

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

William Howard, Special Referee

Opinion No. 5137 (S.C. Ct. App. refiled August 28, 2013)

Ritter and Associates, Inc.,

Respondent,

v.

Buchanan Volkswagen, Inc.
and David Buchanan,

Petitioner

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that this matter was ruled upon by the Court of Appeals on May 22, 2013, a Petition for Rehearing was filed on May 31, 2013 and the matter was finally ruled upon by the Court of Appeals on August 28, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to consider Taylor's agency relationships with other dealers and holding that Taylor was the exclusive agent of BVW?
2. Did the Court of Appeals err in holding that liability may not be apportioned to Ritter based upon his negligent business practices in dealing with Taylor?
3. Did the Court of Appeals err in holding that Ritter had presented adequate evidence of damages?

STATEMENT OF THE CASE

Petitioner David Buchanan ("Buchanan") was the principal of Petitioner Buchanan Volkswagen, Inc. ("BVW"), a car dealership in Charleston. BVW ceased doing business in the 1990's, but the entity remained in existence for the purpose of continuing to own and rent out a parcel of real property. Robert Ritter is the principal of Respondent Ritter and Associates ("Ritter"), a licensed used car wholesaler located in Florida.

Todd Taylor ("Taylor") had once been employed by BVW as a salesman. Taylor had subsequently become known to Ritter and other Florida wholesalers through the Florida Auto Auction of Orlando (the "auction"). Taylor regularly purchased used vehicles in quantity on behalf of a number of automobile dealers in the Charleston area from various sellers at the auction including Ritter.

In 2000, Buchanan was told by his accountant that BVW should develop some

means of earning active, rather than merely passive, income in order to retain its Subchapter S corporate status. Buchanan entered into a business relationship with Taylor wherein Taylor purchased cars from the auction with funds provided by BVW and then Taylor resold those cars to other dealers in the Charleston area. To facilitate this arrangement, Buchanan obtained a South Carolina Wholesale Dealer License for BVW from the South Carolina Department of Public Safety, which listed Taylor as BVW's employee/agent. Buchanan and Robert Ritter did not know of or conduct business dealings with each other at any time relevant to this petition. Buchanan never obtained possession any of the cars or the titles of the cars purchased by Taylor at the auction.

During the time he was purchasing cars with funds provided by BVW, Taylor continued to act on behalf of other dealers to purchase cars from sellers at the auction with funds other than those provided by BVW. Taylor's business grew rapidly and he made regular, weekly, trips to the auction for the purpose of purchasing cars at the auction and from authorized dealers including Ritter. Over time, as the volume of business between Taylor and Ritter increased, their dealings became correspondingly more and more casual. Taylor started making direct deposits into Ritter's bank account of checks drawn on bank accounts of BVW and a company owned by Taylor.

In 2003, Taylor used his ability to deposit checks to initiate an elaborate check kiting scheme, involving the accounts of BVW, Ritter and Charleston dealer Cumbie Chevrolet ("Cumbee"). Following the discovery of this scheme, an investigation revealed that Taylor had been receiving cars and titles from Ritter without paying for them and selling the cars to various entities including Cumbie without delivering the

vehicles.

A series of lawsuits were filed and, following consolidation, Ritter cross-claimed against BVW and Buchanan alleging breach of contract, negligence, negligent supervision and violation of the South Carolina Dealer's Act and seeking damages for twenty unpaid vehicles sold and delivered to Taylor. The case was referred to special referee William L. Howard by a consent order signed by the Honorable R. Markley Dennis, Jr. on June 25, 2010. The case was tried without a jury on January 24-26, 2011 and February 10, 2010. On May 19, 2011, the special referee issued an order granting judgment in favor of Ritter on its breach of contract claim, concluding that the allegations of negligence and negligent supervision were merely examples of the nonperformance of the contractual obligations of the parties, and awarding Ritter \$434,000.00 in damages and \$280,286.71 in prejudgment interest. BVW appealed the special referee's order.

This matter was initially ruled upon by the Court of Appeals on May 22, 2013 and a Petition for Rehearing was filed on May 31, 2013. The Court of Appeals issued a final ruling on August 28, 2013, holding that that Taylor's agency relationships with other dealers could not be considered and that Taylor was an exclusive agent of BVW, that damages could not be apportioned to Ritter based upon his negligent business practices in dealing with Taylor because comparative negligence does not sound in contract and that Ritter had presented adequate evidence of damages to substantiate the award. Ritter and Associates, Inc. v. Buchanan Volkswagen, Inc. and David Buchanan, Op. No. 5137 (S.C. Ct. App. refiled August 28, 2013). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE CONSIDERED TAYLOR'S AGENCY RELATIONSHIPS WITH OTHER DEALERS AS TAYLOR WAS NOT AN EXCLUSIVE AGENT OF BVW.

