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The Rescue Doctrine Following the Advent of Comparative Negligence in South Carolina

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THE RESCUE DOCTRINE FOLLOWING THE ADVENT OF COMPARATIVE NEGLIGENCE IN SOUTH CAROLINA

I. INTRODUCTION

Though the United States has historically avoided judicial imposition of a duty to rescue,[1] the law places great value on human life and has developed the rescue doctrine to encourage third parties to render aid to those in need.[2] This doctrine not only establishes rescuers as a foreseeable class of intervening actors, but also reduces the potential bar to recovery created by contributory negligence.[3] As a result, a rescuer under the common law could recover damages from the original tortfeasor for injuries suffered unless the rescuer's actions were reckless, willful, or wanton.[4] In *Furka v. Great Lakes Dredge & Dock Co.*, the Fourth Circuit explained the rescue doctrine: "[T]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness."[5]

Along with the development of the rescue doctrine, many states adopted comparative negligence, which is designed to mitigate the harsh effects of contributory negligence.[6] Because both the rescue doctrine and comparative negligence were designed to remove the bar to recovery created by contributory negligence, states must decide how the two doctrines interact. Jurisdictions disagree how the rescue doctrine interacts with their comparative negligence systems. South Carolina has not yet had occasion to decide the effect of comparative negligence on the rescue doctrine.

This Comment suggests the direction South Carolina should take if confronted with a case involving an injured rescuer. In doing so, this Comment analyzes two relevant issues involved in determining how to apply the rescue doctrine in light of comparative negligence—proximate cause and contributory negligence. Part II gives background information on the rescue doctrine, contributory negligence, and comparative negligence. Part III analyzes the

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1. Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 675–76 (1994).

2. *See, e.g.*, Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 450 (Mo. Ct. App. 1987) (citing Doran v. Kansas City, 237 S.W.2d 907, 912 (Mo. Ct. App. 1951)) (stating that because the law values human life, "the rescuer was justified in exposing himself to a danger").

3. *See id.* at 449, 450.

4. Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985), *rev'd on other grounds*, 824 F.2d 330, 331–32 (4th Cir. 1987); *Allison*, 738 S.W.2d at 450 (citing Lowrey v. Horvath, 689 S.W.2d 625, 626 (Mo. 1985)).

5. *Furka*, 755 F.2d at 1088 (quoting Scott v. John H. Hampshire, Inc., 227 A.2d 751, 753–54 (Md. 1967)).

6. *See, e.g.*, F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS, 183–84 (3d ed. 2004) (discussing comparative negligence in South Carolina); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 471 & n.30 (5th ed. 1984).

current state of the law in South Carolina. Part IV examines how other jurisdictions have addressed the rescue doctrine in light of comparative negligence. Part V suggests the proper approach South Carolina should take and sets forth possible jury instructions. Part VI argues that comparative negligence should not apply to a rescuer unless the rescuer's acts or omissions constitute gross negligence because the central purpose of the rescue doctrine is to encourage and promote rescue attempts. Therefore, South Carolina should follow the jurisdictions continuing to hold that comparative negligence has not subsumed the rescue doctrine.

II. THE RELATIONSHIPS AMONG THE RESCUE DOCTRINE, CONTRIBUTORY NEGLIGENCE, & COMPARATIVE NEGLIGENCE

A. Traditional Role of the Rescue Doctrine

The rescue doctrine serves two purposes. First, the rescue doctrine establishes "a causal nexus linking the tortfeasor's negligent conduct to the rescuer's injuries."[7] A rescuer, by definition, is a bystander who, "[u]nder the impulse of danger, . . . was undertaking to render aid."[8] The person needing aid must either be in imminent peril, or the rescuer must reasonably believe the person was in imminent peril.[9] Because the rescuer intervenes following the wrongdoer's negligent act, the rescue doctrine holds the rescuer as a foreseeable victim of the original negligent act.[10] As stated by the Georgia Court of Appeals, "[T]he chain of causation remains intact, since it is reasonably to be anticipated that, once such peril to life or property is initiated and brought into being by the negligence of a defendant, reasonable attempts will be undertaken to alleviate and nullify the consequences of such peril."[11]

Second, the doctrine prevents the "harsh inequity of barring relief under principles of contributory negligence to a person who is injured in a rescue attempt."[12] Originally, contributory negligence posed a complete bar to recovery for the negligent rescuer without considering the extent of the rescuer's negligence in comparison to the defendant's negligence.[13] To encourage rescue attempts, the rescue doctrine raised the ordinary negligence standard to rash, reckless, or wanton.[14]

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7. Estate of Solomon v. Shuell, 457 N.W.2d 669, 683 (Mich. 1990).

8. *See* Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958).

9. *Cf. Solomon*, 457 N.W.2d at 683 (stating that the issue in Michigan is not whether the victim is in actual danger, but whether the rescuer acted as a reasonable person would in the same or similar circumstances).

10. *See* Walker Hauling Co. v. Johnson, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964).

11. *Id.*

12. Ouellette v. Carde, 612 A.2d 687, 689 (R.I. 1992) (citing Wilson v. N.Y., N.H. & H.R. Co., 69 A. 364, 371 (R.I. 1908); Willis v. Providence Telegram Publ'g Co., 38 A. 947, 948 (1897)).

13. Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 450 (Mo. Ct. App. 1987).

14. Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985); *Allison*, 738 S.W.2d at 450.

As a result of these two purposes, the rescue doctrine encourages the important social policy of rescue encapsulated in "Good Samaritan" statutes. South Carolina's Good Samaritan Statute[15] provides that anyone who renders assistance to a victim at the scene of an emergency shall not be held civilly liable for "any personal injury as a result of any act or omission . . . except acts or omissions amounting to gross negligence or wilful or wanton misconduct."[16] Because there is no common law duty to rescue absent certain exceptions,[17] it is important to promote rescue attempts by individuals who are otherwise under no duty to rescue.[18] Professor Antony M. Honoré accurately states the importance of the rescue doctrine in promoting aid to those in need: "There is no neutrality. If the law does not encourage rescue, it is sure to discourage it. If it does not compensate, it will indirectly penalize."[19]

B. Proximate Cause

For an injured rescuer to recover from the original tortfeasor, the rescuer must establish that the tortfeasor's conduct was both the cause-in-fact and the proximate cause of the rescuer's injuries.[20] While several tests for proximate cause have been suggested, South Carolina has adopted foreseeability as the test for proximate cause.[21] As stated in *Young v. Tide Craft, Inc.*,[22] "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought."[23]

South Carolina's general test is consistent with the rescue doctrine's emphasis on foreseeability. For a rescuer to recover from the original tortfeasor, the rescuer must be foreseeable and must not be an intervening actor who breaks the chain of causation.[24] In *Wagner v. International Railway*, the defendant railway company argued that the rescuer had time to consider his action and thus

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15. *See* Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) (referring to S.C. CODE ANN. § 15-1-310 as the "Good Samaritan Act").

