

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )  
 )  
Andre Kinley, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Husqvarna Consumer Outdoor )  
Products, N.A., Inc., Thaddeus Grant, )  
and John Doe, )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

CA No. 2018-CP-38-00521

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

**RECEIVED**  
FEB 28 2020  
SC Court of Appeals

This matter came before the Court upon the motion of Defendants Husqvarna Consumer Outdoor Products N.A., Inc. ("Husqvarna") and Thaddeus Grant, seeking the dismissal of this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP. The Court heard oral argument on October 14, 2019, and has reviewed the parties' submissions. For the reasons set forth herein, the Court denies Defendants' motion to dismiss.

**FACTUAL ALLEGATIONS**

Plaintiff alleges that on May 4, 2015, he was employed by Interline Logistics Group ("ILG") when he was injured while working on Defendant Husqvarna's premises in Orangeburg County. Husqvarna is a manufacturer of consumer outdoor products and operates a facility in Orangeburg. In 2012, Husqvarna contracted with a third-party company (Eleets Logistics) to perform yard management services at the facility, including the receiving and moving of trailers around the yard. The contract was subsequently assigned to ILG. ILG provided 8 "yard trucks" and 10 "yard drivers" to move trailers around Husqvarna's yard. Plaintiff was one of the drivers employed by ILG to move trailers at Husqvarna.

On May 4, 2015, as Plaintiff attempted to access the rear of a Tyco "yard dog" truck, the truck steps failed due to prior damage that was not visible to Plaintiff, causing him to fall and

severely injure himself. Prior to Plaintiff's fall, it is alleged that an unknown employee of Husqvarna ("John Doe") collided with the truck steps causing the damage that later led to Plaintiff's injury. Plaintiff alleges Husqvarna employees, including the safety manager, were notified of the damage to the steps of the truck but failed to take action to repair the steps, take the truck out of service, or warn others like Plaintiff of the damaged condition of the steps and resulting hazard.

Plaintiff asserts negligence causes of action against Husqvarna and its safety manager, as well as John Doe (the unknown Husqvarna employee who collided the Husqvarna maintenance vehicle into the truck and damaged the steps). Generally, Defendants deny Plaintiff's allegations of liability and seek the dismissal of this action for lack of subject matter jurisdiction upon the argument that Plaintiff was not just an employee of ILG, but also a statutory employee of Husqvarna, thereby precluding any claims against Husqvarna due to the exclusive remedy provision of the South Carolina Workers' Compensation Act.

## DISCUSSION

### I. Jurisdiction and Exclusive Remedy

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Jeter v. S.C. DOT*, 369 S.C. 433, 439, 633 S.E.2d 143, 146 (2006). In the workers' compensation setting, determining whether or not an employer-employee relationship exists is a jurisdictional question. *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002). More specifically, the determination of whether a worker is a statutory employee is jurisdictional and therefore a question of law. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

The Workers' Compensation Act ("the Act") is the exclusive remedy against an employer for an employee's work-related accident or injury. *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863

(2004). The exclusivity provision is found in section 42-1-540 of the Act. This provision precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. *Id.*

Coverage under the Act is generally dependent on the existence of an employer-employee relationship. However, there are certain statutory exceptions to this general rule. One exception is found in § 42-1-400 of the Act which, under some circumstances, imposes liability on an employer or business owner for the payment of compensation benefits to a worker not directly employed by the employer. *Id.* This section provides:

When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as “owner,” undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code § 42-1-400. Under this exception, a statutory employee is considered under the Act as the owner’s employee only if the facts and circumstances satisfy the criteria in § 42-1-400.

Three tests are applied to determine whether the activity of a contractor’s employee is sufficient to make him a statutory employee of the owner within the meaning of § 42-1-400: “(1) Is the activity an important part of the owner’s business or trade? (2) Is the activity a necessary, essential, and integral part of the owner’s trade, business, or occupation? or (3) Has the identical activity previously been performed by the owner’s employees?” *Posey v. Proper Mold & Eng’g, Inc.*, 378 S.C. 210, 218, 661 S.E.2d 395, 399 (Ct. App. 2008). If the activity at issue meets one of these three criteria, the worker qualifies as the statutory employee of the owner. *Id.* As noted by our Supreme Court, “there is no easily applied formula [for this analysis] and each case must be decided on its own facts.” *Abbott v. The Limited, Inc.*, 338 S.C. 161, 164, 526 S.E.2d 513, 514

(2000). “The guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner.” *Id.*

## **II. Plaintiff was not a statutory employee of Husqvarna**

It is not disputed that Plaintiff was injured while working as an employee of non-party ILG. Indeed, he recovered workers’ compensation benefits from ILG prior to instituting this third-party case against Husqvarna. The sole question presented by Husqvarna’s motion to dismiss is whether Plaintiff qualifies as a statutory employee of Husqvarna. In evaluating this question, the court looks to a number of factual and evidentiary considerations presented by the parties, all with the guidepost above in mind.

