THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John W. Kittredge, Circuit Court Judge

S.C. Court of Appeals
Unpublished Opinion No. 2003-UP-336

Betty Tripp, ... Petitioner,

v.

Patricia Price, David G. Price,
Jeff Harris d/b/a Harris Auto
Reconditioning, Fairway Ford,
Inc., and Binh Nguyen, ... Defendants,

Of Whom
Jeff Harris d/b/a Harris Auto
Reconditioning is the . . . . . Respondent.

RESPONDENT'S BRIEF

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II. DID THE COURT OF APPEALS ERR IN FINDING THAT PETITIONER, AS A MATTER OF LAW, CONCEDED HER APPEAL WHEN SHE FAILED TO ADDRESS IN HER FINAL BRIEF WHETHER THE EMPLOYEE WAS IN FACT NEGLIGENT?

STATEMENT OF THE CASE

This action involves an automobile accident between Patricia Price and Petitioner, Betty Tripp on February 27, 2000. Petitioner instituted this action on December 28, 2000 alleging that defendants, including Respondent, Jeff Harris d/b/a Harris Auto Reconditioning, were vicariously liable for the accident under a theory of *respondeat superior* and/or liable for the accident under theories of negligent entrustment, supervision and/or hiring. Respondent was served with a copy of the summons and complaint and filed a timely answer to the complaint on March 29, 2001. Respondent denied the allegations of the complaint.

On or about August 14, 2001 respondent filed a notice of motion and motion for summary judgment on the grounds that (1) the only conclusion which could be drawn from the evidence developed through discovery was that Petitioner had failed to show any actionable conduct on the part of Jeff Harris d/b/a Harris Auto Reconditioning, (2) that Petitioner had failed to show that any conduct on the part of Jeff Harris d/b/a Harris Auto Reconditioning acted as the proximate cause of the accident and (3) that the accident was caused by conduct on the part of other persons

or entities over whom Jeff Harris d/b/a Harris Auto Reconditioning had no control and for whom he had no responsibility.

The trial court, Circuit Court Judge John W. Kittredge, issued an order granting Respondent's motion. See Order of Circuit Court Judge John W. Kittredge dated September 30, 2001 (R. p. 1-14); See also Transcript of Record, September 20, 2001 (R. p. 55-79). Thereafter, Petitioner timely filed and served a notice of appeal. In an unpublished order filed on May 15, 2003, the Court of Appeals affirmed Judge Kittredge's decision. Petitioner filed a Petition for Rehearing pursuant to Rule 221, SCACR which the Court of Appeals denied in a written order on August 21, 2003. See Appendix p. 1. This Court has granted Petitioner's writ of certiorari to review the Court of Appeal's decision.

Petitioner has abandoned her theories of negligent entrustment, supervision and hiring. Petitioner now only requests that this Court reverse the Court of Appeals and remand this case for a new trial on her claim of vicarious liability. Respondent requests that this Court affirm the Court of Appeals' decision and hold that Respondent's employee was not using the vehicle in question for any employment purpose or to further the business interests of Respondent.

STATEMENT OF FACTS

On Sunday, February 27, 2000, Patricia Price rear-ended the Petitioner's vehicle while driving a Ford Explorer (hereinafter "Explorer") owned by Fairway Ford, Inc. (hereinafter "Fairway"). It is undisputed that Patricia Price was not an employee of Jeff Harris d/b/a Harris Auto Reconditioning (hereinafter "Harris" or "Respondent") on the date of this accident. (R. pp. 160, 173; R. p. 447; R. p. 294). Patricia Price was married to David G. Price, an employee of Harris, and took the

Explorer without the permission or knowledge of Harris or her husband. (R. pp. 447, 460; R. pp. 125, 173; R. pp. 80-83).

As noted above, David Price was employed by Harris at the time of this accident. Respondent provides detailing and reconditioning services and products to automobile dealerships in Greenville, including Fairway Ford, Inc. (R. pp. 80-83). In connection with the reconditioning of those vehicles, Harris owned and operated facilities in Greenville where vehicles from the dealership would be taken, reconditioned and returned. Harris' employees would drive the vehicles to and from the dealership. Id.

David Price was the manager and shop foreman of respondent's location responsible for reconditioning Fairway Ford's vehicles. David Price oversaw the pick-up and delivery of vehicles to and from Fairway Ford. He also was responsible for opening and closing the location every workday. He had authority to operate the vehicles. (R. p. 171; R. pp. 80-83). With the exception of Harris, David Price was the only employee who had keys to the location that serviced Fairway at the time of this accident. (R. pp. 80-83; R. p. 173).