16. S.C. CODE ANN. § 15-1-310 (2005 & Supp. 2006); *see also* 42 PA. CONS. STAT. § 8332 (2006) (providing, like South Carolina's statute, that a rescuer is not liable to the victim for acts or omissions at the scene of an accident unless those acts or omissions amount to gross negligence).

17. *See* Heyman, *supra* note 1, at 675–76.

18. William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1126–27 (2001).

19. Antony M. Honoré, *Law, Morals and Rescue*, *in* THE GOOD SAMARITAN AND THE LAW 225, 232 (James M. Ratcliffe ed., 1966).

20. HUBBARD & FELIX, *supra* note 6, at 137–38.

21. *See generally id.* at 148–50 (noting that there are many other ways to phrase the test for proximate cause including "direct cause," "efficient cause," and "substantial factor," but that foreseeability is a widely used test).

22. 270 S.C. 453, 462 S.E.2d 671 (1978).

23. *Id.* at 462, 242 S.E.2d at 675 (1978) (quoting Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968)).

24. *See* Wagner v. Int'l Ry., 133 N.E. 437, 438 (N.Y. 1921) (involving a rescuer who injured himself while attempting to save his cousin who fell from a train).

broke the chain of causation.[25] Justice Cardozo dismissed the argument stating, "Continuity in such circumstances is not broken by the exercise of volition."[26] Moreover, Cardozo noted that a distinction should not be drawn between the rescuer who acts on impulse and the rescuer who weighs the risks of danger.[27]

The *Wagner* test is often quoted and widely accepted by courts for the notion that rescuers as a class are foreseeable so long as they are not reckless.[28] As stated by Justice Cardozo, "Danger invites rescue. . . . The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. *He is accountable as if he had.*"[29] While reasonable rescue is foreseeable, jurisdictions disagree as to whether negligent rescue should be considered foreseeable to allow the rescuer to recover damages.[30]

C. Contributory Negligence

Prior to the adoption of comparative fault system, contributory negligence barred the rescuer from recovery where the rescuer was rash or reckless or created the situation that invited the rescue.[31]

D. Impact of Comparative Negligence

Almost all jurisdictions, including South Carolina, have now adopted some form of comparative negligence allowing the negligent plaintiff to recover, less the proportion of fault attributable to the plaintiff.[32] In South Carolina, the plaintiff's recovery is not barred by contributory negligence unless the plaintiff's negligence exceeds the defendant's negligence.[33]

The adoption of comparative negligence in South Carolina and other jurisdictions has affected several common law doctrines.[34] The last clear chance doctrine, recklessness, and assumption of risk have been supplanted by

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25. *Id.*

26. *Id.* (citing Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87 (N.Y. 1918); Donnelly v. H.C. & A.I. Piercy Contracting Co., 118 N.E. 605, 606 (N.Y. 1918); Twomley v. Cent. Park, N. & E. River R.R., 69 N.Y. 158, 160 (1877)).

27. *Id.*

28. KEETON ET AL., *supra* note 6, § 44, at 307–08; *see also* Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958) (indicating that rescuers are foreseeable as a class (quoting *Wagner*, 133 N.E. at 437)).

29. *Wagner*, 133 N.E. at 437–38 (citation omitted) (emphasis added).

30. *See infra* Part IV.

31. Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 450–51 (Mo. Ct. App. 1987).

32. *See* HUBBARD & FELIX, *supra* note 6, at 183–84.

33. *Id.* at 183 (citing Nelson v. Concrete Supply Co., 303 S.C. 243, 243–44, 399 S.E.2d 783, 783 (1991)).

34. *See, e.g.*, *id.* at 186–88 (discussing whether recklessness and the last clear chance doctrine have been subsumed by comparative negligence).

comparative negligence in almost all jurisdictions, including South Carolina.[35] For instance, the last clear chance doctrine allowed a plaintiff who was negligent to recover damages if the defendant had the last clear chance to avoid the accident.[36] However, the last clear chance doctrine does not serve the same purpose as the rescue doctrine. The last clear chance doctrine ameliorated the harsh effect of contributory negligence,[37] but the rescue doctrine encourages people to assist others in emergency situations. After the adoption of comparative negligence, the rescue doctrine has been retained by some states, yet partly subsumed into comparative negligence by others.[38] South Carolina has not had occasion to address the rescue doctrine in light of comparative negligence.

III. STATUS OF THE LAW IN SOUTH CAROLINA

South Carolina has previously addressed the rescue doctrine in two respects. First, South Carolina's Good Samaritan Statute encourages rescue attempts by providing that anyone who renders assistance to a victim at the scene of an emergency shall not be held civilly liable for personal injuries resulting from any acts or omissions "except acts or omissions amounting to gross negligence or wilful or wanton misconduct."[39]

The South Carolina Court of Appeals discussed the operation of the statute in *Ballou v. Sigma Nu General Fraternity*,[40] which involved the death of one of the fraternity's potential members due to acute alcohol intoxication.[41] Sigma Nu appealed the verdict of the trial court that held the fraternity liable for Mr. Ballou's son's death.[42] On appeal, the fraternity argued that the trial judge committed reversible error by refusing to instruct the jury on the South Carolina Good Samaritan Statute.[43] The court of appeals stated that, because the jury found the fraternity acted with "willful, wanton, or reckless conduct," the statute did not provide a shield from liability.[44]

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35. *See* Spahn v. Town of Port Royal, 326 S.C. 632, 640–41, 486 S.E.2d 507, 511–12 (Ct. App. 1997), *aff'd as modified*, 330 S.C. 168, 173, 499 S.E.2d 205, 208 (1998) (holding the last clear chance doctrine has been subsumed by comparative negligence); *see also* HUBBARD & FELIX, *supra* note 6, at 186–88, 191–93 (discussing how South Carolina courts have dealt with recklessness, last clear chance, and assumption of risk following the adoption of comparative negligence); W. PAGE KEETON ET AL., *supra* note 6, § 67, at 477–78.

36. HUBBARD & FELIX, *supra* note 6, at 187–88.

37. *Id.*

38. *Compare* Ouellette v. Carde, 612 A.2d 687, 690 (R.I. 1992) (holding no common law duties changed when the state adopted its comparative negligence statute), *with* Cords v. Anderson, 259 N.W.2d 672, 683 (Wis. 1977) (finding that comparative negligence principles apply in an unreasonable rescue).

39. S.C. CODE ANN. § 15-1-310 (2005 & Supp. 2006).

40. 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986).

41. *Id.* at 143, 145, 352 S.E.2d at 491, 492.

42. *Id.* at 142, 352 S.E.2d at 490.

43. *Id.* at 155, 352 S.E.2d at 497.

44. *Id.* at 155–56, 352 S.E.2d at 498.

