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Tort Law

B. D. Pierce

Brent M. Boyd

David E. Rothstein

Michael R. Smith

TORT LAW

I. COURT EXPANDS LANDOWNERS' DUTY OF CARE TO INVITEES

In *Callander v. Charleston Doughnut Corp.*[1] the South Carolina Supreme Court adopted section 343A of the Restatement (Second) of Torts, greatly expanding the duty that landowners owe to invitees.[2] Under the *Callander* rule, a landowner has a duty to warn an invitee of an open and obvious defect if the landowner has reason to expect that the defect might injure an invitee.[3]

The plaintiff, Paul Lingos, was injured in the defendant's doughnut shop when he fell after attempting to sit on a stool that was missing its seat top. Lingos sued Charleston Doughnut Corporation and Krispy Kreme Doughnut Corporation, alleging that the broken stool constituted a latent defect in the premises.[4] The jury returned a verdict for the plaintiff for $30,000, and the defendant appealed.[5] The court of appeals held that the trial judge's jury instruction on latent defect was erroneous because the evidence could not support a finding of latent defect.[6] The court of appeals reversed and remanded for a new trial. The plaintiff then petitioned the supreme court for certiorari.[7]

The supreme court limited its review to whether the broken stool was a latent defect.[8] The supreme court agreed with the court of appeals that there was no evidence that the crowded condition of the doughnut shop affected Lingos's ability to discover the missing seat top.[9] Justice

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1. 305 S.C. 123, 406 S.E.2d 361 (1991).

2. *Id.* at 126, 406 S.E.2d at 362.

3. *Id.* at 125-26, 406 S.E.2d at 362-63.

4. *Id.* at 124-25, 406 S.E.2d at 362. Lingos admitted that he failed to look behind him prior to sitting down. Lingos v. Charleston Doughnut Corp., 300 S.C. 317, 319, 387 S.E.2d 695, 695-96 (Ct. App. 1989), *aff'd as modified sub nom. Callander*, 305 S.C. 123, 406 S.E.2d 361.

5. *Callander*, 305 S.C. at 125, 406 S.E.2d at 362. Defendant's appeal was based on the following part of the trial judge's instruction to the jury:

> "[W]here a dangerous condition in premises is . . . latent, or hidden, and the owner knew or should have known . . . [of it] and it is unknown to a[n] . . . invitee coming onto the premises, the owner is required to give proper warning in order to relieve himself from liability for injuries caused by the hidden or latent, unsafe or dangerous condition."

Lingos, 300 S.C. at 319, 387 S.E.2d at 696 (alterations in original).

6. *Callander*, 305 S.C. at 125, 406 S.E.2d at 362.

7. *Id.*

8. *Id.*

9. *Id.*

Chandler, writing for a unanimous court, defined a latent defect as "one which an owner has, or should have, knowledge of, and of which an invitee is *reasonably* unaware" and "one which a reasonably careful inspection will not reveal."[10]

However, the court declined to follow the "'no duty to warn of the obvious' rule."[11] Instead, the court joined numerous jurisdictions that have modified this rule to hold an owner liable for an invitee's injuries caused by an open and obvious defect if the owner should have anticipated that the invitee would encounter the defective condition or would likely be distracted.[12] The court specifically adopted section 343A of the Restatement (Second) of Torts.[13]

The *Callander* decision was predictable in light of the wide acceptance of section 343A,[14] but the standard adopted by the court poses a problem: section 343A is premised on the doctrine of contributory negligence and the closely associated doctrine of implied assumption of risk. However, the supreme court did not indicate how this decision and its recent adoption of comparative negligence[15] are to interact. The limitations that section 343A places on a landowner's liability to an invitee are inconsistent with the supreme court's rejection of contributory negligence.[16] Under the Restatement, "the fact that the danger is

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10. *Id.* (citations omitted).

11. *Id.*

12. *Id.* at 125-26, 406 S.E.2d at 362 (citing Guidry v. Continental Oil Co., 640 F.2d 523, 531 (5th Cir. Mar. 1981), *cert. denied*, 454 U.S. 818 (1981); Tribe v. Shell Oil Co., 652 P.2d 1040, 1042 (Ariz. 1982); Shaffer v. Mays, 489 N.E.2d 35, 37 (Ill. App. Ct. 1986); Williams v. Boise Cascade Corp., 507 A.2d 576, 577 (Me. 1986); Southern Ry. v. ADM Milling Co., 294 S.E.2d 750, 756 (N.C. Ct. App.), *cert. denied*, 299 S.E.2d 215 (N.C. 1982)).

13. *Id.* at 126, 406 S.E.2d at 362 (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1964) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.")).

14. *See generally* 62 AM. JUR. 2D *Premises Liability* § 146-58 (1990) (discussing the "no duty" rule and the Restatement rule); 62A AM. JUR. 2D *Premises Liability* § 504 (1990) (discussing the application of the rules to commercial premises).

15. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991) (abolishing doctrine of contributory negligence in favor of comparative negligence).

16. A comment to § 343A(1) states:

> [I]n the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The

known, or is obvious, is important in determining whether the invitee is to be charged with *contributory negligence*, or assumption of risk."[17] Thus, although the court has discarded contributory negligence as an affirmative defense, the court has apparently accepted a duty of care for landowners that incorporates the basic concept of contributory negligence.

Two interpretations of section 343A have evolved because of this conflict with the doctrine of comparative negligence.[18] The Courts of Appeals for the Second, Fourth, and Seventh Circuits have held that the "knowledge" and "obviousness" elements in section 343A act as limitations on the landowner's duty of care.[19] The Seventh Circuit summarized this view by stating:

> [W]e read Section 343 together with Section 343A not as providing defenses but as defining when it is negligent to allow the existence of a dangerous condition. Under the Restatement, when the danger is open and obvious and in addition is avoidable in the exercise of ordinary care and therefore the harm is not foreseeable, it is not negligent to allow the danger to exist.[20]

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possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, [i.e., avoid contributory negligence] or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

RESTATEMENT (SECOND) OF TORTS § 343A cmt. e (1964).

17. *Id.* cmt. f (emphasis added).

18. The development of these two interpretations in the federal courts often involved the application of § 343A to the Longshoremen's and Harbor Worker's Compensation Act as amended to abolish the defenses of contributory negligence and assumption of risk. *See* Woolson v. Wells, 663 P.2d 408, 412 (Or. Ct. App. 1983), *aff'd*, 687 P.2d 144 (Or. 1984) (en banc).

19. *See* Clemons v. Mitsui O.S.K. Lines, 596 F.2d 746, 750 (7th Cir. 1979) (per curiam), *cert. denied*, 451 U.S. 969 (1981); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757 (4th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1098 (1977); Napoli v. Hellenic Lines, 536 F.2d 505, 508-09 (2d Cir. 1976). The Fifth Circuit also supported this approach until 1981, when it adopted the "reasonableness approach." *See* Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), *rejected by* McCullough v. S/S Coppename, 648 F.2d 1036, 1038 (5th Cir. June 1981). For a discussion of the "reasonableness approach," see *infra* text accompanying notes 23-25.

