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Torts -- Insulating Negligence in North Carolina

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"Any effort to reconcile the North Carolina law on the subject of insulating negligence seems futile."[1] A study of the North Carolina cases on this subject at best leads one to agree with the somewhat kinder criticism of Chief Justice Stacy that the problem "is usually fraught with some knottiness."[2]

The practicing attorney faces the problem of insulating negligence when his client has received injury at the hands of two negligent parties. The first party (hereafter referred to as the first tortfeasor) in most cases has by his nonfeasance created a possible danger to the plaintiff, *e.g.,* emission of proper safeguards to warn of obstructions in the road. In other cases the first tortfeasor may have caused injury to the plaintiff as a result of his active negligence, *e.g.,* excessive speed. The second negligent party (hereafter referred to as the "insulator") is invariably guilty of active negligence and his negligence is second in point of time.

In a typical fact situation, the first tortfeasor abandons a stalled vehicle on the highway at night, without adequate flares. The insulator, with plaintiff as a passenger, travels at an excessive rate of speed and fails to see the stalled vehicle in time to avoid a collision. Even though both parties are negligent and both therefore wrong the plaintiff, the probable result in North Carolina would be insulation of the negligence of the first tortfeasor by the negligence of the insulator, and consequent release of the first tortfeasor from liability to the plaintiff. Thus, unfortunately for the injured plaintiff, a party contributing to his injury is relieved of liability.

It would of couse be unrealistic to expect the law to be so well defined that an attorney could look at a set of facts and tell at a glance whether the court will rule that the negligence of the first tortfeasor is insulated, but it is contended that an attorney should be able to predict with reasonable certainty which rationale the court will pursue. Therefore, it is the purpose of this note to resolve to some degree of predictability the course of reasoning which the court will follow in a given set of operative facts.

Cases of Passive Negligence on the Part of the First Tortfeasor and Active Negligence on the Part of the Insulator

Clearly the most lenient case for the plaintiff who is attempting to hold the first tortfeasor for damages was the early case of *White v. Carolina Realty Co.*,[3] where the first tortfeasor's truck was negligently

[1] Cronenberg v. United States, 123 F. Supp. 693, 699 (E. D. N. C. 1954).
[2] Butner v. Spease, 217 N. C. 82, 85, 6 S. E. 2d 808, 810 (1940).
[3] 182 N. C. 536, 109 S. E. 564 (1921).

parked at an intersection. There was evidence of fog and also evidence of negligence on the part of the alleged insulator, who, with plaintiff a passenger, collided with the first tortfeasor's truck. The court held that the first tortfeasor could not be released from liability "if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant . . . because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause be attributable to another or others."[4] This case is often quoted and was held controlling in two early cases.[5] Although the court has ceased to be this liberal, it has required that the trial court must charge the jury that the second actor's negligence must totally supersede the negligence of the first tortfeasor as the proximate cause of injury in order to insulate, relying on the *White* case as the authority.[6]

It is submitted that the court reached the logical result in the *White* case in that it would not allow "two wrongs to make a right" by refusing to release the first tortfeasor from liability to the plaintiff. However, on facts similar to the *White* case—(1) the evidence revealing that the first tortfeasor has by his nonfeasance created a possible danger to the plaintiff, and (2) there being no evidence that ths peril was recognized by the insulator or any other party similarly situated as the insulator—the court has in the majority of the later cases insulated the first tortfeasor's passive negligence and deemed the insulator's conduct active negligence subsequently operating. To understand this position it is necessary to review the line of decisions giving rise to this rationale.

In *Herman v. Atlantc Coast Line R.R.*,[7] where the plaintiff's evidence of the speed of the insulator's automobile revealed that his negligence was gross and palpable, the court introduced the works of Wharton on *Negligence*[8] as being pertinent: "I am negligent on a particular subject matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a

[4] *Id.* at 538, 109 S. E. at 565.

[5] Earwood v. Southern Ry., 192 N. C. 27, 30, 133 S. E. 180, 181 (1926) (evidence of excessive speed of first tortfeasor's locomotive and evidence of no warning signals at railroad crossing; insulator, with plaintiff a passenger, guilty of excessive speed); Albritton v. Hill, 190 N. C. 429, 431, 130 S. E. 5, 6 (1925) (first tortfeasor left culvert open, unguarded, and without warning lights; insulator, with plaintiff a passenger, guilty of excessive speed).