The Court of Appeals affirmed the special referee's conclusion that Taylor acted on behalf of and as the agent of BVW throughout Taylor's dealings with Ritter and that Taylor's agency relationships with other dealerships were immaterial. The Court based its ruling on the findings that Taylor had undisputed authority to enter into contracts on behalf of BVW at the time Ritter sold these vehicles to Taylor and that the record did not indicate that Taylor intended to enter into these agreements on behalf of some other principal while still listing BVW as the buyer on the bill of sale.

The Court of Appeals ruling reflects a dangerous extension of the law involving the extent to which a principal is responsible for self-serving acts of misconduct while the agent is under the banner of multiple principals. BVW and Buchanan assert that Taylor's agency relationships with other dealerships were material and the fact that Taylor was not the exclusive agent of BVW precludes liability of BVW and Buchanan under agency theory, at least without evidence emanating from the principal showing participation by the principal in these transactions.

The factual record in this instance indicates that Taylor undisputedly acted on behalf of others and himself in his dealings with Ritter. A finding of liability in this matter must be based not simply upon the existence of an agency between BVW and Taylor, but also that Taylor was acting in that agency and not some other. The conclusion that all of Taylor's dealings with Ritter were entered into on behalf of BVW and Buchanan forms the basis of the decision rendered in this case and that conclusion is

fundamentally incorrect and unsupported by the record. The Court of Appeals erred in affirming the trial court's implied finding that Taylor acted solely on behalf of BVW in his dealings with Ritter.

The special referee relied upon the fact that Taylor had undisputed authority to enter into contracts on behalf of BVW at the time Ritter sold these vehicles to BVW. However, the fact that Taylor was authorized to purchase cars for BVW does not mean that Taylor was purchasing cars for BVW, as opposed to for himself or other dealers. The record shows that Ritter began to deal with Taylor in roughly 1995 and dealt with him as the known agent for multiple dealerships. Ritter never asserted that the only dealer for whom Taylor acted was BVW. Taylor testified that he never told Ritter he was acting solely on behalf of BVW. Finally, BVW never communicated to Ritter that Taylor was acting on its behalf.

"Apparent authority must be established based upon manifestations by the principal, not the agent. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432-433 (S.C. Ct. App. 2000). "An agency may not be established solely by the declarations and conduct of an alleged agent." *Id.* It is clear that Taylor was not purchasing cars solely for BVW and, without an exclusive agency, there is no basis for an award against BVW.

The Court below further relied upon the fact that the record did not indicate that Taylor intended to enter into these agreements on behalf of some other principal while still listing BVW as the buyer. Ritter testified that he would fill out the bills of sale for

cars selected by Taylor and present those bills of sale to Taylor for signing. Trial Trans., pp. 620 - 622, R-414 - 415. Therefore, Ritter completed bills of sale all of which uniformly showed sales to BVW without any actual knowledge of the identity of the purchasers. Certainly, Ritter cannot create the agency evidence tying BVW to Taylor based upon these transactions. Also, those claims of BVW agency on these transactions fly in the face of checks written to Ritter as payment for the vehicles it purportedly sold to BVW, from, among other dealerships, Cumbie Chevrolet and Taylor himself. Trial Ex. 93, R-1021. The special referee found that these bills of sale constituted contracts. However, it is clear that Taylor was acting to defraud multiple parties and scrawling a signature at the bottom of a document completed by Ritter does not create a contract between BVW and Ritter.

Allowing plaintiffs in a multiple agency case to choose the principal who will be liable for rogue is a dangerous system. Presumably, the plaintiff simply picks the person with the deepest pocket or the weakest defense to blame. The undisputed theme of this case is that Taylor was not acting on behalf of Buchanan. He was acting on behalf of himself.

Another way of stating the problem is that when a rogue employee is employed by only one employer and defrauds within the apparent scope of his employment, it may be possible to create liability against the principal because the apparent authority supports employment by that principal. Where a person defrauds while having multiple principals, liability must hinge on something else.

The course of dealing relied upon by the special referee to establish the grant of agency by BVW to Taylor does not support a finding that this agency was exclusive.

There was not only no evidence presented to show that Taylor acted only on behalf of BVW. The course of dealings between Ritter and Taylor shows that Taylor had always acted on behalf of a number of dealers, of whom BVW was only one. Since the finding that Taylor was exclusively BVW's agent is a necessary element to the finding of liability, and since there is no evidence to support such a conclusion, the decision of the special referee and the Court of Appeals was in error, and should be reversed.

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT LIABILITY MAY BE APPORTIONED TO RITTER BASED UPON HIS NEGLIGENT BUSINESS PRACTICES IN DEALING WITH TAYLOR.