20. *Clemons*, 596 F.2d at 750 n.17.

According to this interpretation, the knowledge element of section 343A is integral in defining the landowner's duty to invitees.

In contrast the First, Fifth, Eighth, and Ninth Circuits have adopted an interpretation similar to that in *Gallardo v. Westfal-Larsen & Co.*,[21] in which the court rejected section 343A as the proper standard for measuring the duty of a landowner insofar as the section acts as a complete bar to recovery.[22] Instead, these courts have adopted a standard of care that closely resembles a reasonableness standard.[23] In analyzing the compatibility of section 343A with comparative negligence, the Ninth Circuit ruled that the Restatement standard incorporates the defenses of contributory negligence and assumption of risk into the possessor's duty by allowing the possessor to rely on the invitees "to discover conditions, realize their dangers, and then protect themselves against the dangers."[24] The court concluded that "[t]o apply the limitations of . . . § 343A(1) to negligence suits . . . would, in substance if not in form, give defendant[s] . . . the benefits of a partial or absolute bar to liability having the characteristics of a defense based upon contributory negligence or implied assumption of risk or both."[25]

Most state courts that have addressed the effect of comparative negligence on the knowledge element of section 343A have followed the *Gallardo* approach.[26] These courts have held that the adoption of comparative negligence negates the operation of the knowledge element in section 343A as a complete bar to liability.[27]

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21. 435 F. Supp. 484 (N.D. Cal. 1977).

22. *Id.* at 493-95.

23. *See* Miller v. Patton-Tully Transp. Co., 878 F.2d 1103, 1104 (8th Cir. 1989) (per curiam) (adopting a "reasonableness standard" without expressly citing section 343A); McCullough v. S/S Coppename, 648 F.2d 1036, 1038 (5th Cir. June 1981); Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 340 (1st Cir. 1980), *cert. dismissed*, 449 U.S. 1135 (1981); De Los Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 485-86 (9th Cir. 1979), *aff'd and remanded*, 451 U.S. 156 (1981).

24. *De Los Santos*, 598 F.2d at 486 n.5.

25. *Id.* (citations omitted).

26. *See, e.g.*, Koutoufaris v. Dick, 604 A.2d 390, 396-98 (Del. 1992); Harrison v. Taylor, 768 P.2d 1321, 1328 (Idaho 1989); Ward v. K Mart Corp., 554 N.E.2d 223, 229 (Ill. 1990); Riddle v. McLouth Steel Prods. Corp., 485 N.W.2d 676, 681-83 (Mich. 1992); Cox v. J.C. Penney Co., 741 S.W.2d 28, 29 (Mo. 1987) (en banc); Woolston v. Wells, 663 P.2d 408, 411 (Or. Ct. App. 1983), *aff'd*, 687 P.2d 144 (Or. 1984) (en banc); Donahue v. Durfee, 780 P.2d 1275, 1279 (Utah Ct. App. 1989), *cert. denied*, 789 P.2d 33 (Utah 1990).

27. *See, e.g., Koutoufaris*, 604 A.2d at 396-97. Apparently, only Pennsylvania has reached a contrary conclusion. *See* Carrender v. Fitterer, 469 A.2d 120, 125 (Pa. 1983).

Comparative negligence, by definition, compares the negligence of the opposing parties to determine if there should be a recovery for the injury, and if so, what proportion of the damages each party should bear.[28] Applying the knowledge element of section 343A could circumvent the application of the comparative negligence standard by tipping the scales against the existence of a duty and halting all inquiry at that point. The more equitable and consistent approach is to recognize that an injury occurred and to allow a jury to allocate fault between the parties under a comparative fault analysis.

Therefore, the court should take the next available opportunity to adopt a modified *Gallardo* approach, whereby the knowledge element, with its underlying theme of contributory negligence, is removed from determining a landowner's liability. Despite the potential drawbacks of *Callander*, the court's attempt to move away from a harsh, inflexible "no duty to warn of the obvious" rule in favor of a balancing approach is commendable. However, the court's recent adoption of comparative negligence may be frustrated by a duty of care for landowners that includes the recently discarded doctrine of contributory negligence.

B. Dean Pierce

II. A MEMBER OF AN UNINCORPORATED ASSOCIATION CAN SUE THE ASSOCIATION IN TORT

In *Crocker v. Barr*[29] the South Carolina Supreme Court held that an unincorporated association is amenable to suit by its members for tortious acts.[30] In reaching its decision, the court overruled an earlier opinion by the South Carolina Court of Appeals,[31] which held that the

28. *See* Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991).

29. 305 S.C. 406, 409 S.E.2d 368 (1991).

30. *Id.* at 412, 409 S.E.2d at 372.

31. Crocker v. Barr, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988) (*Crocker I*), *overruled in part by* Crocker v. Barr, 305 S.C. 406, 409 S.E.2d 368 (1991). The procedural history of the present *Crocker* case is somewhat confusing because the court granted certiorari to review Crocker v. Barr, 303 S.C. 1, 397 S.E.2d 665 (Ct. App. 1990) (*Crocker II*) (holding that Crocker was a cotenant instead of an invitee; therefore, defendants maintained no duty to inspect and warn member of latent defect), *rev'd*, 305 S.C. 406, 409 S.E.2d 368 (1991). The supreme court reversed *Crocker II* by holding that Crocker was an invitee. *Crocker*, 305 S.C. at 411-12, 409 S.E.2d at 371-72. However, the supreme court also overruled those portions of *Crocker I* that were inconsistent with its opinion, although that case was not on appeal. *Id.* at 412, 409 S.E.2d at 372.

doctrine of imputed negligence prevents a member of a voluntary unincorporated association from maintaining an action in tort against the association.[32]

The plaintiff, Crocker, brought an action for personal injuries against the Calhoun Falls Pentecostal Holiness Church, an unincorporated association of which he was a member. While Crocker was voluntarily working in the church attic, he fell after grabbing an unstable rafter that had been left unsecured during prior construction on the church. As a result of the fall, Crocker incurred approximately $36,850 in medical bills and almost ten months of lost wages.[33]

In the original action, the circuit court dismissed Crocker's claim based on the doctrine of imputed negligence, and the court of appeals affirmed.[34] Crocker then filed an action against the various individual pastors and church board members allegedly responsible for the tort. The jury returned a verdict in favor of the plaintiff for $300,000, but the court of appeals reversed.[35] This appeal followed.

