

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

APR 16 2020

SC Court of Appeals

The Honorable Edgar W. Dickson, Circuit Court Judge

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

Andre Kinley, Respondent,

v.

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

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

RESPONDENT'S MEMORANDUM OF APPEALABILITY

Pursuant to the Court's request, Respondent files this Memorandum of Appealability. The orders cited in Appellants' Notice of Appeal are interlocutory and not immediately appealable. For the reasons set forth herein, Respondent respectfully requests that the appeal be dismissed.

BACKGROUND

Respondent Andre Kinley (hereinafter "Kinley") was employed by Interline Logistics Group ("ILG") to perform transportation-related work around Husqvarna's Orangeburg manufacturing facility. He was injured on May 4, 2015, while performing duties for ILG on Husqvarna's premises. He filed a worker's compensation claim against ILG, which was resolved in 2016. On May 3, 2018, he filed a civil action against Appellants Husqvarna Consumer Outdoor

Products N.A., Inc. and Thaddeus Grant (“Appellants”). Neither Husqvarna Consumer Outdoor Products N.A., Inc. nor Thaddeus Grant raised the exclusivity provision of the Worker’s Compensation Act as an affirmative defense in their Answers to Kinley’s Complaint. (Answers attached hereto as Exhibits A & B).

After 14 months of discovery, Appellants filed a motion to dismiss Kinley’s Complaint on July 31, 2019 (hereinafter “the Motion”). By its plain language, the Motion sought dismissal under Rule 12(b)(1), SCRCF, for lack of subject matter jurisdiction. (Motion attached hereto as Exhibit C). The sole argument set forth in the Motion was that Kinley should be considered a statutory employee of Husqvarna at the time of his injury, thus depriving the trial court of subject matter jurisdiction under the exclusivity provision of the Workers’ Compensation Act.

The trial court heard the Motion on October 14, 2019. (This hearing transcript was provided to the Court by Appellants via letter dated March 18, 2020). On December 16, 2019, the trial court issued an order denying the Motion. (Order attached to Appellants’ Notice of Appeal). On December 26, 2019, Appellants filed a motion to alter or amend the court’s ruling under Rule 59(e), SCRCF. (Motion to Alter or Amend attached hereto as Exhibit D). The trial court denied the motion in a Form 4 order on January 31, 2020. (Order attached to Appellants’ Notice of Appeal). Appellants filed the Notice of Appeal on February 28, 2020. On March 6, 2020, the Court asked both sides to submit a brief concerning the appealability of the orders.

ARGUMENT

The appealed orders are interlocutory and not immediately appealable. An order denying a motion to dismiss for lack of subject matter jurisdiction, as the Motion sought in this case, is not immediately appealable. *Deskins v. Boltin*, 319 S.C. 356, 461 S.E.2d 395 (1995); *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds by Sabb v. S.C.*

State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). In *Woodard*, the respondent moved for summary judgment based on the exclusivity provision of the Workers' Compensation Act, which the circuit court denied. 319 S.C. at 241, 460 S.E.2d at 393. The Court of Appeals held the respondent should have filed a motion to dismiss rather than a motion for summary judgment but reversed the circuit court and held the appellant was a statutory employee. *Id.* at 241-42, 460 S.E.2d at 393. The Supreme Court held "the proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCF." *Id.* at 242, 460 S.E.2d at 393. The Court then specifically held that the trial court's order denying such motion was not immediately appealable because it does not fall into any of the categories set forth in S.C. Code § 14-3-330. *Id.* at 242, 460 S.E.2d at 393-94. "An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not finally determine anything." *Id.* at 243 n.2, 460 S.E.2d at 394 n.2. "[S]uch orders . . . do not fall under § 14-3-330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. For the same reason, such orders do not 'involve the merits' under § 14-3-330." *Id.* The Court dismissed the appeal.

Under *Woodard*, the orders appealed in this case are not immediately appealable. Appellants, obviously concerned with such outcome, cite *Woodard* on page six of their Memorandum of Appealability. They unconvincingly attempt to avoid dismissal by arguing the facts of this case are distinguishable from *Woodard* but are, instead, identical to the facts of *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), which allowed an immediate appeal of an order arising from a different procedural setting. A simple reading of the *Woodard* and *Cooke* opinions demonstrate that the facts and procedural posture of the instant case are similar only to *Woodard*, thereby subjecting this appeal to dismissal as interlocutory.

