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John D. Eller Jr.

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reasonableness. If such a result is desired, it should be left to the legislature.

If North Carolina does not allow a riparian owner to use riparian water on non-riparian land, then it probably will not allow the riparian owner to convey such a right that he does not have.

JAMES A. ALSPAUGH.

Torts—Breach of Contractual Duty as Negligence

The North Carolina Supreme Court has recently affirmed a ruling of the superior court striking portions of a complaint relating to a contract between the defendants and a third party as irrelevant to the issue of actionable negligence.¹ The complaint charged the defendants with negligence in performance of their plumbing contract with the Board of Education of Mecklenburg County, with which the plaintiff had a contract for the general construction work in the erection of a new school building, the same building for which the defendants were to do the plumbing. The plaintiff's cause of action was that defendants performed their contract negligently, resulting in broken water lines which flooded the foundations of the building, causing large sections of the walls and underpinning erected by the plaintiff to cave in and break off, and thereby necessitating their repair by the plaintiff.

Upon motion by defendants, allegations in the complaint referring to many sections of the plumbing contract were stricken by the trial court. The plaintiff's appeal challenged the striking of these allegations. In affirming this ruling, the Court recognized that in an action for negligence it is competent to allege and prove the existence of a contract for the purpose of showing the relationship of the parties out of which arises the common law duty to use ordinary care, but held that it is not competent to allege specific terms of the contract as a standard for measuring the defendant's conduct.²

There is a liberal doctrine in North Carolina whereby an injured plaintiff may sue in tort for damages caused by the defendant's breach of a contract, even though the plaintiff is not a party thereto.³ The plaintiff was allowed to sue for breach of contract as a third party beneficiary in the case of *Gorrell v. Water Supply Co.*,⁴ where the complaint alleged a contract between the defendant, the Greensboro Water Supply Co., and the City of Greensboro for furnishing the city with water for

¹ *Pinnix v. Toomey*, 242 N. C. 358, 87 S. E. 2d 893 (1955).

² *Id.* at 363, 87 S. E. 2d at 898.

³ *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Bond & Willis v. Hilton*, 44 N. C. 308 (1853); *Robinson v. Threadgill*, 35 N. C. 39 (1851).

⁴ 124 N. C. 328, 32 S. E. 720 (1899). See *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220 (1912); *Guardian Trust Co. v. Fisher*, 200 U. S. 57 (1905).

the use of its citizens and with sufficient force at all times to protect the inhabitants of the city against loss by fire. Further allegations were that a fire was started in a building some thirty feet from the plaintiff's storeroom; that the fire company was prompt in answering the alarm, and could easily have extinguished the fire in time to save the plaintiff's property, but was unable to do so for the reason that the defendant did not supply water with sufficient pressure as it had agreed to do in the contract. A demurrer to this complaint on the ground that the plaintiff was neither a party nor privity to the contract was overruled, and this was upheld on appeal. The court observed that the object of the contract was the benefit and comfort of the citizens of Greensboro, in comparison to which the benefit of the city, the nominal contracting party, would be small and would not justify the grants, concessions, privileges, benefits and payments made to the defendant. It was further reasoned that the protection of private as well as public property was in the contemplation of the parties to the contract, and therefore the plaintiff could maintain an action for its breach. The Court admitted that the majority of decisions in point up to that time had been decided *contra*, but declared that it should adopt "that line (of reasoning) which is most consonant with justice and the 'reason of the thing.'"⁶

Two years later, upon substantially the same facts, the question was squarely raised whether the injured party should recover in tort or in contract.⁶ The jury found that the defendant had breached its contract with the city and that the plaintiff had been injured by the negligence of the defendant. The trial court entered judgment for damage as upon breach of contract, to which the plaintiff excepted and appealed, claiming that under section 1255 of The Code,⁷ an execution issued upon a judgment founded on an action of tort has superior advantages in its enforcement over an execution issued upon a judgment founded upon contract. Although this contention of the plaintiff was not passed upon, the Supreme Court held that the plaintiff was entitled to judgment for damage done him by the negligence of the defendant, as prayed for, since the plaintiff had stated facts out of which arose an obligation, its breach by the defendant, and the resulting damage to the plaintiff.⁸ Later North Carolina cases have strongly affirmed this position.⁹

⁶ *Id.* at 335, 32 S. E. at 722.

