## STATEMENT OF THE ISSUE ON APPEAL

Did the Court of Appeals properly affirm the directed verdict in Food Lion's favor on the respondeat superior claims, where the record contains no evidence the employees committed the assault as part of their job duties or in furtherance of Food Lion's business?

## STATEMENT OF THE CASE

On October 7, 1999, the petitioner Ronnie Armstrong filed a personal injury lawsuit against Byron Brown, Marcus Cameron, and the respondent Food Lion, Inc. The petitioner Tillie Armstrong filed a substantially identical Complaint on March 15, 2000. Food Lion filed and served timely responses to both lawsuits. Brown and Cameron failed to appear in either case, and the trial court eventually entered default judgments against them.

The lawsuits were based on an incident in which two Food Lion employees (Byron Brown and Marcus Cameron) assaulted Ronnie Armstrong. The Armstrongs asserted several causes of action against all three defendants, including assault, battery, outrage, and negligence. In their Complaints, the Armstrongs claimed Food Lion was directly liable for negligently hiring, retaining, and training Brown and Cameron. However, the Armstrongs also alleged Food Lion was vicariously liable for its employees' fight with Ronnie Armstrong.

The two cases were eventually consolidated, and they went to trial in Fairfield County on June 17-18, 2002. Brown and Cameron did not appear at

trial, and the trial court entered a default judgment against them.[1] At the close of the Armstrongs' case, the trial court granted Food Lion's motion for a directed verdict on the vicarious liability claims. [App. p. 197.] The trial court based this decision on the absence of any evidence that the attack on Ronnie Armstrong occurred within the course and scope of Brown and Cameron's employment or in furtherance of Food Lion's business. [App. p. 197.] The trial court denied Food Lion's motion as to the "direct liability" negligence claim, however, and submitted that claim to the jury. [App. p. 197.] The jury returned verdicts in Food Lion's favor in both of the Armstrongs' cases. [App. p. 208.]

On July 17, 2002, the Armstrongs filed a Notice of Appeal in the South Carolina Court of Appeals. The Armstrongs challenged the directed verdict on the vicarious liability claims, but they did not raise any other issues on appeal. The court of appeals affirmed the trial court's decision in an unpublished opinion filed on June 10, 2004. [App. pp. 318-319.] After their Petition for Rehearing was denied in an order dated August 19, 2004, the Armstrongs petitioned this Court for review of the court of appeals' decision. This Court granted that petition in an order dated December 1, 2005.

## STATEMENT OF THE FACTS

Motivated by a longstanding personal grudge, Byron Brown and Marcus Cameron assaulted Ronnie Armstrong in the Food Lion grocery store where they were employed. Tillie Armstrong was also injured in the melee. There was no

[1] It is not clear from the record whether the Armstrongs attempted to subpoena Brown and Cameron to appear at trial.

evidence or indication the assault had anything to do with Food Lion or its business. The *was* evidence Brown and Ronnie Armstrong bore each other personal ill will, however, and Armstrong claimed Brown had once threatened to kill him. Thus, the trial evidence demonstrated the assault was an escalation of a preexisting personal feud between the assailants and the victim.

Taking the evidence in the light most favorable to the Armstrongs, the relevant facts are as follows. On the night of December 14, 1998, Ronnie Armstrong ("Ronnie") went with his mother ("Tillie") and sister to the Food Lion store in Winnsboro, SC. [App. pp. 50-51.] Ronnie left Tillie and his sister standing in a shopping aisle and went towards the meat section to select an item. [App. pp. 50-51.] As he was making his way through the store, Ronnie saw three individuals approaching him. [App. p. 51.] Two of those individuals were Food Lion employees Byron Brown and Marcus Cameron. [App. pp. 50-51.] The third was a man named Justin Loner. [App. pp. 50-51.]

When he got closer to Ronnie, Brown said, "What's up?", to which Ronnie replied, "Nothing." [App. p. 51.] Brown then moved forward, brandished a box cutter, and began swinging it at Ronnie. [App. p. 51.] A fight ensued, during which Ronnie and Brown both wound up on the floor. [App. p. 51.] At some point, Cameron told Ronnie, "Get off of my cousin" and joined in the fight, also swinging a box cutter. [App. pp. 51, 72.] During the scuffle, Tillie told Brown and Cameron to stop attacking her son, and she tried to move them away from Ronnie, but Cameron pushed Tillie to the floor. [App. pp. 82-83.] Eventually,

Justin Loner intervened and got Brown and Cameron away from Ronnie. [App. pp. 52-53.] The Armstrongs then left the store. [App. p. 53.]

None of the witnesses could explain why the attack occurred. When asked this question, Ronnie testified only, "I don't know why they cut me. They just attacked me for no reason." [App. p. 52.] As previously noted, Brown and Cameron failed to appear at trial, and their own explanations for the attack on Ronnie (if any) are not a part of the record. Significantly, though, the attack in the store was not the first troubling incident between Ronnie and Brown. On a previous occasion, the two men had been involved in a heated confrontation, during which Brown allegedly threatened to kill Ronnie. [App. pp. 73-74.]. That incident did not occur at a Food Lion store, and Food Lion had no connection to or involvement with it.

