effectually [negated] the existence of a purpose to injure and defame the respondent . . . .[273]

A qualifiedly privileged remark will be actionable if the remark is made with actual malice.[274] "Actual malice is ill will, recklessness, wantonness, or conscious indifference to the plaintiff's rights."[275] Wright alleged actual malice, but failed to set forth specific facts in her complaint to support the allegations.[276] Sparrow's affidavit, on the other hand, stated his reasons for making the statements and provided support which indicated that his actions were motivated not by ill will,[277] but by the belief that he was acting in the department's best interest.[278]

The court's decision in *Wright* is consistent with previous South Carolina decisions in the area of employee defamation because it protects employers from liability in employment disputes.[279] The court, however, was not willing to transform the employer's privilege into absolute immunity. Thus, when employers make defamatory remarks with actual malice about an employee, employers will be liable for their actions.

Marian Louise Askins

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272. *Id.* at 172, 44 S.E.2d at 329.
273. *Id.* at 173, 44 S.E.2d at 330.
274. Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 902 (1987).
275. *Id.* (citing Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982)).
276. *Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07.
277. Record at 26-30.
278. *Id.* at 29.
279. *See, e.g.*, Conwell v. Spur Oil Co., 240 S.C. 170, 125 S.E.2d 270 (1962); Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946); Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).