THE STATE OF SOUTH CAROLINA ORIGINAL
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. William H. Seals, Jr., Circuit Court Judge

Case No. 2006-CP-26-5391

Don D. Gause, ... Respondent,

v.

Nathan Dale Smithers and Edward W. Hunt, ... Defendants,

Of Whom, Edward W. Hunt is ..... Appellant.

FINAL BRIEF OF RESPONDENT

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collision with a subsequent tortfeasor?

6. Did the trial court properly deny Appellant's motion for new trial because the court's disallowance of certain evidence and cautionary instructions to the jury to disregard such evidence cured any alleged error, and because Appellant cannot show any material prejudice from two limited references to the allegedly improper evidence?

COUNTER-STATEMENT OF THE CASE

Plaintiff commenced this action on November 2, 2006, by filing a complaint against Defendants, Nathan Dale Smithers and Edward W. Hunt. Plaintiff incorrectly named "Edward W. Hunt" as the driver of one of the cars involved in the collision. The driver's name was actually "Edward Raymond Hunt," the son of Edward W. Hunt. The confusion arose because the name "Edward W. Hunt" is listed as the owner of the vehicle in question was the only identifying information on the accident report for the driver of that vehicle. Defendant Hunt filed his answer and motion to dismiss, asserting that he was not the driver of the first vehicle in question, that he was merely the owner of the vehicle, and that the vehicle was being operated by his son, Edward Raymond Hunt, at the relevant time. Plaintiff immediately amended the Complaint to name Edward Raymond Hunt as a defendant and to add two causes of action against Edward W. Hunt under the family purpose doctrine and for negligent entrustment. The Amended Complaint was filed more than three years after the date of the accident.

Edward Raymond Hunt was dismissed from the case based on the statute of limitations, because the trial court refused to allow the Amended Complaint to relate back to the filing of the original complaint under Rule 15(c), SCRCP, despite the obviously

mistaken identity of the original Defendant Hunt. The Court of Appeals affirmed the dismissal of Edward Raymond Hunt, holding that the relation back rule did not apply because Plaintiff did not merely substitute the mistakenly identified party, but instead added a party, since the Amended Complaint added two new claims against Edward W. Hunt (family purpose doctrine and negligent entrustment). Gause v. Smithers, 384 S.C. 130, 133, 681 S.E.2d 607, 609 (Ct. App. 2009).

The case was tried to a jury in Horry County on January 4-6, 2011. The jury returned a verdict in favor of Plaintiff against both Defendants Smithers and Hunt jointly in the amount of $155,432.64 for actual damages, which was the exact amount of Plaintiff's past medical bills. The jury also awarded punitive damages against Defendant Smithers in the amount of $60,000.00 and punitive damages against Defendant Hunt in the amount of $40,000.00.

Both Plaintiff and Defendant Hunt filed motions for new trial, which were denied by the trial judge. Defendant Hunt initiated this appeal by filing a notice of appeal on January 20, 2011. Plaintiff filed a notice of cross appeal on February 4, 2011. Plaintiff has now withdrawn his cross appeal, after settling with Defendant Hunt and his liability insurer on a covenant not to execute. Plaintiff's own underinsured motorist carrier has now taken over the appeal on behalf of Defendant Hunt.

FACTS

This case arises out of an automobile collision in the early morning hours of Saturday, November 15, 2003, near Conway, involving two drunken drivers. Respondent, Don D. Gause, was a patrol officer for the City of Conway Police Department and was on

duty on the morning in question, when he was dispatched at approximately 5:30 a.m. to assist a highway patrol officer with the arrest of a motorist who had been stopped for suspicion of driving under the influence. (R. p. 92, l. 25 to p. 94, l. 10). When Mr. Gause arrived on the scene at Highway 501 N, near the intersection of Highway 701 heading into Conway, Appellant's son, Edward Raymond Hunt, was being taken into custody. Appellant's son had stopped the vehicle he was driving in the left-lane of traffic, rather than pulling off the roadway, in response to the trooper's blue lights. (R. p. 95, ll. 2-22). The arresting officer asked Mr. Gause to wait at the scene for a tow truck to remove the Hunt vehicle from the roadway. (R. p. 98, ll. 18-24). Mr. Gause pulled his vehicle immediately behind the Hunt vehicle with his emergency flashers, signal bar, and blue lights activated. (R. p. 99, ll. 6-16). While Mr. Gause was sitting in his patrol car, waiting for the tow truck to arrive, his patrol car was struck from behind by another vehicle, being operated by co-Defendant Nathan Dale Smithers, who was also driving under the influence of alcohol. (R. p. 101, ll. 12-24; p. 168, ll. 16-25).

Mr. Gause suffered severe injuries in the collision, and all three vehicles were rendered total losses. (R. p. 102, ll. 7-25).

The jury found in favor of Mr. Gause against both Defendants at trial: Defendant Smithers for crashing into the back of the patrol car; and Appellant for the negligence of his son, under the family purpose doctrine, for improperly stopping Appellant's vehicle in the roadway in response to a blue light instead of pulling off the right shoulder of the road. The jury specifically found that the actions of both drivers were contributing, proximate causes of Mr. Gause's injuries. The jury also found that Defendant Hunt was liable for his son's

negligence under the family purpose doctrine because Defendant owned, maintained, or furnished the car in question for the general use, pleasure, and convenience of the members of his family.