## STANDARD OF REVIEW

A trial court should grant a directed verdict when the evidence raises no reasonable inference that would support a finding of liability by the jury. *Guffey v. Columbia / Colleton Reg. Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). "When reviewing an order granting a directed verdict, this Court must view the facts in the light most favorable to the nonmoving party." *Anderson v. Augusta Chronicle*, 365 S.C. 589, 594, 619 S.E.2d 428, 430-431 (2005). If the facts viewed in that light raise more than one reasonable inference, the directed verdict should not stand. *Heyward v. Christmas*, 357 S.C. 202, 208, 593 S.E.2d 141, 144 (2004). However, if the evidence fails to support even one element of

the challenged cause of action, the directed verdict should be affirmed. *Guffey*, *supra*, at 163, 697.

## ARGUMENT

**The court of appeals properly affirmed the directed verdict on the respondeat superior claims because there is no evidence Brown and Cameron acted in furtherance of Food Lion's business when they assaulted the Armstrongs for their own personal reasons.**

Brown and Cameron were Food Lion employees, and they were working on the night of the assault. Those basic facts are undisputed. Yet, employers are not absolutely liable for every act an employee commits while "on the job". Only those acts undertaken *within the scope of employment and in furtherance of the employer's business* can support a finding of vicarious liability. The relevant inquiry in this case, therefore, is whether the Armstrongs presented evidence upon which a reasonable jury could conclude Brown and Cameron attacked Ronnie and Tillie Armstrong within the scope of their employment with Food Lion. For the reasons set forth below, the trial court correctly answered this question in the negative. Therefore, the Court of Appeals properly upheld the directed verdict, and this Court should affirm.

### (A) Respondeat Superior Standards

As this Court has stated, "[i]t is well settled that the liability of the master for the torts of his servant arises only when the servant is acting about the master's business, within the scope of his employment." *Lane v. Modern Music, Inc.*, 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964). A servant acts within the

scope of his or her employment when the conduct is reasonably necessary to accomplish the purpose of his employment and is in furtherance of the employer's business. *Id.* Thus, only acts that serve or benefit the employer in some way fall within the scope of employment for purposes of respondeat superior liability. *Id.*

Conversely, conduct that does *not* further the employer's business is necessarily outside the scope of employment. As this Court explained in *Lane*, *supra*:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. *If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time*.

244 S.C. at 305, 136 S.E.2d at 716 (emphasis added). In other words, the employer is not liable for harm caused by an employee acting for his or her own private reasons, and not in furtherance of the employer's business. *Id.* *See also* *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 227, 317 S.E.2d 748, 753 (Ct. App. 1984). This rule means vicarious liability does not exist when an employee performs a malicious or mischievous act entirely disconnected from the purpose of his or her employment. *Id.* at 306, 717.

A plaintiff asserting a vicarious liability claim against an employer must prove the employee committed the injury-causing acts within the scope of his or her employment. *Id.* at 304-305, 716. If the plaintiff's evidence creates competing inferences as to whether or not the acts were within the scope of employment, the issue is properly submitted to the jury. *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). However, where the plaintiff fails to present evidence the wrongful act was in furtherance of the employer's business, judgment as a matter of law for the employer is warranted. *Hamilton v. Davis*, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990).

(B) <u>Applicable Case Law</u>

Both this Court and the court of appeals have ruled in favor of judgments as a matter of law for employers in cases with closely analogous facts. *See Lane v. Modern Music, Inc.*, 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964); *Hamilton v. Davis*, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990). As the court of appeals correctly determined in this case, *Lane* and *Hamilton* are controlling authorities, and they dispose of the Armstrongs' arguments. Thus, an examination of these cases is warranted.

In *Lane*, the defendant was a company that supplied and serviced coin operated music machines. 244 S.C. at 302, 136 S.E.2d at 715. The lawsuit arose over an incident involving an employee (Powell), whose job duties consisted of "going around to the various locations where [the defendant] had

placed [the music machines], taking up the money in them and changing the records from time to time." *Id.* at 304, 716. On the occasion at issue in *Lane*, the defendant had sent Powell on an errand to a restaurant in Dillon, SC, where one of the machines was located. *Id.* at 302, 715.

After conducting his scheduled business, Powell took the restaurant manager outside to see what he claimed was a mongoose. *Id.* at 302-303, 715. While this was happening, the plaintiff, a patron at the restaurant, also exited and drew near to where Powell and the manager were standing. *Id.* at 303, 715. Powell then tripped a mechanism that threw a fake mongoose out of a cage sitting on the ground. *Id.* This sudden movement startled the plaintiff, who fell on her back and suffered injuries. *Id.*

The defendant moved for a directed verdict at trial, arguing Powell was not acting within the scope of his employment when the plaintiff's injury occurred. *Id.* at 301, 714. The trial court denied the motion, and the jury returned a verdict for the plaintiff. *Id.* After its post-trial motions were denied, the defendant appealed to this Court, which reversed the trial court's decision and remanded the case with instructions to enter judgment in favor of the defendant. *Id.*

After setting forth the general standards for respondeat superior liability, the Court examined the evidence to see if it supported any reasonable inference Powell was acting within the scope of his employment when the injury occurred. Finding none, the Court provided the following analysis:

> There is a complete absence of any evidence from which an inference can be drawn that the aforesaid

> mischievous acts of Powell had any connection whatsoever with his duties concerning his master's business. It was not necessary for Powell to engage in the acts which inflicted injury upon the respondent to accomplish the purpose of his employment. There is absolutely no proof that the master knew that Powell had in his possession, or authorized the use of the "mongoose" device with which he frightened people. *The only reasonable inference from the testimony is that Powell used the aforesaid mongoose device for his personal or private amusement and to effect an independent purpose of his own. Certainly, it was not used in furtherance of the master's business*.