In holding that various South Carolina statutes allow members to bring tort actions against unincorporated associations,[36] the *Crocker* court implied that these statutes characterize unincorporated associations as separate legal entities.[37] The court's holding rests upon both statutory interpretation and the rationale that members of such organizations

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32. *Crocker I*, 295 S.C. at 198-200, 367 S.E.2d at 472-73. *See generally* P. H. Vartanian, Annotation, *Recovery by Member from Unincorporated Association for Injuries Inflicted by Tort of Fellow Member*, 14 A.L.R.2D 473 (1950 & Supp. 1987). The annotation states the general rule regarding imputation of negligence as follows:

> [T]he members of an unincorporated association are engaged in a joint enterprise, and the negligence of each member . . . is imputable to each and every other member, so that the member who has suffered damages . . . through the tortious conduct of another member of the association may not recover from the association for such damage, although he may recover individually from the member actually guilty of the tort.

Id. at 473-74; *see also* 7 C.J.S. *Associations* § 53 (1980 & Supp. 1992) (stating general rule); 6 AM. JUR. 2D *Associations & Clubs* § 31 (1963 & Supp. 1992) (same).

33. *Crocker*, 305 S.C. at 407, 409 S.E.2d at 369.

34. *Crocker I*, 295 S.C. at 195, 367 S.E.2d at 472. The court of appeals noted that the plaintiff could recover individually from those members of the association responsible for his injuries. *Id.*

35. *Crocker II*, 303 S.C. 1, 397 S.E.2d 665.

36. *See* S.C. CODE ANN. §§ 15-5-160 and 15-35-170 (Law. Co-op. 1976), *construed in Crocker*, 305 S.C. at 409, 409 S.E.2d at 370; S.C. CODE ANN. § 33-55-210 (Law. Co-op. 1987), *construed in Crocker*, 305 S.C. at 410-11, 409 S.E.2d at 370-71.

37. *See Crocker*, 305 S.C. at 411, 409 S.E.2d at 370-71.

should have recourse against the association itself, rather than only against its individual members.[38]

The *Crocker* court relied on *Joseph v. Calvary Baptist Church*,[39] a case presenting a similar fact pattern, to illustrate the rule adopted in the present case. Rather than adhering to the doctrine of imputed negligence, the *Joseph* court based its decision on Indiana Rules of Trial Procedure 17(B) and (E).[40] The *Joseph* court stated that prior Indiana case law had interpreted these rules to circumvent the doctrine of imputed negligence because the "actions of the association were no longer to be attributed to each individual member."[41]

The *Crocker* court also justified its holding by using South Carolina statutes and case law. The court relied on section 33-55-210 of the South Carolina Code, which severs the liability of charitable organization employees from the organization itself.[42] The court noted that this statute accomplishes the same result as that reached by the *Joseph* court.[43] Moreover, the supreme court noted that the court in *Elliott v. Greer Presbyterian Church*[44] interpreted the predecessor of section 15-35-170 of the South Carolina Code[45] as severing the liability of an individual association member in a manner similar to the Indiana rule applied in *Joseph*.[46]

The supreme court also espoused a policy argument to support its holding. The court noted: "Today, it is clear that many institutions must rely to a large extent on volunteer labor. . . . It ignores reality to leave a volunteer with no recourse against wrongdoers. The rule established by

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38. *Id.*

39. 500 N.E.2d 250 (Ind. Ct. App. 1986), *vacated*, 522 N.E.2d 371 (Ind. 1988).

40. *Joseph*, 500 N.E.2d at 252. Rule 17(E) reads in part: "A partnership or an unincorporated association may sue or be sued in its common name. A judgment by or against the partnership or unincorporated association shall bind the organization as if it were an entity." IND. R. TR. P. 17(E). For a discussion of the general rule of imputed negligence for unincorporated associations, see sources cited *supra* note 32.

41. *Joseph*, 500 N.E.2d at 252.

42. *Crocker*, 305 S.C. at 410-11, 409 S.E.2d at 371 (construing S.C. CODE ANN. § 33-55-210 (Law. Co-op. 1987)).

43. *Id.*

44. 181 S.C. 84, 186 S.E. 651 (1936).

45. Section 15-35-170 provides: "On judgment being obtained against an unincorporated association . . . final process may issue to recover satisfaction of such judgment, and any property of the association and the individual property of any copartner or member thereof . . . shall be liable to judgment and execution for satisfaction of any such judgment." S.C. CODE ANN. § 15-35-170 (Law. Co-op. 1976).

46. *Crocker*, 305 S.C. at 409, 409 S.E.2d at 370.

the Court of Appeals in *Crocker I* chills the very volunteerism that unincorporated associations require."[47]

In its analysis, the *Crocker* court failed to discuss the doctrine of imputed negligence. Instead, the court dismissed the doctrine outright without any explanation. The court stated that "*Elliott* acts to sever the liability of an individual association member in much the same manner as the Indiana statute [sic] cited in *Joseph.*"[48] However, the *Elliott* court's interpretation of the predecessor to section 15-35-170 does not sever the liability of the members from the association in a way that treats the unincorporated association as a separate legal entity.[49] Rather, the *Elliott* court recognized that the members' liability is joint and several, and that each member is individually responsible for the entire judgment against the association.[50]

Although section 33-55-210 allows an action by "any person" against a charitable organization in an amount not exceeding $200,000,[51] whether the South Carolina legislature intended the statute to abolish the doctrine of imputed negligence, thereby opening the way for litigation by association members, is unclear. Nevertheless, the supreme court held that this statute abolishes the doctrine of imputed negligence with respect to unincorporated associations in South Carolina.[52]

However, the *Crocker* court applied the statute in a confusing manner. The statute applies to actions against a charitable organization, yet the association was not before the court in this appeal. Crocker sued the members of the church individually as present or former board members, not as an association.[53] Under the statute, no judgment against individual members may be returned unless the court finds that they acted in a "reckless, wilful, or grossly negligent manner."[54] The court circumvented the problem by stating that certain stipulations made

47. *Id.* at 411, 409 S.E.2d at 371.

48. *Id.* at 409, 409 S.E.2d at 370.

49. *See* Elliott v. Greer Presbyterian Church, 181 S.C. 84, 86, 186 S.E. 651, 652 (1936).

50. *Id.* Moreover, the court in Medlin v. Ebenezer Methodist Church, 132 S.C. 498, 129 S.E. 830 (1925), expressly held that the severability conferred by the predecessor to section 15-35-170 failed to confer upon an association a legal status separate from its members. *Id.* at 502, 129 S.E. at 831.

51. S.C. CODE ANN. § 33-55-210 (Law. Co-op. 1987).

52. *Crocker*, 305 S.C. at 411, 409 S.E.2d at 371.

53. *See supra* notes 34 and 35 and accompanying text.

54. S.C. CODE ANN. § 33-55-210(A) (Law. Co-op. 1987).

by the parties had the effect of creating a direct action against the association.[55]

The *Crocker* opinion rests most soundly on its policy argument. Many courts allow such actions based on distinctions in the kind of unincorporated association involved.[56] The supreme court stated that members of such associations must be allowed "recourse against wrongdoers."[57] By preventing injured members from recovering against the association itself, the general rule of imputed negligence[58] forces members to sue fellow members individually. Typically, these fellow members are friends of the injured party or have little or no ability to pay the judgment. However, the argument that the general rule chills "volunteerism"[59] arguably operates differently in reality. The absence of a cause of action against certain organizations, such as churches, probably dissuades few volunteers from participating in the activities of these associations.