ARGUMENTS

I. THE TRIAL COURT CORRECTLY RULED THAT APPELLANT COULD BE HELD LIABLE UNDER THE FAMILY PURPOSE DOCTRINE FOR THE TORTIOUS ACTS OF HIS SON WHERE THE SON HAD PREVIOUSLY BEEN DISMISSED FROM THE CASE ON STATUTE OF LIMITATIONS GROUNDS BECAUSE OF A MISTAKEN IDENTIFICATION OF THE DRIVER AND WHERE APPELLANT PREVIOUSLY ARGUED THAT THE EXISTENCE OF THE CLAIMS AGAINST HIM UNDER THE FAMILY PURPOSE DOCTRINE PREVENTED THE AMENDED COMPLAINT FROM RELATING BACK AS TO THE SON.

Appellant first asserts that the trial judge should have dismissed the claim against him under the family purpose doctrine because the liability of the father and son are indivisible. Appellant argues that because the son was dismissed from this action based on the statute of limitations, the claims against the father under the family purpose doctrine must fail.

As an initial matter, Appellant's argument would work a tremendous injustice in this case because it is based on the logical fallacy of circular reasoning. Appellant previously convinced the circuit court and the court of appeals that the son, Edward Raymond Hunt, should not be substituted as a party on the negligence claim so as to fit within the relation-back provisions of Rule 15(c), SCRCP, because the amended complaint also added the claim against the father under the family purpose doctrine. In essence, the Appellant used the existence of the claim under the family purpose doctrine as the premise for having the claims against the son dismissed on statute of limitations grounds. See Gause v. Smithers, 384 S.C.

at 133, 681 S.E.2d at 609 ("We are mindful that this produces a harsh result, although Gause's claims against Father remain viable.") (emphasis added). Now, Appellant is trying to bootstrap the dismissal of the son as the basis for arguing that the claims against the father under the family purpose doctrine must fail. Appellant should not be allowed to whip-saw the Plaintiff's claims and thereby avoid responsibility for the clear negligence of the son in the operation of Appellant's car on the night in question.

This situation is analogous to the doctrine of judicial estoppel, which "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); see also Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004) (elements of judicial estoppel are: "(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent"). Appellant's argument to dismiss his son on statute of limitations grounds presumed that the claim against the father under the family purpose doctrine was viable. (R. p. 481, l. 23 to p. 482, l. 2) ("MR. CONNELL: He's [Edward W. Hunt] been served and if they want to make – just put in the complaint he's the owner of the vehicle and argue some sort of respondeat superior or whatever they want to argue that's fine. I don't have any problem with them reshaping the complaint . . . ."). Now, after the son has been dismissed as a defendant, Appellant asserts that the dismissal of the

son renders the family purpose claim invalid. Appellant should not be able to use the presumed validity of the claim under the family purpose doctrine to obtain a beneficial result at the beginning of the litigation and then turn around and use the fact of the dismissal of the son as a basis for attacking the validity of the family purpose claim against the father.

Appellant cites the case of Jordan v. Payton, 305 S.C. 537, 409 S.E.2d 793 (Ct. App. 1991), for the proposition that liability under the family purpose doctrine is indivisible: that liability of the father under the family purpose doctrine depends upon liability first being imposed on the driver of the vehicle. Appellant overreads the holding of the Jordan case.

The Jordan case was an appeal from the trial court's refusal to set aside a default judgment entered against a minor driver and his legal guardian under the family purpose doctrine. The court of appeals invalidated the default judgment against the minor under Rule 55, SCRCP, because no guardian ad litem had been appointed to represent the child. Rule 55 plainly provides that "no judgment by default shall be entered against a minor . . . unless represented in the action by a guardian ad litem who has appeared therein." Rule 55, SCRCP, quoted in Jordan, 305 S.C. at 538, 409 S.E.2d at 793. The court of appeals rejected the plaintiff's attempt nevertheless to impose the default judgment against the legal guardian alone under the family purpose doctrine because the court noted that the liability of the guardian under the family purpose doctrine depended on the liability of the child. Id. at 539, 409 S.E.2d at 794.

The Jordan court relied on the case of Johnson v. Atlantic Coast Line R. Co., 142 S.C. 125, 140 S.E. 443 (1927), which held that where both a principal and an agent are sued based on the tort of the agent, it would be logically impossible for the jury to render a verdict

against only the principal, while exonerating the agent. Jordan, 305 S.C. at 539, 409 S.E.2d at 794 (citing Johnson, 142 S.C. at 133, 140 S.E. at 445). In this sense, the liability of the principal must be consistent with the actions of the agent: the jury must find some wrongdoing by the agent before the principal can ever be held liable. If the jury finds no negligence by the agent or no proximate cause from the acts of the agent, then the principal cannot be held liable for the plaintiff's injuries. Here, there was no prior determination on the substantive issue of whether Edward Raymond Hunt acted negligently or whether such negligence was a proximate and contributing cause of Mr. Gause's injuries, as alleged in the Complaint.