244 S.C. at 305-306, 136 S.E.2d at 716-717 (emphasis added). Even though Powell was "on the job" when the injury occurred, there was no way his conduct could be seen as benefiting the defendant's business. As the Court noted, "extraordinary, extreme, or prankish acts rarely can be attributed to the master as means or methods of carrying out an ordinary employment." *Id.* at 306, 717 (*quoting Terrett v. Wray*, 105 S.W.2d 93 (Tenn. 1937)). Thus, no jury question existed, and the defendant was entitled to judgment as a matter of law. *Id.* at 307, 717.

The court of appeals reached a similar conclusion in *Hamilton v. Davis*, *supra*. There, the defendant owned rental properties and employed a man named Mueller as a property manager. 300 S.C. at 412, 389 S.E.2d at 297. Mueller's job involved maintenance and cleaning of the properties and collection of rent. *Id.* The plaintiff was a resident at one of the properties, where Mueller allowed her to live rent-free in exchange for her performing some of the maintenance tasks. *Id.* at 413, 297.

On one occasion, Mueller went to the property where the plaintiff lived to haul away debris generated by the plaintiff's yard work. *Id.* at 413, 298. As Mueller was preparing to leave, the plaintiff walked up to his truck to speak with him. *Id.* Seeing the plaintiff was lodged in between the truck's open door and a nearby car, Mueller "started laughing and dropped the gear into reverse and smeared [the plaintiff] the full length of the car." *Id.* The plaintiff suffered injuries as a result of this incident, which she considered to be "rather a dumb stunt" by Mueller. *Id.* Arguing the "stunt" was outside the scope of Mueller's employment, the defendant moved for summary judgment on the plaintiff's respondeat superior claim. *Id.* at 412, 297. The trial court granted the motion, and the plaintiff appealed. *Id.*

Relying on this Court's reasoning in *Lane*, the court of appeals affirmed summary judgment for the defendant. The court noted Mueller was the defendant's employee and was working when the incident occurred. Those facts, however, were not sufficient to create a jury question on liability. According to the court, the key question was whether any reasonable jury could determine Mueller's actions somehow served or furthered the defendant's business. *Id.* at 415-416, 299. Finding no such conclusion was possible under the record evidence, the court stated:

> While Mueller was certainly in the act of furthering his master's business in collecting the debris and removing it from the yard, he momentarily stepped away from that business when he committed the assault on [the plaintiff]. The assault was clearly of a

> personal nature, indulged in for his own personal amusement.

300 S.C. at 417, 389 S.E.2d at 300. The court acknowledged its obligation to give the plaintiff the benefit of any doubts regarding the scope of employment issue, but the court found no such doubts in the record. *Id.* at n.2. As the court concluded, "The record before us contains evidence the assault arose out of acts of mischief and horseplay. Indeed, there is no evidence the assault occurred for any other reason and there is certainly no evidence it occurred in furtherance of [the defendant's] business." *Id.*

Although they were more malicious, the facts in the present case are closely analogous to those involved in *Lane* and *Hamilton*. Like the miscreants in those cases, Brown and Cameron were on-duty employees when the attack occurred. Also like the others, however, Brown and Cameron "stepped away" from their work tasks to pursue a wrongful enterprise for their own personal reasons. *See Hamilton*, 300 S.C. at 417, 389 S.E.2d at 300. The assault on Ronnie Armstrong had nothing to do with their work, and it did not benefit Food Lion or advance its business in any way. Thus, this case falls squarely under *Lane* and *Hamilton*, the court of appeals correctly affirmed based on those authorities.

The Armstrongs have cited several other cases in support of their arguments, but their reliance on those decisions is misplaced. Unlike *Lane* and *Hamilton*, the cases cited by the Armstrongs are easily distinguishable from the present situation. In fact, those cases form what amounts to a separate branch

of respondeat superior authorities. They represent situations in which doubts about the bad actor's motives and purposes created jury issues. *Lane* and *Hamilton*, on the other hand, represent situations in which the actions were unequivocally outside the scope of employment. As argued above, the present case falls under this latter branch. An examination of the Armstrongs' authorities only reinforces this point.

