STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Upon Certiorari to the South Carolina Court of Appeals

Appeal from Fairfield County
Court of Common Pleas
Paul E. Short, Jr., Circuit Court Judge

Ronnie Armstrong and
Tillie Armstrong,

Petitioners,

v.

Food Lion, Inc.,

Respondent

REPLY BRIEF OF PETITIONERS

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in its conclusion that the trial court properly directed a verdict in favor of respondent with respect to petitioners' causes of action which alleged respondent was vicariously liable, under principles of *respondeat superior*, for the torts committed by its employees against petitioners?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners, Ronnie Armstrong and Tillie Armstrong, file this reply brief to respond to certain factual assertions made by respondent, Food Lion, Inc., in its brief filed in this Court, and further to reply to the arguments and authorities cited in Food Lion's brief.

REPLY TO FACTUAL ASSERTIONS OF RESPONDENT

Food Lion makes the unwarranted factual assertion that the attack by its employees, Byron Brown and Marcus Cameron, on Food Lion's customers, Ronnie Armstrong and his mother, Tillie Armstrong, was "[m]otivated by a longstanding personal grudge" and "was an escalation of a preexisting personal feud between the assailants and the victim." Brief of Respondent, pp. 2, 3. To the contrary, there is no evidence to support this assertion. Indeed, Food Lion has previously acknowledged that the evidence did not establish the motivation or reason for the assault. App. p. 293 (Brief of Respondents in Court of Appeals). Food Lion should not now be allowed to change its position and argue that the evidence conclusively established that the attack was personally motivated.

Food Lion premises its conclusion that the assault was personally motivated on Ronnie Armstrong's testimony that Brown had threatened him two years earlier. But the evidence in the record concerning the assault in the Food Lion store does not reveal that

there was any relationship between this incident and any prior threat. In fact, as Food Lion's own brief recites, as Ronnie came down the aisle where Brown and Cameron were working, Brown acknowledged him with the greeting, "What's up?" but said nothing further. App. p. 51. This comment can hardly be construed as the opening remark of someone who intends to act on a grudge, a prior threat, or some previously-formed animus. Brown did not say he was coming after Ronnie because of something that had happened before. Nothing whatsoever was said or done by Brown during this incident to reveal what motivated the assault. Nothing in the record tends to show even that Brown recognized Ronnie or recalled any prior incident between them.

Food Lion also asserts that these employees were not at their assigned duties and working in furtherance of Food Lion's business at the time of this assault. That assertion is also contradicted by the evidence and the reasonable inferences drawn from the evidence, through the testimony of both Ronnie Armstrong and an independent witness, Justin Loner. *See* Brief of Petitioners, p. 4. Moreover, this inference was ultimately confirmed as fact by Food Lion's own evidence when another of its employees, Matthew Peake, testified that he was also in the aisle with Brown and Cameron and that they were all at their work stocking shelves. App. pp. 199, 202.

Food Lion further asserts the evidence did not establish that Food Lion supplied the knives used by Brown and Cameron in this attack. This assertion, however, ignores the established principle that, at the directed verdict stage, the court does not look only at the actual evidence but also at the reasonable inferences to be drawn from the evidence in evaluating whether a case is submitted to the jury. Here, where the employees were on duty and in possession of tools that were essential to their task of opening crates, and where the

employer had addressed the use of such tools in its employee handbook, it can hardly be contended that it was not reasonable to infer that Food Lion supplied these knives for the use of its employees in their stocking duties. App. 234-35. Indeed, this fact was clearly assumed by the court and counsel in argument of this issue at the directed verdict stage of the trial. App. pp. 172-74.

ARGUMENT IN REPLY

THE COURT OF APPEALS ERRED IN ITS CONCLUSION THAT THE TRIAL COURT PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENT WITH RESPECT TO PETITIONERS' CAUSES OF ACTION WHICH ALLEGED RESPONDENT WAS VICARIOUSLY LIABLE, UNDER PRINCIPLES OF *RESPONDEAT SUPERIOR*, FOR THE TORTS COMMITTED BY ITS EMPLOYEES AGAINST PETITIONERS.

Where more than one reasonable inference could be drawn from the evidence on the issue of scope of employment, the trial court was required to submit the case to the jury. As this Court recently reaffirmed, the court must deny a directed verdict motion "when either the evidence yields more than one inference or its inference is in doubt." *See Erickson v. Jones Street Publishers, LLC*, Op. No. 26133 (S.C.Sup.Ct. filed Ap. 10, 2006) (Shearouse Adv.Sh. No. 14 at 45), at 55, *citing Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

Throughout its brief, Food Lion misconstrues several principles of South Carolina law that apply with respect to the scope of employment issue under the facts of this case. First, where there is doubt on the issue of scope of employment, that doubt is resolved against the master at the directed verdict stage and the case is submitted to the jury. *See Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945); *Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 346, 35 S.E.2d 425, 427 (1945); *Adams v. South Carolina Power Co.*, 200 S.C. 438, 441, 21 S.E.2d 17, 19 (1942); *Hyde v. Southern Grocery Stores, Inc.*, 197 S.C.