Second, prior to the adoption of comparative negligence, South Carolina courts addressed the rescue doctrine, specifically regarding proximate cause, in *Brown v. National Oil Co.*[45] *Brown* involved a fire at a filling station that started when West, a bystander, lit a match while a truck delivered gas to the station.[46] The fire strengthened when West pulled the truck's hose out of the station's filler pipe.[47] The jury entered a verdict for the plaintiff;[48] however, the trial judge granted the oil company's motion for judgment notwithstanding the verdict.[49] On appeal, the South Carolina Supreme Court held that the evidence presented a question for the jury on proximate cause.[50]

In so holding, the court determined that West acted as a rescuer in removing the hose from the filler pipe.[51] The court, addressing the issue of proximate cause, conceded that West's acts may have been negligent, but they were not "wanton or foolhardy" and did not bar recovery.[52] Furthermore, the court recited part of *Wagner v. International Railway Co.*: "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind. In tracing conduct to its consequences it recognizes them as normal."[53] The Good Samaritan Statute and *Brown*, while not addressing comparative negligence, provide guidance as to how a South Carolina court may rule in a case involving the rescue doctrine.

IV. OTHER JURISDICTIONS

A. Proximate Cause

The leading case regarding the rescue doctrine and proximate cause is *Wagner v. International Railway Co.*[54] In *Wagner*, a train rounded a bridge, and Wagner's cousin was thrown from a door that the conductor failed to close.[55] Wagner sounded an alarm, and the train stopped just beyond the bridge.[56] It was dark, and Wagner went back to the bridge.[57] Wagner found nothing but his cousin's hat, and as he searched, he lost his footing and fell to the ground beneath the bridge.[58] Wagner sued the railway company for his injuries.[59]

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45. 233 S.C. 345, 347, 357, 105 S.E.2d 81, 82, 87 (1958).
46. *Id.* at 349, 105 S.E.2d at 83.
47. *Id.*
48. *Id.* at 347, 105 S.E.2d at 82.
49. *Id.*
50. *Id.* at 357, 105 S.E.2d at 87.
51. *Id.*
52. *Id.*
53. *Id.* (quoting Wagner v. Int'l Ry., 133 N.E. 437, 437 (N.Y. 1921)).
54. 133 N.E. at 437.
55. *Wagner*, 133 N.E. at 437.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

The *Wagner* trial court found for the railway company.[60] The trial court held Wagner could not recover as a matter of law unless the conductor both invited him on the bridge and followed with a lantern.[61] Justice Cardozo, writing for the New York Court of Appeals, reversed the decision:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion.[62]

Cardozo focused on the foreseeability of the attempted rescue. The court noted that the reaction of the rescuer to the situation of peril is one of instinct.[63] The court also rejected the defendant's argument that the elapsed time between the accident and the rescue attempt broke the chain of causation.[64] Cardozo noted that Wagner did not stop to deliberate his actions from the time of accident until the point Wagner fell.[65] The law seeks to encourage rescue and "does not discriminate between the rescuer oblivious of peril and the one who counts the cost."[66] Based on the rescue doctrine principles espoused by Justice Cardozo, the judgment was reversed.[67]

In *Walker Hauling Co. v. Johnson*,[68] the Georgia Court of Appeals followed principles similar to those in *Wagner* and explained the rescue doctrine as it relates to proximate cause.[69] *Johnson* involved a firefighter who volunteered to help extinguish a petroleum plant fire.[70] The court reasoned through existing Georgia case law to describe the role of proximate cause within the rescue doctrine.[71] The following standard is much like the standard in *Wagner*:

> [I]nsofar as the proximate cause of any injuries that a rescuer sustains as a result of his efforts is concerned, the chain of causation remains intact, since it is reasonably to be anticipated that, once such peril to life or property is initiated and brought into being by the negligence of a defendant, reasonable

60. *Id.*
61. *Id.*
62. *Id.* at 437–38 (citation omitted).
63. *Id.* at 438.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. 139 S.E.2d 496, 499 (Ga. Ct. App. 1964).
69. *Id.* at 499.
70. *Id.* at 497–98.
71. *Id.* at 499.

> attempts will be undertaken to alleviate and nullify the consequences of such peril.[72]

Florida has also followed a similar test for determining proximate cause. In *Ryder Truck Rental, Inc. v. Korte*,[73] the court stated that, although the rescue doctrine is "no longer necessary to relieve a rescuer from the absolute bar of contributory negligence, [it] is still applicable to establish that the defendant's negligence was the proximate cause of the plaintiff's injury."[74] Furthermore, the court stated, "[W]here the defendant has created a situation of peril for another the defendant will be held in law to have caused the peril not only to the victim but also to his rescuer, and so to have caused any injury suffered by the rescuer in his rescue attempt."[75]

Not all states have been willing to adopt the *Wagner* standard for foreseeability. The Pennsylvania Superior Court addressed the rescue doctrine and proximate cause in *Pachesky v. Getz*.[76] In *Pachesky*, the appellant-rescuer returned home from work to find a car parked in the middle of the road—the appellee was slumped over the wheel.[77] Appellant and her husband repeatedly struck the windshield of the car attempting to wake appellee.[78] Believing that he was suffering from carbon monoxide poisoning, appellant opened the driver's side door, "rolled down the window and turned off the ignition."[79] The car then rolled down the hill, and the open door hit appellant, causing physical injuries.[80]

Appellants argued the jury charge on causation was in error.[81] The charge stated, "Proximate means immediate, nearest, next in order, and in its legal sense, closest in causal connection."[82] According to appellants, the jury charge was erroneous because it could have led the jury to consider the appellant as a supervening actor.[83] While the majority in *Pachesky* did not find reversible error in the charge as a whole, it did note that the jury instruction may have been "unnecessarily limiting."[84]

The dissent in *Pachesky*, however, found the jury charge to be reversible error.[85] According to the dissent, "Causation is not a separate consideration in

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72. *Id.*
73. 357 So. 2d 228 (Fla. Dist. Ct. App. 1978).
74. *Id.* at 230.
75. *Id.* (citing J. Tiley, *The Rescue Principle*, 30 MOD. L. R. 25, 25 (1967)).
76. *See* 510 A.2d 776, 783 (Pa. Super. Ct. 1986) ("[T]he relative causal negligence of the [rescuer and tortfeasor] should be apportioned . . . .).
77. *Id.* at 777.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 779.
82. *Id.*
83. *Id.*
84. *Id.* at 780.
85. *Id.* at 787 (Cavanaugh, J., dissenting).

determining the applicability of the rescue doctrine."[86] If the jury determined that a wrongdoer placed an individual in a position that invited rescue, then the wrongdoer is liable to the rescuer—no consideration is needed as to causation.[87]

The *Restatement (Third) of Torts: Liability for Physical Harm*[88] also proposes an approach to proximate cause similar to the dissent's approach in *Pachesky*.[89] The *Restatement* provides the following guidance:

> [I]f an actor's tortious conduct imperils another or the property of another, the scope of the actor's liability includes any physical harm to a person resulting from that person's efforts to aid or protect the imperiled person or property, so long as the harm arises from a risk that inheres in the effort to provide aid.[90]

The proposed draft alters the original *Restatement*'s view of proximate cause in relation to the rescue doctrine.[91] Section 445 of the *Restatement (Second) of Torts* stated that a rescuer's "normal efforts" to rescue an individual were not superseding.[92] The proposed draft expands the original wording by "eliminating the 'normal efforts' qualification."[93] Additionally, the proposal eliminates the consideration of "superseding cause and proximate cause as barriers to recovery."[94] However, while the proposed draft expands the reach of the rescue doctrine, the comments indicate the rescuer's injury must bear some semblance to the expected harms of a rescue attempt.[95]

