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Unpublished Opinion No. 2003-UP-336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.

PETITIONER'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals err in holding as a matter of law that David Price's negligent omission of failing to secure the keys to the Explorer was not committed in the course and scope of his employment when the evidence showed it was one of David Price's employment duties to secure all the vehicles entrusted to Respondent's detailing shop?

II. Did the Court of Appeals err in holding Appellant had not properly preserved relevant issues for appeal when Appellant raised these issues in writing and at oral arguments in the Circuit Court?

STATEMENT OF THE CASE

This is a personal injury case arising from a three car automobile accident. (Record on Appeal (R) at 000025). The accident occurred when Defendant Patricia Price, an unlicensed driver who was on a variety of narcotic pain medications, rear-ended Appellant and caused Appellant to strike another vehicle operated by Defendant Nguyen. Id. Appellant timely filed suit against these drivers. Id. She also filed suit against three other Defendants: Fairway Ford, the owner of the Ford Explorer operated by Patricia Price, Jeff Harris d/b/a/ Harris Auto Reconditioning, who had been entrusted with the vehicle that rear-ended Betty Tripp, and David Price, Patricia Price's husband and the General Manager for Respondent. Id. Defendants Fairway Ford, Harris and Nguyen filed separate answers (R. at 000032, 000036, 000050). Appellant alleged David Price was negligent in failing to secure the keys to the Ford Explorer and that his negligence

was committed in the course and scope of his employment for Respondent. (R. at 00498-00511). Accordingly, Appellant argued Respondent was liable to Appellant under the doctrine of *respondeat superior.* Id.

Respondent moved for summary judgment on the ground that David Price was not operating in the course and scope of his employment when he failed to secure the keys to the Explorer operated by Patricia Price.[1] (R. at 00487). Appellant opposed Respondent's Motion for Summary Judgment and submitted deposition testimony to the trial court in opposition to the Motion. (R. at 00498). At the summary judgment hearing and in a written memorandum to the Circuit Court, Appellant argued both that David Price was negligent in failing to secure the keys to the Explorer and that sufficient evidence existed to show that this act was within the course and scope of his employment with Respondent. (R. at 00498 – 00511 and 00055 – 00079).

The Circuit Court granted Respondent's Motion for Summary Judgment and Petitioner appealed to the Court of Appeals. (R. at 00001 – 00014). The Court of Appeals affirmed the Circuit Court's Order, holding as a matter of law, that David Price was not operating in the course and scope of his employment and that Appellant had not properly preserved issues of appeal. This Court granted a Writ of Certiorari to review the Court of Appeals opinion and Appellant now seeks an order reversing the Court of Appeals unpublished opinion and remanding this case for trial.

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[1] After limited written discovery, Fairway Ford also filed a Motion for Summary Judgment. (R. at 00484,00485). After depositions, Plaintiff voluntarily dismissed her case against Defendant Nguyen (R. at 000023). Plaintiff did not oppose Fairway Ford's Motion for Summary Judgment and the Circuit Court issued an order granting Fairway Ford's Motion for Summary Judgment (R. at 000015). This appeal relates only to Harris' Motion for Summary Judgment.

ARGUMENT

I. **The court below erred in holding as a matter of law that David Price's negligent omission of failing to secure the keys to the Explorer was not committed in the course and scope of his employment because the evidence showed it was one of David Price's employment duties to secure all the vehicles entrusted to Repondent's detailing shop.**

The modern doctrine of *respondeat superior* makes an employer liable to a third party for injuries caused by an employee acting or failing to act in the course and scope of his/her employment. Wade v. Berkeley County, 330 S.C. 311, 318-19 498 S.E.2d 684, 688 (Ct. App. 1998). Application of the doctrine requires both that the tortfeasor be an employee and that his/her tortious conduct be committed in the course and scope of employment. The South Carolina Law of Torts, p. 640. In the instant case it is undisputed that Respondent employed David Price. The only issue before this Court is whether evidence exists demonstrating David Price was acting within the course and scope of his employment in failing to properly secure the vehicle and keys to the vehicle that injured the Appellant, Betty Tripp.