[6] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943); Hanes v. Southern Public Utilities Co., 191 N. C. 13, 19, 131 S. E. 402, 405 (1926).

[7] 197 N. C. 718, 150 S. E. 361 (1929) (First tortfeasor was a railroad company. There was omission of warning signals at crossing. Insulator's car, with plaintiff a passenger skidded 90 feet before the collision and plaintiff's own witness testified it "hit and reared up like a bucking horse.")

[8] WHARTON, NEGLIGENCE 138 (1874).

nonconductor and insulates my negligence. . . ."[9] The court also quoted from the opinion of Justice Strong in the leading United States Supreme Court case of *Milwaukee and St. Paul Ry. v. Kellogg*[10] as applying the same rule, seemingly emphasizing Justice Strong's requirement of a definite causal connection, without comment on his oft-quoted requirement that the injury "ought to have been foreseen in the light of the attending circumstances."[11] In *Hinnant v. Atlantic Coast Line R. R.*,[12] the *Herman* case was cited as standing for the rule that the first tortfeasor is not required to foresee the negligence of the insulator where the latter's negligence in palpable and gross.[13] Subsequently, the *Herman* and *Hinnant* cases were used as authority for the cryptic statement, "In any event, the negligence of the defendant [first tortfeasor] if any, was only passive, while that of the driver of the automobile [insulator] was active, and must be regarded as the sole, proximate cause of the plaintiff's intestate's death."[14] The court in *Haney v. Lincolnton*[15] gave Wharton and Justice Strong as the authorities on insulating negligence without extra comment and actually decided the case with the statement: "This doctrine of insulating the conduct of one, even when it amounts to inactive negligence, by the intervention of the active negligence of a responsible third party, has been applied in a number of cases,"[16] and cited the above line of cases. The *Haney* case set the stage for the pat decisions that where the negligence of the first tortfeasor was passive and would have done no injury to the plaintiff but for the subsequent active act of the insulator, the first tortfeasor's negligence is insulated. In these cases, the court quotes from Wharton and Strong, but gives only cursory reference, if any, to the latter authority's requirement of foreseeability.[17]

[9] Herman v. Atlantic Coast Line R. R., *supra* note 7 at 719, 150 S. E. at 362.
[10] 94 U. S. 469, 475 (1876).
[11] *Ibid.*
[12] 202 N. C. 489, 493, 163 S. E. 555, 557 (1932) (first tortfeasor a railroad company; visible railroad crossing sign at top of hill; no warning signals of approaching train; insulator, with plaintiff a passenger, guilty of excessive speed).
[13] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943) expressly overruled any inference that might be drawn from the *Herman* case, *supra* note 7, that the negligence of the insulator *must be* palpable and gross in order to insulate the first tortfeasor's negligence.
[14] Baker v. Atlantic Coast Line R. R., 205 N. C. 329, 333, 171 S.E. 342, 344 (1933) (first tortfeasor a railroad company, negligence consisted of failure to light stone pillar in middle of underpass beneath railroad's tracks; insulator asleep at wheel with plaintiff a passenger).
[15] 207 N. C. 282, 176 S. E. 573 (1934) (first tortfeasor a municipality, negligently failed to light intersection to show where street ended; insulator, with plaintiff a passenger, failed to make proper turn and went into ravine at end of street); Note, 13 N. C. L. Rev. 245 (1935).
[16] *Id.* at 287, 176 S. E. at 576.
[17] Goodwin v. Nixon, 236 N. C. 632, 642, 74 S. E. 2d 24, 31 (1953); Clark v. Lambeth, 235 N. C. 578, 584, 70 S. E. 2d 828, 832 (1952); Smith v. Sink, 211 N. C. 725, 728, 192 S. E. 108, 109 (1937).