Like Pennsylvania, the Ohio Court of Appeals diverged from the *Wagner* standard regarding proximate cause in *Reese v. Minor*.[96] *Reese* involved an accident caused by Hermann, who lost control of his car as he rounded a curve and then flipped onto the side of the eastbound lane.[97] Upon finding the defendant on the side of the road, Reese pulled over and attempted to stop a car in the westbound lane.[98] However, as Reese stood in the eastbound lane, Minor came upon the scene and collided with Reese.[99] The court of appeals, affirming the lower court, held the plaintiff's actions were unforeseeable in the

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86. *Id.* at 785.
87. *Id.*
88. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005).
89. *Id.* § 32.
90. *Id.*
91. *See id.* § 32 cmt. a.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* § 32 cmt. c.
96. 442 N.E.2d 782, 783–84 (Ohio Ct. App. 1981).
97. *Id.* at 783.
98. *Id.*
99. *Id.*

undertaking of a rescuer.[100] Furthermore, the break in causation was such that "[t]o imply that Hermann should be held accountable for this kind of behavior is to place him in the position of Reese's insurer."[101]

Based on the aforementioned case law, the proximate cause standards among jurisdictions clearly differ. However, a considerable number of jurisdictions continue to employ the *Wagner* standard to determine proximate cause.[102]

B. Comparative Negligence

The rescue doctrine has not been considered by a South Carolina court following the state's adoption of comparative negligence. The rescue doctrine could interact with comparative negligence in two distinct ways. A South Carolina court could rule that the *Wagner* standard should continue as an independent standard of care, and only when the rescuer's actions fall below that standard may his negligence be compared. Or, a court may rule that comparative negligence has subsumed the rescue doctrine. If a court abrogates the rescue doctrine, the nature of the rescue simply becomes a factor to consider in apportioning fault.

The following decisions hold that the rescue doctrine is a standard of care independent of comparative negligence. In *Furka v. Great Lakes Dredge & Dock Co.*, the Fourth Circuit addressed the rescue doctrine and comparative negligence in the context of admiralty law.[103] In *Furka*, the decedent allegedly attempted a rescue during rough waters.[104] The decedent responded to a call for help from a sailor when no other boats were able to assist.[105] However, the stranded sailor would not leave his boat, and when the decedent turned toward shore, the decedent's boat began to flood and he eventually drowned.[106] The jury awarded damages in the suit brought by the decedent's widow.[107] However, the jury found the decedent was 65% contributorily negligent and reduced the damages.[108]

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100. *See id.* at 784. *But see* Bridges v. Bentley, 769 P.2d 635, 637, 640 (Kan. 1989) (holding that a rescuer who sought another individual to signal cars to stop was still acting as a rescuer and therefore, the chain of causation had not broken).

101. *Reese*, 442 N.E.2d at 784.

102. *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1090 (4th Cir. 1985); Walker Hauling Co. v. Johnson, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964); Pachesky v. Getz, 510 A.2d 776, 783 (Pa. Super. Ct. 1986); Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958) (quoting Wagner v. Int'l Ry., 133 N.E. 437, 437 (N.Y. 1921)); *see also* F. Patrick Hubbard, Professor, Univ. of S.C. Sch. of Law, Intervening Actors & The "Elusive Butterfly" of Proximate Cause, 2006 South Carolina Tort Law Update 6 (2006) (stating there is "[o]verwhelming agreement that [the] *Wagner* test should be used").

103. 755 F.2d at 1087–88.

104. *Id.* at 1087.

105. *Id.*

106. *Id.*

107. *Id.* at 1087–88.

108. *Id.* at 1088.

On appeal, the widow contended that the court did not properly instruct the jury on the rescue doctrine.[109] The Fourth Circuit stated, "The instruction in this case failed to inform the jury that no contributory negligence may be inferred from a rescue attempt alone and further that no comparative fault may be assessed unless plaintiff's conduct was wanton or reckless."[110] In holding that comparative negligence does not subsume the rescue doctrine, the Fourth Circuit acknowledged that other jurisdictions have held the negligence of the rescuer should be compared.[111] However, the court stated,

> We do not think that is the appropriate course here. . . . The best traditions of seafaring men demand that we honor attempts to rescue . . . . The wanton and reckless standard reflects the value society places upon rescue as much as any desire to avoid a total defeat of recovery under common law. Law must encourage an environment where human instinct is not insular but responds to the plight of another in peril.[112]

Therefore, the court expressed that the law should encourage rescue by not imputing negligence on efforts to preserve life unless those effects are rash or reckless.[113]

Bridges v. Bentley[114] is another case holding comparative negligence does not subsume the rescue doctrine.[115] Bridges, the plaintiff, was driving a fertilizer truck on Highway 50.[116] Bentley, who was driving a truck towing a car, attempted to pass Bridges, but was unable to do so and struck an oncoming car.[117] Bridges stopped to assist the victims of the accident, first asking another individual "to stop oncoming traffic."[118] As Bridges walked toward the cars in the accident, a truck struck the vehicles at the scene, which in turn, struck Bridges and injured him.[119] At trial, the judge instructed the jury on the rescue doctrine:[120]

> A person who is injured while attempting to rescue another from peril in an emergency situation is not negligent merely on the ground that the rescue entails danger to himself. The law has a high regard for human life and efforts to save it. Danger

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109. *Id.*
110. *Id.*
111. *Id.* at 1088–89.
112. *Id.* at 1089.
113. *See id.*
114. 769 P.2d 635 (Kan. 1989).
115. *Id.* at 640.
116. *Id.* at 637.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

> invites rescue. The impulse to respond to an urgent call for aid, without complete regard for one's own safety, is recognized as normal. The law will not impute negligence to an effort to preserve life unless made under such circumstances as to be rash or wanton. Conduct is rash or wanton when it is undertaken in utter disregard of the consequences.[121]

In conclusion, the jury was instructed not to find negligence if Bridge's actions were not rash or wanton.[122]

The defendant argued that while the jury instruction correctly stated the rescue doctrine, the rescue doctrine no longer applied in Kansas because of the establishment of comparative negligence.[123] The Kansas Supreme Court rejected this argument.[124] The court's reasoning behind the continuation of the rescue doctrine was three-fold. First, the court noted that there had been "'no change' in common law duties [with] the enactment of . . . comparative negligence."[125] The court stated the comparative negligence statute "'distribute[s] liability on the basis of causal fault. *It does not concern the nature and extent of the duty* . . . .'"[126]

The court next considered the legislative intent and concluded the Kansas legislature did not intend to nullify the rescue doctrine.[127] In support of this conclusion, the court cited the Kansas Good Samaritan Statute, which uses gross negligence as the standard for emergency care given by health care providers at the scene of an accident.[128] The court reasoned that the "statute has been amended many times since the introduction of comparative negligence and so does not continue its existence only through oversight."[129]