In determining whether an employee is acting within the course and scope of employment South Carolina has long recognized the "motive" or "purpose" test. Crittendon v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 388 (Ct. App. 1986). "If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment" Id. (citations omitted). South Carolina Courts resolve any doubts as to the course and scope of employment against the employer, at least to the extent of requiring the question be submitted to a jury. Wade v. Berkeley County, 330 S.C. 311, 319, 498 S.E. 2d 684, 688 (Ct. App. 1998).

The court below correctly recited this standard, but erred in its application of this standard to the facts in this case because the lower court failed to consider David Price's motive or purpose in securing the vehicles entrusted to him by Defendant Harris. Instead of focusing on David Price's motive or purpose in securing the vehicles entrusted to him by Defendant Harris, the lower court's order incorrectly focused on David Price's motive and purpose in taking vehicles home for the weekend. In essence, the court below held that because David Price's motive or purpose in taking the Ford Explorer home was for his own benefit he had no further employment duties to Defendant Harris with regard to securing the vehicles. Such a conclusion misconstrues Appellant's argument and is contrary to the deposition testimony and other evidence.

Appellant has never argued Defendant Harris may be held liable under the doctrine of *respondeat superior* merely because Defendant Harris allowed David Price to take vehicles home. On this point, the Circuit Court correctly held merely entrusting a vehicle to an employee does not necessarily make an employer liable under the doctrine of *respondeat superior*. Respondent's argument is and always has been that a jury should consider the precise act that started the string of events leading to Ms. Tripp's injuries; namely, the failure of David Price to secure the Ford Explorer and its keys. Indeed, that critical omission by David Price was both a breach of the standard of care and was a breach of his employment duties to Respondent.

The very nature of Respondent's business as an auto detailer necessitated that vehicles be properly secured after hours. As General Manager of Defendant Harris' auto detailing shop, David Price was responsible for securing vehicles after hours and on weekends. (R. at 00295). Generally, vehicles were secured behind a locked gate. (R. at

00260). In addition, those vehicles were then locked inside a garage. Id. Essentially, anyone wanting to take a vehicle from Respondent's shop would have to climb a fence and then break into a locked building. None of these safe guards were maintained or followed by David Price when he took vehicles home.

Even when David Price took vehicles home for his personal use, it was part of his employment duties to secure and maintain those vehicles. At deposition Counsel asked Respondent:

> Q. Now, in taking these vehicles home would you have wanted David to secure the car?
>
> R. I would hope as an individual he knows our business that, of course, he would secure the car where he lived at.

(R. at 00270) (emphasis added). Later at his deposition, Respondent elaborated:

> Q. Let me try to be a little more direct. If David had a reason to know that his wife might try to drive that vehicle, would you have wanted him to take precautions to prevent that?
>
> A. Sure, I would.
>
> Q. Okay. Would you be dissatisfied with him if he did not take those precautions?
>
> A. Yes.
>
> MR. KELLY: I'm going to object to the form of both of those questions just on the record. Go ahead and answer.
>
> A. As being my top guy, yeah, I would be upset with him.
>
> Q. Why?
>
> A. Well, he's a leader of my company for one things [sic], if he's driving a car to home and back to work and he knows there's any way, shape or form that she may do that, then just common sense tells you shouldn't do it. You shouldn't allow it to be done. I mean it shouldn't have happened. None of this should have happened.

(R. at 00276-00277) (emphasis added). This deposition testimony suggests Respondent expected David Price to properly secure vehicles as part of his employment responsibilities. This employment duty existed as to vehicles left at the shop and those vehicles taken home by David Price. David Price's employment duty in securing vehicles did not end simply because he left the detailing shop. Those duties continued even when he took vehicles home.

In addition to the deposition testimony, other evidence before the Circuit Court also suggests David Price's purpose or motive in securing the vehicles was to benefit his employer, Respondent. David Price did not own the Ford Explorer or any of the vehicles he took home. Those vehicles were entrusted to Respondent. If something was damaged on one of the vehicles entrusted to Respondent, it was Respondent's responsibility to repair it or pay to have it repaired. In fact, the owner of the Ford Explorer at issue required Respondent to pay for its repair following the accident at issue. Most telling is the fact that immediately following this accident Respondent fired David Price for no cause other than dereliction of his duty to secure the company's cars.