In *Jones v. Elbert*, 211 S.C. 553, 34 S.E.2d 796 (1945), the defendant owned a dairy farm and employed a man named Martin as the general manager. Martin contacted the plaintiff's company about installing a refrigeration system at the defendant's farm. *Id.* at 556, 798. The plaintiff installed the system, which did not function properly. *Id.* After several attempts to repair the system, the plaintiff returned to the farm a final time and told Martin the problem was related to plumbing, and, thus, the plaintiff would not fix it. *Id*. at 557, 798. The two men began to argue about who bore the responsibility of fixing the plumbing problem. *Id.* As the argument escalated, Martin physically assaulted the plaintiff, who suffered injuries. *Id.*

The trial court directed a verdict in favor of the defendant, finding Martin acted outside the scope of his employment when he assaulted the plaintiff. On appeal, this Court reversed, finding the evidence presented a question of fact for the jury. The testimony, taken in the light most favorable to the plaintiff, created doubt as to whether Martin assaulted the plaintiff due to the business-related argument, or due to a personal insult leveled at him by the plaintiff. *Id.* at 559-

560, 799. Because the plaintiff was entitled to the benefit of the doubt at the directed verdict stage, submission of the issue to the jury was necessary.

A business-related incident was also involved in *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986). The defendant in that case was a contractor hired by the plaintiff to renovate a building. *Id.* at 113, 386. When the work was nearly completed, the plaintiff refused to pay the defendant's bill. *Id.* The defendant's president informed his job foreman (Welch) of the plaintiff's unwillingness to pay the bill, and then the president went to see the plaintiff at his building. *Id.* at 114, 386. Welch also went to the plaintiff's building to retrieve his crew's tools and to tell the painting subcontractor to cease work. *Id.* When he got to the building, Welch went to the office where the defendant's president and the plaintiff were meeting. *Id.* As his boss looked on, Welch severely beat the plaintiff until he agreed to pay the defendant's bill. *Id.*

The trial court dismissed a cause of action for negligent hiring, but sent the plaintiff's respondeat superior claims to the jury. After a verdict for the plaintiff, the defendant appealed, arguing Welch's actions were outside the scope of his employment as a matter of law. The court of appeals disagreed and concluded the evidence created a jury question as to the scope of employment issue.

The court acknowledged the rule requiring an act to be in furtherance of the employer's business to be considered within the scope of employment. *Id.* at 116, 387. However, the court believed the plaintiff's evidence could support a

reasonable finding by the jury that Welch's assault served his employer's business. As the court explained:

> Welch's relationship to [the plaintiff] arose solely from his position as [the defendant's] employee. The assault took place in the presence of the master, who, according to the testimony of [the plaintiff] and his father, assisted Welch by physically restraining the father when he attempted to come to the aid of his son. *The purpose of the assault was to coerce [the plaintiff] to pay debt owed to the master*. Consequently, although it may have been outside the scope of Welch's authority, the jury could reasonably find the assault was an act in furtherance of the master's business.

*Id.* at 116, 388 (emphasis added). Thus, the court of appeals allowed the jury's verdict to stand.

The Armstrongs presumably rely on *Jones* and *Crittenden* because those cases featured physical assaults by the defendants' employees. By doing so, however, the Armstrongs overlook the obvious distinguishing factor: *Jones* and *Crittenden* both involved assaults arising from *business-related disputes*. In *Jones*, the employee fought the plaintiff after an argument over matters relating directly to the employer's business got out of hand. Although the assault was certainly not part of the employee's work, the evidence supported a reasonable inference the employee committed it in a misguided attempt to help his employer's business (*i.e.*, to force the plaintiff to repair the refrigeration system). Similarly, the employee in *Crittenden* acted in furtherance of his employer's business when he attacked the plaintiff. As the court of appeals expressly noted, the sole purpose for the attack was to force the plaintiff to pay his debt to the

employer. Again, the employee's methods were inappropriate and beyond his authority, but he definitely acted with the intention of furthering his employer's business.

Unlike those in *Jones* and *Crittenden*, the assaults in the present case had nothing even remotely to do with Food Lion's business. There was no evidence Ronnie Armstrong argued with Brown and Cameron about Food Lion before the assault occurred. Likewise, there is no evidence anyone at Food Lion accused Ronnie Armstrong of a criminal offense relating to Food Lion's property or merchandise (*i.e.*, vandalism or shoplifting). On the other hand, there *was* evidence Ronnie Armstrong had been in a previous altercation with Brown long before he became a Food Lion employee. Thus, the evidence does not support a conclusion the assault was in furtherance of Food Lion's business, and, for that reason, this case differs fundamentally from both *Jones* and *Crittenden*.

The Armstrongs' reliance on *Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (1945) is similarly misplaced. In that case, the defendant instructed its employee (Falconer) to deliver gasoline from Charlotte to Rock Hill. *Id.* at 342, 425. Falconer consumed alcoholic beverages during the trip and continued drinking when he attempted to deliver the gasoline in Rock Hill. *Id.* at 342, 426. He then started back for Charlotte, but avoided the most direct route in an attempt to evade police detection. *Id.* During the return trip, Falconer was involved in an accident that caused the plaintiff to sustain property damages.

