ORIGINAL

THE STATE OF SOUTH CAROLINA
in the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2006-CP-26-5391

Don D. Gause, ... Respondent

vs.

Nathan Dale Smithers and Edward W. Hunt
of Whom Edward W. Hunt is ..... Appellant

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This case involves an automobile accident which occurred in Horry County, South Carolina on November 15, 2003. The Plaintiff filed a Summons and Complaint on November 2, 2006. The Defendant, Edward William Hunt, filed his Answer setting forth as defenses a general denial, failure to state facts sufficient to constitute a cause of action, comparative negligence and negligence of others. Also, the Defendant, Edward W. Hunt, filed a Notice of Motion and Motion to Dismiss With Prejudice the Defendant, Edward W. Hunt, on the basis that the Plaintiff's Complaint failed to state a cause of action against him. The Affidavit of Edward W. Hunt was also filed in support of same. The Plaintiff filed an Amended Summons and Complaint adding as a party Defendant, Edward Raymond Hunt. The Defendant, Edward W. Hunt, moved to strike the Amended Summons and Complaint for failure to file the proper Motion to Amend and on the basis that the statute of limitations had run as to the newly added party. An Answer was filed by Edward W. Hunt and Edward Raymond Hunt on February 8, 2007. On February 8, 2007, an additional Notice of Motion and Motion to Dismiss With Prejudice the Amended Summons and Complaint was filed by the Defendant, Edward W. Hunt. After a hearing held on October 24, 2007, by Order dated October 24, 2007, the Motion to Dismiss Edward W. Hunt was denied. An Order Granting the Motion to Dismiss the Defendant, Edward Raymond Hunt, was issued on October 26, 2007. The Plaintiff's Motion for Reconsideration was filed with the Court on November 15, 2007. By Order dated November 28, 2007, the Plaintiff's Motion for Reconsideration was denied. A Notice of Intent to Appeal was filed by Plaintiff on January 9, 2008. The Court of Appeals issued its Opinion on June 16, 2009, upholding the lower court's Order dismissing the Defendant, Edward Raymond Hunt, with prejudice. On April 23, 2010, the Defendant, Edward Hunt, filed a Notice of Motion and Motion for

Summary Judgment. Judge Seals issued a Form Order dated October 10, 2010 and filed on October 12, 2010 denying the Motion for Summary Judgment. The case came for trial before a jury on January 4, 2011 and was concluded on January 6, 2011. The Plaintiff voluntarily dismissed the cause of action for negligent entrustment against Edward William Hunt. At trial, the Plaintiff sought to recover from the Defendant, Edward William Hunt, under the Family Purpose Doctrine. The jury returned a verdict for actual damages against both Defendants in the amount of $155,432.64 as well as punitive damages against the Defendant, Smithers, in the amount of $60,000.00 and punitive damages against the Defendant, Hunt, in the amount of $40,000.00. The Plaintiff moved for a New Trial *Nisi Additur*. The Defendant, Hunt, moved for a new trial on the basis that the Verdict Form that was sent to the jury was in error because included in the caption was Edward Raymond Hunt who was not a party to this action and the body of the Verdict Form referred to the Defendant Hunt several times. Both Motions were denied. Thereafter, on January 11, 2011, the Defendant Hunt filed and served a Notice of Motion and Motion for New Trial. That Motion was denied through e-mail received from the Court on January 18, 2011 and this appeal timely followed. The Notice of Appeal was served on January 20, 2011.

STATEMENT OF FACTS

This action arises out of an automobile accident that occurred on November 15, 2003. Edward Raymond Hunt was pulled over by a South Carolina Highway Patrolman. (T.R. p. 95, ll. 2-7) The Plaintiff, a City of Conway police officer, was called to come to the scene. (T.R. p. 94, ll.3-10) Another City of Conway police officer came to the scene. (T.R. p. 94, ll.11-14) The four cars were in a row in a lane of travel on Highway 501 with the police officers having emergency flashers and blue lights on. (T.R. p. 95, ll.2-7; T.R. p. 100, ll.14-23) The Highway Patrolman left the scene. (T.R. p. 99, ll.3-5) The other City of Conway police officer left the scene with Edward Raymond Hunt in the car. (T.R. p. 98, ll.16-25; T.R. p. 99, ll.1-2) While the Plaintiff was seated in his patrol car, Nathan Dale Smithers ran into the rear of the patrol car. (T.R. p. 101, ll.12-21; T.R. p. 104, ll. 10-18)