The supreme court in *Crocker v. Barr* adopted the rule that unincorporated associations are liable to their members for tortious conduct. In doing so, the court abolished the doctrine of imputed negligence for unincorporated associations by noting the severance of liability between the members and the association itself. However, the *Crocker* court arguably did not institute any safeguards to prevent individual association members from having to satisfy a judgment against the association. As long as section 15-35-170 remains effective,

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55. *Crocker*, 305 S.C. at 412, 409 S.E.2d at 372. As the court noted, the parties stipulated that no judgment would be entered against any individuals, and that an insurance company would pay any judgment Crocker received. *Id.* However, the individual board members maintained that the agreement was misunderstood and that the insurance company could deny coverage to all defendants. The defendants argued that the agreement does not convert the action into one against the association. *See* Respondents' Petition for Rehearing at 4-7, Crocker v. Barr, 305 S.C. 406, 409 S.E.2d 368 (1991) (No. 91-29).

56. *See, e.g.*, Marshall v. International Longshoremen's & Warehousemen's Union, 371 P.2d 987 (Cal. 1962) (en banc); Fray v. Amalgamated Meat Cutters & Butcher Workmen, 101 N.W.2d 782 (Wis. 1960). *Marshall* states that courts developed the doctrine of imputed negligence by applying the rules of partnership law to voluntary unincorporated associations. Partnership law regards a partnership as an "aggregate of individuals with each partner acting as agent for all other partners." *Marshall*, 371 P.2d at 989. The *Marshall* court argues that these rules have little application to voluntary unincorporated associations, such as fraternities, clubs, and labor unions, because these associations normally act through elected officials, and individual members have little authority in the daily operations of the association. *Id.*

57. *Crocker*, 305 S.C. at 411, 409 S.E.2d at 371.

58. *See supra* note 32.

59. *Crocker*, 305 S.C. at 411, 409 S.E.2d at 371.

association members may seek satisfaction of judgments against their association from either the association itself or its individual members.[60]

Brent M. Boyd

III. COURT APPLIES SOUTH CAROLINA COMMON-LAW DISTINCTION BETWEEN LIBEL PER SE AND PER QUOD

In *Holtzscheiter v. Thomson Newspapers, Inc.*[61] the South Carolina Supreme Court held that a newspaper article about the murder of the appellant's daughter, which implied that the appellant was an unfit mother and that a lack of family support contributed to the victim's death, would, if untrue, constitute libel per se.[62] Accordingly, the court concluded that proof of special damage[63] was not necessary for the appellant to recover in her defamation action against the Newspaper.[64] The *Holtzscheiter* court also held that evidence of how readers under-

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60. *See* S.C. CODE ANN. § 15-35-170 (Law. Co-op. 1976). North Carolina passed a statute that allows recovery against the real and personal property of an association without satisfying the judgment through the individual assets of its members. N.C. GEN. STAT. § 1-69.1 (1983). Although North Carolina does not treat unincorporated associations as legal entities, except in certain instances, the statute provides an example of a law that is preferable to the corresponding provisions in South Carolina.

61. 411 S.E.2d 664 (S.C. 1991) (3-2 decision).

62. *Id.* at 666. Libel per se refers to a publication that is defamatory on its face, while libel per quod is a statement that derives a defamatory meaning only from extrinsic facts. *Id.* at 665-66.

63. The court defined special damage as "economic loss to the plaintiff resulting from injury to her reputation." *Id.* at 665 n.1 (citing F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 401-02 (1990)). *See generally* RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 7.01-.02 (5th ed. 1992) (defining and distinguishing special harm, actual harm, and presumed harm).

64. *Holtzscheiter*, 411 S.E.2d at 666. Libel per se is "actionable without proof of special damage." *Id.* (citing Capps v. Watts, 271 S.C. 276, 284-85 n.2, 246 S.E.2d 606, 611 n.2 (1978)). However, the *Holtzscheiter* court declared that libel per quod is treated like slander, and, to be actionable without proof of special damage, a libel per quod must fall within one of the four special categories of slander per se. *Id.* (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 112, at 763 (4th ed. 1971)).

The four traditional classes of slander per se are: (1) imputation of crime, (2) imputation of loathsome disease, (3) statement harming business, trade, profession or office, and (4) accusation of unchastity. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 788-93 (5th ed. 1984); SMOLLA, *supra* note 63, §§ 7.04-.05 (discussing the common-law background and current usage of the four special slander per se categories).

stood the allegedly defamatory language was admissible to show that the article in fact conveyed "a libelous meaning on its face."[65] Although the court expanded upon the framework articulated in *Capps v. Watts*[66] to distinguish between libel per se and libel per quod, the *Holtzscheiter* opinion does little to clarify the confusing common-law standard for determining when proof of special damage is necessary to maintain an action for libel.

Appellant, Sandra Prosser Holtzscheiter ("Holtzscheiter"), brought suit against the publishers of the *Florence Morning News* ("Newspaper") for defamation after the Newspaper reported the murder of Holtzscheiter's seventeen-year-old daughter, Shannon.[67] The Newspaper article contained a description of Shannon's family background, specifically stating that she had "'no family support to encourage her to continue her education.'"[68] Holtzscheiter claimed that the article was defamatory because it implied that she was "'an unfit, uncaring, irresponsible mother and as such, contributed to her daughter's untimely and tragic death.'"[69]

The trial court directed a verdict for the Newspaper in the defamation action.[70] The court determined that the statement, if libelous, was libel per quod; therefore, because Holtzscheiter did not offer the required proof of special damage, her action could not be maintained.[71] In addition, the trial court limited a line of testimony offered to show the article's effect on readers, ruling that such evidence was irrelevant.[72]

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65. *Holtzscheiter*, 411 S.E.2d at 667 & n.5.

66. 271 S.C. 276, 246 S.E.2d 606 (1978). Notably, the *Holtzscheiter* court's declaration of the circumstances in which a libel per quod may be actionable without proof of special damage, *see supra* note 64, is more specific than the "'special damage *or* extrinsic facts' rule" discussed in *Capps*, 271 S.C. at 285, 246 S.E.2d at 611. The *Capps* court made no reference to treating libel per quod like slander per se. For a discussion of jurisdictions that treat libel per quod like slander for purposes of the special damage requirement, see SMOLLA, *supra* note 63, § 7.07[2], at 7-14.

67. *Holtzscheiter*, 411 S.E.2d at 665. Holtzscheiter's complaint also included an action for intentional infliction of emotional distress. *Id.*

68. *Id.*

69. Brief of Appellant at 3 (quoting Record at 6).

70. *Holtzscheiter*, 411 S.E.2d at 665. The trial court also directed a verdict for the Newspaper in the action for intentional infliction of emotional distress, concluding that the Newspaper's conduct did not rise to the level of outrageousness necessary to support that cause of action. *Id.* at 667.