The trial resulted in a verdict for the plaintiff, and the defendant appealed on the ground that Falconer was not acting within the scope of his employment when the accident occurred. This Court affirmed in a 3-2 decision. The Court concluded Falconer's failure to take the most direct route back to Charlotte did not necessarily absolve the defendant of liability because the "circuitous route [Falconer] chose . . . [was not a] complete abandonment of the service of the master." *Id.* at 350, 429. Moreover, there was evidence to support a conclusion Falconer had not abandoned his employer's business when the accident occurred. For example, Falconer still had most of the gasoline in his truck, and, "having failed to deliver [the gasoline] in Rock Hill, it was surely his duty to return it to Charlotte." *Id.* at 348, 428. Based on this evidence, the majority believed it was properly left to the jury to determine whether Falconer was still acting in furtherance of his employer's business at the time of the accident.[2]

As indicated by this Court's split decision, *Carroll* was a closer call than *Jones* and *Crittenden*. Even in *Carroll*, however, there was arguably *some* evidence the employee's conduct was furthering the employer's business (*i.e.*, getting the employer's gasoline returned). The present case, on the other hand,

[2] In his dissenting opinion, Chief Justice Baker found no jury issue because there was testimony Falconer took the indirect route to keep a date in York, not to return to his employer's premises. Based on this evidence, Chief Justice Baker concluded, "The only reasonable inference to be drawn from the testimony is that with utter indifference to the business and interest of the [employer] the driver of its tank truck completely abandoned the business of [the employer], while in the midst of performing it and before completing it, and went off on a purely personal mission, which mission had not been accomplished at the time of the accident." 207 S.C. at 364, 35 S.E.2d at 435.

contains no evidence of any business-related reason or motivation for the wrongful acts. The only reasonable inference to be drawn from the evidence is the attack stemmed from a personal dispute (actual or perceived) between Brown and Ronnie Armstrong. This crucial point, ignored by the Armstrongs, distinguishes the present case from *Jones*, *Crittenden*, and *Carroll*.

Closer to the facts of this case are several decisions from other jurisdictions. *See Wegner v. Delly-Land Delicatessen, Inc.*, 153 S.E.2d 804 (N.C. 1967); *Stern v. Ritz Carlton Chicago*, 702 N.E.2d 194 (Ill. App. 1998), *review denied*, 707 N.E.2d 194 (Ill. 1999); *Maddex v. Ricca*, 258 F. Supp. 352 (D. Ariz. 1966). In those cases, the courts entered or upheld judgment as a matter of law for defendants whose employees "stepped away" from the scope of their employment to assault patrons. Significantly, the assaults in all of those cases apparently stemmed from personal motives, rather than business-related disputes. The cases are substantially similar to the present situation, therefore, and an examination of the cases is instructive.

In *Wegner*, the plaintiff went to eat at the defendant's deli. 153 S.E.2d at 804-805. He and his son sat at an available table that still had some used dishes on it. *Id.* Seeing a bus buy at nearby table, the plaintiff asked him to clear the dirty dishes. *Id.* The bus boy complied, but he mistakenly grabbed the plaintiff's clean glass in the process. *Id.* The plaintiff asked the bus boy to bring a replacement glass. *Id.* When the bus boy returned, he "slammed" the new glass down on the table near the plaintiff. *Id.* The plaintiff and the bus boy then

exchanged heated words, and another patron summoned the deli's owner. *Id.* The owner grabbed the bus boy and attempted to lead him away from the table, but the bus boy broke free, ran back to the table, and assaulted the plaintiff. *Id.*

The North Carolina Supreme Court affirmed a directed verdict in favor of the deli. Looking to the general rules governing "employee assault" cases, the court stated:

> If the act of the employee was a means or method of doing that which he was employed to do, though the act be wrongful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do. . . .
>
> *If an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable.*

153 S.E.2d at 808 (emphasis added). Based on those principles, the court found the evidence could not support a finding of liability. The court failed to see any way the assault could reasonably be seen as part of the bus boy's job. As the court explained:

> Whatever the source of [the bus boy's] animosity toward the plaintiff may have been, he did not strike the plaintiff as a means or method of performing his duties as a bus boy. A different situation would be presented if the glass which he "slammed down" upon the table had shattered and injured the plaintiff, for there the employee would have been performing an act which he was employed to do and his negligent or

> improper method of doing it would have been the act of his employer in the contemplation of the law. *However, the assault, according to the plaintiff's testimony, was not for the purpose of doing anything related to the duties of a bus boy, but was for some undisclosed, personal motive*. It cannot, therefore, be deemed an act of his employer and this basis for attacking the [directed verdict] also fails.

*Id*. at 809 (emphasis added). Thus, no jury issue existed, and judgment for the defendant was appropriate.

In *Stern v. Ritz Carlton Chicago*, *supra*, the plaintiffs were guests at the defendant hotel. 702 N.E.2d at 194-195. The hotel employed masseurs to provide services for its guests, and the plaintiffs signed up for massages during their stays. *Id.* at 195. During separate massage sessions, two different masseurs fondled the respective plaintiffs in a sexual manner. *Id.* Both plaintiffs brought lawsuits against the hotel relying in part on respondeat superior claims. The trial court granted summary judgment to the hotel on the vicarious liability theories, and the Illinois Court of Appeals affirmed.