The Georgia case of Medlin v. Church, 278 S.E.2d 747 (Ga. Ct. App. 1981), which is cited by the Jordan court and also by Appellant, does not support Appellant's arguments for dismissing the family purpose doctrine claims here. The Medlin case involved a judgment against a father and son, who were both South Carolina residents, for an automobile accident that occurred in Georgia. The plaintiff obtained a verdict against both the son, who was a minor child, and his father under the family purpose doctrine. The trial court had previously determined that the son was an indispensable party and required that he be joined as a defendant under the Georgia Non-Resident Motorist Statute. The plaintiff failed to have the son served properly, so no personal jurisdiction ever existed over the son. The court invalidated the judgment against both the son and the father because of this procedural defect. Interestingly, the Medlin court actually observed that "Under Georgia law, where the head of the family is sought to be held liable for some wrong committed by a member of his family within the scope of the family purpose doctrine, that member of the

family need not necessarily be joined as a party defendant." Id. at 748 n.1.

The Jordan case does not stand for the proposition that a plaintiff must sue the child and obtain a verdict against the child as a prerequisite to establishing liability against the father under the family purpose doctrine. In fact, such a holding would be directly contrary to South Carolina precedent on agency law. Under established principles of agency law, where the negligence of an agent acting within the course and scope of his agency causes injury to another, the injured party can elect to sue the principal directly, without also suing the agent. See Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 319, 594 S.E.2d 867, 878 (Ct. App. 2004) ("Respondents were not required to sue both principal and agent to recover from the principal under respondeat superior. They had the choice to sue either the agent or principal or join both."); see also Lane v. Home Ins. Co., 190 S.C. 84, 91, 2 S.E.2d 30, 32 (1939). In the Austin case, the plaintiff brought claims against an individual driver and his employer under respondeat superior for injuries caused in a tractor-trailer collision. After both defendants defaulted, the plaintiff voluntarily dismissed her claims against the individual driver. The case proceeded against the employer under respondeat superior. The Court rejected the appellant's argument that the plaintiff first had to get a verdict against the individual driver before the employer could be liable under respondeat superior. Austin, 358 S.C. at 319, 594 S.E.2d at 878.

It is well established under South Carolina law that the family purpose doctrine is an expression of the agency concept of respondeat superior. In Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976), the South Carolina Supreme Court stated that the family purpose doctrine "is an extension of the concept of agency." Id. at 133, 221 S.E.2d at 857.

Similarly, this Court has stated that the family purpose doctrine "has its genesis in the law of agency, and it will impose liability on a parent when a child is acting as his agent. Thus, 'one who has made it his business to furnish a car for the use of his family is liable as principal or master when such business is being carried out by a family member using the vehicle for its intended purpose, the family member thereby filling the role of agent or servant.'" Evans v. Stewart, 370 S.C. 522, 527, 636 S.E.2d 632, 635 (Ct. App. 2006) (internal citations omitted); see also Norwood v. Parthemos, 230 S.C. 207, 209, 95 S.E.2d 168, 169 (1956) ("Agency is the genesis of the [family purpose] doctrine.").

Accordingly, a plaintiff suing under the family purpose doctrine need not obtain a verdict against the child driver before holding the parent liable as the head of the household. Indeed, in Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968), the plaintiff sued the father directly under the family purpose doctrine without naming the driver son as a party defendant at all in the case.

Furthermore, the family purpose doctrine is a liberal doctrine intended to provide additional protection to motorists in South Carolina by providing access to the person in the family who usually has the deepest pockets. In Lollar v. Dewitt, 255 S.C. 452, 179 S.E.2d 607 (1971), the South Carolina Supreme Court stated, "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 in damages when the family vehicle is used negligently by a person without sufficient assets of his own." Id. at 456, 179 S.E.2d at 608. The court should not construe the family purpose doctrine to allow Appellant to avoid responsibility for his son's negligence after the son was dismissed from the case on a technical defect understandably

caused by the unfortunate similarity between the father's and son's names.

The result in the Jordan case was not "unduly harsh" to the plaintiff. The court of appeals merely set aside the default judgment and remanded the case to allow the plaintiff to properly serve the minor child and his guardian ad litem. The plaintiff's claims were not extinguished on a technicality. Here, Appellant seeks to flip the family purpose doctrine on its head so as to completely extinguish a claim that Appellant previously argued was valid. The court should not deprive Plaintiff of a remedy here against a party who bears ultimate responsibility for the negligence of a family member while using a family purpose vehicle.

II. THE TRIAL COURT PROPERLY HELD THAT APPELLANT'S LIABILITY UNDER THE FAMILY PURPOSE DOCTRINE WAS A QUESTION OF FACT FOR THE JURY, WHERE THERE WAS SUFFICIENT EVIDENCE THAT APPELLANT OWNED THE CAR IN QUESTION, THAT HE STILL MAINTAINED CONTROL OVER THE CAR, THAT HE FURNISHED THE CAR TO HIS SON FOR HIS CONVENIENCE, PLEASURE, AND GENERAL USE, AND THAT THE SON WAS STILL LIVING IN THE FATHER'S HOUSEHOLD.