71. *Id.* at 665.

72. *Id.*

The supreme court reversed the trial court's grant of a directed verdict in the defamation action.[73] The majority noted that the statement in the article was "ambiguous," but concluded that the article "could be read, on its face," to be defamatory, *i.e.*, libel per se.[74] Therefore, it was not necessary for Holtzscheiter to prove special damage, and the trial court should have allowed the case to go to the jury.[75]

The court also determined that the trial court erred in limiting testimony about the article's effect on readers.[76] According to *Nettles v. MacMillan Petroleum Corp.*,[77] evidence of how a witness understood allegedly defamatory language is admissible if "'the meaning of the words is doubtful or ambiguous.'"[78] Because the majority determined that the Newspaper article was "ambiguous," the *Holtzscheiter* court ruled that the trial court should not have excluded evidence of how witnesses perceived the words.[79]

Justices Toal and Gregory disagreed with the majority's application of the defamation law of South Carolina in this case.[80] According to

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73. *Id.* at 666. In addition, the supreme court affirmed the trial court's directed verdict for the Newspaper in the action for intentional infliction of emotional distress. *Id.* at 667. The court analyzed the elements of intentional infliction of emotional distress as stated in Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981), and concluded "that the language of the article was not so extreme and outrageous as to exceed all possible bounds of decency." *Holtzscheiter*, 411 S.E.2d at 667.

Importantly, the court must make an initial determination of whether the defendant's actions "'may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury.'" *Id.* at 666 (quoting Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 167, 321 S.E.2d 602, 609 (Ct. App. 1984), *rev'd in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985)).

74. *Holtzscheiter*, 411 S.E.2d at 666. A statement is considered "'defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Id.* at 669 (Toal, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

75. *Id.* at 666.

76. *Id.* at 667.

77. 210 S.C. 200, 42 S.E.2d 57 (1947).

78. *Holtzscheiter*, 411 S.E.2d at 667 (quoting *Nettles*, 210 S.C. at 204, 42 S.E.2d at 58).

79. *Id.* The court concluded that the article in question is ambiguous because it is capable of several interpretations, at least one of which may be defamatory. *Id.* at 666.

80. *Id.* at 667 (Toal, J., dissenting). The dissenting opinion commenced with a survey of the constitutional aspects of defamation law as addressed by the United States Supreme Court in the line of cases following New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *Holtzscheiter*, 411 S.E.2d at 667-69 (Toal, J., dissenting).

Justice Toal's dissenting opinion, the majority's conclusion that the article is libel per se is not consistent with the introduction of additional evidence about the meaning of the publication.[81] Furthermore, Justice Toal asserted that a statement cannot logically be both libelous on its face and ambiguous.[82]

At first blush, the conclusion that a statement is libel per se seems inconsistent with allowing evidence regarding the meaning of the statement.[83] However, upon closer examination, it is apparent that Justice Chandler's opinion for the majority is the proper application of the South Carolina law of libel. The distinction between libel per se and libel per quod turns solely on whether extrinsic evidence is necessary to

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The dissent concluded that the instant case should be governed by Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), because Holtzscheiter is a private figure suing a media defendant regarding a matter of only private concern. *Holtzscheiter*, 411 S.E.2d at 669 (Toal, J., dissenting). Although *Dun & Bradstreet* concerned a nonmedia defendant, Justice Toal predicted that, for purposes of defamation, the "media/nonmedia distinction is irrelevant." *Id.* at 669 (citing *Dun & Bradstreet*, 472 U.S. at 781-84) (Brennan, J., dissenting)). In *Dun & Bradstreet* a plurality of the Court held that, in a defamation case involving a private figure plaintiff and a nonmedia defendant, "permitting recovery of presumed and punitive damages . . . absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." 472 U.S. at 763.

Although the dissent's brief digression into modern defamation law and the First Amendment is informative, it strays somewhat from the central issue before the court. As Justice Toal noted, neither the majority nor the parties on appeal addressed the impact of the United States Supreme Court's defamation cases. *Holtzscheiter*, 411 S.E.2d at 667 (Toal, J., dissenting).

81. *Holtzscheiter*, 411 S.E.2d at 670 & n.7 (Toal, J., dissenting).

82. *Id.* Additionally, because the dissenters believed that the article was substantially true, they would have affirmed the directed verdict for the Newspaper. *Id.* at 670-71 (Toal, J. dissenting) (citing Dauterman v. State-Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967) (per curiam)). *But see id.* at 666 n.4 (discussing the appropriate standard of appellate review of a directed verdict).

Finally, Justice Toal's dissent concluded with her opinion that the newspaper article "was actionable if at all as an 'invasion of privacy' claim" for "'publicizing . . . private affairs of no legitimate public concern.'" *Id.* at 671 (Toal, J., dissenting) (quoting Rycroft v. Gaddy, 281 S.C. 119, 123, 314 S.E.2d 39, 42 (Ct. App. 1984)). Although the question of whether the article involves a matter of public concern is open for debate, Justice Toal's dicta presents some potentially unsettling implications for newspapers or other members of the news-reporting media.

83. The fundamental disagreement between the majority and the dissent hinges on this apparent inconsistency. *Compare id.* at 670 n.7 (Toal, J., dissenting) *with id.* at 667 n.5.

discover a defamatory meaning.[84] In the instant case, the court correctly classified the newspaper article as libel per se because the defamatory meaning of the statement may be inferred without reference to any extrinsic evidence.[85] Whether the statement actually is defamatory is a question of fact for the jury.[86]

In conclusion, the common-law development of the law of defamation has created a very complex and confusing set of requirements for recovering in an action for libel. In *Holtzscheiter* the court correctly determined that the appellant did not have to prove special damages because the allegedly defamatory article could be interpreted as libelous on its face. Therefore, the trial court should have allowed the jury to resolve this defamation action.

David E. Rothstein

IV. SUPREME COURT RELAXES THE FAVORABLE TERMINATION ELEMENT OF MALICIOUS PROSECUTION CLAIMS

In *McKenney v. Jack Eckerd Co.*[87] the South Carolina Supreme Court held that the entry of nolle prosequi[88] in a criminal case for reasons that imply, or are consistent with, the accused's innocence

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84. *Id.* at 665-66. As a threshold matter, if the statement may be interpreted as defamatory without the need for facts beyond the statement itself, then that statement may be libel per se. It is another question entirely whether the publication in fact conveys a defamatory meaning. *See id.* at 667 n.5 ("[T]his evidence would not be necessary to *supply* a defamatory meaning, but would merely explain whether readers, in fact, interpreted the article to convey a libelous meaning on its face."). *See generally* SMOLLA, *supra* note 63, § 7.06, at 7-11 to -12. Professor Smolla provides the following as an example to distinguish libel per se from libel per quod:

> [T]he statement that "Mary, John's wife, had sexual intercourse with Frank" would be actionable "per se," whereas the statement "Mary had sexual intercourse with Frank" would not be actionable "per se," because proof of the extrinsic fact that Mary is married to John and not Frank would be necessary to establish the defamatory meaning.