Three cases which fall into this category but where the foreseeability rationale was applied can possibly be distinguished upon the facts. In *Beach v. Patton,*[18] the plaintiff was standing on the shoulder of the road when hit by the insulator. There the court reasoned that "to hold that the defendant Riddick [first tortfeasor] owed the duty to plaintiff's intestate to foresee that a third person would operate a car in such a negligent manner as to be compelled to drive out onto the shoulder of the highway in order to avoid a collision with a car [first tortfeasor's] *parked on the opposite side thereof,* [italics supplied] and thereby strike a person standing on the shoulder would not only 'practically stretch foresight into omniscience' . . . but would, in effect, require the anticipation of 'whatsoever shall come to pass.' We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty."[19] In the other two cases where the theory of the *Haney* case was not applied,[20] the first tortfeasor had clearly by his nonfeasance created a hazard. There were no lights or warnings of any kind and no conclusive evidence that other persons similarly situated as the insulator had seen the hazard. It was held that injury under such circumstances was foreseeable and the first tortfeasor was not released from liability. It is suggested that the facts of these two cases were such that injury was not merely foreseeable but was most probable.

The court has invariably approved insulation where the circumstances reveal that a person similarly situated as the insulator has recognized the possible danger, and the insulator, for such reasons as failure to keep a proper lookout, negligently attempting to pass, or excessive speed, failed to recognize the danger in time to avoid the collision. In the leading case on this type of collision, *Powers v. Sternberg,*[21] Chief Justice Stacy drew on a Pennsylvania case[22] for his authority: "Where a second actor has become aware of the existence of a potential danger created by the original tortfeasor, and thereafter by an independent act of negligence, brings about an accident, the first tortfeasor is relieved of liability, because the condition created by him was merely a circum-

[18] 208 N. C. 134, 179 S. E. 446 (1935).

[19] *Id.* at 136, 179 S. E. at 448.

[20] Price v. City of Monroe, 234 N. C. 666, 6 S. E. 2d 283 (1951) (first tortfeasor had no lights whatsoever to warn of open ditch across city street; insulator, with plaintiff a passenger, guilty of failure to keep a proper lookout); Gold. v. Kiker, 216 N. C. 511, 5 S. E. 2d 548 (1939) (first tortfeasor a construction company; omission of duty to warn by lights that bridge was 4 feet narrower than highway; insulator, with plaintiff a passenger, guilty of failure to keep a proper lookout).

[21] 213 N. C. 41, 195 S. E. 88 (1938) (The first tortfeasor's truck was parked partially in the insulator's line of traffic. The road was icy and there were several other cars parked off the highway on the shoulder of the road. The insulator, with plaintiff a passenger, was guilty of excessive speed.)

[22] Kline v. Moyer and Albert, 325 Pa. 357, 364, 191 Atl. 43, 46 (1937).

stance of the accident and not its proximate cause."[23] This requirement does not seem to be one of actual awareness but constructive knowledge is sufficient—"Every appearance indicated that he was running into a zone of danger which he [the insulator] must have seen. Others saw it, if he did not."[24] Therefore, "His was not the 'normal response' of a reasonably prudent man to the circumstances as they appeared."[25] The ultimate issue in these cases seems to be the court's interpretation of the duty owed to the plaintiff. If the evidence reveals that the danger created by the first tortfeasor has been recognized by a person in a similar position as the insulator, then the first tortfeasor's duty to the plaintiff is fullfilled because the insulator is in a sense contructively aware of the danger and can cause injury to the plaintiff only by an independent act of negligence.[26]

Where it is clear that the insulator has become *actually* aware of the potential danger caused by the first tortfeasor and has then negligently gone forward into the recognized zone of danger, the court has sustained a demurrer,[27] or entered a nonsuit on the pleadings,[28] even before the *Sternberg* case.

Where there was no evidence of gross negligence on the part of the insulator or no evidence that a person similarly situated as the insulator recognized the possible peril, or no evidence that the insulator recognized the danger and then negligently went forward into the zone of danger, the court has applied the doctrine of concurrent negligence. This was the view taken by a federal court in North Carolina,[29] relying on the following principle from *Caulder v. Gresham:*[30] "Where the second actor does not become apprised of such danger until his own negligence added