Although the masseurs were performing their jobs (*i.e.*, giving massages) when the assaults occurred, the court found this was not the only inquiry. Instead, the dispositive question was whether or not the masseurs' improper actions could reasonably be seen as serving the hotel's business interests. Since there was no evidence the assaults occurred for any reason other than the masseurs' own deviant purposes, the answer to that crucial question was negative as a matter of law. As the court explained, ". . . plaintiffs have not explained how, in sexually assaulting [the plaintiffs], [the masseurs] were

furthering the interests of the [hotel]. . . . The sexual assault of plaintiffs during the course of each massage could in no way be interpreted as an act in furtherance of the business interests of the [hotel]." *Id.* at 198. Thus, the hotel could not be liable under the respondeat superior claims, despite the fact that the assaults occurred during the performance of the employees' jobs.

A more bizarre factual scenario was involved in *Maddex v. Ricca*, *supra*. The plaintiff attempted to purchase a drink at the defendant's bar, but the owner, believing the plaintiff to be intoxicated, refused to serve him and ordered him to leave. 258 F. Supp. at 353. The plaintiff went to his car in the defendant's parking lot and turned on the ignition before passing out. *Id.* An overheating radiator caused smoke to come from the engine as the car idled in the parking lot, and the bar owner sent out an employee to check on the plaintiff. *Id.* The employee turned off the ignition and went back into the bar, but he later returned to check on the plaintiff again. *Id.* This time, the plaintiff was awake, and he got into an argument with the employee. *Id.* The employee physically assaulted the plaintiff, causing serious injuries. *Id.* As it turned out, the employee and the plaintiff had been involved in a previous altercation at another bar, and bad blood still existed between them. *Id.* at 194.

The federal district court determined the individual employee could be held liable under those facts, but not his employer. In reaching this decision, the court focused on the preexisting animosity between the employee and the plaintiff, which was revealed by the previous altercation. As the court observed, "[a]

factor which has been noted by some courts in connection with the question whether the assault was purely personal to the servant or within the scope of the employment is evidence of past disagreements or animosities." *Id.* at 356 (*quoting* 34 A.L.R.2d 367). Since there was no evidence anything else (*i.e.*, a business-related issue) motivated the assault, the only reasonable inference was that the employee abandoned his employer's business and assaulted the plaintiff out of personal spite and animosity. *Id.* at 358-359. Accordingly, judgment as a matter of law for the defendant bar was warranted.

Although those foreign cases are not binding on this Court, they are strongly persuasive authorities for two reasons. First, the cases come from jurisdictions that follow the same general respondeat superior principles as those found in South Carolina. Second, the cases involve certain factual elements that are similar, if not identical, to those in the present case. In *Maddex*, for example, the only explanation for the assault suggested by the evidence was preexisting animosity between the employee and the plaintiff. The same can be said about the present case. In addition, the employees in *Wegner* and *Stern* were on the job and doing their normal work before "stepping away" from those tasks to commit assaults for their own personal reasons. Precisely the same thing happened in this case. These similarities make the foreign cases more relevant to the current issue than any of the authorities cited by the Armstrongs.

The applicable case law, both from this Court and other courts, supports the court of appeals' decision to affirm the directed verdict. The cases

demonstrate the courts' willingness to find no liability as a matter of law where an employee assaults a patron for reasons not connected to the employer's business. The motivation for the assault is the dispositive factor, and that is why the assault cases cited by the Armstrongs are distinguishable. In those cases (*i.e.*, *Jones* and *Crittenden*), the attacks arose from business disputes and were at least arguably attempts to further the employers' business interests. The assault in the present case, on the other hand, had nothing to do with Food Lion's business, and the evidence does not support any inference to the contrary. Therefore, the court of appeals correctly upheld the directed verdict, and this Court should affirm.

(C) <u>Use of Box Cutters</u>

With no evidence Brown and Cameron committed the assault for business-related reasons, the Armstrongs turn their attention to the box cutters Brown and Cameron used in the attack. The use of the box cutters has no relevance to the scope of employment issue, however, and the Armstrongs' arguments to the contrary are based on a misreading of their cited authorities. Accordingly, this argument does not provide any basis for reversing the court of appeals' decision.

Relying primarily on language in the dissenting opinion from *Carroll v. Beard-Laney, Inc.*, *supra*, the Armstrongs claim the use of Food Lion's box cutters entitles them to a presumption Brown and Cameron were acting within

the scope of their employment.[3] This argument misconstrues the following statement from the dissent in *Carroll*:

> Where one is found in the possession of the property of another, apparently using it in the business of such other, he is presumed to be the agent or servant of the owner and acting within the course of his employment.

207 S.C. at 361, 35 S.E.2d at 433.[4] Selectively reading this passage, the Armstrongs focus on the first and last parts of this statement, while ignoring the crucial middle portion. The omitted clause ("apparently using it in the business of such other") demonstrates that the presumption does not change traditional respondeat superior principles. The use of the employer's property, in and of itself, does not create a jury question as to the scope of employment issue. A plaintiff still must prove the use occurred in furtherance of the employer's business. Otherwise, the middle portion of the passage would be rendered meaningless.