At the time of the automobile accident, which is the subject matter of this action, Edward William Hunt, the father of William Raymond Hunt, was at home in bed. (T.R. p. 282, l. 21 - p. 283, l.3) Edward Raymond Hunt was 25 years old at the time of this accident. (T.R. p. 273, l.25- p. 274, l.6) Edward William Hunt was the titled owner of the Firebird that his son, Edward Raymond Hunt, was driving at the time of the accident. (T.R. p. 276, ll. 3-9) Edward Raymond Hunt was purchasing the 1991 Firebird from his father for $700.00. (T.R. p.272, ll. 17-25 and T.R. p. 276, ll. 10-15) Edward Raymond Hunt had paid $200.00 down and had made several other payments. (T.R. p. 276, ll. 10-17, p. 284, ll. 1-9) The title was transferred to Edward Raymond Hunt after the accident. (T.R. p. 276, ll. 18-25) In November of 2003, Edward Raymond Hunt was providing all of the maintenance for the vehicle. (T.R. p. 279, ll. 5-15) At the time of the wreck, Edward Raymond Hunt was living in a motor home next to the home that Edward William Hunt lived in. (T.R. p. 283,

ll. 13 - 21) Also at the time of the wreck, Edward Raymond Hunt had a job. (T.R. p. 283, ll. 22-23) Edward Raymond Hunt was a grown man who Edward William Hunt exercised no control over at the time of this accident. (T.R. p. 284, ll.10-24)

ARGUMENTS

I. THE OWNER OF A VEHICLE CANNOT BE HELD LIABLE UNDER THE FAMILY PURPOSE DOCTRINE AFTER THE DRIVER IS DISMISSED AS A PARTY BECAUSE THE LIABILITY OF THE OWNER AND THE LIABILITY OF THE DRIVER ARE INDIVISIBLE.

The Plaintiff filed suit against the Defendants, Smithers and Edward William Hunt. (T.R. p. 10). Thereafter, the Plaintiff filed an Amended Complaint adding as a Defendant Edward Raymond Hunt the driver of the vehicle that was titled in the name of Edward William Hunt, his father. (T.R. p. 23). A Motion was made to dismiss Edward Raymond Hunt from the suit on the basis that the suit was not filed against him within the statute of limitations. (T.R. p. 31; T.R. p. 38). The Motion was granted. (T.R. p. 41). The Plaintiff appealed the Order and the Court of Appeals upheld that ruling. (T.R. p. 53). The Plaintiff went to trial against Edward William Hunt and Nathan Dale Smithers. The Plaintiff sought to recover against Edward William Hunt on the basis of the Family Purpose Doctrine. (T.R. p. 10) The Plaintiff withdrew the negligent entrustment cause of action before the trial started (T.R., p. 81, ll. 4-9). Edward William Hunt would assert that the Plaintiff cannot recover against him since his son, the driver, was dismissed from the action.

The South Carolina Court of Appeals set aside a default judgment against a mother because the judgment against the child was set aside based on Rule 55, SCRCP, disallowing default judgments against a minor when a guardian ad litem is not appointed, where the mother's sole liability rested on the family purpose doctrine. *Jordan v. Payton*, 305 S.C. 537, 539, 409 S.E.2d 793 (Ct. App. 1991). The Court stated that the liability of the mother under the family purpose doctrine "depends upon the liability of the child." *Id.* "Therefore, the judgment must be valid against both

or it is valid against neither." *Id.* (citing *Johnson v. Atlantic Coast Line R. Co.*, 142 S.C. 125, 133, 140 S.E. 443, 445 (1927)).