[23] Powers v. Sternberg, 213 N. C. 41, 44, 195 S. E. 88, 90 (1938).
[24] *Id.* at 43, 195 S. E. at 89.
[25] *Id.* at 44, 195 S. E. at 90.
[26] Smith v. Grubb, 238 N. C. 665, 78 S. E. 2d 598 (1953); McLaney v. Motor Freight Inc., 236 N. C. 714, 74 S. E. 2d 36 (1953) (The first tortfeasor's truck was parked in insulator's line of traffic. Insulator, with plaintiff a passenger, was following a preceding vehicle too closely and failed to see the parked truck after the preceding vehicle pulled out to the left to avoid hitting the parked truck.); Reeves v. Staley, 220 N. C. 573, 584, 18 S. E. 2d 239, 247 (1942) ("Further, the evidence shows that every appearance indicates that Saxton [insulator] was running his Ford into a zone of danger which he should have seen, and which others similarly situated did see, if he did not, and that he failed to see the obvious."); Murray v. Atlantic Coast Line R.R., 218 N. C. 392, 11 S.E. 2d 326 (1940).
[27] Peoples v. Fulk, 220 N. C. 635, 18 S. E. 2d 147 (1942).
[28] George v. Atlanta and Charlotte Airline Ry., 207 N. C. 457, 177 S. E. 324 (1934) (The complaint alleged in effect that upon observing the oncoming locomotive, the insulator then negligently attempted to cross the tracks.); Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928).
[29] Cronenberg v. United States, 123 F. Supp. 693, 699 (E. D. N. C. 1954) (First tortfeasor parked mail truck in insulator's line of traffic with improper flares. Insulator, with plaintiff a passenger, did not see the mail truck in time to avoid colliding with it. There was no conclusive evidence of excessve speed on the part of the insulator.)
[30] 224 N. C. 402, 404, 30 S. E. 2d 312, 313 (1944).

to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tortfeasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

Cases of Active Negligence on the Part of Both the First Tortfeasor and the Insulator

A typical example of the cases where both parties are actively negligent is where the first tortfeasor is traveling at excesive speed and the insulator suddenly comes out of a side road without stopping at a stop sign. The court is more apt to emphasize the foreseeability aspect of insulating negligence in such situations. The leading case on the requisite of foreseeability is *Harton v. Forest City Telephone Co.*[31] where the "test . . . is whether the intervening act and resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."[32] This test plus the application of Justice Strong's ruling in the *Kellogg* case resulted in the holding of *Butner v. Spease:*[33] "It does not appear that the collision . . . was the natural and probable consequence of Butner's [first tortfeasor] negligence, or wrongful act, or that it ought to have been foreseen in the exercise of reasonable prevision or in the light of the attending circumstances."[34] In the *Butner* case the insulator suddenly turned across the path of the automobile of the first tortfeasor, whose negligence consisted of excessive speed. The *Butner* case has also been relied upon for *overruling* the requirement that the insulator's negligent conduct must be palpable and gross, "the test is not to be found merely in the degree of negligence of the intervening agency, but in its character—whether it is of such extraordinary nature as to be unforeseeable."[35]

This foreseeability doctrine was applied again in *Warner v. Lazarus,*[36] "In the light of the circumstances disclosed by this record, we do not think the driver of the Lazarus car [first tortfeasor] 'ought to have foreseen in the exercise of reasonable prevision' that the plaintiff or some other person might be injured as a result and probable consequence of her act in slowing down her car."[37]

[31] 141 N. C. 455, 54 S. E. 299 (1906).
[32] *Id.* at 463, 54 S. E. at 302.
[33] 217 N. C. 82, 6 S. E. 2d 808 (1940).
[34] *Id.* at 89, 6 S. E. 2d at 812.
[35] Rattley v. Powell, 223 N. C. 134, 136, 25 S. E. 2d 448, 450 (1943). See note 13 *supra.*
[36] 229 N. C. 27, 47 S. E. 2d 496 (1948) (The first tortfeasor slowed down rapidly as she approached a parked car where plaintiff was changing a tire. The plaintiff and his car were completely off the highway. The insulator was following the first tortfeasor. The insulator's regular brakes were defective and he applied his handbrakes to avoid hitting the first tortfeasor, thus skidding off the highway into the plaintiff.)
[37] *Id.* at 31, 47 S. E. 2d at 499, relying on *Butner v. Spease, supra* note 33;

It can be said that, as to the collision between two active tortfeasors, the court will very probably rely upon the foreseeability doctrine of *Butner v. Spease* and insulate the negligence of the first tortfeasor if the negligence of the insulator is so extraordinary as to be unforeseeable, or if the negligence of the first tortfeasor would not reasonably of itself tend to bring harm to the plaintiff or others.

