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Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.: South Carolina's Suboptimal Approach to Idemnity Claims of Retailers against Manufacturers of Defective Products

R. W. T.

VERMEER CAROLINA'S, INC. V. WOOD/CHUCK CHIPPER CORP.: SOUTH CAROLINA'S SUBOPTIMAL APPROACH TO INDEMNITY CLAIMS OF RETAILERS AGAINST MANUFACTURERS OF DEFECTIVE PRODUCTS

I. INTRODUCTION

In the age of strict products liability, an injured plaintiff will commonly sue the retailer who sold him the product, the distributor, the manufacturer, and anyone else in the chain of distribution. Under Restatement of Torts Section 402A,[1] adopted by the South Carolina legislature as the Sellers of Defective Products Act (Defective Products Act), all of these defendants are strictly liable to the plaintiff for putting a defective product in the stream of commerce.[2] The multiplicity of defendants in such litigation presents problems for the judicial system that may not be solved using traditional rules of liability. For a retailer or distributor who is innocent of fault under traditional principles of tort law, yet held strictly liable for selling or distributing the defective product, there are three possible remedies against the manufacturer of the product: (1) indemnification under traditional principles, (2) indemnification by way of a warranty action, and (3) contribution under the statute of the relevant jurisdiction. This Note will attempt to examine several of the problems confronting courts when trying to define the relationship between the manufacturer and other defendants in products liability cases. This Note will analyze the availability of the first option when a warranty action or contribution claim is either unavailable or for tactical reasons is not pursued by the retailer. The South Carolina Court of Appeals recently confronted such a situation when it decided *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*[3] Part II of this Note summarizes the holding and reasoning of *Vermeer Carolina's*, and Part III analyzes the holding and reasoning of South Carolina cases in light of products liability policies, suggesting an alternative course by outlining the development of the law from a national perspective.

II. *VERMEER CAROLINA'S, INC. V. WOOD/CHUCK CHIPPER CORP.*

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
2. *See* S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).
3. 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

In *Vermeer Carolina's, Inc.* an individual, Causey, was injured by a wood chipper manufactured by Wood/Chuck Chipper Corporation (Wood/Chuck).[4] Causey acquired the product from Vermeer Carolina's, Inc. (Vermeer) in a used condition.[5] After the chipper amputated his right arm, Causey filed an action against Vermeer pleading breach of express and implied warranties, negligence, and strict liability.[6] Causey plead negligent design and strict liability against Wood/Chuck.[7]

Causey asked that Wood/Chuck be dismissed with prejudice, and the court granted the motion against Vermeer's objection.[8] Vermeer failed to appeal this order, and thereafter settled with Causey.[9] Vermeer then filed an action seeking indemnification or, in the alternative, contribution from Wood/Chuck for the money paid in settlement to Causey.[10] Wood/Chuck moved for summary judgment, and the motion was granted by the circuit court.[11]

The South Carolina Court of Appeals affirmed the circuit court order and held that because a retailer of a product is strictly liable by virtue of selling a defective product, that retailer is not entitled to indemnification.[12] The court further held that a retailer is not entitled to receive contribution from a manufacturer who has previously settled because the manufacturer's previous settlement extinguished the manufacturer's liability, thus destroying the commonality of liability required for contribution.[13]

In analyzing Vermeer's claim for indemnification, the court of appeals identified three elements which the indemnitee must prove: "(1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor."[14] In applying this test, the court relied principally upon two earlier cases: *Scott v. Fruehauf Corp.*[15] and *Stuck v. Pioneer Logging Machinery, Inc.*[16] The court of appeals found that these two cases stand for the simple principle that "there can be no indemnity among mere joint tortfeasors" in strict liability.[17]

The court of appeals offered *Stuck* as an example of a case in which indemnification is appropriate in a strict liability context, and the court