Similarly, the Court of Appeals of Georgia has held that the liability of a father and child is indivisible where a child is released from a judgment rendered against him for reasons other than on the merits of the case, such as for lack of sufficient service. *Medlin v. Church*, 157 Ga. App. 876, 878, 278 S.E.2d 747 (1981) (citing *Ammons v. Horton*, 128 Ga.App. 273, 275, 196 S.E.2d 318 (1973)); see also *O'Hara v. Gilmore*, 310 Ga. App. 620, 713 S.E.2d 869 (2011). Once the son was released from judgment for lack of sufficient service, the Court of Appeals of Georgia ordered that the judgment against the father also be reversed since the liability of the father and the son was indivisible. *Id.*

In the current case, Edward Raymond Hunt was dismissed as a defendant in the case because the statute of limitations ran. Once the suit was dismissed as to the son, the suit against the father should have been dismissed. (T.R. p. 41; T.R. p. 53). If the son can no longer be held liable because the statute of limitations has run, the father also cannot be liable because the father's liability depends upon the liability of the son. Since the liability of the son and the father are indivisible and the son has been dismissed as a party to this law suit, the jury verdict against Edward William Hunt should be reversed and Edward William Hunt should be dismissed from the action.

II. THE TRIAL COURT ERRED IN ALLOWING THE CASE TO GO TO THE JURY AGAINST EDWARD WILLIAM HUNT ON THEORY OF THE FAMILY PURPOSE DOCTRINE AS THAT DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE.

Edward Raymond Hunt was 25 years of age at the time of this accident. (T.R. p. 274, ll.4-6) He lived in a motor home on the same property where his father's house was located. (T.R. p. 283, ll.13-21) Edward Raymond Hunt was purchasing the vehicle he was driving at the time of this accident from his father, Edward William Hunt. (T.R. p. 276, ll.10-15) He had paid his father $200.00 as a down payment and had made several additional payments. (T.R. p. 276, ll.10-15) In November of 2003, Edward Raymond Hunt was providing all of the maintenance to the vehicle. (T.R. p.279, ll. 5-15). The Title to the vehicle had not been transferred from Edward William Hunt's name to Edward Raymond Hunt's name at the time of this accident; however, it was transferred three or four months thereafter. (T.R. p. 276, ll.18-25) Edward William Hunt owned his own vehicle at the time of this accident as did his wife and daughter. (T.R. p. 273, ll.23-24; T.R. p. 281, ll.21-24) Edward William Hunt had no reason whatsoever to drive the vehicle which his son, Edward Raymond Hunt, was driving at the time of this accident. (T.R. p. 281, l. 25 - p.282, l. 7) At the time of the wreck, Edward Raymond Hunt had a job. (T.R. p. 283, ll. 22-23). Edward Raymond Hunt was a grown man who Edward William Hunt exercised no control over at the time of the accident. (T.R. p.284, ll. 10-24). Also, on the evening of the accident, Edward Raymond Hunt was not operating the vehicle for any family purpose. He had been to a club at the beach and was returning home when he was pulled over by the police. (T.R. p. 294, ll.9-12; T.R. p. 296, ll.16-19; T.R. p. 297, ll.4-12) Neither of the Hunts were involved in the accident or even at the scene of the accident when it occurred. (T.R. p. 280, ll.1-9)

The family purpose doctrine was created in order to make parents responsible for the actions of their minor children. Under the family purpose doctrine, the head of a household who "owns, furnishes, and maintains a vehicle for the general use and convenience his family" may be held liable for the negligence of a family member who is operating the vehicle for a family purpose. *Thompson v. Michael*, 315 S.C. 268, 433 S.E.2d 853 (1993) (citing *Lucht v. Youngblood*, 266 S.C. 127, 221 S.E.2d 854 (1976)). The family purpose doctrine holds a parent liable when the child is acting as the parent's agent. *Id.* (citing *Norwood v. Coley*, 235 S.C. 314, 111 S.E.3d 550 (1959)). If the parent did not provide the vehicle for the family's general use and convenience, then no principal-agent relationship exists at the time of the accident, and liability cannot be imposed on the parent under the family purpose doctrine. *Id.* Furthermore, the "rationale of the family purpose doctrine is that it serves to place financial responsibility upon the head of the family who is more likely to respond to damages when the family vehicle is used negligently by a person without sufficient assets of his own." *Lollar v. Dewitt*, 255 S.C. 452, 456, 179 S.E.2d 607 (1971).