The Court of Appeals affirmed the special referee's decision to not apportion any liability to Ritter based upon his negligent business practices in dealing with Taylor because the special referee found for Ritter under a breach of contract cause of action. BVW and Buchanan assert that Ritter recovered under negligence and negligent supervision causes of action that were incorrectly incorporated by the special referee into the breach of contract cause of action and that the negligence principles of proximate cause and comparative negligence should have allowed for the apportionment of liability to Ritter also. However, the special referee and the Court of Appeals should not ignore Ritter's business practices, which enabled the theft.

Ritter's claims against BVW and Buchanan alleged breach of contract, negligence, and negligent supervision. The special referee concluded that the essence of Ritter's claim was for breach of contract by failing to pay the purchase price for twenty vehicles and that the allegations of negligence and negligent merely described actions in breach of the contract. The special referee stated that the failure of

Buchanan and BVW to properly supervise Taylor and manage the BVW checkbook are "proof of negligence" in breach of contract. But he then concluded that the failure to pay for the vehicle constituted nonperformance of the contractual obligation rather than actionable negligence.

The special referee erred in incorporating the findings of negligence into the breach of contract cause action. If the special referee can conclude that the alleged negligent conduct is merely evidence of breach of contract, thereby allowing the overlap of contract and tort principles, then the tort principles of comparative negligence and proximate cause should have been properly considered as well in defense of that breach of contract claim. The plaintiff cannot have it both ways. If the plaintiff receives the benefit of this overlap, then fairness and logic dictate that the defendant should as well. Accordingly, the Court of Appeals should have held that Ritter's actions be considered in the proximate cause analysis and that liability be apportioned to Ritter under the doctrine of comparative negligence based upon his negligent business practices in dealing with Taylor.

The special referee erroneously concluded that the entire liability for Taylor's misdeeds was the sole responsibility of BVW and Buchanan. In doing so, he used the contract rubric to ignore the clear evidence that, but for the improper actions of Ritter, Taylor could have caused no injury to any party (other than BVW itself) if Ritter had merely exercised normal care in following car dealer industry practices. Taylor's scheme hinged on his ability to sell the same vehicle twice and his ability to sell cars for which he had never paid. But for Ritter's practice of turning over to Taylor both vehicles and their titles before receiving payment, Taylor could not have engaged in his

fraudulent practices of selling cars and titles separately, or of selling the same car to multiple purchasers. Ritter frequently gave Taylor cars, titles or both prior to receiving payment. In fact, the specific cars upon which this action is allegedly based were sold by Ritter to Taylor, handed over to Taylor, complete with paperwork, without Ritter ever receiving payment.

Cleve Payne, a wholesale dealer from Florida, a friend of Robert Ritter's and qualified as an expert in the automotive wholesale business, testified about the standard practice in the industry. Payne testified that while it was standard practice to give titles to buyers without completing the document, he admitted this action was likely in violation of Florida law. Trial Trans., p. 70, R-274. He also testified that, although he had known Taylor for years, he would only give Taylor title to a purchased vehicle after the check paying for the car had cleared. Id., p. 71. He testified that he would never give an agent a vehicle until after he had spoken to the principal, would never permit anyone to take both vehicle and title at the same time until his check had cleared, and would never extend credit to someone for weeks at a time, allowing cars for which he had not been paid to leave his possession. Id. at 81 - 82, R-277. Finally, Payne admitted that, by engaging in these practices, Ritter was giving Taylor the tools he needed to commit the fraud. Id. at 85 -86, R-278.

Ritter's failure to take reasonable steps to protect itself was the proximate cause of his own injury. But for Ritter failing to follow ordinary practices, none of its injuries could have occurred, regardless of the actions of either Taylor or BVW. Furthermore, the injury was clearly foreseeable where a wholesale dealer failed to complete the paperwork required by state law and permitted to leave the premises with multiple cars

and their titles without first ensuring that he has been paid. This initial negligence of Ritter was the initial link in a chain of events that eventually allowed Taylor to misappropriate money and vehicles belonging to either Ritter or BVW. Even under a contract paradigm, an injured party may recover only those damages reasonably considered to arise naturally from a breach of contract or those damages within the reasonable contemplation of the parties at the time of contracting. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). The special referee and the Court of Appeals erred in failing to consider Ritter's comparative negligence as it relates to the issue of the proximate cause of Ritter's damages and whether Ritter's damages were a natural consequence of the breach.

Even if this Court concludes that Taylor was, at all relevant times, exclusively BVW's agent, this action should be remanded for further consideration of the negligence of Ritter as it relates to the issue of the special referee basing the finding of breach of contract on BVW's negligence and for a new computation as to damages.