Appellant next attacks the underlying factual findings of the jury under the family purpose doctrine. Appellant ignores the fundamental rule that after a jury verdict, the appellate court "must adopt the view of the evidence most favorable to the verdict and give it the strongest probative force of which it will admit." Reid v. Swindler, 249 S.C. 483, 489, 154 S.E.2d 910, 913 (1967). It is well established that an appellate court reviewing a trial judge's refusal to grant a motion for directed verdict or a new trial "must consider the evidence and all inferences reasonably deducible therefrom most strongly against the moving party and most favorably to the non-moving party." Id.; see also South Carolina Fed. Credit Union v. Higgins, 394 S.C. 189, 714 S.E.2d 550 (2011) (when considering a directed verdict

motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party, and if more than one reasonable inference can be drawn, the case should be submitted to the jury; the trial court should only be concerned with the existence or nonexistence of evidence, not its credibility or weight); Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) (the trial judge must deny a motion for directed verdict when the evidence yields more than one inference or its inferences are in doubt). Here, Appellant's counsel improperly attempts to cherry-pick certain testimony from the trial and wrongly portrays sharply disputed facts and inferences in favor of Appellant, rather than in favor of the jury's verdict for Respondent.

In Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976), the South Carolina Supreme Court recognized that "ordinarily the applicability of the Family Purpose Doctrine is a question of fact for the jury." Id. at 133, 221 S.E.2d at 857. Under the family purpose doctrine, "a head of a family, who owns, furnishes and maintains a vehicle for the general use, pleasure and convenience of his family is liable for the negligence of a member of the family having general authority to operate the vehicle for such a purpose." Id. Other expressions of the family purpose doctrine have used the disjunctive "or" in the statement of the essential elements, such that liability under the family purpose doctrine can be established by showing that the head of the household owned, maintained, or furnished the car to a family member. Campbell v. Paschal, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986); Porter v. Hardee, 241 S.C. 474, 477, 129 S.E.2d 131, 132 (1963) ("A necessary requisite to the imposition of liability under the family purpose doctrine . . . is that the head of the family own, maintain, or furnish the automobile . . . for the general family use . . . .") (emphasis

added).

The Campbell case involved a car that was actually owned by the at-fault driver's brother, who had left the car with his father while stationed overseas in the Navy. The brother's younger sister injured the plaintiff while negligently operating her brother's car. The father moved for an involuntary non-suit on the claim against him under the family purpose doctrine, arguing that he could not be liable for his daughter's operation of the car because he was not actually the legal owner of the car. The court of appeals determined that legal ownership of the vehicle in question is not a requirement of the family purpose doctrine; thus, the use of the word "or" is actually proper between the words "own," "maintain," and "furnish." The key issue in a family purpose doctrine case is whether the head of the household "controlled the use of the automobile." Campbell, 290 S.C. at 9, 347 S.E.2d at 897.

Here, Appellant admitted during the trial that he was the head of his household in November 2003, (R. p. 281, ll. 13-15); that his son, Edward Raymond Hunt, lived with him at the time of the collision, (R. p. 271, ll. 7-9); that Appellant was the title owner of the Firebird automobile that was involved in the collision, (R. p. 276, ll. 3-5; p. 277, ll. 1-3); and that his son used the car for his general use, pleasure, and convenience, (R. p. 278, ll. 16-25). Appellant further testified that he had keys to the Firebird, (R. p. 279, ll. 21-23), and that the car was available for his use, (R. p. 289, ll. 13-15). He also testified that he paid the property taxes on the car, (R. p. 277, ll. 4-6), and that he had recently paid to put new tires on the car, (R. p. 279, ll. 13-20). Most importantly, Appellant stated that at the time of the accident, he had the power to take the car away from his son, (R. p. 277, ll. 7-9). All of these facts clearly

create a sufficient evidentiary basis for the jury to have found Appellant liable under the family purpose doctrine.

Appellant's current counsel, who did not appear at trial in this case, now attempts to portray a very different picture of the son (Edward Raymond Hunt), his arrangement with his father's car, and even his living arrangements at the time–none of which is availing. Appellant argues that the family purpose doctrine does not apply here because Edward Raymond Hunt was a grown man at the time, living in a trailer beside his parents' house, with his own life and supporting himself, and that he was actually purchasing the Firebird from his father at the time of the collision.

The fact that Edward Raymond Hunt was 25 years old at the time of the collision does not preclude application of the family purpose doctrine. Although many family purpose doctrine cases have involved minor children, there is no requirement that the driver be an unemancipated minor at the time of the collision. There are numerous cases in South Carolina where the courts have applied the family purpose doctrine in a situation where the driver of the vehicle was 18 years or older. See Reid v. Swindler, 154 S.C. 483, 154 S.E.2d 910 (1967) (18-year old driver); Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968) (18-year old driver living at home with parents). Indeed, the two earliest cases under the family purpose doctrine in South Carolina involved drivers who were not minor children. See Davis v. Littlefield, 97 S.C. 171, 81 S.E. 487 (1914) (19-year old driver); Mooney v. Gilreath, 124 S.C. 1, 117 S.E. 186 (1923) (driver was "about 18-years old"). Other cases have actually applied the family purpose doctrine between spouses. See Lollar v. Dewitt, 255 S.C. 452, 179 S.E.2d 607 (1971); cf. Mock .v. Atlantic Coast Line R. Co., 227 S.C. 245,

87 S.E.2d 830 (1955) (applying family purpose doctrine to defense of contributory negligence where wife-driver was acting as agent for husband-owner of the vehicle and named plaintiff in suit for injuries to couple's child). Appellant's statement that "The family purpose doctrine was created in order to make parents responsible for the actions of their minor children" (Br. at 9) is simply not an accurate statement of the law.