In the current case, Edward Raymond Hunt was not acting as his father's agent at the time of the accident. No family purpose was being served at the time of the incident. Edward Raymond Hunt had been to the beach to a club and was returning home at the time he was stopped by the police. (T.R. p. 294, ll.9-12; T.R. p. 296, ll.16-19; T.R. p. 297, ll.4-12) Edward Raymond Hunt was twenty-five at the time of the accident. (T.R. p. 274, ll.4-6) He was employed and lived in a separate residence on the family's property. (T.R. p. 283, ll.13-23) Edward Raymond Hunt was purchasing the car from his father. (T.R. p. 276, ll.10-15) Edward Raymond Hunt was responsible for the maintenance on the vehicle. (T.R. p. 279, ll.5-7) The family purpose doctrine does not apply. Further, the elements of the family purpose doctrine as delineated in the *Lollar* case are not met

when a parent exercises no control over his adult son and the son provides for himself, lives separate and apart from his family members, provides maintenance for the vehicle, and was not using the vehicle for any family purpose when the incident occurred. In conclusion, the family purpose doctrine does not apply to the facts of this case; therefore, the verdict against Defendant Edward William Hunt should be reversed and he should be dismissed from this action.

III. UNDER THE FAMILY PURPOSE DOCTRINE, PUNITIVE DAMAGES CANNOT BE AWARDED AGAINST THE OWNER OF THE VEHICLE.

The Plaintiff withdrew his cause of action for negligent entrustment prior to taking any testimony in this case. (T.R. p. 81, ll.4-9) The only basis for asserting any liability with regard to the Defendant, Edward William Hunt, in this action was through the Family Purpose Doctrine. (T.R. p. 10). The jury returned a verdict against Hunt for actual and punitive damages. (T.R. p. 6).

Punitive damages cannot be awarded against the owner of a vehicle under the Family Purpose Doctrine. North Carolina courts have disallowed punitive damages awards against automobile owners who are found liable through the family purpose doctrine. See *Byrne v. Bordeaux*, 85 N.C. App. 262, 264, 354 S.E.2d 277 (N.C. Ct. App. 1987). Furthermore, the main purposes of punitive damages are punishment and deterrence. *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528 (2000). These purposes are not served by awarding punitive damages against the owner who did not recklessly, willfully, or maliciously injure anyone.

a. North Carolina Courts Hold that Punitive Damages Cannot be Awarded Against the Owner of a Car Under the Family Purpose Doctrine.

The Court of Appeals of North Carolina upheld a trial judge's dismissal of a plaintiff's punitive damages claim against a husband under the family purpose doctrine for the willful and wanton actions of his wife. *Byrne v. Bordeaux*, 85 N.C. App. 262, 264, 354 S.E.2d 277 (N.C. Ct. App. 1987). The Court further stated that the Court was "unwilling to say that when a driver uses a family member's automobile willfully, wantonly, or maliciously to injure another that the family purpose doctrine should be applied so as to allow recovery of punitive damages against the owner based on such use." *Id.* at 265.

b. The Primary Purposes of Punitive Damages are to Punish the Wrongdoer and Deter the Wrongdoer and Others from Similar Conduct. These Purposes are not Fulfilled when Punitive Damages are Awarded Against the Owner of an Automobile who is not Reckless, Willful, Wanton, or Malicious.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528 (2000) (citing *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d, 162, 163 (1989)). "Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.* at 379 (citing *Harris v. Burnside*, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973)). Three "important" purposes of punitive damages are punishment, deterrence, and "compensation for the reckless or willful invasion of the plaintiff's rights." *Id.* at 379. "However, the paramount purpose for awarding exemplary damages is *not* to compensate the plaintiff, but to punish and set an example for others." *Id.* at 380 (emphasis in original). Furthermore, punitive damage awards should be viewed from a public policy standpoint not from the viewpoint of a recovering plaintiff. *Id.*

Furthermore, the Supreme Court of the United States has stated that the purposes of punitive damages are to punish the wrongdoer and deter similar conduct. In fact, the Court stated that "the consensus today is that punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492, 128 S.Ct. 2605 (2008). "The prevailing rule in American courts also limits punitive damages to cases of what the Court in *Day*, at 371, spoke of as 'enormity', where a defendant's conduct is 'outrageous,' 4 Restatement §908(2), owing to 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' or behavior even more deplorable, 1 Schuleter §9.3(A)." *Id.* at 493.