Where the negligence of the first tortfeasor has continued to be a causal factor in the ultimate injury to the plaintiff, *i.e.,* beyond the point of the original collision (between the two tortfeasors), the court has arrived at refreshing consistency in holding that the first tortfeasor is not relieved from liability to the plaintiff,[38] reasoning that "the superseding act must so intervene as to exclude the negligence of the defendant [first tortfeasor] as one of the proximate causes of the injury."[39] Therefore if it can be shown that the first tortfeasor's negligence, *i.e.,* excessive speed, failure of brakes or other essential safeguards, was the proximate factor in the first tortfeasor failure to avert further injury to the plaintiff after the initial collision, it is reasonably safe to assume that the first tortfeasor's liability to the plaintiff will not be insulated.

It is submitted that the court's variance in rationale will not permit an ascertainable rule which will apply to every situation in determining insulation,[40] although it does reach a reasonable degree of consistency when the decisions are viewed in the light of similar factual situations. In the cases of passive negligence on the part of the first tortfeasor and active negligence on the part of the insulator, the court will very probably insulate the passive negligent act, relying upon either (1) the reasoning of the *Haney* decision that the passive negligence would have done

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accord, Loving v. Whitton, 241 N. C. 273, 84 S. E. 2d 919 (1955) (First tortfeasor did not have to foresee that the insulator would fail to stop at stop sign.); *cf.* Hollifield v. Everhart, 237 N. C. 313, 74 S. E. 2d 706 (1953) (failure to frame adequate causal relationship in the complaint).

[38] Alridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954) (The insulator turned across the path of the first tortfeasor's vehicle. After the initial impact, the first tortfeasor's vehicle because of excessive speed veered across the road, travelled down a ditch, jumped an embankment and struck the plaintiff.); Dickson v. Queen City Coach Co. and Chappell v. Queen City Coach Co., 233 N. C. 167, 63 S. E. 2d 297 (1951) (After the initial impact, the first tortfeasor's bus, with plaintiffs as passengers, veered across the highway and down an eight foot embankment. There was evidence that the driver could have stopped the bus by proper application of the hand brake.); *accord,* Riggs v. Akers Motor Lines and Breeze v. Akers Motor Lines, 233 N. C. 160, 63 S. E. 2d 197 (1951); Mangum v. Atlantic Coast Line R. R., 188 N. C. 689, 125 S. E. 549 (1924).

[39] Riggs v. Akers Motor Lines and Breeze v. Akers Motor Lines, *supra* note 38 at 165, 63 S. E. 2d at 200.

[40] Blair, *Automobile Accidents in North Carolina,* 23 N. C. L. REV. 223, 242 (1945) attributes to Justice Seawell this observation about North Carolina's experience in the field of insulating negligence: "the vacillation of the court . . . reminded him of the man who said his prayer was 'Lord, give me this day my daily opinion and forgive me the one I had yesterday.'"

no injury to the plaintiff but for the subsequent active and independent act of the insulator, or (2) the constructive knowledge requirement of *Powers v. Sternberg*. Where both the first tortfeasor and the insulator are guilty of active negligence, the court very probably apply the foreseeability reasoning of *Butner v. Spease* and insulate the first tortfeasor's active negligent conduct if the act of the insulator is so extraordinary as to be unforeseeable.

And yet, why the different tests for determining liability? Is it not just as logical that a party parking his car on the highway without lights should be charged with a duty to foresee that an injury might occur as it is to charge a party guilty of excessive speed with the duty of foreseeability?

We proceed upon two well founded principles of law; one, foreseeability is an essential element in determining proximate cause; and, two, a negligent actor is liable for injury where his negligence is one of the proximate causes of such injury. The court says, in effect, that in order for the first tortfeasor to be relieved of liability to the plaintiff, his negligence must be insulated as to the proximate cause of the injury. We, therefore, arrive at the logical conclusion that in order for the first tortfeasor's negligence to be insulated as a proximate causal factor in the injury to the plaintiff, the alleged insulating act must be an unforeseeable act. Yet our review of the decisions has shown the foreseeability principle omitted in some cases, paid mere lip service in others, and emphasized as the test primarily where both the first tortfeasor and the insulator are actively negligent, but even then confined, in the main, to cases where the acts of the insulator were of extraordinary nature.

It is submitted, therefore, that the requisite of foreseeability should be the test in *all* cases of insulating negligence.

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