As an initial matter, the Court notes that the service agreement entered into between Husqvarna and ILG states that ILG “is an independent contractor, not entitled to any benefits or privileges as an employee.” It further states that ILG is not “a joint venture, partner, or agent of Husqvarna.” This all weighs against a finding that ILG employees are also statutory employees of Husqvarna. Indeed, no such argument or finding was made during Plaintiff’s workers’ compensation proceeding, and Husqvarna did not pay any benefits to Plaintiff. In reviewing the service agreement in greater detail, it is apparent that all services to be provided by ILG are transportation related, including the receiving of trailers, assigning barcodes to trailers, noting locations of each trailer, moving trailers around the yard, and documenting trailer movement around the Husqvarna facility. In order to perform this work, ILG provided commercially-licensed drivers to move the trailers in and around Husqvarna’s yard. As a whole, by clearly defining the separation of entities and work being performed at Husqvarna’s facility, the service agreement itself distinguishes the different trades, businesses, and occupations being performed by the parties.

In support of its motion, Husqvarna filed an affidavit of Donald Ricks describing Husqvarna’s business operations. The affidavit makes clear that Husqvarna’s “general trade,

business, and occupation” is the manufacturing and selling of outdoor power products. Husqvarna is not in the transportation business, and according to counsel at the hearing, does not employ any commercial truck drivers to perform the work being performed by ILG’s employees at the time of Plaintiff’s injury. Thus, the Court does not believe a finding of statutory employment is appropriate under these facts and circumstances.

Husqvarna claims that the management of inventory is important to its business, and that because the trailers being moved around the yard by ILG employees sometimes contain parts and inventory, then the work being performed by ILG employees falls under or is essential to Husqvarna’s “general trade, business, and occupation.” However, a close examination of Ricks’ affidavit reveals that ILG’s employees such as Plaintiff have no control over Husqvarna’s inventory, and do not actively manage Husqvarna’s inventory in any manner. Rather, the record reveals that ILG employees such as Plaintiff simply receive trailers at Husqvarna’s facility, collect the bill of lading for each trailer, assign a barcode to each trailer, inspect each trailer for damage, attach a truck to each trailer to move it around the yard in compliance with the Federal Motor Carrier Safety Regulations. These are all transportation-related tasks that have nothing to do with the manufacturing and selling of outdoor power products.

As demonstrated by Ricks’ affidavit, Husqvarna is not in the transportation business and therefore contracts with ILG to receive and move trailers around its facility with commercially-licensed drivers. The fact that the trailers may contain inventory or parts for use in Husqvarna’s business does not make the work performed by ILG employees an essential part of Husqvarna’s “general trade, business, and occupation.” Moving trailers around a yard is different from actively managing inventory or the contents of such trailers, and ILG was not contracted to provide, and did not provide, any inventory management services. Indeed, Husqvarna does not allege, and the record does not support any finding that ILG employees physically load or unload the trailers,

decide what is loaded onto or unloaded from the trailers, or decide when or where the trailers are loaded and moved. Those decisions and tasks are solely within Husqvarna's purview. In other words, Husqvarna is the sole entity managing the contents of the trailers, be it parts or inventory or completed products.

The Supreme Court in *Abbott* analyzed a similar factual scenario in ruling that statutory employment did not exist between a business owner and a distribution company's employee. In that case, Abbott was employed by Observer Transport, who had a contract with Limited Distribution Services to deliver goods to a business owner/retailer (The Limited), including "inside delivery." Limited Distribution Services was the retailer's agent for delivery. *Abbott*, 338 S.C. at 162, 526 S.E.2d at 514. Abbott was injured when he slipped and fell while unloading boxes on the retailer's premises. He received workers' compensation benefits from his employer and then filed a negligence action against the retailer/business owner. The Supreme Court held that it was error for the trial court to have granted the retailer's motion to dismiss for lack of subject matter jurisdiction under the exclusive remedy provision of the Workers' Compensation Act, finding:

The fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of Retailer's business. "The mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business." *Caton v. Winslow Bros. & Smith Co.*, 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941). We conclude that the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee.

*Abbott*, 338 S.C. at 163-64, 526 S.E.2d at 514.