There is also no conclusive evidence that the son was independent and self-supporting at the time of the collision so as to remove him from Appellant's household. Edward Raymond Hunt testified that he lived with his parents in November 2003 at the time of the collision. (R. p. 291, ll. 11-15). Appellant confirmed that his son was living with him at the time. (R. p. 271, ll.7-9). Under pointed questioning from Defendant Hunt's trial counsel, the Hunts tried to establish that the son was actually living in a broken down trailer or motor home next to Appellant's house, with an electrical chord running from the house to the trailer. (R. p. 283, ll. 18-21; p. 284, l. 25 to p. 285, l. 3). Edward Raymond Hunt also testified that he was not sure whether he was even employed at the time of the collision. (R. p. 306, ll. 2-6). He was clearly dependent on his father as part of the same household. Whether or not Appellant had any control over his son's comings and going is not relevant; the key inquiry is whether Appellant had control over the use of the car. Appellant's testimony that he had the power to take the car away from his son is compelling, if not conclusive, evidence of such control. (R. p. 277, ll. 7-9) ("Q. Okay, at the time of the wreck could you have taken the car away from your son? A. Yeah, sure.").

There was also conflicting evidence about the actual ownership of the Firebird. Clearly, Appellant was the record owner of the car at the time of the collision. He was the

sole owner listed on the title, (R. p. 276, ll. 3-5; p. 277, ll. 1-3), and he paid the property taxes on the vehicle, (R. p. 277, ll. 4-6). The Hunts' story at trial that the son was in the process of purchasing the vehicle is not dispositive on the issue of ownership of the vehicle, especially when viewed in the light most favorable to Respondent. There was no bill of sale, contract, note, or other documentary evidence introduced at trial to corroborate the Hunts' trial testimony that the Firebird was being sold to the son just prior to the time of the collision. The $200.00 that the son allegedly paid down on the car was used to bail the son out of jail after his arrest on the morning in question. (R. p. 276, ll. 12-15). Edward Raymond Hunt clearly testified on direct exam that his father owned the car at the time of the collision. (R. p. 299, ll. 8-10). He also testified that he had purchased an Impala before the accident because the Firebird was not his. (R. p. 303, ll. 6-9). Approximately six weeks after the wreck, Appellant gave the Firebird to his son as a Christmas gift. (R. p. 301, ll. 9-17). Perhaps most tellingly, Defendant Hunt filed an affidavit early on in the case in which he testified as follows: "While the vehicle was owned by me, it was being driven by my son, Edward Raymond Hunt." (R. p. 22, ¶ 3) (emphasis added). In addition, at oral argument on the motion to dismiss the Amended Complaint, counsel for Edward W. Hunt also conceded that his client (the father) was the owner of the vehicle: "THE COURT: I got you. Edward R. is the driver son, Edward W. is the owner dad. MR. CONNELL: Yes, sir." (R. p. 477, ll. 7-9). Appellant cannot play fast and loose with the testimony about who owned the car in a post hoc effort to avoid liability under the family purpose doctrine. See Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 477 (Ct. App. 2000) ("A court invokes judicial estoppel to prevent a party from changing its position over the course of judicial

proceedings. The doctrine estops a party from playing 'fast-and-loose' with the courts or to trifle with the proceedings.") (internal citations omitted).

The evidence of record at trial, when properly viewed in the light most favorable to Respondent, amply supports the jury's verdict on the family purpose doctrine. The trial court properly found that this was a factual determination for the jury and appropriately instructed the jury about the elements of the family purpose doctrine. (R. p. 437, l. 25 to p. 438, l. 6) ("The first thing I want to say [is that] the Plaintiff claims Defendant Hunt is liable under a doctrine of law known as the family purpose doctrine. Where a parent owns, furnishes, or maintains a motor vehicle for the family's general use and convenience the parent is responsible for the negligence of a family member having general authority to drive the vehicle for such purpose."). The jury resolved any dispute about the ownership of the vehicle against Appellant.

III. THE TRIAL COURT PROPERLY RULED THAT PUNITIVE DAMAGES ARE APPROPRIATE AGAINST APPELLANT UNDER THE FAMILY PURPOSE DOCTRINE, EVEN WHERE APPELLANT'S SON, WHO WAS THE ACTUAL WRONGDOER, HAS BEEN DISMISSED FROM THE CASE, BECAUSE SETTLED AGENCY PRINCIPLES ALLOW PUNITIVE DAMAGES TO BE AWARDED AGAINST A PRINCIPAL FOR THE EGREGIOUS ACTS OF HIS AGENT.

Appellant next challenges the jury's award of punitive damages. Appellant argues that punitive damages are not available against the owner of the vehicle under the family purpose doctrine for the grossly negligent, reckless, willful, or wanton acts of the driver. Appellant's argument in this regard is not supported by any precedent in South Carolina and disregards settled agency law that principals can be liable for punitive damages based on the

egregious conduct of their agents under the rules of vicarious liability. Appellant's argument also ignores several of the underlying purposes of punitive damages.

It is well established under South Carolina law that a principal can be held liable for punitive damages based on the acts of his agent acting within the course and scope of his agency, under the doctrine of respondeat superior. In Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004), the court of appeals affirmed an award of punitive damages against an employer even after the individual employee had been voluntarily dismissed from the case. Id. at 319, 594 S.E.2d at 878; see also Johnson v. Atlantic Coast Line R. Co., 142 S.C. 125, ____, 140 S.E. 443, 455 (1927) ("'When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance, or within the scope of his agency, are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him.'") (quoting Rucker v. Smoke, 37 S.C. 377, ____, 16 S.E. 40, 41 (1892)).