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[3] The Armstrongs presented no evidence Food Lion actually provided the knives to Brown and Cameron. Ultimately, though, it makes no difference where the box cutters came from. The only thing that matters for present purposes is the use to which the box cutters were put.

[4] This passage appears in Chief Justice Baker's dissent, in which one other justice joined. Significantly, the dissent concluded there was *no jury issue* regarding scope of employment and the trial court should have directed a verdict for the defendant employer. This Court later cited the passage favorably in *Falconer v. Beard-Laney, Inc.,* 215 S.C. 321, 54 S.E.2d 904 (1949), but that case, like the dissent in *Carroll*, held the evidence was insufficient to support a "scope of employment" finding. Thus, it is difficult to see how this passage could possibly stand for the proposition that the use of an employer's property automatically creates a jury question as to scope of employment. Yet, this is the argument the Armstrongs are now making.

Accepting the Armstrongs' argument on this issue would dramatically alter South Carolina's respondeat superior law. Essentially, it would make employers strictly liable for torts committed by employees while using the employers' property. For example, under the Armstrongs' logic, a security company that provided a handgun to one of its employees would face vicarious liability if the employee used the gun to murder her spouse's paramour.[5] The over-extended "presumption of scope of employment" would allow a respondeat superior claim to go to a jury in that situation, even though the employee clearly acted for her own reasons that were totally unrelated to the security company's business. The "furtherance of business" requirement prevents this type of absurd result, and that is precisely why it appears in the quoted passage.

Tacitly conceding this point, the Armstrongs argue Brown and Cameron were using the box cutters for work-related tasks prior to attacking Ronnie. This position ignores the important difference between "before the assault" and "during the assault". For respondeat superior liability to exist, the employee must be acting in furtherance of the employer's business *when the wrongful act occurs*. *See Falconer v. Beard-Laney, Inc.*, 215 S.C. 321, 330, 54 S.E.2d 904, 908-909 (1949) (noting the evidence could not create a jury question as to scope of employment without testimony the employee was "engaged *at the time of the*

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[5] In this hypothetical, the security company might be liable on a negligent entrustment theory, but that claim would involve the security company's *own* negligence. The issues involved in that type of direct claim would be much different than those in a respondeat superior claim. In the present case, of course, the only claims at issue on the appeal are based on respondeat superior. The jury decided the Armstrongs' direct liability claims in Food Lion's favor.

*accident* in or about the business of his master") (emphasis added). What the employee was doing *before* the wrongful act, therefore, has no bearing on whether he was acting within the scope of employment *during* the wrongful act.[6]

Indeed, the applicable respondeat superior principles presuppose work-related activities immediately *prior* to the wrongful act. The cases cited in the previous section speak of employees "abandoning" or "stepping away" from their work. Obviously, those employees could only abandon or step away from their work if they were doing it in the first place, and they were all performing their work immediately prior to the assaults.[7] Yet, that fact did not prevent judgment as a matter of law for their employers. Accordingly, even if Brown and Cameron were using the box cutters for work-related purposes before the assault, that fact has no impact on the scope of employment issue.

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[6] Recall the North Carolina Supreme Court's hypothetical in *Wegner v. Delly-Land Delicatessen, Inc.*, *supra*. The court said vicarious liability could have existed if the drinking glass had shattered when the bus boy slammed it down, and glass fragments had injured the plaintiff. 153 S.E.2d at 809. A similar hypothetical applies to the present case. If Brown had cut Ronnie Armstrong due to an errant swing of the box cutter while opening a box, a jury question might exist. That is not what happened, however, and the actual evidence does not support any reasonable inference that Brown and Cameron were performing their job duties *during* the assault on Ronnie Armstrong.

[7] In *Lane*, the employee was making a service call before engaging in the mongoose prank. The property manager in *Hamilton* was picking up yard debris before running his car into the plaintiff. The masseurs in *Stern* were performing massages immediately prior to the inappropriate fondling. In *Wegner*, the bus boy was cleaning off tables before he attacked the plaintiff. Finally, the bar employee in *Maddex* was following his boss's instructions by checking on the plaintiff in the time leading up to the assault.

Simply put, the Armstrongs' "box cutter argument" is a red herring. The assailants' use of box cutters, in and of itself, does not create a presumption they committed their wrongful acts in the scope of their employment. Nor does their prior use of box cutters for work-related purposes have any relevance to the scope of employment issue at the time of the assault. To create a jury question, the Armstrongs had to present evidence that Brown and Cameron were acting in furtherance of Food Lion's business when they actually assaulted Ronnie. As demonstrated below, the Armstrongs failed to do so, and the directed verdict for Food Lion was proper.

(D) Failure to Establish "Furtherance of Business" Element

All logical roads in this case lead back to the one dispositive question: were the assaults on Ronnie Armstrong in furtherance of Food Lion's business? Stated another way, the inquiry is: did Brown and Cameron assault Ronnie Armstrong for work-related reasons or for their own personal reasons? Only if the attack arose from business issues, or as part of the assailants' job duties, would respondeat superior liability be possible. Thus, the Armstrongs bore the burden of presenting evidence the assault benefited Food Lion or furthered its business in some way. The Armstrongs did not carry that burden at trial, and their appellate arguments likewise fall short.