263, 272, 15 S.E.2d 353, 357 (1941); *Cantrell v. Claussen's Bakery*, 172 S.C. 490, 494, 174 S.E. 438, 440 (1934); *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). Even the cases on which Food Lion relies, *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964), and *Hamilton v. Davis*, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990), recognize and follow this standard. In those cases, there was no doubt as to the reason for the actions of the employees. In *Lane*, the evidence showed the acts which led to injury of a third party were a prank, intended to frighten others, performed for his personal amusement and completely unrelated to his work. *See Lane*, 244 S.C. at 305-06, 136 S.E.2d at 716-17. In *Hamilton*, the record contained evidence that an employee's assault on another arose out of acts of mischief and horseplay, and the assault was "clearly" of a personal nature, indulged in for personal amusement, leaving no doubt on the issue of scope of employment. *See Hamilton*, 300 S.C. at 417 & n.2, 389 S.E.2d at 300 & n.2. In this case, however, there was no such evidence conclusively establishing what motivated this attack.

Food Lion also cites cases from other jurisdictions,[1] cases that Food Lion acknowledges are not controlling precedents in South Carolina. *See* Brief of Respondent, p. 21. Even if they were, Food Lion's reliance on those cases suffers from the same infirmity as its reliance on *Lane* and *Hamilton*. For example, the passage quoted and emphasized at page 19 of Food Lion's brief demonstrates that *Wegner v. Delly-Land Delicatessen, Inc.*, 270, N.C. 62, 153 S.E.2d 804 (1967), is distinguishable. That court specifically noted the

[1] Food Lion makes the conclusory assertion that these cases are from jurisdictions which follow the same general *respondeat superior* principles as those found in South Carolina. *See* Brief of Respondent, p. 21. However, the cited cases do not involve the additional factor present in this case – the use of dangerous instrumentalities supplied by the employer – nor do they address the presumption recognized in South Carolina in such situations. *See, infra,* pp. 5-6.

plaintiff himself testified the bus boy's actions were not for the purpose of doing anything related to the master's business but instead for a personal motive. *See Wegner*, 270 N.C. at 68, 153 S.E.2d at 809.

Unlike those cases, in this case there was no evidence, as South Carolina's precedents require, that the acts of Food Lion's employees, who were on the job carrying out their employment duties when they attacked these customers, were "wholly disconnected" from furtherance of the master's business. *See Crittenden*, 288 S.C. at 116, 341 S.E.2d at 387. There was no evidence to establish that they had "abandoned" and "turned aside completely" from Food Lion's business to engage in some purpose "wholly [their] own." *See Carroll*, 207 S.C. at 344, 35 S.E.2d at 426. The doubt as to their motivation, at the directed verdict stage, had to be resolved against the master. Upon the evidence presented in this case, it was the jury's province to decide the question whether they were acting within the scope of employment.

Moreover, Food Lion seeks to minimize the importance of the presumption under South Carolina law with respect to Food Lion's having supplied the knives used in this attack, calling petitioners' "box cutter argument" a "red herring." *See* Brief of Respondent, p. 26. To the contrary, this argument is a legitimate argument premised on South Carolina case law which recognizes the presumption. *See Falconer v. Beard-Laney, Inc.*, 215 S.C. 321, 330, 54 S.E.2d 904, 908-09 (1949); *Carroll*, 207 S.C. at 361, 35 S.E.2d at 433 (dissenting opinion); *cf. Lane*, 244 S.C. at 305-06, 136 S.E.2d at 716-17 (reversing denial of directed verdict, this Court noted the absence of any evidence that employer knew employee had in his possession or had authorized use of the "mongoose" device with which employee caused plaintiff's injuries). Nor is it correct, as Food Lion asserts, that this presumption has

the effect of imposing strict liability on employers for the torts committed by their employees while using the employers' property. *See* Brief of Respondent, p. 24. Instead, the presumption is rebuttable. *See Carroll*, 207 S.C. at 361, 35 S.E.2d at 433 (dissenting opinion). Under its operation, it becomes the province of the jury to determine whether the employee was or was not acting within the scope of the employment. *See Carroll*, 207 S.C. at 345, 35 S.E.2d at 427.

The presumption also undermines Food Lion's reliance on *Lane*, *Hamilton*, and the authorities it cites from other jurisdictions, as none of those cases involved a situation in which the employee used an instrument furnished by his employer to inflict the injuries for which the plaintiffs sought to hold the employer responsible in damages. Under the facts of this case, where the evidence and reasonable inferences therefrom established that these employees were actively engaged in the duties of employment and using dangerous instrumentalities furnished by the employer, instruments they also used in their attack on the store's customers, and where there was no evidence establishing that they had wholly abandoned the employer's business and undertaken this attack solely for personal reasons, the scope of employment issue was for the jury, and the court error in directing a verdict in favor of Food Lion.

CONCLUSION

For these reasons, and for the additional reasons articulated more fully in the brief of petitioners previously filed, this Court should find that the trial court erred in directing a verdict in favor of Food Lion and should remand the case for a new trial on the plaintiffs' causes of action against Food Lion based on vicarious liability for the actions of its employees.

Respectfully submitted,

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