As discussed above, because the family purpose doctrine is a form of agency, there is no reason to shield the head of a household from punitive damages for the acts of a family member using a family purpose vehicle.

The North Carolina case of Byrne v. Bordeaux, 354 S.E.2d 277 (N.C. Ct. App. 1987), is not particularly persuasive. The Byrne case involved a situation the defendant's wife deliberately crashed into the back of the car in which plaintiff was a passenger, then followed plaintiff's car to a gas station, where the wife and another passenger in her car pulled plaintiff

from the vehicle, knocked her to the ground, pulled her hair, and beat her. Id. at 278. The North Carolina Court of Appeals dismissed the punitive damages claim against the husband under the family purpose doctrine. The court stated, "We are unwilling to say that when a driver uses a family member's automobile wilfully, 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 279. The court did not announce a broad prohibition against imposing punitive damages against the head of the household under the family purpose doctrine. That case is limited to its unique facts, which obviously have no similarity to the facts presented here.

Appellant next argues that punitive damages are not appropriate against him under the family purpose doctrine because the actual wrongdoer who is deserving of punishment was no longer in the case at the time of trial. Appellant improperly focuses only on the punishment and specific deterrence aspects of punitive damages. Appellant's argument is foreclosed by the South Carolina Supreme Court's decision in O'Neill v. Smith, 388 S.C. 246, 695 S.E.2d 531 (2010), which allowed a claim for punitive damages after the at-fault driver had settled on a covenant not to execute and was, therefore, insulated from personal liability for punitive damages. The O'Neill court held that "punitive damage awards, even though not paid directly by the tortfeasor because of the covenant, continue to serve several public policy aims; specifically, deterring similar conduct by the tortfeasor and others, as well as vindicating the private rights of the injured plaintiff. These purposes are fulfilled even if a specific defendant is not financially punished by imposition of an award." Id. at 253, 695 S.E.2d at 534.

South Carolina courts have historically recognized that punitive damages serve several important, underlying societal purposes: (1) punishment of the defendant for grossly negligent, reckless, willful, or wanton conduct; (2) deterrence against similar conduct in the future, not just as specific deterrence for the defendant against whom the punitive damages are actually awarded, but also as general deterrence to the public at large by serving as an example of the consequences of such behavior; and (3) vindication of the private rights of the plaintiff, beyond the usual measure of compensatory damages. Id. (citing Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000)).

Although Appellant himself was not the tortfeasor, his son's wrongful conduct is imputed to him under the family purpose doctrine, just like an employer is liable for the actions of his employees under respondeat superior. The jury's award of punitive damages against Appellant will most certainly have a deterrent effect on the conduct of the actual tortfeasor, Edward Raymond Hunt, in the future, even though he is not personally liable for the judgment. The jury's award of punitive damages against Appellant under the family purpose doctrine should be affirmed.

IV. THE TRIAL COURT PROPERLY DETERMINED THAT ANY CONFUSION CAUSED BY INCLUDING APPELLANT'S SON IN THE CASE CAPTION ON THE VERDICT FORM WAS REMEDIED BY THE SUPPLEMENTAL CURATIVE INSTRUCTIONS TO THE JURY.

The fourth issue raised by Appellant is that the verdict form erroneously included Edward Raymond Hunt in the caption as a named Defendant, even though he had been dismissed from the case. Appellant asserts that the jury verdict form was confusing and ambiguous because the jury could have interpreted the words "Defendant Hunt" to refer to

either Edward W. Hunt (the father) or Edward Raymond Hunt (the son).

Any ambiguity in this regard or confusion in the mind of the jury was specifically addressed by the trial court's curative instructions in response to the jury's questions. The jury's first question sought clarification about who the actual Defendants in the case were and also asked for clarification about the family purpose doctrine. (R. p. 440, ll. 14-18). The trial court simply and properly instructed the jury, "All right, I received your question and I'm going to tell you that the Defendant in this case in regards to the family purpose doctrine is the father, not his son who was the driver of the car." (R. p. 444, ll. 20-23). The judge also properly re-instructed the jury on the elements of the family purpose doctrine. (R. p. 444, l. 25 to p. 445, l. 15). Appellant's trial counsel actually objected to the Court's re-charging the jury on the elements of the family purpose doctrine at all. (R. p. 445, ll. 22-24). The court's supplemental instruction clearly cured any confusion in the jury's mind about whether the son–Edward Raymond Hunt–was a Defendant in the case.

The jury's second question was prompted by a clerical error in the verdict form, where the judge's law clerk added a parenthetical statement to the verdict form after it was approved by counsel. The incorrect parenthetical was an explanation beside the special interrogatory for Defendant Hunt that essentially would have made it impossible for the jury to award punitive damages against Defendant Hunt. Any confusion on this point would have actually been detrimental to Plaintiff. The trial court responded to the second question by bringing in the jury foreperson, explaining the clerical error, and providing her with a revised verdict form. Counsel for the parties specifically approved the amended verdict form, which simply struck out the incorrectly worded parenthetical. Neither Defendant's counsel raised

any objection to the revised verdict form at the time it was given to the jury. (R. p. 448, l. 1 to p. 449, l. 12). After the revised verdict form was provided to the foreperson, the jury returned its verdict approximately six minutes later. Only after the clerk published the verdict form in open court did Defendants' counsel raise an issue about the name "Edward Raymond Hunt" being in the caption on the verdict form. (R. p. 454, ll. 3-11).