David Price had been an employee of Harris for over 10 years prior to this accident. (R. p. 103). It is undisputed that prior to this accident, David Price had not been involved in any accidents involving a vehicle being reconditioned by Harris. (R. pp. 154-155, 171, 173). He had also never allowed a non-employee to use or operate any vehicle being reconditioned by Harris and was a model employee before this accident. (R. p. 171; R. pp. 247-248, 257). David Price was allowed to operate dealership vehicles to and from his home. However, he rarely used them to travel anywhere else. (R. p. 116). David Price was a licensed driver. (R. p. 172).

David Price removed a Ford Explorer that was to be reconditioned from Harris' premises on Friday, February 25, 2000. David Price used the Explorer on February 25, 2000 to transport a "vac" machine to his home to perform yard work, blowing leaves. (R. pp. 163-164; R. p. 170). His choice of this vehicle and his use of it was for a personal errand wholly unconnected with his employment with Harris. (R. p. 170). The shop was closed the weekend of this accident. (R. p. 120; R. p. 440; R. pp. 243-244). David Price testified that he was not acting on behalf of Harris the weekend of the accident and was not engaged in any activity related to Harris' business on the weekend of the accident. (R. p. 170). The Explorer remained secure at David Price's house during the weekend until taken by his wife. Patricia Price took the Explorer from the driveway of her home while David Price was napping. (R. pp. 421-422). Patricia Price was driving the vehicle on a Sunday, on a personal errand, to and from a convenience store, when the accident occurred. (R. p. 174; R. pp. 423; 463-464).

David Price was specifically instructed by Harris not to allow anyone else, other then Harris employees, to operate the vehicles being reconditioned. (R. p. 169; R. p. 461). Only David Price had permission to drive vehicles to and from work. (R. pp. 247, 255-256; R. p. 116). David and Patricia Price understood that only David could drive the vehicles he brought home from work. (R. p. 169; R. p. 461). It is undisputed that Patricia Price was not given permission or authority to operate the Explorer by David Price, Jeff Harris or anyone at Fairway. (R. pp. 440, 460; R. p. 125; R. pp. 80-83). David Price specifically forbade his wife to drive any vehicle. (R. p. 460; R. pp. 125, 127). He also specifically forbade her from driving any vehicle he brought home from Harris. Id.

Just prior to the weekend of this accident, Patricia Price's medications, for treatment of injuries received in an accident in North Carolina several years before she met David Price, had been changed. This change in her medication caused her to "feel bold and to believe that she could run to the store while David was asleep that Sunday." (R. p. 421). At the time of this accident Patricia Price was taking medication which included Prozac, Xanax, Lortabs, and Roxicodone. (R. pp. 424-425). Patricia Price testified that she was impaired at the time of the accident. (R. pp. 425-426). However, she also testified that she knew when she took the keys that she was not supposed to drive the Explorer or any vehicle and that she did not have permission to do so. (R. pp. 440, 447, 460).

Jeff Harris had no indication that Patricia Price, the wife of his foreman, would take the Explorer. Although Harris had met Patricia Price and was friends with David Price, he was not aware of Patricia Price's medical or driving history and was not friends with Patricia Price. (R. pp. 161-164; R. pp. 239-240, 292-293). David Price and Jeff Harris did not socialize with each other after David Price married Patricia Price. (R. pp. 161-162). The Prices did not socialize with Jeff Harris or his wife. Id. Patricia Price testified that she could not think of any reason why Harris would know what medications she was taking at the time of the accident. (R. pp. 455-456).

ARGUMENT

I. The Court of Appeals correctly held that Harris cannot be vicariously liable for the conduct of David Price because David Price was not acting within the course and scope of his employment or in furtherance of any business interest of Harris when he took the vehicle home and at the time of the accident.

The Respondent will first address the flawed nature of the Petitioner's argument, which, if accepted by the Court, would render any use of a company vehicle by an employee within the course and scope of his employment. The Respondent will then discuss the undisputed facts, not addressed in Petitioner's Brief, that are critical to this Court's review of this matter and which overwhelmingly support the Court of Appeal's decision.

A. The Logic of Petitioner's Argument is Critically Flawed and Contrary to Established Law

Petitioner's argument is flawed and not supported by South Carolina case law. If adopted by this Court, Petitioner's argument would create a legal system wherein any time an employee uses or operates a company vehicle he is automatically acting within the course and scope of his employment, even if he is not acting in furtherance of his employer's business and the act is not necessary to accomplish the purpose of his employment. Respondent submits that any time an employee uses a company vehicle he has a responsibility and a duty, owed to his employer and closely connected to his job security, to keep the vehicle free from damage and/or harm. If this duty, rather than the circumstance under which he is operating the vehicle, is sufficient to render him acting within the course and scope of his employment then there is no situation in which an employee operating a company vehicle or machine is not within the course and scope of his employment. This is the only conclusion to be drawn if this Court accepts the Petitioner's position that the employee's responsibility

for securing the vehicle in this case, to avoid theft, renders him within the course and scope of his employment.