4. *Id.* at 57, 518 S.E.2d at 304.
5. *Id.*
6. *Id.* at 58, 518 S.E.2d at 304.
7. *Id.* at 57-58, 518 S.E.2d at 304.
8. *Id.* at 58, 518 S.E.2d at 304.
9. *Id.*
10. *Id.*
11. *Id.* at 57-58, 518 S.E.2d at 304.
12. *Id.* at 67, 518 S.E.2d at 309.
13. *Id.* at 68, 518 S.E.2d at 309-10.
14. *Id.* at 63, 518 S.E.2d at 307.
15. 302 S.C. 364, 396 S.E.2d 354 (1990).
16. 279 S.C. 22, 301 S.E.2d 552 (1983).
17. *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307.

distinguished the facts of *Vermeer* from those of *Stuck*.[18] In *Stuck* the indemnitee bought a vehicle from the indemnitor for use in its business.[19] The truck proved to be defective, and killed another driver.[20] The buyer settled claims brought by the other driver and sought indemnification from the seller.[21] Thus, *Stuck* presented a situation in which the indemnitee was not a reseller of the product, but a consumer. The indemnitor was not the manufacturer, but the seller. The supreme court allowed indemnification, reasoning that the parties were not joint tortfeasors because the injured party's claim sounded in negligence, while the indemnification claim sounded in strict tort and contract.[22] In essence, the supreme court distinguished the duties that each party breached. Because the character of each party's duty to the injured party was different, the court concluded that the parties were not joint tortfeasors.[23] The purchaser owed a duty to the other driver to exercise reasonable care in inspecting for and discovering defects in the vehicle, while the seller was strictly liable for selling the vehicle in a defective condition.[24] Therefore, the purchaser's claim against the seller was independent of the grounds upon which the other driver was entitled to recover.[25] In *Vermeer* the court of appeals relied upon the analysis in *Stuck* to demonstrate that Vermeer and Wood/Chuck owed the same duty to Causey, holding they were both strictly liable for putting a defective product into the stream of commerce.[26]

In analyzing the legal relationship that exists between parties both liable under a theory of strict liability, the court of appeals relied upon *Scott v. Fruehauf Corp.*[27] In *Scott* the manufacturer had already settled with the plaintiff, and the dispute over indemnification was between two parties in the chain of distribution.[28] The retailer was seeking indemnification from a distributor who had refurbished and sold a product.[29] The distributor and retailer were successive sellers and were both strictly liable for selling a defective product.[30] The court in *Scott* relied upon *Promaulayko v. Amtorg Trading Corp.*,[31] in which the New Jersey Appellate Division held "common law indemnification does not apply among joint tortfeasors in strict liability."[32]

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18. *Id.* at 66-67, 518 S.E.2d at 308-09.
19. *Id.* at 23, 301 S.E.2d at 552.
20. *Stuck*, 279 S.C. at 23, 301 S.E.2d at 553.
21. *Id.* at 24-25, 301 S.E.2d at 554.
22. *Id.* at 25, 301 S.E.2d at 554.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Vermeer*, 336 S.C. at 67, 518 S.E.2d at 309.
27. 302 S.C. 364, 396 S.E.2d 354 (1990).
28. *Id.* at 367, 396 S.E.2d at 356.
29. *Id.*
30. *Id.*. at 371, 396 S.E.2d at 358.
31. 540 A.2d 893 (N.J. Super. Ct. App. Div. 1988).
32. *Scott*, 302 S.C. at 371, 396 S.E.2d at 358.

In *Promaulayko* the intermediate New Jersey court held that indemnification was not available to a broker against his supplier.[33]

In *Vermeer* the court of appeals used *Stuck* to demonstrate that indemnification is available to the purchaser of the product because the strict liability that governs the seller's relationship with the purchaser is independent of any liability the purchaser may have to an injured third party.[34] After discussing *Stuck*, the court of appeals presented *Scott* as a counterpoint to *Stuck*. Whereas the indemnitor and indemnitee in *Stuck* were liable under different theories, in *Scott* both parties were strictly liable under the Defective Products Act.[35] Applying *Scott* to the relationship existing between Vermeer, Wood/Chuck and Causey, the court of appeals concluded:

> Absent a contractual provision whereby the upstream manufacturer agreed to indemnify the downstream retailer, the retailer cannot escape liability and, at the same time, prove the manufacturer negligently designed or manufactured a product. Vermeer did not show there was a genuine issue of material fact that Vermeer was not a joint tortfeasor, but was the innocent defendant entitled to indemnification from Wood/Chuck.[36]