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." Johnson v. Parker, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983). Only where the verdict is "so confused that the jury's intent is unclear" should the court order a new trial. Id. Here, the jury very carefully and methodically analyzed the case, even catching the error in the original verdict form. After the trial court sent the foreperson back to the jury room following the second question, the court remarked, "Obviously, the forelady is very intelligent." (R. p. 450, ll. 2-3). Counsel for Defendant Smithers agreed. (R. p. 450, l.4). Any confusion in the jury's mind was addressed sufficiently by the Court's curative instruction. Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010) (a curative instruction is generally deemed to have cured any alleged error). The jury's verdict represents a considered determination of this action. The jury awarded two different amounts of punitive damages against Defendant Smithers and Defendant Hunt, reflecting the differing degree of culpability by each individual Defendant in causing harm to Mr. Gause. There is no indication that the jury was confused at all, much less that it was so confused that its intent is so unclear as to warrant a new trial.

Most of the trial focused on the application of the family purpose doctrine, because Defendant Smithers did not mount much of a defense, other than arguing proximate cause

on some of Respondent's damages. The opening statements, closing arguments and jury instructions all featured extensive discussions of the family purpose doctrine. The court clarified the elements of the family purpose doctrine and reiterated that the father, Edward W. Hunt, was the Defendant, not his son the driver, Edward Raymond Hunt, in response to the jury's first question, which further indicates that the jury intended to hold Appellant liable under the family purpose doctrine. The trial court appropriately determined that a new trial was not necessary. The lower court's decision in that regard should be given substantial deference, and the verdict against Appellant should be affirmed.

V. THE TRIAL COURT PROPERLY RULED THAT THE QUESTION OF WHETHER PLAINTIFF'S INJURIES WERE PROXIMATELY CAUSED BY THE NEGLIGENCE OF APPELLANT'S SON WAS A QUESTION OF FACT FOR THE JURY WHERE THE SON'S NEGLIGENCE SET THE STAGE FOR PLAINTIFF TO BE INJURED IN A FORESEEABLE COLLISION WITH A SUBSEQUENT TORTFEASOR.

The fifth issue raised by Appellant relates to proximate cause. Appellant argues that Defendant Smithers's action in smashing into the back of Respondent's patrol car was a superceding, intervening act that cut off the causal chain and should absolve Defendant Hunt of any liability for the negligence of his son in stopping improperly and unlawfully in the roadway.

Issues of proximate cause are quintessentially questions of fact for the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). "The touchstone of proximate cause is foreseeability." Id. at 463, 494 S.E.2d at 842. The test is whether the plaintiff's injuries are a "natural and probable consequence of the complained-of act." Id. A single injury can have more than one proximate cause. Id. at 464, 494 S.E.2d

at 843. In Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962), the South Carolina Supreme Court stated as follows:

> The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising.

Id. at 626, 124 S.E.2d at 324.

The facts of this case are very similar to the facts in the Matthews case. There, the plaintiff was injured after stopping to provide aid to injured passengers in a wreck caused by appellant, Porter. As the plaintiff was standing at the scene, another vehicle driven by a motorist named McKnight sideswiped one of the cars at the scene and crashed into the plaintiff. A jury determined that the driver responsible for causing the original crash which blocked the road was a proximate cause of the plaintiff's injuries, even though McKnight may also have been negligent. The Supreme Court held that there was sufficient evidence for the jury to determine that the chain of events set in motion by the original negligence of Porter was a proximate cause of the plaintiff's injuries and that the subsequent negligence of McKnight did not break the causal chain. Id. at 632, 124 S.E.2d at 327.

The case of Gibson v. Gross, 280 S.C 194, 311 S.E.2d 736 (Ct. App. 1983), which is heavily relied on by Appellant, is easily distinguished from this case. In the Gibson case, the plaintiff, Gibson, had stopped at the scene of an accident to intervene in an altercation between the two or three other drivers following an accident caused by defendant Gross. Apparently Gibson succeeded in breaking up the argument, but while he was standing next

to Gross's vehicle, he was struck by another car driven by a third person, Edwards. The trial court granted involuntary non-suit in favor of Gross because there was no testimony from which a jury could conclude that Gross's negligence in causing the original collision was a proximate cause of Gibson's injuries. The court determined that the negligence of the final driver, Edwards, was the sole proximate cause of Gibson's injuries. The Gibson court held that Gibson was not among the class of persons intended to be protected by the statute prohibiting a motorist from blocking the roadway. Id. at 197, 311 S.E.2d at 739. The court distinguished the facts presented there from the holding of Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962), by stating that the plaintiff, Gibson, did not produce any evidence that the second driver (Edwards) struck the plaintiff because of the partially blocked roadway. Gibson, 280 S.C. at 198-99, 311 S.E.2d at 739.