In the current case, the Defendant Edward William Hunt was not the wrongdoer. Edward William Hunt should not be punished because he did not recklessly, willfully, or wantonly injure anyone. Edward William Hunt was at home in his bed at the time of the accident. (T.R. p. 282, l. 21 - p. 283, l. 3) Furthermore, the Defendant, Edward William Hunt, was selling the car involved in the accident to his son, Edward Raymond Hunt (T.R. p. 276, ll.10-15). Edward Raymond Hunt had already paid the down payment and made several payments to his father. (T.R. p. 276, ll.10-15) Edward Raymond Hunt was an adult who lived in a motor home on the property where his father's home was located, not with his parents. (T.R. p. 283, ll.13-23) Edward Raymond Hunt was responsible for all of the maintenance on the vehicle he was driving at the time of the accident and Edward Raymond Hunt had a job. (T.R. p. 279, ll.5-7; T.R. p. 283, ll.22-23) Edward William Hunt had no control whatsoever over the actions of his adult son, Edward Raymond Hunt, at the time of this accident. (T.R. p. 284, ll.10-14) The Family Purpose Doctrine is not the proper tool to seek punitive damages against anyone. Certainly, in this particular case taking all of the facts into consideration, it was inappropriate for the trial court to allow the jury to award punitive damages against Edward William Hunt. The verdict should be overturned.

IV. A NEW TRIAL SHOULD BE AWARDED BECAUSE THE VERDICT FORM IS AMBIGUOUS, UNCLEAR AND INCLUDES THE NAME OF A WITNESS WHO WAS NOT A DEFENDANT AT THE TIME OF TRIAL.

The caption of the Verdict Form included as Defendants, Nathan Dale Smithers, Edward William Hunt and his son, Edward Raymond Hunt, who was a witness but not a party. (T.R. p. 7). The jury first had a choice of finding in favor of the Defendant Hunt or the Plaintiff. The actual damages verdict was against Smithers and Hunt. The jury also found "for the Plaintiff against the Defendant Hunt in the amount of $40,000 punitive damages" (T.R.. p. 451, ll. 8-9). Although the caption includes the names of both of the Hunts, the body of the Verdict Form does not make it clear which Hunt the Verdict was against. The jury's verdict is ambiguous because two reasonable but differing conclusions can be drawn from the verdict. The verdict against "Defendant Hunt" could be construed to mean a verdict against the father, Edward William Hunt, or the son, Edward Raymond Hunt. At trial, the son was a witness, but not a party to the lawsuit; however, his name mistakenly appeared on the caption of the jury verdict form given to the jury (T.R. p. 454, ll. 3-5). Because the jury's Verdict Form awarding actual and punitive damages against the Defendant Hunt is ambiguous and the intent of the jury is unclear, the proper remedy is a new trial.

Counsel for Edward William Hunt asked for separate verdict forms to prevent confusion of the jury. (T.R. p.328, l.5 - p. 329, l.25). The Court did not allow separate verdict forms. The verdict form that was shown to the attorneys was not the verdict form that was sent to the jurors. (T.R. p.439, l. 16 - p. 440, l. 11). The jurors sent out with two questions. The first jury question asked that the Court clarify the Family Purpose law and clarify the Defendants. (T.R. p.440, l. 12 - p. 445, l. 25). The jurors sent out a second question asking for clarification with regard to assessing "punitive