Id.

85. *Holtzscheiter*, 411 S.E.2d at 666. Although the court determined rather conclusorily that the article was libel per se, the record does contain evidence that may indicate that Holtzscheiter's reputation was injured by the article's implication that "she was an unfit mother and, as such, had contributed to Shannon's death." *Id.* at 665.

86. *Id.* at 666 & n.4.

87. 304 S.C. 21, 402 S.E.2d 887 (1991).

88. A prosecutor enters a "nolle prosequi" on the record to indicate that he will prosecute a case no further. State v. Gaskins, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974). "Nolle prosequi" is commonly referred to as "nol pros." BLACK'S LAW

constitutes a termination in favor of the accused sufficient to support a subsequent claim for malicious prosecution.[89] The *McKenney* case reverses the supreme court's long-standing position that the entry of nolle prosequi cannot support an action for malicious prosecution.[90]

Ronald McKenney ("McKenney") wrote a check for $3.55 to the Jack Eckerd Co. ("Eckerd"), but because of a bank error, the check was returned for insufficient funds. Although the bank promptly notified Eckerd of the mistake, Eckerd obtained a fraudulent check warrant against McKenney approximately one month later. After the solicitor entered nolle prosequi in the case against McKenney, McKenney sued Eckerd for malicious prosecution. Applying the old rule that a nolle prosequi cannot support a malicious prosecution claim, the trial court granted Eckerd's motion for summary judgment.[91] The court of appeals upheld the trial court's ruling, but urged the supreme court to grant certiorari and modify its decision.[92]

The issue before the supreme court in *McKenney* was whether entry of nolle prosequi is a sufficient termination of the proceedings in favor of the plaintiff to support an action for malicious prosecution.[93] State courts have generally taken one of three approaches in deciding this issue. The first approach is consistent with the former South Carolina rule that an entry of nolle prosequi does not satisfy the favorable termination element of a malicious prosecution claim.[94] The second

89. *McKenney*, 304 S.C. at 22, 402 S.E.2d at 888.

90. Mack v. Riley, 282 S.C. 100, 316 S.E.2d 731 (Ct. App. 1984), *overruled by McKenney*, 304 S.C. 21, 402 S.E.2d 887; Heyward v. Cuthbert, 15 S.C.L. (4 McCord) 345 (1827), *overruled by McKenney*, 304 S.C. 21, 402 S.E.2d 887; Smith v. Shackleford, 10 S.C.L. (1 Nott & McC.) 36 (1817), *overruled by McKenney*, 304 S.C. 21, 402 S.E.2d 887.

91. *McKenney*, 304 S.C. at 22, 402 S.E.2d at 887.

92. McKenney v. Jack Eckerd Co., 299 S.C. 523, 524-25, 386 S.E.2d 263, 264 (Ct. App. 1989), *rev'd*, 304 S.C. 21, 402 S.E.2d 887 (1991).

93. In order to recover for malicious prosecution in South Carolina, a plaintiff must show: (1) the initiation of judicial proceedings, (2) by the defendant, (3) termination of the proceedings in favor of the plaintiff, (4) malice by the defendant in initiating the proceedings, (5) lack of probable cause in initiating the proceedings, and (6) damages resulting from the defendant's conduct. Ruff v. Eckerds Drugs, Inc., 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975) (citing Parrott v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)); Gibson v. Brown, 245 S.C. 547, 549, 141 S.E.2d 653, 654 (1965) (citing 34 AM. JUR. *Malicious Prosecution* § 6 (1941)).

94. *See* cases cited *supra* note 90 and accompanying text. To the author's knowledge, only Maine continues to adhere to this rule. *See* Garing v. Fraser, 76 Me. 37, 42 (1884). Even in Maine, however, an entry of nolle prosequi is a termination in favor of the accused if entered over the accused's objection. Bickford

approach holds that the entry of any nolle prosequi satisfies the favorable termination element regardless of the reasons underlying the decision to dismiss the charges.[95] The final approach, the majority view adopted by the *McKenney* court, finds the favorable termination element satisfied only when criminal charges are dismissed for reasons tending to show the accused's innocence.[96]

The *McKenney* court's decision to adopt the majority rule is sound. The prior South Carolina rule was unduly harsh because it permitted a person maliciously to institute a criminal action against another without probable cause, while eviscerating any remedy of the aggrieved party. After a conscientious solicitor properly dismissed the unfounded criminal charges, the accused was barred from suing for malicious prosecution. This paradoxical rule forced an innocent party to object to the dismissal of the baseless charges against him and risk proceeding to trial in order to preserve his civil remedy.[97] Even disregarding the obvious unfairness involved, this waste of judicial resources at trial is hardly a desirable result for an already overloaded court system.

Furthermore, the more liberal view of permitting a malicious prosecution claim based on any unbargained-for nolle prosequi is equally undesirable. Prosecutors often dismiss criminal charges for merely procedural or technical reasons, *e.g.*, because of failure to locate a necessary witness or because evidence has not yet been processed by state laboratories. Additionally, evidence of additional criminal activity is occasionally discovered after the filing of initial charges. For reasons of strategy or efficiency, the initial charges may be dismissed and refiled later along with additional charges that developed during the subsequent investigation. Allowing a malicious prosecution suit to proceed in any of

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v. Lantay, 394 A.2d 281, 283 (Me. 1978).

95. *See, e.g.*, Woodyatt v. Bank of Old York Rd., 182 A.2d 500, 501 (Pa. 1962) ("[I]f . . . the charges are withdrawn by the prosecutor, this is sufficient to satisfy the requisite element of prior favorable termination of the criminal action."); Niese v. Klos, 222 S.E.2d 798, 801 (Va. 1976) (holding that entry of nolle prosequi terminated the prosecution "in a manner not unfavorable to plaintiff for purposes of instituting a malicious prosecution action").

96. *McKenney*, 304 S.C. at 22, 402 S.E.2d at 888 (characterizing the newly adopted rule as the majority approach); *see also* RESTATEMENT (SECOND) OF TORTS § 660 cmt. a (1976) ("Proceedings are 'terminated in favor of the accused,' . . . only when their final disposition is such as to indicate the innocence of the accused."); 54 C.J.S. *Malicious Prosecution* § 56 (1987) ("[T]he abandonment [of a prosecution] must have been under circumstances or for reasons which imply or are consistent with the innocence of [the] accused.").

97. *See* Wynne v. Rosen, 464 N.E.2d 1348, 1352 (Mass. 1984).

these instances would be improper because an appropriate criminal prosecution would be forthcoming.