III. ANALYSIS

A. Three Types of Cases, Two Types of Defendants

The fountainhead of modern strict products liability law is *Escola v. Coca Cola Bottling Co.*[37] Justice Traynor authored a concurring opinion in this manufacturing defect case which presaged the strict liability movement. While the majority relied upon the traditional tort principle of *res ipsa loquitur*,[38] Justice Traynor advocated strict liability as opposed to negligence as a means for holding the manufacturer liable.[39] More importantly, Traynor expressed the fundamental premise upon which strict product liability doctrine would develop:

> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in

33. *Promaulayko*, 540 A.2d at 895-96.
34. *Vermeer*, 336 S.C. at 65-66, 518 S.E.2d at 308 .
35. *See* S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).
36. *Vermeer*, 336 S.C. at 67, 518 S.E.2d at 309.
37. 150 P.2d 436 (Cal. 1944).
38. *Id.* at 440.
39. *Id.* at 441-42 (Traynor, J., concurring).

> defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.[40]

The policy goal of placing liability upon the party that can most efficiently prevent injuries has become the touchstone of both strict product liability law in general and the law of indemnification specifically.[41]

As a preliminary matter it should be noted that *Stuck*, *Scott*, and *Vermeer* represent three distinct types of cases, and the policy implications of each type are different and important to recognize. First, *Stuck* represents the simple situation in which a purchaser is seeking indemnification from a manufacturer for injuries to a third party for which the purchaser was held liable.[42] Only the indemnitor is subject to strict products liability, and the policies that urge strict liability for defective products also urge indemnification on the same theory. Whether the indemnitor is a manufacturer or a retailer, the South Carolina General Assembly has determined in the Defective Products Act that one who sells an unreasonably dangerous product is subject to liability for the injuries caused by the product.[43]

Scott and *Vermeer* present situations more complicated than the situation in *Stuck*, and implicate two different sets of policy questions. In *Scott* the party seeking indemnification was a lessor, essentially in the same position as a retailer, and the party against whom indemnification was sought was a distributor.[44] Thus, both parties were intermediate members of the chain of distribution. In *Vermeer* an intermediate member of the distributional chain was seeking indemnification from the manufacturer, the initial link in the chain of distribution.[45] The policy questions implicated by these distinct factual settings revolve around a single idea that flows throughout tort law generally and strict products law specifically. The social loss, either by compensation or denial of compensation, should be imposed upon whichever party to a transaction is in the best position to avoid the loss.[46]

While South Carolina's courts may not be in the habit of speaking in terms of efficient allocation of social loss, the idea is inherent in the language of cases such as *Stuck*.[47] Notably, the supreme court in *Stuck* wrote of indemnification in the following terms, reflecting a concern for allocating social loss efficiently:

> We note the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable

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40. *Id.* at 440-41 (Traynor, J., concurring).
41. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 179-83, 197-99 (5th ed. 1998).
42. 279 S.C. at 24-25, 301 S.E.2d at 553.
43. *See* S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).
44. *Scott*, 302 S.C. at 371, 396 S.E.2d at 358.
45. *Vermeer*, 336 S.C. at 58, 518 S.E.2d at 304.
46. *See* POSNER, *supra* note 41, at 179-83.
47. *See* 279 S.C. 22, 301 S.E.2d 553.

> principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful *act* of another in which he does not join.[48]

The emphasis of this language is on what "act" exposed the party seeking indemnification to liability.[49] Further, the court of appeals in *Vermeer* stated that "the most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."[50] This proposition reflects the idea that social loss should be allocated to the party who may avoid the loss at the lowest cost. A finding of fault is itself a judgment that a party was in a position to prevent a loss and failed to do so. The purpose of equitable indemnification is to protect an "innocent" defendant when the act of a wrongdoer exposes her to liability.[51] Thus, the emphasis throughout these cases is to impose the loss on the party at fault and to protect the more innocent parties.

