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I. Supreme Court Reversed Court of Appeals and Held That Foster Parents Are Not Employees of the Department of Social Services

In *Simmons v. Robinson*[1] the South Carolina Supreme Court held that foster parents are not employees of the South Carolina Department of Social Services (DSS). The supreme court's decision reverses the decision of the South Carolina Court of Appeals,[2] which held that foster parents are employees of DSS and imposed liability on DSS for the negligence of a foster parent.

DSS placed Arnold Simmons in the home of Ellen D. Anderson, a foster parent. On July 6, 1985, while on the way to visit Anderson's relatives, Anderson and Simmons were involved in a car accident in which Anderson was killed and Simmons was seriously injured. A suit, which alleged that Anderson's negligence in operating the car caused the accident, was brought on behalf of Simmons against Anderson's estate and DSS. DSS denied liability on the ground that its liability insurance did not cover Anderson because she was not an employee or agent of DSS.[3]

The South Carolina Tort Claims Act[4] allows suits against a governmental defendant based on causes of action that accrued prior to July 1, 1986, if the defendant had liability insurance.[5] DSS had liability insurance for the period when Simmons's cause of action accrued, but the policy covered only DSS and its employees.[6] The policy provided coverage for employees operating privately owned vehicles if the " 'operation [was] in the performance of, in connection with, or incidental to their duties.' "[7] The trial judge ruled that Anderson was not an employee of DSS. The judge did not consider whether Anderson

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1. No. 23473 (S.C. filed Sept. 9, 1991).

2. Simmons v. Robinson, 399 S.E.2d 605 (S.C. Ct. App. 1990), *rev'd*, No. 23473 (S.C. filed Sept. 9, 1991).

3. *See id.* at 607.

4. S.C. Code Ann. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1990).

5. *See Simmons*, 399 S.E.2d at 607; S.C. Code Ann. §§ 15-78-20(c)(i), -180 (Law. Co-op. Supp. 1990).

6. *Simmons*, 399 S.E.2d at 607. The trial judge held that in light of the South Carolina Governmental Vehicle Tort Claims Act, the policy also covered agents of DSS. *Id.*

7. *Id.* (quoting liability insurance policy).

was an agent. The trial judge further decided that even if Anderson was an employee, she was not operating the car " 'in the performance of, in connection with or incidental to her duties' " as a foster parent when the accident occurred.[8] Simmons appealed.

The court of appeals reversed. The court of appeals focused primarily on whether Anderson was an employee of DSS or an independent contractor.[9] The court stated, " 'The decisive test in determining whether the relation of master and servant [or employer and employee] exists is whether the purported master [or employer] has the right or power to direct and control the servant [or employee] in the performance of [the] work and in the manner in which the work is to be done.' "[10]

The court of appeals stated that South Carolina courts should apply four factors to determine whether the right to control exists. The factors, which bear on the right of control, are " '(1) direct evidence of the right to or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire.' "[11] In determining whether DSS's right to control foster parents was sufficient to indicate an employment relationship, the court of appeals examined state regulations and the DSS policy and procedure manual. The court found that the regulations authorize DSS to exercise considerable control over foster parents.[12] The DSS policy manual provided further evidence of the right to control foster parents, including an express reservation by DSS of the right to supervise foster parents, which the court of appeals found particularly significant.[13] Based solely on the evidence gleaned from the DSS regulations and policy manual, the court of appeals decided that foster parents are employees of DSS.[14] Because these sources provided "overwhelming direct evidence of the right of DSS to control foster parents,"[15] the court concluded that an analysis of the

8. *Id.* (quoting Record at 16).

9. *Id.* In South Carolina an employer generally is liable for the negligence of an employee acting within the scope of employment, *see* Hyde v. Southern Grocery Stores, Inc., 197 S.C. 263, 271, 15 S.E.2d 353, 356 (1941), but not for the negligence of an independent contractor performing work for the employer, Duane v. Presley Constr. Co., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978).

10. *Simmons*, 399 S.E.2d at 608 (brackets supplied by court) (quoting Felts v. Richland County, 299 S.C. 214, 217, 383 S.E.2d 261, 263 (Ct. App. 1989), *aff'd*, 400 S.E.2d 781 (S.C. 1991)).

11. *Id.* at 609 (quoting Crim v. Decorator's Supply, 291 S.C. 193, 194, 352 S.E.2d 520, 521 (Ct. App. 1987)); *accord* 1C A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 44.00 (1986).

12. *Simmons*, 399 S.E.2d at 608-09.

13. *Id.* at 609.

14. *Id.* at 609-10.

15. *Id.* at 609. The trial judge "focuse[d] on the control actually exercised by DSS."

other three factors was unnecessary.[16]

The court of appeals decided that because the right to control was clearly established, separate consideration of each of the remaining factors was unnecessary.[17] "[T]he fundamental test of employment relation is the right of the employer to control the details of the work, and . . . all other tests are subordinate and secondary."[18] The court of appeals therefore ruled that foster parents are employees of DSS, and that DSS is liable for the negligence of foster parents.[19]

Id. at 610. The court of appeals admitted that only "scant evidence that DSS actually exercised control over Mrs. Anderson" existed. *Id.* at 608. The court noted, however, that "the proper test is whether DSS had the right and authority to control Mrs. Anderson," and not whether DSS actually exercised control. *Id.* at 610 (citing Felts v. Richland County, 299 S.C. 214, 383 S.E.2d 261 (Ct. App. 1989), *aff'd*, 400 S.E.2d 781 (S.C. 1991)).