damages for Hunt." It was determined at that time that the body of the Verdict Form was wrong. The law clerk apologized and indicated that he changed the Verdict Form and gave it to the jurors without showing it to the attorneys (T.R. p. 446, l. 5 - p. 450, l. 11; T.R. p. 471). The jury was given another Verdict Form. The jury came back with its verdict and awarded actual damages against Smithers and Hunt and awarded punitive damages against Smithers in the amount of $60,000.00 and punitive damages against Hunt in the amount of $40,000.00. When the verdict is read, the Clerk reads the caption and it includes as a Defendant, Edward Raymond Hunt, who was not a party to this action. Edward William Hunt's attorney then asked that he take up a matter outside the presence of the jury, but before the jury is let go. (T.R., p. 453, l. 18 - p. 458, l. 25). Both attorneys and the Judge all agree that the jurors need to be brought back in to cure the issue raised by the Verdict Form. (T.R. p. 455, l.23 - p. 456, l.7) However, when the Court attempted to bring the jurors back into the courtroom, the bailiff had let the jurors go and the jury could not be reconvened. (T.R. p. 456, l.12 - p. 457, l.18) At that point in time, Edward William Hunts's attorney moved for a mistrial. (T.R. p. 456, ll.16-19) That Motion was denied. (T.R. p. 458, ll.13-24)

"Once the jury in a civil case is discharged, the trial judge has little power to correct or amend a jury's verdict which, on its face, is unambiguous." *Vinson v. Jackson*, 327 S.C. 290, 293, 491 SE.2d 249 (citing *Anderson v. Aetna Casualty & Sur. Co.*, 175 S.C. 254, 178 S.E. 819 (1934)). "A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. However, when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." *Id.* at 293 (quoting *Johnston v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983)).

Where it is at least possible, if not probable that a special question or interrogatory submitted by the trial judge misleads the jury, reversal is required. *Sellers v. Public Sav Life Insurance Co.*, 255 S.C. 251, 178 S.E.2d 241 (1970). "The jury's verdict should be upheld when possible to do so and to carry into effect what was clearly the intentions." *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004), "but when the verdict is so confused that it is not absolutely clear what was intended, the court should order a new trial." *Camden , Supra* at 173-174. "The authority of a circuit judge to correct, modify, or interfere with the verdict of the jury in a case properly triable by a jury is embraced in and limited to the power to grant new trials." *Camden, Supra* at 174.

This court should grant Edward William Hunt a new trial.

V. THE ACTIONS OF THE DEFENDANT, NATHAN DALE SMITHERS, ARE A SUPERCEDING INTERVENING ACT WHICH ABSOLVES EDWARD WILLIAM HUNT OF ALL LIABILITY IN THIS ACTION.

Edward Raymond Hunt was stopped by a South Carolina Highway Patrolman. (T.R. p. 95, ll.2-7) The Plaintiff, a City of Conway Police Officer, was called to the scene as was a second City of Conway Police Officer. (T.R. p. 94, ll.3-14) All four cars were in a line in the same lane of travel. (T.R. p. 242, ll.13-25) The Plaintiff's police car was the third car in the line. (T.R. p. 242, ll.13-18) The car driven by Edward Raymond Hunt was first, the Highway Patrol car was second and the other Conway City Police officer's car was fourth in line. (T.R. p. 242, ll.13-25) The Highway Patrolman left the scene as did the second City Police Officer leaving the car driven by Edward Raymond Hunt in the roadway and the car driven by the Plaintiff in the roadway with some distance between both vehicles. (T.R. p. 98, l.16 - p. 99 l. 16) Along came the Defendant Smithers. He struck the Plaintiff's vehicle while the Plaintiff was sitting in his patrol car with his blue lights and flashers on. (T.R. p. 101, ll.12-21; T.R. p. 104, ll.10-18) Neither William Raymond Hunt or his father, Edward William Hunt, were at the scene of the accident at the time that the Defendant Smithers drove his vehicle into the Plaintiff's police car. (T.R. p. 280, ll.1-9)