In *Cooke*, the appellants asserted the exclusivity provision as an affirmative defense in their answer and notified the Cookes that they intended to seek summary judgment. 367 S.C. at 171, 624 S.E.2d at 440-41. “Appellants [then], with the *consent* of the Cookes, made *a motion for a hearing on the merits* to determine whether the” exclusivity provision applied. *Id.* at 171, 624 S.E.2d at 441 (emphasis added). At the hearing, the appellants’ attorney disagreed with the judge’s characterization of the motion as a motion hearing on jurisdictional issues and stated it was “*not a motion*. . . . We’re here today *on the merits* of whether . . . Mr. Cooke qualifies as a statutory employee.” *Id.* (emphasis added). The lower court found Cooke was not a statutory employee. *Id.* at 172, 624 S.E.2d at 441. On appeal, the Court of Appeals cited *Deskins* and *Woodard, supra*, in reaffirming the South Carolina rule of law that orders denying motions to dismiss for lack of subject matter jurisdiction are not immediately appealable. *Id.* at 173, 624 S.E.2d at 442. The Court then held, “However, the issue before the circuit court was *not brought via a motion to dismiss*; rather, *both parties consented to have a non-jury hearing on the merits* of the Hospital’s exclusivity defense.” *Id.* (emphasis added). Given such a unique procedural posture, which was consented to by both litigants and specifically stated on the record at the hearing, the Court found the trial court’s order immediately appealable, while at the same time reaffirming the general rule espoused in *Woodard* that orders denying motions to dismiss are not immediately appealable. *Id.* at 173-74, 624 S.E.2d at 442; *see also Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (“A circuit court order denying a motion to dismiss for lack of subject matter jurisdiction is not directly appealable because, among other things, it does not affect the merits.”) (citing *Woodard*, 319 S.C. 240, 460 S.E.2d 392).

Contrary to the facts in *Cooke*, and also to the arguments set forth in Appellants’ Memorandum of Appealability, this case involves a simple motion to dismiss and not a motion for

a hearing on the merits. Appellants' Motion sought an order dismissing the case and nothing more. (See Exhibit C hereto). Appellants did not move for a non-jury merits hearing on applicability of the workers' compensation exclusivity provision despite the existence of *Cooke*. In fact, despite Appellants now referring to their motion as one seeking a final ruling on their affirmative defense, Appellants failed to even raise the defense in their Answers to Kinley's Complaint. Because the "exclusivity provision of the Workers' Compensation Act does not involve subject matter jurisdiction," *Cooke* at 173, 624 S.E.2d at 442, Appellants arguably waived any such defense, which served as the sole basis of their Motion.¹

Nevertheless, and perhaps more importantly, Kinley never consented to a non-jury hearing on the merits of the alleged applicability of the exclusive remedy provision in this case. Rather, Kinley simply argued against the dismissal of this lawsuit as sought by the Motion, and the trial court agreed, denying the Motion. At the hearing, counsel for Appellants made one statement suggesting he was seeking a final ruling on the merits of the exclusivity defense (Transcript, p. 4), but Kinley never consented to any such hearing, and counsel cannot ask for that *at the hearing*. Likewise, the trial court did not acknowledge the request or indicate the motion hearing was being conducted as "a hearing on the merits" of the purported exclusivity defense. In contrast, the parties in *Cooke* made a consent motion for a non-jury hearing on the merits of a defense that was raised by the defendant in its Answer to the Complaint, which the trial court granted, held, and then issued a ruling found to be immediately appealable. No such motion was made, or hearing conducted, in

¹ See *McCreery v. Covenant Presbyterian Church*, 303 S.C. 271, 274, 400 S.E.2d 130, 131 (1990) ("It is settled law that an employer wishing to raise the exclusivity of the Commission's jurisdiction as a defense to an action in circuit court must plead facts raising it as an affirmative defense or it is waived.") (citing *Ammons v. Hood*, 288 S.C. 278, 281, 341 S.E.2d 816, 818 (Ct. App. 1986) ("A defendant who wishes to raise the exclusivity of workers' compensation as a defense must do so affirmatively.")).

this case, thereby rendering this case markedly different and distinguishable from *Cooke*, which is the sole basis for Appellants' position on appealability. Instead, this case is identical to the factual and procedural scenario presented by *Woodard*, in which the Supreme Court unequivocally held that an order denying a simple motion to dismiss evaluating the exclusivity provision of the Workers' Compensation Act is interlocutory and not immediately appealable. The same outcome should be reached in this case.

Should the orders in this case be held immediately appealable as requested by Appellants, two manifest injustices would result. First, all orders denying motions to dismiss based on the workers' compensation exclusivity provision – like the one in *Woodard* and the Motion in this case – will be deemed to result in an order that is immediately appealable, contrary to the plain holding of *Woodard*, *Cooke*, and other cases. This is plainly not the outcome or intent of our governing law, which specifically holds otherwise – that such orders are not immediately appealable under S.C. Code § 14-3-330. *See Woodard, supra.*