Finally, the Kansas Supreme Court looked to other jurisdictions, including Missouri and the Fourth Circuit.[130] After reviewing the holdings in *Allison* and *Furka*, the court concluded that rescue is a "sound policy to encourage."[131] In taking the position adopted by Missouri and the Fourth Circuit, the court argued that the elimination of the rescue doctrine would discourage potential rescuers.[132]

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121. *Id.*
122. *Id.* at 637–38.
123. *Id.* at 638.
124. *Id.* at 639.
125. *Id.* at 638–39; *see also* M. Bruenger & Co. v. Dodge City Truck Stop, Inc., 675 P.2d 864, 869 (Kan. 1984) (holding in various contexts that the advent of comparative negligence does not change common law duties).
126. *Bridges*, 769 P.2d at 638 (quoting Britt v. Allen County Cmty. Junior Coll., 638 P.2d 914, 917 (Kan. 1982)).
127. *Id.* at 639–40.
128. *Id.*
129. *Id.* at 640.
130. *Id.* at 639 (citing Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 454 (Mo. Ct. App. 1987); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088–89 (4th Cir. 1985)).
131. *Id.* at 640.
132. *Id.*

Therefore, the court upheld the jury instruction that did not impute negligence to the rescuer unless his actions were rash or reckless.[133] The court concluded that lowering the standard to ordinary negligence for potential rescuers "would be one more weapon in the arsenal of the 'don't-get-involved' creed of citizenship which is already too prevalent."[134]

Another example of a court holding that the rescue doctrine continues to operate independently of comparative negligence is *Ouellette v. Carde*.[135] The Rhode Island Supreme Court held that a rescuer's damages should not be compared unless the rescue is performed in a rash or reckless manner.[136] In *Ouellette*, the defendant, Carde, became trapped under his car in the garage while attempting to change the muffler and tailpipe.[137] When the car fell off a jack, "the gas tank landed on the right stanchion jack puncturing the tank and releasing approximately ten gallons of gas onto the garage floor."[138] Carde telephoned his neighbor, Ouellette, for help, and she entered through the front of the house and eventually found Carde trapped under the car.[139] Carde instructed her to leave via the garage by pressing the electric garage door opener.[140] As the garage door opened, the gas ignited, causing severe burns to both Ouellette and Carde.[141]

In affirming the judgment for Ouellette and maintaining the rescue doctrine in conjunction with comparative negligence, the Rhode Island Supreme Court based its holding on two findings.[142] First, the court looked to the purpose of the rescue doctrine and determined that allowing comparative negligence to subsume the doctrine "does not fully protect the rescue doctrine's underlying policy of promoting rescue."[143] The court noted that the rescue doctrine was designed to encourage individuals to undertake rescue attempts absent an affirmative duty to act.[144] Furthermore, the court stated, "The law places a premium on human life, and one who voluntarily attempts to save a life of another should not be barred from complete recovery."[145]

Second, the court applied the same line of reasoning used by the Kansas Supreme Court: the advent of comparative negligence has not changed common law duties, and therefore, it does not affect the rescue doctrine.[146] In conclusion, the court found it should not reduce Ouellette's recovery pursuant to the

133. *See id.*
134. *Id.*
135. 612 A.2d 687, 690 (R.I. 1992).
136. *Id.*
137. *Id.* at 688.
138. *Id.*
139. *Id.* at 688–89.
140. *Id.* at 689.
141. *Id.*
142. *Id.* at 690.
143. *Id.*
144. *See id.*
145. *Id.*
146. *Id.*

principles of comparative negligence because the rescue was neither rash nor reckless.[147]

Georgia and Missouri have also decided a separate threshold for rescuers should exist; once that threshold is met, comparative negligence should apply.[148] In *Lorie v. Standard Oil Co.*, the court addressed the appropriate standard of care to be applied under the rescue doctrine.[149] The case involved Lorie's attempt to rescue an excavation worker stranded in a collapsed pit.[150] Hearing that the excavation pit collapsed, Lorie hastened to the pit, squatted to his hands and knees, and then leaped onto a gasoline storage tank.[151] While Lorie was on top of the gasoline tank, a falling object struck and injured Lorie's head.[152] Though the trial court awarded Lorie damages for personal injuries, Lorie appealed, claiming error in the trial court's jury charge that led to a diminished recovery.[153] The trial court instructed the jury on the rescue doctrine:[154]

> The rescue doctrine applies when the defendants' negligent acts or omissions have created a condition or situation which involves imminent and urgent peril to life and property. In such instances, those negligent acts or omissions are also negligent in relationship to all others who, in the exercise of ordinary care for their own safety under the circumstances, attempt to rescue the endangered life or property by reasonably appropriate means.[155]

The Georgia Court of Appeals held the trial court's jury charge was in error because it did not reflect the appropriate standard of care for rescuers.[156] The court noted that greater importance is attached to attempts to save human life than attempts to rescue property only;[157] thus, a higher level of risk is allowed.[158] The court found that the rescuer's recovery would not be barred because of a failure to "exercise ordinary care for his own safety or even that he assumed the risk of injury to himself unless his actions are so imprudent and beyond what a person in the same circumstances might be expected to do that they must be classified as reckless or wanton."[159]

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147. *Id.*
148. *See* Lorie v. Standard Oil Co., 368 S.E.2d 765 (Ga. Ct. App. 1988); Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 442 (Mo. Ct. App. 1987).
149. *Id.* at 767.
150. *Id.* at 766.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 767.
155. *Id.*
156. *Id.*
157. *Id.*
158. *See id.*
159. *Id.* (citing Blanchard v. Reliable Transfer Co., 32 S.E.2d 420, 421–22 (Ga. Ct. App. 1944)).

In addition, the court held that the jury should have been instructed on comparative negligence.[160] To determine the rescuer's negligence, the court must apply the appropriate standard of care—reckless or wanton.[161] Consequently, it appears that in Georgia, comparative negligence applies unless the jury determines that the actions of the rescuer were not reckless.[162]

Similar to Georgia's analysis of the rescue doctrine and comparative negligence, Missouri also continues to recognize the rescue doctrine but finds comparative negligence principles applicable as well. In *Allison v. Sverdrup & Parcel & Assoc.*,[163] the Missouri Court of Appeals determined the application of comparative negligence to the rescue doctrine.[164] *Allison* involved equipment maintenance for a science experiment that Coors Brewing Company (Coors) donated to the University of Missouri-Rolla (UMR).[165] Several UMR researchers collaborated with researchers at Sverdrup on a research project to produce useful gases from wood.[166] To remove a build-up of sawdust on the inner walls of the equipment, a research assistant climbed into the equipment.[167] Despite the potential danger, the assistant did not wear a protective mask and subsequently collapsed while still inside.[168] In an effort to rescue his colleague, Allison climbed into the equipment wearing a mask for protection.[169] However, both the assistant and Allison asphyxiated due to a build-up of carbon monoxide inside the equipment.[170]

The trial court determined that Allison was 100% at fault and did not award damages for his rescue attempt.[171] On appeal, Allison's survivors alleged the trial court erred in refusing to instruct the jury on the rescue doctrine while instructing on comparative fault.[172] The Missouri Court of Appeals held that the principles of comparative negligence should apply when the rescuer is negligent.[173] However, the court noted, "[A] person who sees another in imminent peril created by the negligence of [the] defendant *will not be charged with negligence* in risking his or her own life or serious injury in an attempt to rescue, *provided he or she does not act recklessly or rashly*."[174]

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160. *Id.* at 768.
161. *Id.*
162. *See id.*
163. 738 S.W.2d 442 (Mo. Ct. App. 1987).
164. *Id.* at 444. *See generally* Gustafson v. Benda, 661 S.W.2d 11, 15–16 (Mo. 1983) (discussing the adoption of pure comparative fault in Missouri).
165. *Allison*, 738 S.W.2d at 444.
166. *See id.* at 444–46.
167. *Id.* at 447.
168. *Id.*
169. *Id.* at 448.
170. *Id.*
171. *Id.* at 442.
172. *Id.*
173. *Id.* at 454.
174. *Id.* (emphasis added).