To recover for negligence, a plaintiff must prove that the defendant proximately caused the plaintiff's injuries. S.C. Jurisprudence Vol. 18, § 21. However, if a third party negligently injures the plaintiff and that third party's negligence was unforeseeable, then the defendant cannot be held liable for the injuries caused by the third party's superceding, intervening act. In *Gibson v. Gross*, the Court of Appeals stated that "[t]he test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author

of the primary negligence should have reasonably foreseen and anticipated them in light of attendant circumstances." *Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736 (1983) (citing *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171, 173 (1968)). If the injury is not reasonably foreseeable, then the defendant cannot be held liable. *Id.* "When the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Id.* (citing *Locklear v. Southeastern Stages, Inc.*, 193 S.C. 309, 8 S.E.2d 736). The Court of Appeals in *Gibson* held that a defendant who was involved in an automobile accident was not liable to a passerby who was hit by a third party while standing on the side of the road following the automobile accident . The Court held that the actions of the third party in hitting the passerby were superceding, intervening acts that absolved the defendant of liability to the passerby.

The facts of this case are very similar to the facts of *Gibson v. Gross*. The injuries to the Plaintiff were directly caused by the negligence of Defendant Nathan Smithers following the traffic stop of Edward Raymond Hunt. Defendant Nathan Smithers' negligence was a superceding, intervening cause of Donald Gause's injuries. Therefore, Edward William Hunt should be absolved of all liability because Defendant Nathan Smithers caused the injuries to the Plaintiff and any negligence of Edward Raymond Hunt was superceded by the negligence of Defendant Nathan Smithers. Therefore, the jury verdict against Edward William Hunt should be reversed and Edward William Hunt dismissed from this action.

VI. THE REPEATED REFERENCES TO EDWARD RAYMOND HUNT WHO IS NOT A PARTY TO THIS ACTION BEING UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF THE ACCIDENT WERE HIGHLY PREJUDICIAL TO EDWARD WILLIAM HUNT AND THE PREJUDICE OUTWEIGHED ANY PROBATIVE VALUE.

At the very outset of the case, counsel for Edward William Hunt brought up the issue to the Court of whether or not the Plaintiff was going to be allowed to go into the issue of Edward Raymond Hunt being under the influence of alcohol on the evening of this accident. (T.R. p.86, ll. 4-19). The Court ruled that the alcohol consumption of Edward Raymond Hunt could not come into evidence. (T.R. p. 86, ll.13-19) Disregarding the ruling of the Court, Plaintiff's counsel during his opening statement tells the jury that Edward Raymond Hunt was pulled over by the police officer on suspected drunk driving. (T.R. p. 88, l.7 - p. 90, l.6). Thereafter, the Court gives a curative instruction to the jury to disregard the comment about drinking and driving. (T.R., p. 90, ll. 14 - 19). Plaintiff's counsel then goes on to elicit testimony from his client as to Edward Raymond Hunt having a strong odor of alcohol. (T.R. p. 97, l. 25 - p. 98, l.5). Edward William Hunt's attorney then objected to that testimony. The Court sustained that objection and admonished the jury to disregard completely any reference to alcohol. (T.R. p. 98, ll. 6-10). At that point, Edward William Hunt's attorney continues to object to Plaintiff's counsel attempting to put into evidence the use of alcohol by Edward Raymond Hunt. (T.R. p. 98, ll. 11 - 14). Plaintiff's counsel once again argues with the Court before putting the Hunts on the stand that he should be able to bring out the issue of the intoxication of Edward Raymond Hunt. (T.R. p. 250, ll. 8 - 15). The Court once again finds that the issue of intoxication is substantially prejudicial and he indicates that the jury has already heard three, four or five times about the use of alcohol so that the jury at that point knows as the Court said

"exactly why he was pulled". (T.R. p. 250, ll. 16-21). The trial court once again indicates to the lawyers that testimony regarding alcohol consumption by Edward Raymond Hunt is inappropriate for the jury to hear. (T.R. p. 267, l.5 - p. 268, l. 1)