3. THE COURT OF APPEALS SHOULD HAVE HELD THAT RITTER HAD NOT PRESENTED ADEQUATE EVIDENCE OF DAMAGES.

The Court of Appeals affirmed the special referee's award based on his finding that adequate evidence had been presented that Ritter had not received payment for twenty vehicles. BVW and Buchanan assert that there was inadequate evidence to support this damages award.

Ritter presented the testimony of a forensic CPA, W. Ellison Thomas, for a number of purposes. Although Thomas testified that Taylor was an agent for Buchanan, he also admitted that he had no actual knowledge of the other dealers and

dealerships for which Taylor was acting. Trial Trans., pp. 295 - 296, R332. One of the specific purposes for which Ritter called Thomas was to demonstrate that certain specific vehicles formed the basis for Ritter's actual damages. Exhibits 64 - 83, summarized at Exhibit 84, R-930. Thomas testified that these cars were the ones Buchanan had purchased but for which it had not paid as of the time Buchanan discovered that Taylor had been absconding with money and kiting checks. He was not, however, actually able to establish that Ritter had not been paid for these particular cars.

Thomas testified that, at times, Ritter would give Taylor cars and car titles without payment. Trial Trans., p. 310, R-336. He also testified that Ritter had received payment for these twenty vehicles, although it was a check written on Taylor's own account and would not clear the bank. Trial Trans., p. 311, R-336. The basis for his conclusion that the last twenty vehicles represented on his summary exhibit were the basis of Ritter's damages is not, however, based upon any ability to trace payments to particular vehicles. It merely reflects that, at the time Taylor's scheme was completely ended, there were twenty titles left in Ritter's hands. Ritter and Mr. Thomas have no idea whether Ritter was actually paid for these cars or not.

Thomas testified that these cars wound up back at the auction. Trial Trans., p. 326, R-340. He did not know where they had been before they were returned. Ritter purchased them, and the money, after being placed in escrow with the auction, was turned over to Cumbie, which had initially written checks to pay for these cars. Trial Trans., pp. 328 - 330, R-340 - 341. He admitted, at the same time, that to the extent that he was able to trace and match checks to cars, at least some of the very cars he

was calling damages had been paid for, by Cumbie checks written to and received by Ritter. Trial Trans., pp. 332 - 334, R-341. He testified that he had used those cars because he had no other way of trying to track the source of Ritter's damages. Trial Trans., pp. 336, R-342. The documents he used were Ritter's attempt at reconciliation of his account, in which he matched, as best he could, from the cars to what was represented to him that was being paid. Id.

The fundamental difficulty with Thomas' documents, culminating in his summary, is that at no time did Ritter ever actually see the checks written as payment for the cars he was turning over to Taylor, and he had no way of determining which vehicles matched up to which check. Although he was, at the end, unable to conclusively determine that Ritter had not been paid, in one form or another, from Buchanan or Taylor or Cumbie or some other dealership, for those last twenty cars, he used them as the basis for his damages calculations because somebody had to get left without a chair when the music stopped.

The special referee's reliance on Thomas' calculations as the basis for its damages determination is in error. There was no evidence sufficient to trace the twenty cars as actually having been sold to Buchanan, or to show that they had not been paid for. Although Ritter lost some money at the end of Taylor's scheme, so did Buchanan and others. It remains impossible to trace and correlate particular cars to particular payments, and the identification of specific cars as the basis for damages is purely arbitrary. Even if this Court concludes that Taylor was exclusively Buchanan's agent, and even if it concludes that Ritter bore no responsibility in the creation of its own damages, this action should be remanded in order that Ritter be required to

demonstrate the precise nature of its damages for each car.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari and consider the questions presented herein.

Respectfully submitted,

September 19, 2013



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THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013 I have hand delivered one copy of the
Petition for a Writ of Certiorari to:

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September 27, 2013

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SEP 27 2013

File No.: 2013-01-0001
SC Court of Appeals

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court - Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: Ritter and Associates, Inc. v. Buchanan Volkswagen, Inc. and David Buchanan

Dear Mr. Shearouse:

I am taking over as counsel for the Appellant regarding the above-referenced case and understand that no formal substitution of counsel is necessary. If you need a substitution of counsel, I am happy to provide one.

Enclosed please find the original and six copies of the Petition for a Writ of Certiorari, Certificate of Service, and one bound and one unbound Appendix regarding the above-referenced case. After filing, please return a copy of the Petition to me in the enclosed envelope. I have also enclosed a check for \$100 for filing fees.

Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

CLAWSON AND STAUBES, LLC



Timothy A. Domin

TAD/paa
Enclosures

cc: Robert B. Varnado, Esquire
Court of Appeals

(Both via hand delivery and w/Petition)

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