The *McKenney* ruling strikes a balance between the two alternatives of permitting legitimate malicious prosecution claims and barring frivolous claims. Moreover, by placing the burden on the plaintiff to demonstrate that the criminal charges against him were dismissed for reasons that indicate his innocence,[98] the supreme court encourages the reporting of crime and remains "solicitous of the honest efforts of citizens to assist in enforcing the law."[99]

However, the *McKenney* court failed to articulate what constitutes sufficient reasons for implying the innocence of the accused. This omission raises questions in two common situations. The first involves dismissal of charges by a solicitor pursuant to an agreement or compromise with the accused. Ordinarily, a dismissal of this type is not sufficiently indicative of the accused's innocence to constitute favorable termination.[100] In fact, an agreement of this type is tantamount to an admission that probable cause existed. Undoubtedly, the South Carolina Supreme Court will eventually find that such agreements to dismiss charges would preclude an action for malicious prosecution.

Prosecutors also commonly enter nolle prosequi to drop criminal charges against an accused after a certain period of good behavior.[101] In South Carolina, the Pretrial Intervention Act[102] provides for the dismissal of charges against an accused after successful completion of a mandated program.[103] The purpose of such programs is to show

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98. *See McKenney*, 304 S.C. at 22, 402 S.E.2d at 888 ("[W]here *an accused establishes* that charges were *nolle prossed* [sic] for reasons which imply or are consistent with innocence, an action for malicious prosecution may by maintained.") (emphasis added).

99. Ruff v. Eckerds Drugs, Inc., 265 S.C. 563, 567, 220 S.E.2d 649, 651 (1975).

100. *See* Liu v. Mandina, 396 So. 2d 1155 (Fla. Dist. Ct. App. 1981) (holding that a nolle prosequi obtained by accused's promise to make restitution is not termination in the accused's favor as to support action for malicious prosecution); Joiner v. Benton Community Bank, 411 N.E.2d 229 (Ill. 1980) (holding that dismissal of theft charges against accused upon his agreement to pay restitution did not constitute favorable termination that would support claim for malicious prosecution); *see also* RESTATEMENT (SECOND) OF TORTS § 660(a) (1976); 52 AM. JUR. 2D *Malicious Prosecution* § 35 (Supp. 1991).

101. *See, e.g.*, Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980) (holding that under New York law dismissal of charges after six months of good behavior by the accused did not permit the accused to sue for malicious prosecution), *cert. denied*, 450 U.S. 920 (1981).

102. S.C. CODE ANN. §§ 17-22-10 to -160 (Law. Co-op. 1976 & Supp. 1991).

103. S.C. CODE ANN. § 17-22-150 (Law. Co-op. 1976).

leniency to first-time offenders and to avoid the stigma of a criminal conviction.[104] The dismissal of charges does not imply the innocence of a person who successfully completes the pretrial intervention program. Furthermore, if an entry of nolle prosequi resulting from the program sufficiently supported a malicious prosecution action, solicitors would be less likely to use pretrial intervention.[105] Consequently, South Carolina courts should hold that dismissal of criminal charges after completion of a pretrial intervention program does not indicate the accused's innocence and, therefore, does not support a malicious prosecution claim.

The rule announced in *McKenney* brings South Carolina in line with the majority of other states. Plaintiffs in malicious prosecution actions must now prove that the prior criminal charges against them were dismissed for reasons that imply their innocence. This rule is the best of the three alternatives available and adequately addresses the competing policy considerations involved. Until the supreme court defines the circumstances in which an entry of nolle prosequi demonstrates the innocence of an accused, this area of the law will provide fertile ground for appeals.

Michael R. Smith

V. SUPREME COURT NARROWS STATUTORY EXEMPTION UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

In *Ward v. Dick Dyer & Associates*[106] the South Carolina Supreme Court held that only those activities allowed or authorized by statutes or regulatory agencies are exempt from the South Carolina Unfair Trade Practices Act (UTPA).[107] The court significantly narrowed the scope of the exemption provision of the UTPA[108] by modifying or overruling

104. *See Singleton*, 632 F.2d at 194.

105. *See id.*

106. 304 S.C. 152, 403 S.E.2d 310 (1991).

107. *Id.* at 154-55, 403 S.E.2d at 311-12. The South Carolina Unfair Trade Practices Act is codified at S.C. CODE ANN. §§ 39-5-10 to -160 (Law. Co-op. 1976).

In *Ward* the court also held that corrective action taken by the defendant subsequent to the challenged transaction is not a defense to an allegation of wilfulness. *Ward*, 304 S.C. at 158, 403 S.E.2d at 313. The defendant's corrective action was an offer to replace or repurchase the allegedly defective automobile sold to the plaintiffs. *Id.* at 154, 403 S.E.2d at 311.

108. S.C. CODE ANN. § 39-5-40(a) (Law. Co-op. 1976). This section of the UTPA is discussed *infra* note 113.

several previous South Carolina decisions that applied the "'general activity' test."[109]

In *Ward* the plaintiffs brought action for fraud and unfair trade practice after the defendant dealership failed to disclose that the car the plaintiffs purchased had previously been in an accident. The trial court dismissed the plaintiffs' unfair trade practice claim because the dealership's actions were already regulated by a South Carolina state agency and thus, exempt from UTPA coverage.[110] Both parties appealed.[111]

The trial court based the dismissal of the UTPA claim on *State ex rel. McLeod v. Rhoades*,[112] in which the supreme court construed section 39-5-40(a)[113] of the UTPA.[114] In *Rhoades* the court interpreted section 39-5-40(a) to mean that, when a party claiming an exemption from the UTPA shows that "'the general activity in question is regulated by'" an official agency or officer, the complainant has the burden of showing that the activity in question is not exempt from the UTPA.[115] Because automobile sales are regulated by statute in South Carolina,[116] the trial court in *Ward* correctly applied the general activity test of *Rhoades* by dismissing the plaintiff's UTPA claim.

On appeal in *Ward*, the plaintiffs argued that the supreme court should narrow the general activity test of *Rhoades* so that automobile sales are not exempt from the UTPA.[117] The court agreed and con-

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109. *Ward*, 304 S.C. at 155, 157, 403 S.E.2d at 311-13. See *infra* note 115 and accompanying text for a discussion of the general activity test and previous applications of this test by South Carolina courts.

110. *Ward*, 304 S.C. at 154, 403 S.E.2d at 311. The trial court also dismissed the dealership's defense that it had offered to replace or repurchase the allegedly defective car on the grounds that settlement offers are not admissible into evidence. *Id.*

111. *Id.*

112. 275 S.C. 104, 267 S.E.2d 539 (1980), *modified by Ward*, 304 S.C. at 157, 403 S.E.2d at 313.

113. S.C. CODE ANN. § 39-5-40(a) (Law. Co-op. 1976). This section provides that the UTPA shall not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." *Id.*

114. *Ward*, 304 S.C. at 154, 403 S.E.2d at 311.

115. *Rhoades*, 275 S.C. at 107, 267 S.E.2d at 541 (quoting State v. Piedmont Funding Corp., 382 A.2d 819, 822 (R.I. 1978)). This rule is often referred to as the "general activity" test. *Id.*

116. *See* S.C. CODE ANN. §§ 56-15-10 to -360 (Law. Co-op. 1991) (regulating automobile manufacturing, distribution, and sales).