Here, the trial court properly submitted to the jury the question of whether the negligence of Appellant's son was a contributing, proximate cause of Respondent's injuries. The court properly charged the jury on proximate cause and intervening and superceding causes. (R. p. 398, l. 18 to p. 402, l. 17). Respondent, an on-duty police officer, was squarely within the class of persons protected by the statute requiring a motorist not to stop his vehicle in the roadway when it is practical to stop the vehicle off the roadway. See S.C. Code Ann. § 56-5-2510(A) ("No person shall stop, park, or leave standing a vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park, or leave the vehicle off the roadway."). It is reasonably foreseeable that leaving a car parked in the left lane of traffic could cause another motorist to crash into the back of Respondent's police cruiser. See Ayers v. Atlantic Greyhound

Corp., 208 S.C. 267, 277, 37 S.E.2d 737, 741 (1946) ("A violator of a safety statute or ordinance may justly and logically be held to foresight of injury within the prospect of the enactment, even though it be contributed to by the concurrent delict of another. The latter should be foreseen if it is of the nature of injuries sought to have been guarded against by the regulation."). Appellant's son's negligence set into motion a chain of events that culminated in Respondent's injuries. Defendant Smithers's subsequent negligence was foreseeable. Significantly, if Appellant's car was not improperly stopped in the roadway, the co-Defendant never would have crashed into the back of the patrol car. Accordingly, the jury properly found that the negligence of Appellant's son, which was imputed to Appellant under the family purpose doctrine, was a proximate cause of Respondent's injuries.

VI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR NEW TRIAL BECAUSE THE COURT'S DISALLOWANCE OF CERTAIN EVIDENCE AND CAUTIONARY INSTRUCTIONS TO THE JURY TO DISREGARD SUCH EVIDENCE CURED ANY ALLEGED ERROR, AND APPELLANT CANNOT SHOW ANY MATERIAL PREJUDICE FROM TWO LIMITED REFERENCES TO THE ALLEGEDLY IMPROPER EVIDENCE.

Finally, Appellant argues that a new trial is necessary because there were "repeated" references during the trial to the fact that Edward Raymond Hunt was intoxicated at the time he was initially pulled over by the highway patrol officer at the scene.

First of all, with all due respect, the trial judge was wrong in excluding evidence of Edward Raymond Hunt's intoxication. That evidence was directly relevant to the issue of the son's negligence, gross negligence, and recklessness in operating the vehicle while intoxicated, as well as his violation of several statutes regarding the operation of a motor

vehicle. Respondent's counsel made a proffer of the anticipated trial testimony based on the son's previous deposition testimony. (R. p. 250, l. 22 to p. 251, l.24). The judge ruled that the prejudicial effect of such testimony outweighed any probative value, and he excluded the evidence under Rule 403, SCRE. (R. p. 250, ll. 16-21). Because the evidence should have been admitted in the first place, Appellant cannot show any prejudice by the exclusion of such evidence.

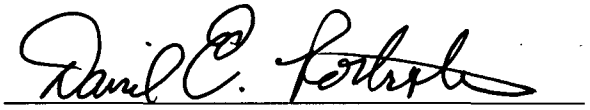
Nevertheless, Appellant's counsel grossly overstates the significance of this issue, perhaps because she was not trial counsel for Defendant Hunt. What Appellant's counsel now describes as "pervasive" was actually only two very minor occurrences: one in opening statement (R. p. 90, ll. 3-6), and one during the direct examination of Mr. Gause (R. p. 98, ll. 2-5). In both instances, Defendant Hunt's counsel objected, and the judge sustained the objection and gave a curative instruction to the jury to disregard any reference to alcohol with regard to Defendant Hunt's son. (R. p. 90, ll. 14-19; p. 98, ll. 7-10). Defendant Hunt's trial counsel did not move for a mistrial, nor did he object to the court's curative instruction as being inadequate. Even in a criminal case, two innocent references to objectionable evidence are not grounds for a new trial, especially when followed by a curative instruction. See State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("'Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.'") (quoting State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999)). The trial judge's curative instruction and his exclusion of evidence relating to alcohol consumption was not materially prejudicial to Appellant so as

to warrant a new trial.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this court affirm the judgment against Appellant under the family purpose doctrine based on the jury's verdict in this case.

Respectfully submitted,



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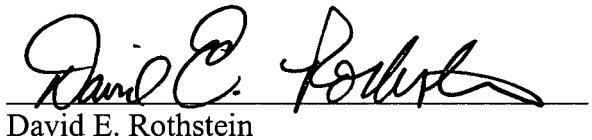
CERTIFICATE OF COUNSEL

The undersigned hereby certifies, pursuant to Rule 211, SCACR, that the foregoing Final Brief is identical to the brief previously served under Rule 208, SCACR, except that the references to the Record on Appeal have been revised, and obvious typographical errors and misspellings contained in the initial brief may have been corrected. No other substantive changes have been made.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. William H. Seals, Jr., Circuit Court Judge

Case No. 2006-CP-26-5391

Don D. Gause, ... Respondent,

v.

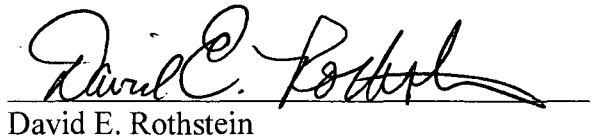
Nathan Dale Smithers and Edward W. Hunt, ... Defendants,

Of Whom, Edward W. Hunt is ..... Appellant.

AMENDED PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Appellant, Edward W. Hunt, by depositing a copy of the Brief in the United States Mail, postage prepaid, on December 27, 2011, addressed to his attorney of record, Linda Weeks Gangi, 1300 Second Avenue, Third Floor, P.O. Box 1740, Conway, SC 29528.

January 25, 2012



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