A few years later, the Supreme Court revisited and expanded its ruling in *Abbott*. In *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003), the court held that "*Abbott* does not change the need for [a] case by case analysis; *Abbott* merely establishes that transportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier

alone, without something more, does not qualify as 'part of [the owner's] trade, business, or occupation' under any of the three established tests for statutory employment." *Id.* at 426, 581 S.E.2d at 486.

In *Olmstead*, the plaintiff owned and operated a truck and trailer that he leased to his employer, Hot Shot Express, who dispatched him to various places to pick up and deliver goods. Hot Shot sent Olmstead to Shakespeare to pick up fiberglass utility poles from Shakespeare's plant for delivery to Shakespeare's customer in Montana. Olmstead assisted Shakespeare's staff in loading and strapping the large poles onto Olmstead's flatbed trailer, when one of the poles fell and injured Olmstead. After receiving workers' compensation benefits from Hot Shot Express, Olmstead filed suit against Shakespeare, who claimed Olmstead was its statutory employee. Citing *Abbott*, the Supreme Court in *Olmstead* ruled that Olmstead was not a statutory employee of Shakespeare:

*Abbott* is not limited to receipt of goods cases, but applies equally to delivery of goods cases as long as the transportation of goods is not the primary business of the company to whom or from whom goods are being delivered. Shakespeare manufactures fiberglass products and was shipping a finished product to a customer via a common carrier. As this Court noted in *Abbott*, "the fact that it was important to [defendant retailer] to receive goods does not render delivery of goods an important part of the [defendant retailer's] business" for statutory employment purposes. 338 S.C. at 163, 526 S.E.2d at 514. Likewise, the fact that it was important to Shakespeare to deliver its finished product to its customer in order to consummate a sale does not render the delivery of its products an important part of its business for purposes of statutory employment.

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Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier.... Although delivery by common carrier was certainly important to Shakespeare's operation, it does not

follow that such delivery was “part or process” of its manufacturing business.

*Olmstead*, 354 S.C. at 425-26, 581 S.E.2d at 485-86.

*Abbott* and *Olmstead* both involved a common carrier providing transportation services that were deemed distinct from the owner’s general trade, business, or occupation. The same reasoning underlying the court’s holdings in those cases is equally applicable to the facts of this case. Husqvarna, like the retailer in *Abbott* and fiberglass manufacturer in *Olmstead*, is not in the transportation business and instead contracted with a third-party to provide such services. Here, the third-party was ILG whereas in *Abbott* and *Olmstead* it was a common carrier. Moreover, in *Abbott*, the distributor was the retailer’s agent and the court still refused to make a finding of statutory employment. Under all of these scenarios, the movement of goods, parts, and inventory is important to the owner’s business, but is not “essential” to their trade or occupation for purposes of statutory employment. Husqvarna is not in the transportation business, although its business necessarily involves the transportation of parts, products, and inventory to and from and around its facility, and Plaintiff was performing transportation-related work at the time of his injury, thereby precluding a finding that he was a statutory employee of Husqvarna. As noted by our Supreme Court, the transportation of goods is important to nearly all businesses, but transportation of goods does not qualify as “part of [the owner’s] trade, business, or occupation” under any of the three established tests for statutory employment. *Olmstead*, 354 S.C. at 425, 581 S.E.2d at 485.

The Court finds the factual situation presented in this case to be analogous to the ones presented in *Abbott* and *Olmstead* such that the work being performed by ILG employees do not meet either test: “(1) Is the activity an important part of the owner’s business or trade? (2) Is the activity a necessary, essential, and integral part of the owner’s trade, business, or occupation?” Likewise, it does not appear to the Court that Husqvarna’s employees have ever performed the

same work or activities, thereby foreclosing any argument under the third test for statutory employment. Considering the “guidepost” for this analysis is whether or not the work being performed is or is not a part of “the general trade, business or occupation of the owner,” the Court finds that Plaintiff was not a statutory employee of Husqvarna at the time of his injury. Accordingly, the Court denies Husqvarna’s motion to dismiss.

**CONCLUSION**

The Court denies Defendants’ motion to dismiss for lack of subject matter jurisdiction under the exclusive remedy provision of the Workers’ Compensation Act.

IT IS SO ORDERED.

December \_\_\_\_, 2019  
Orangeburg, SC

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The Honorable Edgar W. Dickson  
First Judicial Circuit



Orangeburg Common Pleas

**Case Caption:** Andre Kinley VS Husqvarna Consumer Outdoor Products, N.A.

**Case Number:** 2018CP3800521

**Type:** Order/Dismissal

So Ordered

s/ Edgar W. Dickson #2153