It is clear from the language of these cases that the concept of fault plays an important role in determining whether one is entitled to indemnification. However, it is equally clear that the concept of fault plays no role in determining a seller's liability for selling a defective product. The Defective Products Act sets out a seller's liability for a defective product as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) shall apply although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and

48. 279 S.C. at 24, 301 S.E.2d at 553 (emphasis added) (citing 41 AM. JUR. 2D *Indemnity* § 2 (1968) and 42 C.J.S. *Indemnity* § 21 (1994)).

49. *Id.*

50. *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307 (citing Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971); Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)).

51. *See Addy* at 28, 183 S.E.2d at 708.

> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.[52]

Subsection (2)(a) is explicit in its statement that a seller may be liable without being at fault, and it is equally clear that this section is intended to define only the legal relationship that obtains between sellers and consumers. There is no reference to the relation that exists between parties within the chain of distribution. These observations about the role of fault in determinations of liability and indemnification are essential to a proper understanding of the distinction between the three types of cases with which this Note is concerned.

As to those cases in which one party is acting in the role of ultimate consumer, such as *Stuck*, the legislature has already made the necessary decision. The Defective Products Act reflects the legislature's judgment that between a consumer and any party in the chain of distribution, the proper way to allocate the loss is to impose it on the party distributing the product.[53] In *Vermeer*, between Causey, Vermeer, and Wood/Chuck, the loss is properly allocated to Vermeer and Wood/Chuck. The statute clearly prefers consumers over all classes of sellers but does not indicate any preference between classes of sellers. Thus, it is silent as to the dispute between Vermeer and Wood/Chuck.

While the statute may not express a preference about liability between classes of sellers, it is relevant in determining liability in cases of the second two types, such as *Scott* and *Vermeer*. Two elements of the statute are crucial to the determination of disputes between parties within the chain of distribution. First, the statute requires that the product be "unreasonably dangerous to the user or consumer" in order for there to be any liability at all.[54] Second, it incorporates the previously discussed provision in subsection (2)(a), which states that a seller may be liable despite "exercis[ing] all possible care."[55]

Though purported to be strict liability, the first of these elements requires courts to engage in a negligence-type analysis "balancing expected accident costs against the costs of making the product safer."[56] The statute requires the court to determine whether or not the design and manufacture of the product are reasonable.[57] Thus, subsection (1) introduces a concept of fault into the analysis of liability for defective products. What distinguishes this concept of fault from others is that the injured party does not have to prove the negligence of each defendant to prevail against that defendant. Rather, the defect is carried

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

53. *Id.*

54. *Id.* § 15-73-10(1).

55. *Id.* § 15-73-10(2)(a).

56. POSNER, *supra* note 41, at 197 (citing Comment, *Strict Products Liability and the Risk-Utility Test for Design Defects: An Economic Analysis*, 84 COLUM. L. REV. 2045 (1984)).

57. . *Id.* § 15-73-10(1).

by the product, and liability for the defect attaches to each seller in the chain of distribution.

The second element in subsection (2)(a) furthers the policy of consumer protection by allowing injured consumers to collect compensation even from those in the chain of distribution that act with "all possible care,"[58] a standard certainly higher than reasonable care. Taken together, these provisions effectively ensure that parties injured by defective products are compensated, but a policy ensuring compensation does not necessarily provide an efficient level of deterrence. However, the Defective Products Act does provide two categories of defendants that are useful in formulating an effective deterrent. First are those defendants that are liable despite exercising "all possible care," or perhaps reasonable care. Second are the defendants that acted unreasonably in the manufacture or design of the product because presumably an unreasonably dangerous product cannot exist without unreasonable action.

In turning to the final two types of cases, these categories of defendants are the key to efficient resolution of the disputes. First, let us consider the *Scott* situation in which the dispute is between two intermediate members of the chain of distribution.[59] The facts in *Scott* are not typical of this class of cases because the distributor in *Scott* refurbished the product before selling it to the retailer;[60] thus the product may have been unreasonably dangerous because of the refurbishing work performed by the distributor. In the typical case of a retailer versus a middleman, the only difference between the two is that the middleman deals in a greater volume of the product than the retailer. Application of the two categories of defendants to such a case should identify both as being innocent of fault, although they would both be liable to the consumer. Between the two, neither contributed to the product being unreasonably dangerous, and neither was in a better position to prevent the defect.[61] The situation presented is essentially an alternative-care case in which neither of the defendants could have avoided the accident at a lower cost than the other, at least not by direct control over the manufacturing process.[62] Thus, because neither party was at fault, indemnity may not be appropriate.