The duty that the petitioner has latched onto is one that inures to the employer. The petitioner has not cited to any law that extends this duty to third parties. Such an extension would work a fundamental alteration of vicarious liability in South Carolina, altering the criteria previously used to determine if an employee is acting within the course and scope of his employment, and rendering use of all company machines and vehicles within the course and scope of employment.

The law in South Carolina, or any other jurisdiction, does not provide that the mere provision of a company vehicle, with the accompanying duty owed to the employer not to damage it, is sufficient to hold that the employee is acting within the course and scope of his employment with regard to his use of the vehicle. The Court of Appeals correctly held that in South Carolina an employer is not responsible for the acts of its employees where the employee is not in the execution of the employer's business but rather is engaged in the servant's own private business. Lane v. Modern Music, 244 S.C. 299, 136 S.E.2d 713 (1964); Wade v. Berkeley County, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (Ct. App. 1998)(quoting South Carolina Insurance Co. v. James C. Greene & Co., 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986)). Whether the employee is within the course and scope of his employment is to be determined from the circumstances of each case. Id. In Lane this Court held:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. If a servant steps aside from the master's business for some

> purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time.

Lane, 244 S.C. at 305, 136 S.E.2d at 716. See also Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 227, 317 S.E.2d 748, 753(Ct. App. 1984)(citations omitted).

The first factor to consider when determining if an employee is within the course and scope of his employment is whether the employee was acting in furtherance of the employer's business when the injury occurred. The second factor to consider is whether the act was reasonable and necessary to accomplish the purpose of his employment. Id. at 304-05, 136 S.E.2d at 716. See also Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 429, 412 S.E.2d 425, 429 (Ct. App. 1991)(citation omitted).

An employer can only be held responsible for the actions of an employee under the doctrine of *respondeat superior* if the relationship of master and servant, or employer and employee, existed between the two at the time of the accident. Id. (emphasis added). If the employee at the time of the accident is not acting with the course and course and scope of his employment then the employer can have no liability. See also, Wade v. Berkeley, 330 S.C. 311, 318, 498 S.E.2d 684 688 (Ct. App. 1998).

Under South Carolina law, it is the purpose and intent of the employee at the time of the negligence that governs whether he is acting in the course and scope of his employment. McAllister v. Graham, 287 S.C. 455, 339 S.E.2d 154, 156 (Ct. App. 1986)(holding that an employee who had an accident while driving a company car to a coffee shop while visiting his son at the hospital, acted outside the scope of his

employment and the employer could not be held liable); See also, Harris v. United States, 718 F.2d 654, 656 (4th Cir.1983)(holding that a soldier not acting in his military role at the time of the accident, did not subject the government to vicarious liability for injuries resulting from an accident he was involved in on his way to a party).

The Petitioner's argument is contrary to the holdings of both McAllister and Harris. In both cases, the court could have held that since the negligent party was operating a company vehicle, and had a duty to keep it secure and free from harm, he was necessarily within the scope and course of his employment with regard to his operation of the vehicle. However, both courts examined the purpose and reason for the employee's use of the vehicle to hold that the employee, although operating a company vehicle and with a duty to his employer to keep it safe, was not acting within the course and scope of his employment. McAllister, 287 S.C. at 456, 339 S.E.2d at 155; Harris, 718 F.2d at 656.

In this case, if David Price were intoxicated and operating the Explorer on Sunday to the grocery store to purchase groceries for his family, under South Carolina law he would not be acting within the course and scope of his employment. Yet petitioner argues that the conduct of someone even more removed from the employer then David Price, who is operating the vehicle on a personal errand, should allow for a finding that this accident was caused by David Price and that his actions occurred within the course and scope of his employment. However, examination of the intent and purpose of the employee's use of the vehicle, rather then a narrow examination of only the duty he owed his employer, is required by law. Such an examination

necessitates a conclusion that as a matter of law David Price was not acting within the course and scope of his employment in the use, or non-use, of the Explorer.

B. The Court of Appeal's Holding is Overwhelmingly Supported by the Facts.

The Court of Appeals' holding was correctly based upon the facts of this case. The facts overwhelming establish that any conduct by David Price that could be argued to have proximately caused this accident did not occur within the course and scope of his employment and were not in furtherance of any business purpose of Respondent.

The Petitioner attempts to narrowly focus the Court upon David Price's securement of the vehicle and ignores the context of David Price's activities at the time of his use of the Explorer and at the time of this accident. As discussed above, the law requires an analysis of the intent and purpose of the employee's use of the vehicle in this case.