⁷ *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912 (1901).

⁸ N. C. GEN. STAT. § 55-44 (1950), which provides: "Mortgages, deeds of trust or other conveyances upon condition of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in the courts of the State against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured."

⁹ 128 N. C. at 378-79, 38 S. E. at 914.

⁹ *Brown v. Bowers Construction Co.*, 236 N. C. 462, 73 S. E. 2d 147 (1952); *Canestrine v. Powell*, 231 N. C. 190, 56 S. E. 2d 566 (1949); *Powell v. Wake*

Another instance of breach of contract in which a party to the contract is liable in tort to one not a party thereto may be found in the telegraph "mental anguish" cases, where the addressee seeks to recover from the telegraph company for its negligent failure to properly transmit and deliver a message. North Carolina allows recovery upon this basis in the case of intrastate messages;¹⁰ however, where interstate messages are involved, the federal rule governs, and no recovery is allowed for mental anguish.¹¹

A telegraph company is a quasi public corporation, and, as such, the law implies duties upon it for the benefit of the public.¹² It is required to receive, and promptly transmit and deliver with reasonable care¹³ all messages tendered in good faith.¹⁴

Thus we see the recognition of the availability of a tort action in cases of breach of contract. This provides persons who would usually have no standing to recover on the contract itself with a means of recoupment for damage caused to them by the defendant's conduct.

But this recognition may be important to persons who are parties to the contract as well as to those who are not. An illustration of this

Water Co., 171 N. C. 290, 88 S. E. 426 (1916); Morton v. Washington Light and Water Co., 168 N. C. 582, 84 S. E. 1019 (1915); Orinoco Supply Co. v. Shaw Brothers Lumber Co., 160 N. C. 428, 76 S. E. 273 (1912); Helms v. Telegraph Co., 143 N. C. 386, 55 S. E. 831 (1906); Jones v. Water Co., 135 N. C. 553, 47 S. E. 615 (1904); Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363, 42 S. E. 858 (1902).

¹⁰Russ v. Western Union Telegraph Co., 222 N. C. 504, 23 S. E. 2d 681 (1942); Gibbs v. Western Union Telegraph Co., 196 N. C. 516, 146 S. E. 209 (1928); Waters v. Western Union Telegraph Co., 194 N. C. 188, 138 S. E. 608 (1927); LeHue v. Western Union Telegraph Co., 174 N. C. 332, 93 S. E. 843 (1917); Smith v. Western Union Telegraph Co., 168 N. C. 515, 84 S. E. 796 (1915).

¹¹Ward v. Western Union Telegraph Co., 226 N. C. 175, 37 S. E. 2d 123 (1946); Gibbs v. Western Union Telegraph Co., 196 N. C. 516, 146 S. E. 209 (1928); Johnson v. Western Union Telegraph Co., 175 N. C. 588, 96 S. E. 36 (1918); Askew v. Western Union Telegraph Co., 174 N. C. 261, 93 S. E. 773 (1917); Norris v. Western Union Telegraph Co., 174 N. C. 92, 93 S. E. 465 (1917). In the first case in which recovery was allowed in North Carolina, the Court said that the action was in reality in the nature of tort for negligence, and that the plaintiff was entitled to recover compensation for actual damage done him, and that mental anguish was actual damage. Young v. Western Union Telegraph Co., 107 N. C. 370, 11 S. E. 1044 (1890).

¹²Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165 (1904); Cashion v. Western Union Telegraph Co., 124 N. C. 459, 32 S. E. 746 (1899).

¹³Barnes v. Postal Telegraph-Cable Co., 156 N. C. 150, 72 S. E. 78 (1911).