The third type of case, as exemplified by *Vermeer*, presents both categories of defendants. The retailer that sells the product is innocent as to fault, though liable to the consumer under the statute despite taking all reasonable precautions. The manufacturer, on the other hand, is responsible for the "unreasonably dangerous" character of the product. Again, this situation is an alternative-care case, but in this situation there is little question that the

58. *Id.* § 15-73-10(2)(a).

59. *Scott*, 302 S.C. at 367, 396 S.E.2d at 356.

60. *Id.*

61. There is a persuasive argument that the distributor is in a better position to prevent the defect than the retailer, and thus retailers have been allowed to obtain indemnification from their distributors. Promaulayko v. Johns Manville Sales Corp., 562 A.2d 202 (N.J. 1989).

62. *Scott*, 302 S.C. at 367, 396 S.E.2d at 356.

manufacturer who controls the processes of design and production can avoid the social loss of injury at a lower cost than the retailer. In the words of Judge Posner:

> In an alternative-care case we do not want both tortfeasors to take precautions; we want the lower-cost accident avoider to do so. The liability of the other is a backstop in case insolvency prevents the threat of tort liability from deterring the primary accident avoider. Hence the need for a mechanism that will, where possible, shift the ultimate liability to the most efficient accident avoider; indemnity does this.[63]

By forcing a retailer such as Vermeer to absorb a portion of the loss, the incentive for Wood/Chuck to design and manufacture safe products becomes less than optimal. The court of appeals was correct in its conclusion that both parties are strictly liable to the consumer for his injury, but the idea that liability is the equivalent of fault for the purposes of determining a right to indemnity was misguided.

B. *The Proper Course: A National Perspective and the Proposed Restatement (Third) of Torts*

In *Scott* the supreme court cited an opinion of the New Jersey Appellate Division for the proposition that "common law indemnification does not apply among joint tortfeasors in strict liability."[64] *Promaulayko* demonstrated the second type of case, pitting two intermediate members of the chain of distribution against one another, and thus it was properly analogous to *Scott*. *Promaulayko* presented a broker of asbestos material seeking indemnification from his supplier, and the intermediate New Jersey court held that the broker was not entitled to indemnification.[65] The New Jersey Supreme Court reversed the appellate division, reasoning that the distributor was more capable of exerting pressure on the manufacturer than the broker.[66] The New Jersey Supreme Court's opinion in *Promaulayko* presents a good argument that indemnification should be allowed even between intermediate members of the chain of distribution so long as the indemnitee is lower in the chain than the indemnitor.[67] Moreover, by allowing indemnification in the most marginal type

63. POSNER, *supra* note 41, at 207.
64. *Scott*, 302 S.C. at 371, 396 S.E.2d at 358.
65. Promaulayko v. Amtorg Trading Corp., 540 A.2d 893, 894, 897 (N.J. Super. Ct. App. Div. 1988).
66. *Promaulayko*, 562 A.2d at 207.
67. *See id.* at 206.

of case, the court made it clear that indemnity would be available to retailers and distributors against the manufacturer.[68]

In California, it is clear that retailers and distributors are entitled to indemnity from the manufacturer of the defective product even if the manufacturer has already settled with the plaintiff. In *Angelus Associates Corp. v. Neonex Leisure Products, Inc.*[69] the California Court of Appeals reasoned that under a theory of strict products liability, all parties in the chain of distribution are liable to the plaintiff, although they may not be responsible for the defect that was the proximate cause of the plaintiff's injury.[70] The court further reasoned that parties not responsible for the defect proximately causing the injury are entitled to complete indemnification from the responsible party.[71]

California has also confronted a case all parties had settled with the injured party, leaving the dispute in question between the distributor and the manufacturer—*Huizar v. Abex Corp.*[72] *Huizar* used reasoning similar to that in *Angelus*, holding that despite settlement by all parties, the distributor may be entitled to indemnification so long as the finder of fact finds no active negligence.[73] The court opined that under traditional principles, a retailer without fault is entitled to total indemnification when a manufacturing or design defect subjects the retailer to liability for injuries to a third party.[74]

