

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2018-CP-38-00521  
Appellate Case No. 2020-000362

Andre Kinley,.....Respondent,

v.

Husqvarna Consumer Outdoor Products N.A., Inc., Thaddeus Grant and  
John Doe, Defendants,

Of Whom Husqvarna Consumer Outdoor Products N.A., Inc., and  
Thaddeus Grant are the ..... Appellants.

**APPELLANTS' MEMORANDUM IN SUPPORT OF APPEALABILITY**

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Products N.A., Inc. and Thaddeus Grant*

## **INTRODUCTION**

Responding to the letter dated March 6, 2020, from the Honorable V. Claire Allen, Chief Deputy Clerk of the South Carolina Court of Appeals, Appellants Husqvarna Consumer Outdoor Products N.A., Inc. (“Husqvarna”) and Thaddeus Grant (“Grant” and collectively, “Appellants”), by and through undersigned counsel, respectfully submit the following memorandum of law addressing the appealability of the circuit court’s order, entered on December 16, 2019, denying the motion to dismiss pursuant to Husqvarna’s affirmative defense that Plaintiff Andre Kinley’s (“Kinley”) claims are subject to the exclusive remedy provision of the Workers’ Compensation Act, S.C. CODE ANN. § 42-1-540.

## **BACKGROUND**

On or about May 4, 2015, Kinley—an employee of non-party Interline Logistics Group (“ILG”)—was working on the premises of Husqvarna’s Orangeburg facility when he fell while attempting to access a Tyco truck (the “Truck”). [Complaint ¶¶ 8-9]. Kinley alleges the Truck’s steps failed due to prior damage that was not visible to Kinley. [Complaint ¶ 9]. Kinley asserts that at an unknown time prior to his fall, an unidentified Husqvarna employee (“John Doe”) struck the Truck with an unidentified maintenance vehicle. [Complaint ¶ 11]. Kinley alleges that the maintenance supervisor and safety manager of Husqvarna were notified of the collision and failed to take action to repair the vehicle or warn others of the damaged condition of the steps. [Complaint ¶ 12].

On May 3, 2018, Kinley filed a complaint asserting negligence claims against Husqvarna, Grant, and John Doe arising out of his alleged fall from ILG’s vehicle at Husqvarna’s Orangeburg facility.

On July 31, 2019, Husqvarna and Grant filed a motion to dismiss pursuant to Husqvarna’s affirmative defense that Kinley’s claims are subject to the exclusive remedy provision of the

Workers' Compensation Act, S.C. CODE ANN. § 42-1-540 (the "Motion").<sup>1</sup> The South Carolina Workers' Compensation Act provides the exclusive remedy for an employee's claims against an employer arising out of an employee's work-related injury. *See* S.C. CODE ANN. § 42-1-540. The statutory employee exception, S.C. CODE ANN. § 42-1-400, converts certain non-employee workers to "employees" for the purpose of determining whether a worker's claims are subject to the exclusive original jurisdiction of the Workers' Compensation Commission. In the Motion, Husqvarna argued that, at the time of Kinley's alleged accident, Kinley was a statutory employee of Husqvarna and, therefore, the South Carolina Workers' Compensation Act provides the exclusive remedy for Kinley's claims against Husqvarna.

In support of the Motion, Husqvarna and Grant submitted an Affidavit of Donald Ricks and the contract between ILG and Husqvarna. Mr. Ricks is employed as a Senior Buyer, Indirect Sourcing for Husqvarna's Orangeburg Plant, and he offered a sworn statement as to the facts relevant to the circuit court's consideration of the Motion. Specifically, Mr. Ricks's affidavit detailed the relationship between ILG and Husqvarna, and it identified how the work performed by ILG employees was essential to Husqvarna's manufacturing process.

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<sup>1</sup> In *Sabb v. S.C. State University*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002), the court found "the exclusivity provision [of the Workers' Compensation Act] does not involve subject matter jurisdiction." Subsequently, the courts in *Edens v. Bellini*, 359 S.C. 433, 440-41, 597 S.E.2d 863, 867 (Ct. App. 2004) and *Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008) stated the proper procedure for raising the application of the Workers' Compensation Act's exclusivity provision is to file a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Therefore, Husqvarna styled its motion to dismiss pursuant to the Workers' Compensation Act's exclusivity provision as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction even though the Workers Compensation Act's exclusivity provision involves the issue of exclusive original jurisdiction of the Workers' Compensation Commission and not the circuit court's subject matter jurisdiction, or lack thereof.

On December 16, 2019, the circuit court issued an order denying the Motion (the “Order”).<sup>2</sup> In the Order, the circuit court noted that in evaluating the application of the Workers Compensation Act’s exclusivity provision it reviewed a number of factual and evidentiary considerations presented by the parties, including (1) the service agreement between Husqvarna and ILG and (2) the affidavit of Donald Ricks. The circuit court found “the factual situation presented in this case” does not satisfy the tests for a worker to be classified as a statutory employee. In reviewing the facts presented, the circuit court found the work performed by Kinley was not a part of Husqvarna’s “general trade, business, or occupation.” Accordingly, after considering the facts presented and the merits of the Motion, the circuit court found that Kinley was not a statutory employee of Husqvarna.

On December 26, 2019, Husqvarna and Grant filed a Rule 59(e) Motion to Alter or Amend requesting the circuit court alter or amend its order, arguing (1) the Order contains an erroneous final ruling on the merits of Husqvarna’s affirmative defense that Kinley’s claims are subject to the exclusive remedy provision of the Workers’ Compensation Act and (2) the Order incorrectly and finally determines, on the merits, a substantial matter forming part of Husqvarna’s defense.