¹⁴Cordell v. Western Union Telegraph Co., 149 N. C. 402, 63 S. E. 71 (1908); Cogdell v. Telegraph Co., 135 N. C. 431, 47 S. E. 490 (1904).

In order for a plaintiff to recover for mental anguish caused by failure or delay in delivery, it is essential that it be shown that the telegraph company had knowledge of the urgency and importance of the message. Powell v. Western Union Telegraph Co., 191 N. C. 356, 131 S. E. 762 (1926); LeHue v. Western Union Telegraph Co., 175 N. C. 561, 96 S. E. 29 (1918); Holler v. Western Union Telegraph Co., 149 N. C. 336, 63 S. E. 92 (1908); Suttle v. Western Union Telegraph Co., 148 N. C. 480, 62 S. E. 593 (1908); Darlington v. Western Union Telegraph Co., 127 N. C. 448, 37 S. E. 479 (1900).

may be found in the common carrier field, which furnishes a widely litigated instance of breach of contract giving rise to an action in tort. It would seem that the availability of a tort action would prove highly beneficial when we consider that because of their public character, common carriers have been held to the highest degree of care.

When a common carrier takes into its possession goods for transportation, the law imposes upon the carrier the duty 1) to transport the goods safely, and 2) to deliver them within a reasonable time.¹⁵ Therefore, upon showing delivery of the goods to the carrier in good condition, and their delivery to the consignee in bad condition, the plaintiff has made out a *prima facie* case of negligence on the part of the carrier.¹⁶ Herein lies one advantage of a tort action in such cases.

The obligations that are assumed by a carrier as to passengers are to transport them safely and reasonably swiftly to their destination. Again, if these obligations are breached by the negligence of the carrier, the injured party may sue for breach of contract, or may sue in tort. Here, too, the passenger is aided in a tort action against the carrier for injuries caused by the negligence of the carrier in that, upon a showing that the injury was received without fault on the part of the plaintiff, in consequence of the breaking or failure of the vehicle, roadway, or other appliances owned or controlled by the carrier in making the transit, the plaintiff has made out a *prima facie* case, which the carrier must rebut.¹⁷

In making a choice of remedies, another major factor is the question of damages. Generally, an action in tort will prove more advantageous in this respect, as it will permit a greater recovery. Damages recoverable in an action for breach of contract are usually such as may reason-

¹⁵ *Holmes v. East Carolina R. R.*, 186 N. C. 58, 118 S. E. 887 (1923); *Bivens v. Atlantic Coast Line R. R. Co.*, 176 N. C. 414, 97 S. E. 215 (1918); *Forrester v. Southern R. R. Co.*, 147 N. C. 553, 61 S. E. 524 (1908).

At common law, in the absence of a special contract, the liability of a common carrier for the loss of or injury to property is practically that of an insurer, exceptions being damage or loss caused by an act of God, acts of the public enemy, negligence of the shipper, and the inherent nature of the goods. *American Cigarette and Cigar Co. v. Garner*, 229 N. C. 173, 47 S. E. 2d 854 (1948); *Merchant v. Lassiter*, 224 N. C. 343, 30 S. E. 2d 217 (1944); *Moore v. Southern R. R. Co.*, 183 N. C. 213, 111 S. E. 166 (1922); *Morris v. American Ry. Express Co.*, 183 N. C. 144, 110 S. E. 855 (1922); *Perry v. Seaboard Air Line Ry. Co.*, 171 N. C. 158, 88 S. E. 156 (1916); *Harrell v. Owens*, 18 N. C. 273 (1835).

¹⁶ *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416 (1926); *Precythe v. Atlantic Coast Line R. R. Co.*, 230 N. C. 195, 52 S. E. 2d 360 (1949); *Fuller v. Virginia and Carolina Southern R. R. Co.*, 214 N. C. 648, 200 S. E. 402 (1938); *Edgerton v. Southern R. R. Co.*, 203 N. C. 281, 165 S. E. 689 (1932); *Moore v. Southern R. R. Co.*, 183 N. C. 213, 111 S. E. 166 (1922); *Bivens v. Atlantic Coast Line R. R. Co.*, 176 N. C. 414, 97 S. E. 215 (1918); *Mitchell v. Carolina Central R. R. Co.*, 124 N. C. 236, 32 S. E. 671 (1899).