In holding that a rescuer's actions are not negligent unless they amount to recklessness or rashness,[175] the court recognized the important role the rescue doctrine has and continues to play in Missouri. The court quoted Justice Cardozo's famous words from *Wagner* regarding the rescue doctrine.[176] The court then commented that Missouri has recognized the rescue doctrine as an important concept designed to encourage the preservation of human life.[177] However, the court was also persuaded by the reasoning of jurisdictions applying comparative negligence principles to the rescue doctrine.[178] Therefore, based on the desire to encourage rescue attempts while recognizing the impact of comparative negligence, the court concluded that a rescuer is negligent only if his efforts are rash or reckless.[179] If the rescuer is negligent, then the principles of comparative negligence apply.[180]

Despite the general trend toward greater judicial encouragement of rescue attempts, many states, including Michigan, Wisconsin, and Pennsylvania, have held that comparative negligence partially subsumes the rescue doctrine.[181] The following cases allowed rescue to remain a factor in determining percentage of negligence but do not retain the higher threshold set forth in *Wagner*.

In *Sweetman*, the court held that comparative negligence subsumed the rescue doctrine in a case involving an accident on an icy road.[182] Sweetman, upon seeing the accident, stopped her car and intended to alert oncoming traffic to the icy conditions.[183] While attempting to warn a group of cars, Sweetman was severely injured when she was hit by a car that lost control on the ice.[184] On appeal, Sweetman argued that because she acted as a rescuer, the trial court erred in applying comparative negligence and reducing her recovery.[185]

The Michigan Court of Appeals held that while the rescue doctrine is still applicable to establish causation,[186] the rash or reckless standard no longer applies.[187] Instead, the court held that the rescue doctrine poses a question for the trier of fact as to whether a reasonable person under similar circumstances would

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175. *Id.*

176. *See id.* at 449 (quoting Wagner v. Int'l Ry., 133 N.E. 437, 437–38 (N.Y. 1921) ("Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal.")).

177. *See id.* at 450.

178. *Id.* at 452–54.

179. *Id.* at 454.

180. *Id.*

181. *See* Sweetman v. State Highway Dep't, 357 N.W.2d 783 (Mich. Ct. App. 1984); Pachesky v. Cetz, 510 A.2d 776 (Pa. Super. Ct. 1986); Cords v. Anderson, 259 N.W.2d 672 (Wis. 1977).

182. *See Sweetman*, 357 N.W.2d at 786, 789.

183. *Id.* at 786.

184. *Id.*

185. *Id.* at 788.

186. *Id.* at 789 (citing Ryder Truck Rental, Inc. v. Korte, 357 So. 2d 228, 230 (Fla. Dist. Ct. App. 1978)).

187. *Id.*

have acted in the same manner as a rescuer.[188] In making this determination, the jury should balance the usefulness of the rescuer's actions against the degree of risk involved.[189] The jury should also consider that the risk a rescuer is "justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger."[190] If the rescuer's actions were unreasonable, then the recovery should be reduced proportionately.[191] Applying the test to the facts, the court vacated the judgment of the lower court and remanded for further consideration.[192]

Wisconsin has also held that comparative negligence subsumes the rescue doctrine.[193] In *Cords v. Anderson*, four couples went to Parfrey's Glen to hike and have a picnic.[194] Later in the evening, one of the hikers left the group for an unknown reason and went to an isolated and dangerous trail.[195] As the hiker attempted to walk the trail, she fell approximately eighty feet to the bottom of the gorge.[196] Cords descended the steep gorge in an effort to rescue the hiker below, but she also fell and sustained severe physical injuries.[197] The trial court held that the rescue doctrine was not applicable.[198] On appeal, the Wisconsin Supreme Court held that the rescue doctrine is applicable where one renders aid to another in imminent peril.[199] Considering the advent of comparative negligence in Wisconsin, the court declined to use the *Wagner* standard and instead found that a rescuer is not negligent merely because he exposes himself to a dangerous situation.[200] Where the rescue attempt is unreasonably carried out, the principles of comparative negligence apply and the rescuer's damages will be reduced proportionately.[201]

In *Pachesky v. Getz*,[202] the Pennsylvania Superior Court held that comparative negligence eliminated the need for the rash or reckless standard.[203] On appeal, Pachesky argued that comparative negligence did not subsume the rescue doctrine, and thus, the trial court committed reversible error in instructing the jury that the rescuer's negligence should be compared with that of the original tortfeasor.[204] In analyzing whether to retain the reckless standard for

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188. *Id.* (citing Padilla v. Hooks Int'l, Inc., 654 P.2d 574, 578 (N.M. 1982); Calvert v. Ourum, 595 P.2d 1264, 1266 (Or. Ct. App. 1979)).
189. *Id.* (citing Moning v. Alfono, 254 N.W.2d 759, 762 (Mich. 1977)).
190. *Id.* (citing *Padilla*, 654 P.2d at 578; Lave v. Neumann, 317 N.W.2d 779, 782 (Neb. 1982)).
191. *Id.* (citing *Ryder Truck*, 357 So. 2d at 789).
192. *Id.* at 790.
193. Cords v. Anderson, 259 N.W.2d 672, 683 (Wis. 1977).
194. *Id.* at 675.
195. *See id.* at 676.
196. *Id.* at 675–76.
197. *Id.* at 676–77.
198. *Id.* at 681.
199. *See id.* at 682.
200. *Id.* at 683.
201. *Id.*
202. 510 A.2d 776 (Pa. Super. Ct. 1986).
203. *Id.* at 783.
204. *Id.* at 780.

rescuer recovery, the court looked to the policy behind the rescue doctrine.[205] The court also reiterated that the rescue doctrine establishes a causal connection between the rescuer's injuries and the defendant's negligence while also removing the bar of contributory negligence.[206] Furthermore, the court quoted the often cited words of Justice Cardozo: "Danger invites rescue. The cry of distress is the summons to relief."[207]

However, after looking to other jurisdictions such as Florida and Wisconsin, the court concluded that comparative negligence principles should apply if the rescuer is negligent.[208] Nevertheless, the court determined the rescue doctrine continues to establish a "causal connection between a defendant's negligence and a plaintiff/rescuer's injury, which in turn leaves open the courthouse door."[209]

Also noteworthy in *Pachesky* is the vigorous dissent, which argued that the twin goals of the rescue doctrine were robbed of meaning by the majority's holding.[210] The dissent advanced its argument for the continuation of the rescue doctrine unaffected by comparative negligence by noting that the rescue doctrine is a "unique theory of tort recovery."[211] Importantly, the comparative negligence statute did not contemplate the rescue doctrine and therefore should not subsume it.[212] The dissent relied on *Furka v. Great Lakes Dredge & Dock Co.*[213] when declaring, "The common law doctrine of rescue may be succinctly stated: '[T]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness.'"[214] The Fourth Circuit in *Furka* found no legislative intent to abrogate the rescue doctrine, and *Pachesky*'s dissent argued that neither did the Pennsylvania legislature espouse such an intent.[215] While jurisdictions do not agree on a single approach, the rescue doctrine, in light of its important policy implications, should not be completely subsumed by comparative negligence.