On January 31, 2020, the circuit court issued an order denying Husqvarna and Grant’s Motion to Alter or Amend. Thereafter, on February 28, 2020, Husqvarna and Grant filed a Notice of Appeal.

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<sup>2</sup> On October 14, 2019, the circuit court held a hearing on the Motion. The statements of the circuit court and counsel for the parties will establish that the circuit court was on notice that the hearing was to determine the merits of the statutory employee defense. On March 5, 2020, Appellants requested a copy of the transcript from the Court Reporter. Appellants will file a copy of the hearing transcript with the Court of Appeals as soon as a copy becomes available.

## ARGUMENT

**I. The circuit court’s order ruled on the merits of Husqvarna and Grant’s affirmative defense that Kinley’s claims are subject to the exclusive remedy provision of the Workers’ Compensation Act.**

The Order is an immediately appealable ruling involving the merits of Husqvarna and Grant’s affirmative defense that Kinley’s claims are subject to the exclusive remedy provision of the Workers’ Compensation Act.

The Court has appellate jurisdiction over interlocutory orders—like the circuit court’s Order—when the order “involves the merits.” *See* S.C. CODE ANN. § 14–3–330. “To involve the merits, an order ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense. . . .’” *Cooke v. Palmetto Health All.*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005) (quoting *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)).

In *Cooke*, 367 S.C. at 174, 624 S.E.2d at 442, the Court of Appeals reviewed whether the circuit court’s interlocutory order finding the Workers’ Compensation Act’s exclusivity provision did not apply to a non-employee worker’s claims against an employer was immediately appealable. The circuit court in *Cooke* held a hearing to determine the merits of the defendant employer’s exclusivity defense, and weighed the evidence presented. *Id.* After weighing the evidence, the circuit court found the plaintiff was neither a statutory employee, nor a borrowed servant of the defendant hospital and denied the hospital’s motion to dismiss pursuant to the Workers’ Compensation Act’s exclusivity provision. *Id.* On appeal, the Court found that the circuit court “‘finally determined a substantial matter forming a part of the [defendant] [h]ospital’s defense,’ and thus, the order [was] appealable.” *Id.*

Like the court in *Cooke*, the circuit court in the present case held a hearing on the merits of Husqvarna’s motion, weighed the facts presented, and analyzed the respective arguments of

counsel. Like the defendant hospital in *Cooke*, Husqvarna requested the circuit court issue a final ruling on the merits of the application of the exclusivity defense. Following the hearing on the Motion, the circuit court issued a final ruling on the merits of the application of the exclusivity defense. Subsequently, Husqvarna filed a Motion to Alter or Amend arguing (1) the Order contains an erroneous final ruling on the merits of Husqvarna's affirmative defense that Kinley's claims are subject to the exclusive remedy provision of the Workers' Compensation Act, and (2) the Order incorrectly and finally determines on the merits a substantial matter forming part of Husqvarna's defense. The circuit court denied the Motion to Alter or Amend, and Husqvarna and Grant filed their Notice of Appeal so that the Court of Appeals may review the circuit court's final ruling on the merits of Husqvarna's exclusivity defense.

In contrast to the present case and *Cooke*, other courts addressing whether a motion to dismiss pursuant to Rule 12(b)(1) and the Workers' Compensation Act's exclusivity provision is immediately appealable have found that the denial of such an order is not immediately appealable pursuant to S.C. CODE ANN. § 14-3-330. See *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995) *overruled in part on other grounds Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). The cases finding such an order is not immediately appealable are readily distinguishable from the present case and *Cooke*, because those cases did not involve a hearing on the merits of the employer's motion to dismiss pursuant to the Workers' Compensation Act's exclusivity provision. Unlike the employers in the cases finding such an order is not immediately appealable, Husqvarna moved for a final ruling on the merits of the Motion and application of the Workers' Compensation Act's exclusivity provision. The circuit court issued a final ruling on the merits, and Husqvarna requested the circuit court alter or amend its finding—the circuit court declined this request. Therefore—like the order in *Cooke*—the circuit court's

order denying Husqvarna's motion to dismiss pursuant to the Workers' Compensation Act's exclusivity provision is immediately appealable.

Accordingly, the circuit court's orders denying the Motion are ripe for appeal, because those orders are final rulings on the merits of Husqvarna's exclusivity defense.



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March 16, 2020  
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March 16, 2020

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SC Court of Appeals

**Via Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: **Andre Kinley vs. Husqvarna Consumer Outdoor Products N.A., Inc.,  
Thaddeus Grant, and John Doe**  
**Case Number: 2018-CP-38-00521**

Ms. Kitchings:

Enclosed for filing please find an original and two (2) copies of Appellants' Memorandum in Support of Appealability, in the above-referenced matter.

Please return a filed-stamped copy with our courier. As evidenced by the attached Proof of Service and by copy of this letter, we are providing counsel of record with a copy of same.

Sincerely,

Katon E. Dawson, Jr.

KED:mem  
Enclosure

Cc: David C. Marshall, Esq. (via U.S. Mail w/ encl.)  
Shane Morris Burroughs, Esq. (via U.S. Mail w/ encl.)

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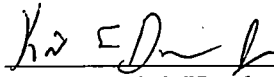
Husqvarna Consumer Outdoor Products N.A., Inc., Thaddeus Grant and  
John Doe, Defendants,

Of Whom Husqvarna Consumer Outdoor Products N.A., Inc., and  
Thaddeus Grant are the ..... Appellants.

**PROOF OF SERVICE**

The undersigned hereby certifies that on March 16, 2020, he caused a copy of the foregoing  
**APPELLANTS' MEMORANDUM IN SUPPORT OF APPEALABILITY**, with attachments,  
to be served upon all counsel of record via by mailing a copy of the same in the United States Mail,  
first-class postage prepaid, addressed as follows:

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