The intent and purpose of David Price in utilizing the vehicle Friday evening, and over the weekend, was purely personal. It is undisputed that David Price used the Explorer on Friday, February 25, 2000, to transport a "vac" machine to his home to perform yard work which consisted of blowing leaves and other items. His choice of this vehicle and his use of it was for a personal errand wholly unconnected with his employment with Respondent. The Explorer remained secure and safe at David Price's house during the weekend until taken by his wife without his permission on a Sunday.

Patricia Price took the Explorer on a Sunday while David Price was taking a nap at home and while Respondent's shop was closed. David Price could not have been and was not acting on behalf of Harris during the weekend of the accident and

was not engaged in any activity related to Harris' business. Although, David Price was allowed to operate vehicles to and from his home this fact alone does not render his use of the vehicle at the time of the accident within the course and scope of his employment. This accident did not occur while David Price was travelling to and from work, or pursuing any employment activity, and his use of the Explorer on Friday evening, and Saturday and Sunday, was not related to accomplishing any employment purpose. Further, Patricia Price was driving the vehicle on a personal errand, to and from a convenience store, when the accident occurred.

These facts are the important context ignored by Petitioner by focusing on the argument that David Price, like all employees allowed to use company vehicles, owed a duty to his employer to keep the vehicle safe and secure. Any *respondeat superior* analysis in this case must include consideration of the intent and purpose of David Price's use of the vehicle. At the time of this accident it is undisputed that David Price was not acting with any intent to further any business interest of Respondent and any act or omission on his part in using and securing the Explorer at the time of the accident was not reasonable or necessary to accomplish the purpose of his employment. Accordingly, the facts overwhelmingly support a ruling that as a matter of law David Price was not within the scope and course of his employment.

II. Concession by Petitioner Concerning Negligence by David Price Noted by the Court of Appeals

The Court of Appeals raised *sua sponte* as an alternative and additional argument to support its holding that Petitioner specifically waived and purposefully failed to address the issue of whether David Price was actually negligent and, therefore, the issue was not preserved for appeal. The Court of Appeals cites to a footnote in Petitioner's Final Brief in which Petitioner stated that David Price's

negligence would not be addressed. Petitioner argues that the issue was not addressed because the grounds for the Trial Court's decision did not deal with this issue due to the fact that this issue was not contested during the summary judgment hearing.

Respondent moved for summary judgment on the grounds that (1) the only conclusion which could be drawn from the evidence developed through discovery was that Petitioner had failed to show any actionable conduct on the part of Respondent, (2) that Petitioner had failed to show that any conduct on the part of Respondent acted as the proximate cause of the accident and (3) that the accident was caused by conduct on the part of other persons or entities over whom Respondent had no control and for whom he had no responsibility. Fundamental to the plaintiff's case is the establishment of negligence by David Price.

Petitioner is correct that at the summary judgment hearing there was no argument concerning David Price's negligence because the focus was on whether he was acting within the course and scope of his employment. Respondent's theory was that regardless of what David Price did or failed to do any such conduct did not occur within the course and scope of his employment. However, Petitioner's footnote arguably concedes an issue that renders the issue in this appeal moot. Petitioner need not have conceded this issue but did so voluntarily in her Brief. The Court of Appeals raised the concession in Petitioner's brief, pursuant to Rule 220(c), SCACR, that the negligence of David Price may have been abandoned and noted that it served as an additional ground to affirm the trial court.

CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeal's and the Trial Court's holding that as a matter of law David Price was not acting

within the course and scope of his employment and Respondent cannot be liable in this matter. Pursuant to Rule 220(c), SCACR, Respondent requests that this Court deny the Petitioner her requested relief and affirm the decision of the lower courts for any ground appearing in the record.

Respectfully submitted,

October 1, 2004

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PROOF OF SERVICE

The undersigned, Christopher M. Kelly of the firm of Gallivan, White & Boyd, P.A., attorneys for the Respondent Jeff Harris d/b/a Harris Auto Reconditioning, certifies that on the 1st day of October, 2004, he served three copies of Respondent's Brief, on all counsel of record, by depositing in the United States mail, with due and proper postage affixed thereto, copies of the same addressed to:

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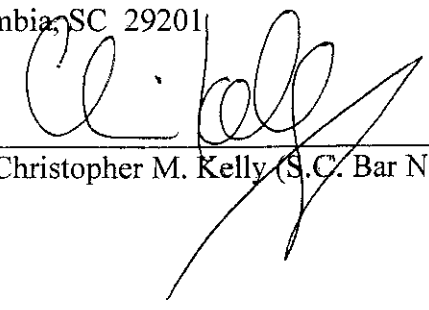

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