V. PROPOSED SOUTH CAROLINA APPROACH

A. Proximate Cause

As to proximate cause, South Carolina courts should follow the approach set forth in *Wagner v. International Railway Co.*,[216] which holds rescuers are a

205. *Id.* at 782.
206. *Id.*
207. *Id.* at 781 (quoting Wagner v. Int'l Ry., 133 N.E. 437, 437 (N.Y. 1921)).
208. *Id.* at 782–83.
209. *Id.* at 783.
210. *Id.* at 785 (Cavanaugh, J., dissenting).
211. *Id.*
212. *Id.*
213. *Id.* at 785–86 (citing *Furka*, 755 F.2d 1085, 1088 (4th Cir. 1985)).
214. *Id.* at 786 (quoting Scott v. John H. Hampshire, Inc., 227 A.2d 751, 753–54 (Md. 1967)).
215. *Id.* at 787.
216. 133 N.E. 437 (N.Y. 1921).

foreseeable class unless their acts or omissions are rash, reckless, or wanton.[217] Using foreseeability as the test for proximate cause is consistent with South Carolina case law. As noted in *Young v. Tide Craft, Inc.*,[218] South Carolina courts generally use foreseeability as the test for proximate cause.[219] The South Carolina Supreme Court has cited *Wagner* with approval, specifically regarding the rescue doctrine and proximate cause.[220] Following the *Wagner* approach is also consistent with other jurisdictions holding rescuers are a foreseeable class.[221]

Furthermore, South Carolina courts should hold, as did *Wagner*, that negligent rescue is foreseeable. Rescuers are acting with the "excitement and confusion of the moment."[222] As the Fourth Circuit stated, "In rescue, promptness may be prudence, and reflex may claim the seat of reason."[223] Because rescue brings risks unknown, the rescuer should not be penalized for voluntarily exposing himself to those risks.

South Carolina courts should also consider negligent rescuers as foreseeable to foster the legislative intent behind the Good Samaritan Statute.[224] If the rescue is performed in a manner short of gross negligence, the rescuer should be able to recover full damages.[225] Rescue is encouraged by the legislature and has been encouraged in the past by the supreme court.[226] If negligent rescue attempts are not considered foreseeable, such a policy creates another disincentive for the potential rescuer of human life.

A South Carolina court could use a variety of jury instructions regarding proximate cause and the rescue doctrine. The following proposed jury instructions are based on case law from other jurisdictions:

1. The increased risk inherent in a rescue attempt does not render unforeseeable an individual who attempts to rescue someone in danger. "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal."[227] Even if the tortfeasor did

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217. *Id.* at 437.

218. 270 S.C. 453, 242 S.E.2d 671 (1978).

219. *Id.* at 462, 242 S.E.2d at 675.

220. *See* Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958) (quoting *Wagner*, 133 N.E. at 437).

221. *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1090 (4th Cir. 1985); Walker Hauling Co. v. Johnson, 139 S.E.2d 496, 499 (Ga. Ct. App. 1964); Pachesky v. Getz, 510 A.2d 776, 783 (Pa. Super. Ct. 1986); *see also* Hubbard, *supra* note 102 (noting an "[o]verwhelming agreement that [the] *Wagner* test should be used").

222. *Furka*, 755 F.2d at 1088 (quoting Corbin v. City of Philadelphia, 45 A. 1070, 1074 (Pa. 1900)).

223. *Id.*

224. *See* S.C. CODE ANN. § 15-1-310 (2005 & Supp. 2006).

225. *See, e.g., id.* (establishing that a rescuer's negligent actions are foreseeable to the tortfeasor by using a standard of gross negligence).

226. *See id.*; Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958).

227. Wagner v. Int'l Ry., 133 N.E. 437, 437 (N.Y. 1921).

not foresee the rescuer, "[h]e is accountable as if he had."[228] "The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer."[229] The response of the rescuer is often guided by the "excitement and confusion of the moment."[230] "In rescue, promptness may be prudence, and reflex may claim the seat of reason."[231] "The risk of rescue, if only it be not wanton, is born of the occasion."[232]

a. *Rescuer*: First, to apply the rescue doctrine, you must find that the plaintiff's actions were taken to assist an individual in imminent peril, or who appears to a reasonable person to be in imminent peril, as a result of the defendant's negligence.
b. *Proximate Cause*: If you find that the plaintiff was acting as a rescuer, you must then determine whether the plaintiff's actions were foreseeable. The plaintiff's actions were foreseeable and did not break the chain of causation unless the actions or inactions of the plaintiff regarding the rescue were rash, reckless, or wanton.

2. "A person who is injured while attempting to rescue another from peril in an emergency situation is not acting in an unforeseeable manner merely on the ground that the rescue entails dangers to himself. The law has a high regard for human life or limb and efforts to save it. Danger invites rescue. The impulse to respond to an urgent call for aid, without complete regard for one's own safety, is recognized as normal. The law does not regard an effort to preserve life or limb as unforeseeable unless the effort is made under such circumstances as to be rash or wanton. Conduct is rash or wanton when it is undertaken in utter disregard of the consequences, including both the risk to the rescuer and the possible benefits to the person in peril. Therefore, you should find the Plaintiff's actions in attempting to rescue another [were] foreseeable unless those actions were rash or wanton in the sense that those actions were undertaken in utter disregard of the consequences."[233]

B. Comparative Negligence

While South Carolina has yet to address the rescue doctrine in light of comparative negligence, both the Good Samaritan Statute and *Brown* indicate that rescue is a highly valued service and should be encouraged.[234] If faced with

228. *Id.* at 438 (citing Ehrgott v. Mayor of New York, 96 N.Y. 264, 280–81 (1884)).
229. *Id.* at 437.
230. Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088 (4th Cir. 1985) (quoting Corbin v. City of Philadelphia, 45 A. 1070, 1074 (1900)).
231. *Id.*
232. *Wagner*, 133 N.E. at 438.
233. Hubbard, *supra* note 102, at 19.
234. S.C. CODE ANN. § 15-1-310 (2005 & Supp. 2006); Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958).

this issue, South Carolina courts should hold that the rescue doctrine is only partially subsumed by comparative negligence. Accordingly, a South Carolina court would apply comparative negligence to a rescuer if his acts or omissions during a rescue amount to gross negligence or willful or wanton misconduct.[235] This standard, in addition to promoting rescue, is consistent with the application of comparative negligence in South Carolina and the Good Samaritan Statute.[236] South Carolina's Good Samaritan Statute allows anyone rendering aid to a victim to avoid civil liability for negligence causing injury to the victim.[237] The plain language of the statute evinces a policy to encourage rescue attempts.[238]

If a South Carolina court held that comparative negligence completely subsumes the rescue doctrine, the results of a rescuer's recovery under the Good Samaritan Statute and the rescue doctrine would be paradoxical. Under the statute, a rescuer would have no liability to the initial victim if the rescuer injured the victim during the rescue unless his acts amounted to "gross negligence or willful or wanton misconduct."[239] However, if the rescuer sustained an injury while negligently attempting the rescue, she would receive no recovery or a reduced recovery under the doctrine of comparative negligence.