Indemnification has long been the rule in New York in disputes between manufacturers and distributors. The seminal New York case is *Ruping v. Great Atlantic & Pacific Tea Co.*,[75] in which a retailer sought indemnification from the manufacturer and the bottler of an exploding soft drink.[76] The court held that the retailer was entitled to indemnification so long as there was no showing of independent negligence on the part of the retailer in storing or displaying the bottle.[77] This holding is consistent with optimal deterrence because it places liability only upon those parties that could have controlled the conduct which caused the injury.

The continuing vitality of this approach in New York is clear as stated in section 64 of New York Jurisprudence: "[A] right of indemnity has been implied between a manufacturer and distributor, as between a distributor and purchaser...."[78] Thus, New York treats indemnification between strictly liable

68. *See id.*
69. 213 Cal. Rptr. 403 (Cal. Ct. App. 1985).
70. *Id.* at 404 (citing Vandermart v. Ford Motor Co., 391 P.2d 168 (Cal. 1964)).
71. *Id.* (citing Davis v. Air Technical Indus., Inc., 582 P.2d 1010 (Cal. 1978)).
72. 203 Cal. Rptr. 47 (Cal. Ct. App. 1984).
73. *Id.* at 50-51.
74. *Id.* at 50.
75. 126 N.Y.S.2d 687 (N.Y. App. Div. 1953).
76. *Id.* at 688-89.
77. *Id.* at 689-90.
78. 23 N.Y. JUR. 2D *Contribution, Indemnity, and Subrogation* § 64 (1982 & Supp. 1999).

tortfeasors in the same way it treats indemnification in cases of vicarious liability by looking to fault rather than liability.[79]

These New Jersey, California, and New York cases represent a national trend that is also reflected in the proposals by the American Law Institute for the Restatement (Third) of Torts. The Proposed Final Draft provides:

> (a) If two or more tortfeasors are or may be liable to a plaintiff for the same harm and one of them discharges the liability of the others by settlement or discharge of judgment, the tortfeasor discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, to secure the discharge if:
>
> (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
>
> (2) the indemnitee
>
> (i) was not liable except vicariously for the tort of the indemnitor, or
>
> (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.
>
> (b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought is not liable to the plaintiff.[80]

On its face, the rule may not protect retailers when manufacturers settle first because the rule appears to require the indemnitee to discharge the liability of the party from whom it seeks indemnification. However, Comment c provides: "An indemnitor is not protected from indemnity, however, by a settlement with or other voluntary discharge of liability by the plaintiff."[81] This rule would prevent many of the fights over indemnification resulting from single party settlements.

While there may be some limitations on the face of the rule, such as the requirement that the indemnitee be supplied by the indemnitor, the rule effectively distinguishes between the two categories of defendants. It places the ultimate liability where the defect and the resulting injury may be most efficiently controlled - on the defendant responsible for the defect that proximately caused the injury. South Carolina should adopt this rule for two reasons. First, it does not in any way diminish the rights of injured consumers to receive compensation from whichever defendant in the chain of distribution

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79. *Id.*
80. RESTATEMENT (THIRD) OF TORTS § 31 (Proposed Final Draft No. 1, 1998).
81. *Id.* § 31 cmt. c.

is most amenable to suit. Second, this rule provides a more efficient system of deterrence for manufacturers than the system reflected in *Vermeer*.

IV. CONCLUSION

The holding and reasoning in *Vermeer* is misguided because it fails to provide optimal incentives for the manufacture and design of safe products. Moreover, the supreme court's analysis in *Scott* does not require that a party such as Vermeer be denied indemnification from the manufacturer. *Scott*'s holding was made in the context of two intermediate members in the chain of distribution, and an application of *Scott* to a dispute between a retailer and manufacturer is an expansion of the holding in *Scott*. South Carolina's courts should reconsider the availability of indemnification to retailers, understanding that the concept of strict liability controls the relationship between sellers and consumers, and that the strict liability concept is not useful in defining the relationship between retailers, distributors, and manufacturers.

R. W. T.