16. *Id.* at 609. The court nevertheless included a brief discussion of the other three factors. The court concluded that only the fourth factor, the right to fire, was helpful and its application supported the court's determination. *Id.*

17. The court of appeals noted that courts in three other states that have considered the same question reached a contrary result. *Id.* at 610 n.3 (discussing Kern v. Steele County, 322 N.W.2d 187 (Minn. 1982); New Jersey Property-Liab. Ins. Guar. Ass'n v. State, 195 N.J. Super. 4, 477 A.2d 826 (App. Div. 1984); Blanca C. v. County of Nassau, 103 A.D.2d 524, 480 N.Y.S.2d 747 (1984), *aff'd mem.*, 65 N.Y.2d 712, 481 N.E.2d 545, 492 N.Y.S.2d 5 (1985)). In *Kern* the Minnesota Supreme Court applied a five-factor analysis very similar to the four-factor approach articulated by the *Simmons* court and determined that foster parents are not governmental employees. 322 N.W.2d at 189. The *Kern* court's analysis reveals the inappropriateness of a mechanical application of every factor to every setting. As the court of appeals noted in *Simmons*:

> [T]he Court in *Kern* considered whether foster parents furnish "materials or tools." We do not think this is a realistic consideration either. The things used to provide child care are many and varied, everything from bassinets and pabulum plates to bunk beds and book bags. If all these things are to be thought of as tools, then parents will certainly need enormous toolboxes.

Simmons, 399 S.E.2d at 610 n.3.

18. 1C A. LARSON, *supra* note 11; *accord* DeBerry v. Coker Freight Lines, 234 S.C. 304, 307-08, 108 S.E.2d 114, 116 (1959) ("The right or power of control retained by the person for whom the work is being done is uniformly regarded as the essential criterion for determining whether the workman is an employee or an independent contractor."). Often, however, the right to control is not a "demonstrable fact," and analysis of the other factors is therefore helpful. 1C A. LARSON, *supra* note 11.

19. *Simmons*, 399 S.E.2d at 609-10. The court of appeals further held that it could impose liability on DSS even if foster parents were not employees of DSS. First, the court noted that the DSS liability insurance policy covered agents as well as employees. The court concluded that the term "agent" encompassed a foster parent's relationship with DSS. *Id.* at 612. Second, the court indicated that it could impose liability on DSS under the concept of nondelegable duties. The court stated, "Some responsibilities are so important to society that they cannot be transferred." *Id.* (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 71 (5th ed. 1984)). The court determined that the responsibility for children entrusted to DSS by the family court was such a responsibility. *Id.*; *accord* Vonner v. State Dep't of Pub. Welfare, 273 So. 2d 252, 255-56 (La. 1973).

The supreme court reversed. The supreme court did not view the DSS regulations as evidence of the right to control. Instead, the court found that the regulations merely establish procedures that must be followed in order to be licensed as a foster parent.[20] The court noted that " '[t]he mere granting of a license or permit to do an act which is not in itself unlawful or dangerous or a nuisance does not render a municipality liable for injuries caused by the performance of the act.' "[21] The court stated that before evaluating the right to control, "the legal relationship between the parties must be determined."[22] The court found that a foster parent is merely a licensee of DSS, not an employee or independent contractor. The supreme court therefore did not hold DSS liable for the foster parent's negligence.[23]

The supreme court's decision is problematic. The court seems to indicate that a licensee can never be an agent or employee. It seems clear that circumstances can exist under which a licensee of the State of South Carolina is also an agent of the state. For example, the state licenses nurses.[24] The granting of the license alone would not expose the state to liability. However, courts in other jurisdictions have held governmental entities liable for the negligence of licensed nurses that worked in a government-owned hospital.[25] If South Carolina hired a licensed nurse to work in a state hospital, the courts surely could hold South Carolina liable for the negligence of that nurse. Similarly, the state licenses foster parents and hires them to carry out the state's duty to care for foster children. If a nonlicensed employee or agent were negligent, the courts would hold the state liable. It is difficult to understand why the granting of a license shields the state from liability that courts would impose in the absence of the license.

As a matter of policy, the court of appeals decision in *Simmons* may have been too far-reaching because of the enormous liability to which the state could have been exposed. The court of appeals decision was, however, well reasoned and consistent with accepted principles of agency law. By refusing to address the agency question, the supreme court failed to resolve the true issue in the case.

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20. Simmons v. Robinson, No. 23473, slip op. at 35 (S.C. filed Sept. 9, 1991).

21. *Id.* (quoting 63 C.J.S. *Municipal Corporations* § 780 (1950)).

22. *Id.*

23. *Id.* at 36.

24. S.C. CODE ANN. § 40-33-520 (Law. Co-op. Supp. 1990).

25. *See* Pettis v. State, 336 So. 2d 521 (La. Ct. App.) (holding that state is liable for negligence of doctors and nurses in state mental hospital), *rev'd in part on other grounds*, 339 So. 2d 855 (La.), *modified*, 340 So. 2d 1108 (La. Ct. App. 1976); Becker v. City of New York, 2 N.Y.2d 226, 140 N.E.2d 262, 159 N.Y.S.2d 174 (1957) (recognizing that city can be held liable for the negligence of a nurse in a city hospital).