117. Brief of Respondents-Appellants at 7.

cluded that previous interpretations of the exemption provision[118] were too broad to serve the UTPA's underlying purpose of "prohibiting unfair trade practices."[119] The court noted that the exemption provision is intended to prevent a party from being sued under the UTPA for activities authorized by other laws or regulations.[120] The legislature enacted section 39-5-40(a) to prevent conflicts of laws, not to exempt every type of regulated activity.[121] Accordingly, the supreme court reversed the trial court's dismissal of the plaintiff's UTPA claims against the defendant automobile dealership.[122]

Several states with unfair trade practice provisions similar to section 39-5-40(a) continue to exempt generally regulated activities in their statutes.[123] The Connecticut Unfair Trade Practices Act exempts "[t]ransactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the

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118. *See e.g.*, Anderson v. Citizens Bank, 294 S.C. 387, 365 S.E.2d 26 (Ct. App. 1987) (holding banking practices exempt from UTPA), *overruled in part by Ward*, 304 S.C. 152, 403 S.E.2d 310; Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987) (holding mobile home sale exempt from UTPA), *overruled in part by Ward*, 304 S.C. 152, 403 S.E.2d 310.

119. *Ward*, 304 S.C. at 155-56, 403 S.E.2d at 312.

120. *Id.* at 156, 403 S.E.2d at 312. The court adopted the reasoning of the Tennessee Court of Appeals which interpreted a similar statutory exemption. *Id.* (citing Skinner v. Steele, 730 S.W.2d 335 (Tenn. Ct. App. 1987)). The *Ward* court noted that sales of securities shall remain exempt from the UTPA because such transactions are so strictly regulated. *Id.* at 155 n.1, 403 S.E.2d at 312 n.1.

121. *See id.* at 156, 403 S.E.2d at 312.

122. *Id.* at 157, 403 S.E.2d at 313. In addition, the supreme court affirmed the trial court's ruling that the dealership's offer to replace or repurchase the defective car was inadmissible to show the dealership's lack of bad faith. *Id.* at 157-58, 403 S.E.2d at 313. The court held that "[s]ubsequent actions on the part of [the defendant] do not affect the alleged wrongdoing at the time of the sale and therefore such actions may not constitute a defense." *Id.* at 158, 403 S.E.2d at 313. The court's holding on this issue demonstrates a distinction between lack of bad faith regarding mitigation of damages and lack of bad faith as a defense to wilfulness. Lack of bad faith remains relevant to the issue of whether punitive damages are warranted in a given situation, and *Ward* does not change this principle. *See* F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 301 (1990). Bad faith exists, if at all, at the time of the transaction; therefore, the court's reasoning that subsequent ameliorative actions do not constitute a defense to bad faith during the transaction is both logical and appropriate.

123. *See, e.g.*, Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983); Connelly v. Housing Auth., 567 A.2d 1212 (Conn. 1990); First of Me. Commodities v. Dube, 534 A.2d 1298 (Me. 1987).

state or of the United States."[124] Interpreting this statute, the Connecticut Supreme Court held that a municipal housing authority's actions are exempt from the Act because "the actions of the defendant . . . are expressly authorized and pervasively regulated by both the state department of housing and HUD."[125]

Similarly, the Supreme Judicial Court of Maine interpreted its Unfair Trade Practices Act as exempting real estate brokers' activities because those activities are regulated by the Maine Real Estate Commission.[126] Finally, a United States district court in Georgia interpreted a provision of Georgia's version of the Unfair Trade Practices Act as exempting specifically regulated conduct.[127] Thus, the *Taylor* court held that securities transactions are exempt under Georgia law because they are heavily regulated by federal statutes.[128]

Although these decisions would support continued application of the general activity test in South Carolina, they are not persuasive under South Carolina's statutory scheme. Section 39-5-40(a) does not exist in a vacuum. Within this very section, the UTPA also exempts innocent media publications of false or misleading advertising,[129] transactions involving insurance sales,[130] and practices that comply with statutes and regulations administered by the Federal Trade Commission.[131] Interpreting section 39-5-40(a) to exempt generally regulated activities "renders the third and fourth exemptions superfluous, severely limits the coverage of an act intended to have general application, and raises the difficult problem of determining when another agency or state statute sufficiently regulates or controls challenged conduct to establish the exemption."[132]

The UTPA itself provides the most persuasive proof that the regulated activity exemption of *Rhoades* is not the proper interpretation of section 39-5-40(a). According to section 39-5-160 of the Act, "[t]he powers and remedies provided by this article shall be cumulative and supplementary

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124. CONN. GEN. STAT. ANN. § 42-110c (West 1987). This language is almost identical to South Carolina's provision. *Cf.* S.C. CODE ANN. § 39-5-40(a) (Law. Co-op. 1976).

125. *Connelly*, 567 A.2d at 1216.

126. *Dube*, 534 A.2d at 1302.

127. *Taylor*, 572 F. Supp. at 675. Georgia's Unfair Trade Practices Act exempts "specifically authorized" activities. GA. CODE ANN. § 10-1-396(a) (Michie 1982).

128. *Taylor*, 572 F. Supp. at 675.

129. S.C. CODE ANN. § 39-5-40(b) (Law. Co-op. 1976).

130. *Id.* § 39-5-40(c).

131. *Id.* § 39-5-40(d).

132. Richard E. Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?*, 33 S.C. L. REV. 479, 500 (1982).

to all powers and remedies otherwise provided by law."[133] The very language of the Act suggests that the legislature intended to provide remedies in addition to those found in statutes or regulations governing the allegedly wrongful conduct. Consequently, even if an activity is heavily regulated, a party should not be precluded from bringing a UTPA claim for an unfair or deceptive practice arising out of that regulated activity.

In *Scott v. Mid Carolina Homes, Inc.*[134] the South Carolina Court of Appeals first expressed dissatisfaction with the limitations of the general activity test.[135] By narrowing the application of section 39-5-40(a) to exempt only those activities specifically authorized by regulatory agencies or statutes, the South Carolina Supreme Court now has adopted the sensible interpretation urged by the court of appeals and legal commentators.[136]

Michael R. Smith

133. S.C. CODE ANN. § 39-5-160 (Law. Co-op. 1976).

134. 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987), *overruled in part by* Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310 (1991).

135. *Id.* at 200-01, 359 S.E.2d at 297. In *Scott* the defendant argued that mobile home sales were exempt from the UTPA as a generally regulated activity. The court of appeals reluctantly agreed, but openly invited the supreme court to reconsider the general activity test. *Id.* For examples of cases prior to *Ward* that apply a narrower definition of the general activity test, see Tousley v. North American Van Lines, 752 F.2d 96 (4th Cir. 1985) and Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987).

136. *See* Day, *supra* note 132, at 500 (urging that "permitted" in section 39-5-40(a) be interpreted as "expressly permitted").