The second manifest injustice that would result if the Court allows the orders in this case immediate appealability relates specifically to Kinley, who simply responded to a motion to dismiss. Appellants are attempting to unilaterally and retroactively convert the hearing on their motion to dismiss into a non-jury hearing on the merits of a defense that was not raised in their Answer to the Complaint, after the hearing was conducted and without moving for such a hearing or obtaining the consent of either Kinley or the trial court. Appellants attempt to do so after the fact solely to make this case fit within the facts and procedural posture from *Cooke*. The Court should reject that attempt. Had Appellants moved for a hearing on the merits of the claimed affirmative defense, Kinley would have had the right and opportunity, and prepared, to present evidence and witness testimony. Yet there was no need to do so in response to the simple motion

to dismiss that was filed, and if the Court accepts Appellants' argument, then Kinley will have been deprived of his constitutional due process rights. Stated plainly, Appellants will get away with a post-hearing ambush by unilaterally and retroactively changing the procedure, nature, purpose, and result of the hearing without formal notice to Kinley or the lower court.

After the denial of Appellants' motion to dismiss, the case should continue to trial, after which Appellants will have the opportunity to appeal, if necessary. Any other result would mean that all such orders denying such motions to dismiss could be immediately appealed in the face of longstanding South Carolina authority to the contrary.

Furthermore, all of the cited case law and authority was established long before this lawsuit was ever filed and long before the Motion in this case was ever heard or ruled upon. The law set forth in *Woodard* and *Cooke* is not new. If Appellants wanted the *Cooke* case to control the instant question of appealability, then they had the opportunity to file a motion for a non-jury hearing on the merits of such defense. Not only did Appellants choose not to go that route, they chose to not even include such defense in their Answers to Kinley's Complaint. (See Exhibits A & B). Appellants instead took the same action that was unsuccessfully taken in *Woodard* by filing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCPP. In doing so, Appellants picked their poison, which in turn dictates the outcome. No matter how artfully Appellants attempt to describe their motion or the relief sought, it remains a 12(b)(1) motion to dismiss as stated in the written motion itself, and as described by the court in its order denying it. Appellants cannot hide their intent in the written motion, mention the word "merits" in passing at the hearing, and then, after losing the motion, try to retroactively make it an appealable issue without ever formally moving for or seeking consent for such relief. Allowing Appellants to unilaterally modify the procedural posture of the case on appeal to fit the narrow factual pattern

and holding of *Cooke* would be manifestly unfair to Kinley and a miscarriage of justice, as well as an outcome directly contrary to long-standing South Carolina precedent. Indeed, neither the *Woodard* nor *Cooke* cases were even raised before the trial court.

The trial court's order denying the motion is not immediately appealable. As the Supreme Court held in *Woodard* and affirmed in *Allison*, an order denying a motion to dismiss on the applicability of the workers' compensation exclusivity provision is not immediately appealable under S.C. Code § 14-3-330 because it does not meet any of the criteria for appeal. *Woodard*, 319 S.C. at 242, 460 S.E.2d at 393-94. Such order does not finally determine the action and prevent a judgment from which an appeal might be taken, discontinue the action, or involve the merits. *Id.* at 243 n.2, 460 S.E.2d at 394 n.2. Rather, the proper time for any such appeal is after trial.


CONCLUSION

For the reasons set forth herein, Respondent Andre Kinley submits that the orders cited in Appellants' Notice of Appeal are interlocutory and not immediately appealable. Accordingly, this appeal should be dismissed.

Respectfully submitted,

April 13, 2020

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ATTORNEYS FOR RESPONDENT ANDRE KINLEY

ANDRE KINLEY V. HUSQVARNA CONSUMER
OUTDOOR PRODUCTS, N.A., VS. THADDEUS GRANT
AND JOHN DOE

CIVIL ACTION NO.: 2018-CP-38-521
APPELLATE COURT NO.: 2020-000362

“EXHIBIT A”

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Andre Kinley,	)	C.A. No. 5:18-cv-01845-CMC
)	
Plaintiff,)	
)	
vs.	)	ANSWER OF DEFENDANT HUSQVARNA
	)	CONSUMER OUTDOOR PRODUCTS N.A.,
Husqvarna Consumer Outdoor	)	INC.
Products, N.A., Inc., Thaddeus Grant,)	
and John Doe,)	
)	
Defendants.)	
)	

Defendant Husqvarna Consumer Outdoor Products N.A., Inc. ("Defendant"), by and through its undersigned counsel, hereby responds to the Complaint filed by Plaintiff Andre Kinley ("Plaintiff") as follows:

GENERAL RESPONSE

Defendant denies each and every allegation of Plaintiff's Complaint that is not hereinafter specifically admitted, modified, or explained.

FOR A FIRST DEFENSE

Defendant responds to the individually numbered paragraphs of the Complaint as follows:

1. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraph 1 of the Complaint and accordingly denies the same.
2. Defendant admits the allegations set forth in Paragraph 2 of the Complaint.
3. Answering Paragraph 3 of the Complaint, Defendant admits that it is a corporation organized and existing under the laws of the State of Delaware and that its principal

place of business is in the State of North Carolina. Any allegations inconsistent with the foregoing limited admissions are denied.

4. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraph 4 of the Complaint and accordingly denies the same.

5. Paragraph 5 of the Complaint does not contain allegations to which a response is required.

6. Answering Paragraph 6 of the Complaint, Defendant admits that, at all times relevant to this claim, Thaddeus Grant ("Grant") was an employee of Defendant with the title of Safety Manager. Defendant denies any remaining allegations set forth in Paragraph 6 of the Complaint.

7. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraph 7 of the Complaint and accordingly denies the same.

8. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraphs 8, 9, and 10 of the Complaint and accordingly denies the same.

9. Defendant denies the allegations set forth in Paragraph 11 of the Complaint.

10. Defendant denies the allegations set forth in Paragraph 12 of the Complaint.

11. Defendant denies the allegations set forth in Paragraph 13 of the Complaint.

12. Paragraph 14 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 14 of the Complaint.

13. Paragraph 15 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 15 of the Complaint.

14. Defendant denies the allegations set forth in Paragraph 16 of the Complaint.

15. Defendant denies the allegations set forth in Paragraph 17 of the Complaint, including all subparts a. through n.

16. Defendant denies the allegations set forth in Paragraph 18 of the Complaint.

17. Defendant denies any allegations set forth in the unnumbered "WHEREFORE" paragraph.

FOR A SECOND DEFENSE

Plaintiff fails to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE

To the extent any Defendant has acted wrongly, which is expressly denied, that Defendant's actions may be excused, in whole or in part, by the mistakes of it, Plaintiff, or other parties.

FOR A FOURTH DEFENSE

Plaintiff's claims may be barred, in whole or in part, by Plaintiff's contributory or comparative negligence.

FOR A FIFTH DEFENSE

Plaintiff has a legal obligation to mitigate his damages, which are denied, and to the extent that he has failed to do so, his claims may be barred in whole or in part.

FOR A SIXTH DEFENSE

Plaintiff's claims may be barred, in whole or in part, by the intervening acts or negligence of others.

FOR A SEVENTH DEFENSE

Plaintiff's claims may be barred because of assumption of the risk.

FOR AN EIGHTH DEFENSE

Plaintiff suffered no damage as a result of the alleged acts or omissions of Defendant.

FOR AN NINTH DEFENSE

Plaintiff fails to state any basis upon which punitive damages are recoverable against Defendants, and, accordingly, Plaintiff's prayer for such damages should be dismissed and/or stricken from the Complaint pursuant to Rules 12(b)(6) and/or 12(f) of the South Carolina Rules of Civil Procedure.

FOR A TENTH DEFENSE

Plaintiff's claims for recovery of punitive damages are barred by the South Carolina Constitution and the Constitution of the United States because no reasonable and well-defined limits are placed on such punitive damages award; because the award and payment of punitive damages would be a windfall and would advance no legitimate state purpose; and because such punitive damages would constitute an imposition of punishment on Defendants without adequate notice of the substantive rules governing the conduct giving rise to such punitive damages.

WHEREFORE, having fully answered Plaintiff's Complaint and presented its defenses thereto, Defendant respectfully prays that this honorable Court:

1. Dismiss Plaintiff's claims with prejudice;
2. Tax the costs of this action against Plaintiff;
3. Grant such other and further relief as may be just and proper.

s/Lawrence M. Hershon

Lawrence M. Hershon (Fed ID # 10404)

Katon E. Dawson, Jr. (Fed. ID # 12297)

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July 12, 2018

Columbia, South Carolina

**ANDRE KINLEY V. HUSQVARNA CONSUMER
OUTDOOR PRODUCTS, N.A., VS. THADDEUS GRANT
AND JOHN DOE**

**CIVIL ACTION NO.: 2018-CP-38-521
APPELLATE COURT NO.: 2020-000362**

“EXHIBIT B”

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Andre Kinley,	)	C.A. No. 5:18-cv-01845-CMC
)	
Plaintiff,)	
)	
vs.	)	ANSWER OF DEFENDANT THADDEUS
	)	GRANT
Husqvarna Consumer Outdoor)	
Products, N.A., Inc., Thaddeus Grant,)	
and John Doe,)	
)	
Defendants.)	
)	

Defendant Thaddeus Grant (“Defendant”), by and through his undersigned counsel, hereby responds to the Complaint filed by Plaintiff Andre Kinley (“Plaintiff”) as follows:

GENERAL RESPONSE

Defendant denies each and every allegation of Plaintiff’s Complaint that is not hereinafter specifically admitted, modified, or explained.