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson v. Horry County Solid Waste Authority*, 389 S.C. 528, 534, 698 S.E.2d 835 (Ct. App. 2010) (quoting *State v. Owens*, 346 S.C. 637,666, 552 S.E.2d 745, 760 (2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). On appeal, a trial court's Rule 403 ruling is reviewed "pursuant to an abuse of discretion standard." *Id.* (quoting *Lee v. Bunch*, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007)). Furthermore, great deference should be given to the trial court's decision. *Id.* In *Johnson v. Horry County Solid Waste Authority*, the South Carolina Court of Appeals upheld the trial court's ruling that evidence of the Decedent's blood alcohol level could not be introduced because the prejudice of admitting the evidence substantially outweighed the probative value. *Id.* at 536. In the *Johnson* case, the Decedent was involved in a single car accident. After the first accident, the Decedent got out of her car and then was struck by another vehicle while standing on the side of the road near her vehicle. *Id.* at 531. The Court of Appeals upheld the trial court's decision disallowing evidence involving the Decedent's intoxication because the evidence was insufficient to prove that the Decedent's intoxication caused the second accident. *Id.* at 536.

In the present case, Defendant Smithers caused the injuries to the Plaintiff. Because Edward Raymond Hunt's driving under the influence of alcohol did not cause the accident, all evidence relating to Edward Raymond Hunt's driving under the influence of alcohol should have been

excluded. Edward William Hunt's attorney made the appropriate Motion in Limine. (T.R. p. 86, ll. 4-19) The Court ruled that alcohol consumption by Edward Raymond Hunt could not come into evidence; however, that information was repeatedly put before the jury. (T.R. p. 86, ll. 13-19; T.R. p. 88, l. 7 - p. 90, l. 6 and T.R. p. 97, l. 25 - p. 98, l. 6) It was so pervasive that the trial judge indicated that the jury had heard three, four or fives times about the use of alcohol by Edward Raymond Hunt so the jury knew exactly why Edward Raymond Hunt was pulled over by the police. (T.R. p. 250, ll. 16-21) Edward William Hunt is entitled to have this court grant him a new trial. .

CONCLUSION

If the Court determines that Mr. Gause cannot pursue his claim against Edward William Hunt under the theory of the Family Purpose Doctrine, then the jury verdict against Edward William Hunt should be reversed. Furthermore, if this Court determines that the actions of Nathan Dale Smithers constitute a superceding intervening act, then the jury verdict against Edward William Hunt should be reversed. If the Court determines that the Plaintiff can go forward against Edward William Hunt under the theory of the Family Purpose Doctrine and the actions of Mr. Smithes do not constitute a superceding intervening act of negligence, then this court should grant Edward William Hunt a new trial because the Verdict Form is ambiguous and unclear. It includes the name William Raymond Hunt in the caption. The body of the Verdict Form simply refers to giving a judgment against Hunt and does not make it clear which Hunt it is referring to. Finally, if this court determines that Mr. Gause can proceed against Edward William Hunt under the Family Purpose Doctrine, Mr. Smithers' actions do not constitute a superceding intervening act of negligence and the Verdict Form is not defective, then the court should grant Edward William Hunt a new trial on the basis of the prejudice created by the repeated actions of the Plaintiff in putting before the jury the fact that Edward Raymond Hunt was driving his vehicle under the influence of alcohol on the evening of the incident.

Respectfully submitted,

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December 20 2011.

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THE STATE OF SOUTH CAROLINA
in the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2006-CP-26-5391

Don D. Gause, ... Respondent

vs.

Nathan Dale Smithers and Edward W. Hunt
of Whom Edward W. Hunt is ..... Appellant

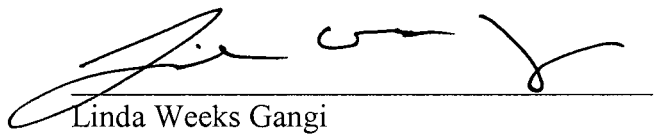
I hereby certify that the Final Brief of the Appellant is in compliance with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

Respectfully submitted,

THOMPSON & HENRY, P.A.

Conway, South Carolina

December 20 2011.



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CERTIFICATE OF MAILING

I certify that I have served the Appellant's Final Brief and Certificate of Mailing by depositing one (1) copy in the United States Mail on December 20, 2011, to David Rothstein at his address of record, with sufficient postage attached thereto as follows:

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