¹⁷ *Humphries v. Queen City Coach Co.*, 228 N. C. 399, 45 S. E. 2d 546 (1947); *Lindsey v. Atlantic Coast Line R. R. Co.*, 173 N. C. 390, 92 S. E. 166 (1917); *McCord v. Atlanta & C. Air Line R. R. Co.*, 134 N. C. 53, 45 S. E. 1031 (1903); *Lambeth v. North Carolina R. R. Co.*, 66 N. C. 494 (1872).

ably be supposed to have been in the contemplation of the parties when the contract was made,¹⁸ whereas in an action of personal injury resulting from the defendant's negligence, the plaintiff is entitled to recover the present worth of all damages sustained in consequence of the defendant's tort.¹⁹ In proper cases it is possible to recover punitive damages²⁰ and damages for mental suffering²¹ in tort actions, while they are not usually allowed in actions for breach of contract.²²

Many attempts have been made to define the areas of tort liability and liability upon contract, one of the most common of which is upon the basis of misfeasance and nonfeasance, the acting negligently and the complete failure to act. However, the line between the two is sometimes difficult to draw, as in some instances there may be tort liability in cases of nonfeasance. In these cases there is a duty to act, independent of the contract; thus a carrier is bound to furnish transportation facilities for freight;²³ a telegraph company is bound to receive and transmit messages tendered in good faith;²⁴ and an innkeeper is bound to provide suitable accommodations for his guests.²⁵

Although the writs have been swept away, and there is now only one form of civil action,²⁶ some of their difficulties of application still remain. Perhaps it was well said that "when the ghosts of case and assumpsit walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland in which they may lose themselves."²⁷

JOHN D. ELLER, JR.

¹⁸ Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953); Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949); Meier v. Miller, 229 N. C. 243, 49 S. E. 2d 396 (1948); Price v. Goodman, 226 N. C. 223, 37 S. E. 2d 592 (1946); Troitino v. Goodman, 225 N. C. 406, 35 S. E. 2d 277 (1945); Chesson v. Keickheffer Container Co., 216 N. C. 337, 4 S. E. 2d 886 (1939).

¹⁹ Mintz v. Atlantic Coast Line R. R. Co., 233 N. C. 607, 65 S. E. 2d 120 (1951); Helmstetter v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1944); Lane v. Southern R. R. Co., 192 N. C. 287, 134 S. E. 855 (1926); Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922).

²⁰ Horton v. Carolina Coach Co., 216 N. C. 567, 5 S. E. 2d 828 (1939); Purcell v. Richmond and Danville R. R. Co., 108 N. C. 414, 12 S. E. 954 (1891).

²¹ Sparks v. Tennessee Mineral Products Corp., 212 N. C. 211, 193 S. E. 31 (1937); Muse v. Ford Motor Co., 175 N. C. 466, 95 S. E. 900 (1918); Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916); Carmichael v. Southern Bell Telephone and Telegraph Co., 157 N. C. 21, 72 S. E. 619 (1911); Britt v. Carolina Northern R. R. Co., 148 N. C. 37, 61 S. E. 601 (1908); Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906); Bowers v. Telegraph Co., 135 N. C. 504, 47 S. E. 597 (1904).

²² Swinton v. Savoy Realty Co., 236 N. C. 723, 73 S. E. 2d 785 (1952); Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949).

²³ N. C. GEN. STAT. § 60-111 (1950).

²⁴ N. C. GEN. STAT. § 14-371 (1953).

²⁵ N. C. GEN. STAT. § 72-1 (1950).

²⁶ N. C. GEN. STAT. § 1-9 (1953).

²⁷ PROSSER, SELECTED TOPICS ON THE LAW OF TORTS, 452 (1954).