FOR A FIRST DEFENSE

Defendant responds to the individually numbered paragraphs of the Complaint as follows:

1. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraph 1 of the Complaint and accordingly denies the same.
2. Defendant admits the allegations set forth in Paragraph 2 of the Complaint.
3. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraphs 3 and 4 of the Complaint and accordingly denies the same.
4. Paragraph 5 of the Complaint does not contain allegations to which a response is required.

5. Answering Paragraph 6 of the Complaint, Defendant admits that, at all times relevant to this claim, he was and currently is an employee of Defendant Husqvarna Consumer Outdoor Products N.A., Inc. ("Husqvarna") with a title of Safety Manager. Defendant denies any remaining allegations set forth in Paragraph 6 of the Complaint.

6. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraph 7 of the Complaint and accordingly denies the same.

7. Defendant is without knowledge sufficient to admit or deny the allegations set forth in Paragraphs 8, 9, 10, and 11 of the Complaint and accordingly denies the same.

8. Defendant denies the allegations set forth in Paragraph 12 of the Complaint.

9. Defendant denies the allegations set forth in Paragraph 13 of the Complaint.

10. Paragraph 14 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 14 of the Complaint.

11. Paragraph 15 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 15 of the Complaint.

12. Defendant denies the allegations set forth in Paragraph 16 of the Complaint.

13. Defendant denies the allegations set forth in Paragraph 17 of the Complaint, including all subparts a. through n.

14. Defendant denies the allegations set forth in Paragraph 18 of the Complaint.

15. Defendant denies any allegations set forth in the unnumbered "WHEREFORE" paragraph.

FOR A SECOND DEFENSE

Plaintiff fails to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE

To the extent any Defendant has acted wrongly, which is expressly denied, that Defendant's actions may be excused, in whole or in part, by the mistakes of it, Plaintiff, or other parties.

FOR A FOURTH DEFENSE

Plaintiff's claims may be barred, in whole or in part, by Plaintiff's contributory or comparative negligence.

FOR A FIFTH DEFENSE

Plaintiff has a legal obligation to mitigate his damages, which are denied, and to the extent that he has failed to do so, his claims may be barred in whole or in part.

FOR A SIXTH DEFENSE

Plaintiff's claims may be barred, in whole or in part, by the intervening acts or negligence of others.

FOR A SEVENTH DEFENSE

Plaintiff's claims may be barred because of assumption of the risk.

FOR AN EIGHTH DEFENSE

Plaintiff suffered no damage as a result of the alleged acts or omissions of Defendant.

FOR AN NINTH DEFENSE

Plaintiff fails to state any basis upon which punitive damages are recoverable against Defendants, and accordingly, Plaintiff's prayer for such damages should be dismissed and/or stricken from the Complaint pursuant to Rules 12(b)(6) and/or 12(f) of the South Carolina Rules of Civil Procedure.

FOR A TENTH DEFENSE

Plaintiff's claims for recovery of punitive damages are barred by the South Carolina Constitution and the Constitution of the United States because no reasonable and well-defined limits are placed on such punitive damages award; because the award and payment of punitive damages would be a windfall and would advance no legitimate state purpose; and because such punitive damages would constitute an imposition of punishment on Defendants without adequate notice of the substantive rules governing the conduct giving rise to such punitive damages.

WHEREFORE, having fully answered Plaintiff's Complaint and presented his defenses thereto, Defendant respectfully prays that this honorable Court:

1. Dismiss Plaintiff's claims with prejudice;
2. Tax the costs of this action against Plaintiff;
3. Grant such other and further relief as may be just and proper.

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July 12, 2018
Columbia, South Carolina

ANDRE KINLEY V. HUSQVARNA CONSUMER
OUTDOOR PRODUCTS, N.A., VS. THADDEUS GRANT
AND JOHN DOE

CIVIL ACTION NO.: 2018-CP-38-521
APPELLATE COURT NO.: 2020-000362

“EXHIBIT C”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG)	
	)	CA No. 2018-CP-38-00521
Andre Kinley,)	
)	
Plaintiff,)	
	)	DEFENDANTS' MOTION TO DISMISS
vs.)	
)	
Husqvarna Consumer Outdoor)	
Products, N.A., Inc., Thaddeus Grant,)	
and John Doe,)	
)	
Defendants.)	

Defendants Husqvarna Consumer Outdoor Products N.A., Inc. (“Husqvarna”) and Thaddeus Grant move the Court, pursuant to Rule 12(b)(1) of South Carolina Rules of Civil Procedure, for an order dismissing the Complaint of Plaintiff Andre Kinley (“Plaintiff”) for lack of subject matter jurisdiction of this action.¹ In support of this Motion, Husqvarna shows the following to the Court:

1. There is no justiciable case or controversy set forth in Plaintiff’s Complaint to be decided by the Court, because the Court lacks subject matter jurisdiction over Plaintiff’s claim.
2. At the time of the alleged events in the Complaint leading to the injuries purportedly sustained by Plaintiff, Plaintiff was the employee of Interline Logistics Group, Inc., which contracted to perform a variety of services related to the operations, inventory and logistics management for Husqvarna at its facility located in Orangeburg County.
3. Pursuant to the Workers’ Compensation Act, Plaintiff is a statutory employee of Husqvarna. *See* S.C. CODE ANN. § 42-1-400 (recognizing the statutory employee doctrine);

¹ The issue of a court’s lack of subject matter jurisdiction may be raised at any time. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (“[I]ssues related to subject matter jurisdiction may be raised at any time.”); *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time).