Under these facts it simply defies logic and common sense to conclude David Price had any other purpose or motive in securing vehicles, and in particular, of securing the Ford Explorer that struck Ms. Tripp, other than to serve his employer. Respondent cannot now insulate himself from liability simply because David Price's negligence and breach of his employment duties occurred off Respondent's premises. Securing vehicles may have been David Price's only employment duty when he took vehicles home for his own use, but it was this very breach of his duty that allowed Patricia Price to take the Explorer that rammed Betty Tripp. Simply because David Price was at home "off the

clock" at the time of the accident does not absolve Respondent of liability. At the very least, a jury could properly infer from this evidence that David Price's negligence in failing to secure the Ford Explorer was also a breach of his employment duty to Respondent. The court below erred in failing to allow a jury to consider this evidence.

II. The Court of Appeals erred in holding Petitioner had not properly preserved relevant issues for appeal because Petitioner raised these issues in writing and at oral arguments in the Circuit Court.

In its opinion, the Court of Appeals stated "there were some questions as to whether David Price was negligent in failing to secure the keys to the vehicle." The Court of Appeals went on to hold that since this issue was not argued to the Court it was not properly preserved for appeal. This is simply not the case because Appellant argued extensively to the Circuit Court that David Price was negligent. (R. at 00067 through 00070 and 00500 through 00504). After hearing those arguments, the Circuit Court granted Respondent's Motion for Summary Judgment based solely on its conclusion that David Price's acts and/or omissions did not occur while he was operating in the course and scope of his employment for Respondent. (R. at 00001 through 00014). The Circuit Court made no findings of fact or law related to David Price's negligence and therefore there was nothing for Petitioner to argue to the Court of Appeals related to this issue. Id.

An overview of this case and of the legal arguments presented to the Circuit Court are helpful in understanding this issue. Quite obviously, for any party to prevail on a theory of *respondeat superior*, that party must demonstrate negligence on the part of an employee. In addition, that party must show that the negligent act or omission occurred in the course and scope of employment. Prior to the Summary Judgment hearing,

Petitioner's Counsel extensively briefed the issue of David Price's negligence and presented the Circuit Court Judge with a detailed legal argument. (R. at 00500 through 00504). At the Summary Judgment hearing Petitioner's Counsel again argued extensively that David Price was negligent and cited case law and other authority for that position. (R. at 00067 through 00070). The Circuit Court never addressed those issues and only granted summary judgment because it found that David Price was not operating in the course and scope of his employment.

There was never any question raised regarding David Price's negligence and even a cursory review of Respondent's own Brief demonstrates this. While Respondent spends some five pages arguing to the Court of Appeals that David Price's negligence was not within the course and scope of his employment with Respondent, Respondent never argued or moved for summary judgment on the ground that David Price was not negligent. (R. at 00487 through 00497). David Price never moved for summary judgment or otherwise moved for judgment related to his own negligent conduct. The Circuit Court never held or implied David Price was negligent in failing to secure the keys to the vehicle. (R. at 00001 through 00014 and 00022 through 00024). The Circuit Court simply did not grant summary judgment on this basis nor did it ever address this issue. Accordingly, there was no basis for Appellant to argue this specific point because it has never been an issue in this case until erroneously raised by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should reverse the court below and remand this matter for trial.

Respectfully submitted.

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September 8th, 2004

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PROOF OF SERVICE

I, Robert D. Dodson, attorney for Petitioner, do hereby certify that on September 8, 2004, I caused to be served three copies of the APPELLANT'S BRIEF and APPENDIX by depositing them in the United States Mail, with sufficient postage prepaid and addressed as follows:

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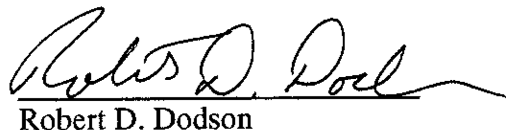

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