Even when taken in the light most favorable to the Armstrongs, the evidence fails to suggest the assaults arose from the attackers' jobs or had any business-related purpose. Brown and Cameron were merchandise stockers, and

they quite literally "walked away" from their job duties when they approached Ronnie Armstrong. [App. pp. 51-52.] Brown and Cameron then attacked Armstrong without expressing any business-related reason for doing so. The only evidence providing any explanation for the attack was Ronnie Armstrong's admission he and Brown had been involved in an altercation on a previous occasion, at which time Brown had threatened him. [App. pp. 73-74.] This evidence creates only an inference that the attack occurred due to personal animosity. It does not raise any inference the attack occurred in furtherance of Food Lion's business.

In a strange argument, the Armstrongs attempt a sort of "logical alchemy" by claiming the *absence* of evidence creates a jury question. Without citing to any specific testimony, the Armstrongs claim there was "doubt" as to why the assault took place, and the doubt had to be resolved by a jury. Yet, the reason for the assault was not "in doubt"; it was *unexplained.* These are significantly different concepts.

Saying the reason was "in doubt" suggests there was evidence supporting competing explanations, and it was uncertain which one was accurate.[8] But that is not what happened in this case. Here, no one provided *any explanations at all*,

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[8] For example, if there had been testimony offering several competing explanations for the assault – some business-related and others merely personal – a jury question may have been present. Under the actual record in this case, however, there was no "either / or" choice to make because only one explanatory inference exists. Any explanation other than the preexisting animosity would be purely speculative and could not serve as the basis for a reasonable finding of liability.

other than Ronnie Armstrong's testimony about a prior confrontation with Brown. The Armstrongs failed to present an evidentiary basis for the jury to conclude the attack occurred for any reason other than Brown's personal animosity toward Ronnie. Thus, the unknown reason for the attack was not a jury question; it was a failure by the Armstrongs to present evidence to support a crucial element of their respondeat superior claims.

After nearly seven years of litigation, the Armstrongs still have not explained how the assault on Ronnie Armstrong was in furtherance of Food Lion's business. Indeed, it is difficult to envision how such an attack ever *could be* in furtherance of a retail store's business. Perhaps such a finding might be possible if employees used box cutters to disable an armed robber or to subdue a deranged person threatening immediate harm to other shoppers,[9] but nothing even close to those scenarios is involved in the present case. Here, Brown and Cameron attacked Ronnie Armstrong for no reason other than personal animosity, and that type of conduct was inherently *detrimental* to Food Lion's interests. It is simply impossible to reach any other conclusion based on the record evidence.

Brown and Cameron temporarily abandoned their employment when they assaulted Ronnie Armstrong. The attack had nothing to do with Food Lion's business, and it did nothing to further the company's interests. Rather, the

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[9] Food Lion does not concede that respondeat superior liability would exist in those scenarios, but factual questions might be raised in them, depending upon the evidence presented.

record supports only the inference that Brown and Cameron assaulted Ronnie Armstrong based on a preexisting grudge. The Armstrongs presented nothing to challenge this inference, and they did not offer any evidence of alternative, business-related motivations for the attack. Thus, the evidence supported only one reasonable conclusion, and the trial court had no choice but to direct a verdict for Food Lion on the respondeat superior claims.

Ultimately, the Armstrongs can rely only on the following facts: (1) Brown and Cameron were "on duty" Food Lion employees; (2) they assaulted Ronnie Armstrong on Food Lion's premises; and (3) they used box cutters presumably obtained from Food Lion. If the "furtherance of business" requirement were not part of a respondeat superior claim, these facts might be sufficient to get the vicarious liability claims to a jury. But this requirement *is* an element of a respondeat superior claim, and the evidence does not – and *cannot* – support a conclusion Brown and Cameron acted in furtherance of Food Lion's business when they assaulted Ronnie Armstrong.

Unlike *Jones*, there is no evidence Brown and Cameron got into a fight over a business deal. Unlike *Crittenden*, there is no evidence they used physical force to collect a debt owed to their employer. And unlike *Carroll*, there is no evidence they committed a wrongful act while returning their employer's property. Instead, like the employees in the cases cited by Food Lion, Brown and Cameron abandoned their work duties and assaulted a patron for reasons wholly unrelated to their employer's business. As a matter of law, therefore, Brown and Cameron

"step[ped] aside from the master's business for some purpose wholly disconnected with [their] employment, [and] the relation of master and servant [was] temporarily suspended." *Lane*, 244 S.C. at 305, 136 S.E.2d at 716. Accordingly, there is no respondeat superior liability for Food Lion.

## CONCLUSION

For purposes of respondeat superior liability, Brown and Cameron were not Food Lion employees when they assaulted the Armstrongs. They attacked Ronnie Armstrong for their own reasons, and the assault had nothing to do with furthering Food Lion's business. Thus, Brown and Cameron were serving themselves, not Food Lion, when the assault occurred, and Food Lion has no vicarious liability for their actions. The evidence on these points was not in dispute, and the trial court properly directed a verdict in favor of Food Lion. Therefore, the court of appeals' decision is correct, and this Court should affirm.

Respectfully submitted,

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