Glass v. Dow Chem. Co., 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997) (“The statutory employee doctrine converts conceded non-employees into employees for purposes of the Workers’ Compensation Act.”); *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) (discussing the three tests that have been adopted by South Carolina Courts for determining whether a worker is a statutory employee).

4. As a statutory employee, Plaintiff’s exclusive remedy for his claims against Husqvarna is under the South Carolina Workers’ Compensation Act. *See* S.C. CODE ANN. § 42-1-540 (“The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee . . . as against his employer, at common law or otherwise, on account of such injury, loss of service[,], or death.”); *Edens v. Bellini*, 359 S.C. 433, 441-42, 597 S.E.2d 863, 867 (Ct. App. 2004) (stating that the exclusivity provision of the South Carolina Workers’ Compensation Act “precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury”).

5. Therefore, the Court lacks subject matter jurisdiction over Plaintiff’s claims against his statutory employer (Husqvarna). *See Posey v. Proper Mold & Eng’g, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 402 (Ct. App. 2008) (affirming a statutory employer’s Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction on the grounds that the statutory employee’s sole recourse against his statutory employer for his workplace injuries was with the Workers’ Compensation Commission).

This motion is based upon the Complaint, the South Carolina Rules of Civil Procedure, all applicable statutory and common law, affidavits related to the relevant jurisdictional facts,

including the affidavit of Donald Ricks attached hereto as Exhibit A, and upon such memoranda of law and additional arguments as may be submitted to the Court in support hereof.

Respectfully submitted,

s/Katon E. Dawson Jr.

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July 31, 2019
Columbia, South Carolina

ANDRE KINLEY V. HUSQVARNA CONSUMER
OUTDOOR PRODUCTS, N.A., VS. THADDEUS GRANT
AND JOHN DOE

CIVIL ACTION NO.: 2018-CP-38-521
APPELLATE COURT NO.: 2020-000362

“EXHIBIT D”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG)	
	)	CA No. 2018-CP-38-00521
Andre Kinley,)	
)	
Plaintiff,)	
	)	DEFENDANTS'
vs.	)	MOTION TO ALTER OR AMEND
)	
Husqvarna Consumer Outdoor)	
Products, N.A., Inc., Thaddeus Grant,)	
and John Doe,)	
)	
Defendants.)	
)	

Defendants Husqvarna Consumer Outdoor Products N.A., Inc. (“Husqvarna”) and Thaddeus Grant, (collectively, “Defendants”), by and through undersigned counsel, hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order altering, amending, or vacating the order denying Husqvarna’s motion to dismiss pursuant to Husqvarna’s affirmative defense that Plaintiff Andre Kinley’s (“Plaintiff”) claims are subject to the exclusive remedy provision of the Workers’ Compensation Act, S.C. CODE ANN. § 42-1-540, entered on December 16, 2019 (the “Order”). Defendants respectfully submit that the Order contains conclusions of law that the evidence in the record does not support and that overlook or misapprehend controlling law. Specifically, (1) the Order contains an erroneous final ruling on the merits of Husqvarna’s affirmative defense that Plaintiff’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.

STANDARD OF REVIEW

In determining whether a party’s claim falls under the South Carolina Workers’ Compensation Act, any doubt should be resolved in favor of inclusion rather than exclusion.

Hernandez-Zuniga v. Tickle, 374 S.C. 235, 243, 647 S.E.2d 691, 695 (Ct. App. 2007) (quoting *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720, 723 (1964)).

ARGUMENT

I. The Court erred in finding Plaintiff Andre Kinley was not a statutory employee of Husqvarna.

The Court erred in finding Plaintiff was not a statutory employee of Husqvarna. This error is based upon inaccurate findings of fact related to the work performed by Plaintiff and Interline Logistics Group, LLC (“ILG”) and a misapplication of the facts to the applicable authorities regarding the statutory employee exclusion.¹ The facts of this case necessitate a finding that Plaintiff was engaged in work that was a part of the general trade and business of Husqvarna and, therefore, Plaintiff was a statutory employee of Husqvarna.

An owner is considered to be a statutory employer of a worker who performs one of the following:

1. activities that are an important part of the trade or business of the owner;
2. activities that are a necessary, essential, and integral part of the business of the owner; or
3. activities that have been previously performed by employees of the owner.

Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 322, 523 S.E.2d 766, 770 (1999). If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner, and any doubts as to a worker’s status as a statutory employee are to be resolved in favor of coverage under the Workers’ Compensation Act. *Fortner v. Thomas M. Evans Const. & Dev., LLC*, 402 S.C. 421, 432, 741 S.E.2d 538, 544 (Ct. App. 2013) (citation omitted). When

¹ Plaintiff failed to submit *any* affidavit or *any* other evidence to the Court in response to Defendants’ motion to dismiss. Therefore, the only facts appropriately before the Court are contained in the affidavit of Donald Ricks and the excerpt of Plaintiff’s deposition testimony submitted with Defendants’ motion to dismiss and memorandum in support.

determining whether a worker is a statutory employee, the ultimate guidepost for the Court is whether “that which is being done is or is not a part of the general trade, business[,] or occupation of the owner.” *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 367, 827 S.E.2d 183, 189 (Ct. App. 2019) (citation omitted). There is no easily applied formula for determining whether work in a given case is a part of the general trade, business, or occupation of the principal employer. *Id.* at 371-72, 827 S.E.2d at 191. Rather, each case must be determined on its own facts. *Id.*

Plaintiff was engaged in work that was a part of the general trade and business of Husqvarna and, therefore, Plaintiff was a statutory employee of Husqvarna. The Court incorrectly found that ILG did not provide any inventory management services and ILG’s work was “transportation-related.” The contract between ILG and Husqvarna details multiple services related to “Yard Management.” “Yard Management” is effectively inventory and product management within the Husqvarna Orangeburg Plant. Specifically, the contract between ILG and Husqvarna requires ILG provide the following to Husqvarna:

1. Four Operations Specialists;
2. Yard Management Software (“YMS”); and
3. Upload all Yard Driver movements into the YMS System.

The contract between Husqvarna and ILG also requires the Husqvarna Inventory Control Supervisor to execute certain forms acknowledging and requesting the movements of trailers by the ILG Yard Drivers. These tasks are all a part of Husqvarna’s inventory management and, therefore, the manufacturing process at the Husqvarna Orangeburg Plant. Moreover, a “Key Performance Indicator” for ILG that is identified in the contract is an increase in the yard management productivity, which results in improved efficiency of the plant. The provision of Yard Management Services and the management of the inventory at the Husqvarna Orangeburg

facility is an essential part of the Husqvarna manufacturing process; in other words, without the work of ILG, Husqvarna could not conduct its business.

The Court's Order also appears to ignore the Affidavit of Donald Ricks which was filed by Husqvarna and states that "ILG's management of the yard and its coordination of the movement of inventory at the plant was essentially the first step of Husqvarna's manufacturing process," and "[t]he management of inventory includes the systematic management of trailers around and within Husqvarna's yard located at the Orangeburg Plant." Plaintiff presented no evidence to the contrary and the record only contains affirmative evidence plainly establishing that the management of the yard is a part of Husqvarna's inventory management process and, therefore, a part of the manufacturing process.

The Court's Order compounds the incorrect factual findings related to the work performed by ILG and its employees with an incorrect conclusion that the work performed by Plaintiff is equivalent to the "transportation business" or services provided by common carriers. Specifically, the Court erred in relying upon the holdings in *Abbott v. The Ltd., Inc.*, 338 S.C. 161, 164, 526 S.E.2d 513, 514 (2000) and *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) to find that Plaintiff was not a statutory employee of Husqvarna. The yard management services provided by ILG and Plaintiff are not comparable to the delivery services provided by the employees of the common carriers in *Abbott* and *Olmstead*.

Simply put, *Abbott* and *Olmstead* do not apply to the case at bar. These two cases involve common carriers—companies that transport goods from Point A to Point B for a fee, typically in eighteen wheel tractor trailers. Instead, the court should look to the facts and circumstances in *Meredith v. Honeywell Int'l, Inc.*, 245 F. App'x 325, 327–28 (4th Cir. 2007) for guidance. While *Meredith* applies Virginia law, the applicable statutory scheme in Virginia is similar to that of South Carolina, and the facts before the Court are similar to the facts presented to the Fourth

Circuit. In *Meredith*, the defendant Honeywell International, Inc. (“Honeywell”) contracted with a third-party to transport caprolactam—a chemical that is processed and used to manufacture nylon—from a Honeywell plant in Hopewell, Virginia to a Honeywell plant in Irmo, South Carolina. While waiting for the truck to be unloaded at the South Carolina plant, the worker was injured when the waiting room chair collapsed beneath him. Honeywell argued that the worker was a statutory employee because the intra-company transportation of caprolactam was essential to Honeywell’s business. The Fourth Circuit agreed and found that that the transportation of caprolactam between the Honeywell facilities in Virginia and South Carolina was an integral part of Honeywell’s business. The Fourth Circuit stated that the plaintiff “was not merely delivering an independently manufactured product to a job site. Rather, he was transporting material manufactured by Honeywell between Honeywell’s manufacturing plants, which was . . . an essential part of Honeywell’s business.” *Id.* at 328.