The Good Samaritan Statute and the rescue doctrine are interrelated and should be interpreted similarly. Consistency and fairness in tort law are not furthered if a rescuer is subject to two different standards—gross negligence under the Good Samaritan Statute and mere negligence under the rescue doctrine. In addition to an inconsistent result, rescuers would be discouraged from intervening to aid those in imminent peril.

Many jurisdictions agree that allowing comparative negligence to subsume the rescue doctrine is an undesirable policy for three reasons. First, these jurisdictions find that application of comparative negligence to the rescue doctrine is contrary to the legislative intent of good samaritan statutes.[240] Second, these states argue that the advent of comparative negligence does not result in a change in common law duties.[241] Last, other jurisdictions reason that rescue is an admirable policy that the judicial system should encourage.[242]

The Fourth Circuit, in an admiralty case, set forth a strong argument that the law should encourage rescue attempts and retain the *Wagner* standard.[243] If given the occasion, the Fourth Circuit likely would not limit the *Furka* holding, as rescue should be encouraged on all terrain. The reasoning is very persuasive

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235. *Cf.* § 15-1-310 (using the same language, "gross negligence or willful or wanton misconduct," to set the negligence standard for a Good Samaritan).

236. *Id.*; *see also* HUBBARD & FELIX, *supra* note 6, at 186–88, 191–93 (discussing how recklessness, last clear chance, and assumption of risk have been handled by South Carolina courts following the adoption of comparative negligence).

237. § 15-1-310.

238. *See id.*

239. *Id.*

240. *See, e.g.*, Bridges v. Bentley, 769 P.2d 635, 639 (Kan. 1989).

241. *Id.* at 638–39.

242. Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 450 (Mo. Ct. App. 1987).

243. *See* Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088–89 (4th Cir. 1985).

and consistent with South Carolina law. As a result, the rescue doctrine should not be subsumed by comparative negligence because of the high regard the law places on human life.

A South Carolina court could employ several different jury instructions regarding the rescue doctrine and comparative negligence. A separate instruction on comparative negligence should be given if the jury determines that the rescuer's actions constituted grossly negligent, willful, or wanton misconduct.

1. "A person who is injured while attempting to rescue another from peril in an emergency situation is not negligent merely on the ground that the rescue entails danger to himself. The law has a high regard for human life and efforts to save it. Danger invites rescue. The impulse to respond to an urgent call for aid, without complete regard for one's own safety, is recognized as normal. The law will not impute negligence to an effort to preserve life unless made under such circumstances as to be rash or wanton. Conduct is rash or wanton when it is undertaken in utter disregard of the consequences."[244] As *Bridges* suggests, a statement should conclude this jury instruction noting that, if the jury finds the plaintiff's actions were not rash or wanton, the plaintiff was not acting negligently.[245]

2. "Danger invites rescue."[246] The law places such a high value on human life that the actions or omissions of a rescuer attempting to save another's life are not considered negligent merely because of the inherently greater risk associated with rescue.[247] A reasonable rescue results if the rescuer's acts or omissions do not constitute "gross negligence, willful, or wanton misconduct."[248]

    a. If you find that the plaintiff's acts or omissions during the rescue attempt were reasonable, then you must award the plaintiff full recovery of damages sustained as a result of the rescue.
    b. If you find that the plaintiff's actions associated with the rescue were not reasonable—that the actions amounted to gross negligence, willful, or wanton conduct—then you must apply the principles of comparative negligence set forth in the following instruction.

3. "[T]he law makes special provision for persons who respond to an urgent need for rescue in order to protect the life or limb of another. Therefore, if Plaintiff is a rescuer, you should not find that his/her engaging in rescue

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244. *Bridges*, 769 P.2d at 637.
245. *See id.* at 638.
246. Wagner v. Int'l Ry., 133 N.E. 437, 437 (N.Y. 1921).
247. *See Furka*, 755 F.2d at 1088.
248. S.C. CODE ANN. § 15-10-310 (2005 & Supp. 2006).

efforts was negligent in any way unless you find that Plaintiff's conduct in undertaking these rescue efforts was done in bad faith or involved gross recklessness or wilful and wanton misconduct."[249]

VI. CONCLUSION

The rescue doctrine promotes selfless bystanders' efforts to aid in the preservation of human life. If confronted with whether comparative negligence subsumes the rescue doctrine, a South Carolina court would be wise to follow the courts of Georgia, Kansas, Missouri, and Rhode Island and hold that rescuers should not be considered negligent unless their actions are reckless.[250]

South Carolina's Good Samaritan Statute indicates the high value the state places on rescue attempts by innocent bystanders. Subjecting a rescuer to two different standards of care would lead to a judicially inconsistent result. In addition to the Good Samaritan Statute, prior to comparative negligence, the South Carolina Supreme Court indicated the importance of judicial consistency and foreseeability of rescue in *Brown*.[251] While not binding, but certainly persuasive, the Fourth Circuit also held that rescue is to be encouraged and comparative negligence only applies if the rescuer's actions are reckless.[252]

Therefore, in an effort to create a judicially sound decision consistent with the legislative intent of the Good Samaritan Statute, South Carolina courts should hold that comparative negligence does not apply to the rescue doctrine unless the rescuer's acts or omissions constitute gross negligence, or willful or wanton misconduct.

Yasamine J. Christopherson

249. Hubbard, *supra* note 102, at 21.

250. *See* Lorie v. Std. Oil Co., 368 S.E.2d 765, 767 (Ga. Ct. App. 1988); Bridges v. Bentley, 769 P.2d 635, 640 (Kan. 1989); Allison v. Sverdrup & Parcel & Assocs., 738 S.W.2d 440, 454 (Mo. Ct. App. 1987); Ouellette v. Carde, A.2d 687, 690 (R.I. 1992).

251. Brown v. Nat'l Oil Co., 233 S.C. 345, 357, 105 S.E.2d 81, 87 (1958).

252. Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085, 1088–89 (4th Cir. 1985), *rev'd on other grounds*, 824 F.2d 330, 331–32 (4th Cir. 1987).