By comparison, in *Abbott*, the plaintiff—an employee of a common carrier—slipped and fell on a retailer’s premises while delivering goods to the retailer. 338 S.C. at 162, 526 S.E.2d at 514. The court in *Abbott* held that the plaintiff was not a statutory employee of the retailer because the delivery of goods by a common carrier was not a part or process of the retailer’s business. *Id.*

In *Olmstead*, the plaintiff—an employee of a common carrier—contracted to transport fiberglass utility poles from the defendant fiberglass pole manufacturer’s premises in Newberry, South Carolina to Montana. 354 S.C. at 426, 581 S.E.2d at 486. The plaintiff employee was injured during the process of receiving the fiberglass poles and loading the poles onto the delivery truck. *Id.* at 422, 581 S.E.2d at 484. The court held that the plaintiff employee of the common carrier was not a statutory employee of the manufacturer of fiberglass products, because the receipt of goods alone by a common carrier was insufficient for the Court to find that the common carrier’s

employee's services were a part of the fiberglass pole manufacturer's business operations. *Id.* at 426, 581 S.E.2d at 486.

The holdings in *Abbott* and *Olmstead* may be read together to stand for the general proposition that employees of common carriers are not statutory employees of the companies that contract to merely ship or receive goods through common carriers. These cases are inapplicable to the case at bar, as there are no facts in the record to support the conclusion that ILG is a common carrier. For example, there are no facts in the record indicating that ILG carries goods from Husqvarna to any third-party facility, or that ILG or its drivers even have commercial drivers' licenses for performing such activities.

The services performed by ILG are not similar to services provided by the common carriers in *Abbott* and *Olmstead*. Husqvarna is more than the mere recipient of goods from a common carrier. A common carrier transports goods and products from one location to another location. ILG provides no service to Husqvarna outside of the Orangeburg Plant. ILG and Plaintiff moved inventory within the same location. ILG does not transport inventory or completed products away from the Husqvarna Orangeburg Plant. Moving inventory and products within a facility is not a "transportation" service under its traditional meaning or a service provided by a common carrier. A more appropriate comparison is to equate ILG employees to forklift operators moving inventory within a manufacturing warehouse. However, in this instance the warehouse is the yard at the Husqvarna Orangeburg facility and the forklifts are the TYCO trucks.

ILG and its employees—including Plaintiff—were engaged in the daily management of inventory at the Husqvarna Orangeburg facility. It is the extra duties imputed upon ILG and its employees that differentiates the ILG employees from the plaintiffs in *Abbott* and *Olmstead*. ILG is not simply a common carrier that is contracted to receive inventory and deliver completed products. ILG works directly with Husqvarna to manage the initial steps of the manufacturing

process. ILG and Husqvarna share information and Husqvarna exerts direct control over ILG as the entities work together so that Husqvarna may more efficiently manufacture its products. To conclude otherwise ignores the facts before the Court.

The work performed by ILG and Plaintiff is substantially more similar to the work performed by the employee in *Meredith* than the work performed by the common carriers in *Abbott* and *Olmstead* because Plaintiff worked at a single facility and moved Husqvarna inventory and products intra-company. The coordination of ILG and Plaintiff's movements was based upon a joint effort of Husqvarna and ILG and the purpose of the extensive coordination of ILG and Plaintiff's movements was so that the manufacturing processes may operate more efficiently. Therefore, upon review of the facts presented, the Court should find that the work performed by Plaintiff was essential to the Husqvarna manufacturing process. To hold otherwise discounts the value that operations and logistics management that occurs solely within a manufacturing facility has to the business of manufacturing a product. Accordingly, the Court should alter or amend its Order and find that Plaintiff was a statutory employee of Husqvarna and Plaintiff's sole and exclusive remedy resides within the South Carolina Workers' Compensation Act. Moreover, any doubt the Court has as to whether Plaintiff's claims are within the South Carolina Workers' Compensation Act should be resolved in favor of inclusion rather than exclusion. *Hernandez-Zuniga*, 374 S.C. at 243, 647 S.E.2d at 695.

CONCLUSION

Based on the foregoing, Defendants respectfully request the Court alter or amend its Order and GRANT Husqvarna's Motion to Dismiss pursuant to the Workers' Compensation Exclusivity Provision. The Court's ruling on the Motion to Dismiss is a final ruling on the merits of the application of the exclusivity defense, making this matter subject to immediate appeal if this

motion is denied by the Court.

s/Katon E. Dawson, Jr.

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