THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr.

Case No. 2018-CP-07-2069

Charles Waymon Murphy, ……Appellant,

v.

Lori Ann Niverson; Starr Distributing, LLC,……..……..……Defendants,

Of which Starr Distributing, LLC, is the ……Respondent,

and

Starr Distributing, LLC,……Third-Party Plaintiff,

v.

Arthur C. Niverson, ……...…Respondent.

NOTICE OF APPEAL

Appellant Charles Waymon Murphy appeals the Amended Order Granting Summary Judgment of the Honorable R. Ferrell Cothran, Jr., filed February 22, 2021. This Notice is timely filed. A copy of the Order appealed from is attached to this Notice.

Dated: March 19, 2021

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2018-CP-07-2069

CHARLES WAYMON MURPHY,

Plaintiff,

v.

LORI ANN NIVERSON; STARR DISTRIBUTING, LLC,

Defendants,

STARR DISTRIBUTING, LLC,

Third-Party Plaintiff,

v.

ARTHUR C. NIVERSON,

Third-Party Defendant.

AMENDED ORDER GRANTING SUMMARY JUDGMENT

Before this Court are motions for summary judgment filed by each Defendant Starr Distributing, LLC ("Starr Distributing") and Arthur C. Niverson. Starr Distributing seeks summary judgment on all claims alleged by Plaintiff against Starr Distributing. Arthur Niverson seeks summary judgment as to all claims based on a theory of *respondeat superior*. This Court heard arguments from the parties on January 26, 2021. For the reasons set forth below, and in the materials on file with the court, both motions are granted.

FINDINGS OF FACT

This lawsuit arises from a motor vehicle accident that took place during the early morning hours of September 30, 2017, while Plaintiff Charles Waymon Murphy and Lori Niverson were each traveling straight on Highway 17 near Hardeeville, South Carolina. Plaintiff alleges that as he was stopped for road work on Highway 17, he was struck from behind by Lori Niverson's vehicle. Plaintiff claims personal injuries and other damages as a result of this accident.

In his Complaint, Plaintiff alleges that Lori Niverson was an agent and employee of Starr Distributing (a newspaper distributing company) and that she was on a newspaper route delivering newspapers at the time of the accident. Plaintiff, therefore, claims that Starr Distributing is responsible for his injuries under a theory of *respondeat superior*.

Lori Niverson's husband, the Third-Party Defendant Arthur Niverson, was not involved in the accident and was not present at the scene of the accident. Arthur Niverson was an independent contractor of Starr Distributing, and his wife Lori Niverson was filling in for her husband on the morning of the accident. Plaintiff has not brought a cause of action against Arthur Niverson. Instead, Arthur Niverson was brought into this suit by Starr Distributing under the independent contractor agreement between Starr Distributing and Arthur Niverson.

This Court finds that the facts show that Lori Niverson was not working, but was

on her way to work, at the time of the accident. Plaintiff admits that Lori Niverson told him and his wife that she was "on her way" to work to start delivering newspapers on the morning when the accident occurred. Plaintiff further testified that Lori Niverson did not have any newspapers with her in her vehicle at the time of the accident. Similarly, deposition testimony of Arthur and Lori Niverson also demonstrates that Lori Niverson was on her way to pick up papers at the time of the accident and did not have the papers with her at the time. She and her husband often split duties, and Arthur Niverson was not working on this particular day. Some days, Lori Niverson or Arthur Niverson would stop and pick up the Savannah Morning News in Bluffton, South Carolina, before driving to the Starr Distributing Warehouse on Laurel Bay Road in Beaufort. However, on the date of this accident, there is no evidence that Lori Niverson had actually picked up the Savannah Morning News from the Bluffton Location. Starr Distributing paid a flat $25 per week payment for Arthur Niverson picking up the Savannah Morning Paper in Bluffton and delivering them to Beaufort.

Only Arthur Niverson had an agreement with Starr Distributing to deliver newspapers. That agreement is titled "Starr Distributing Independent Contractor Distribution Agreement" and is part of the record (the "Independent Contractor Agreement"). There is no dispute that Arthur Niverson executed and entered into that agreement. The Independent Contractor Agreement specifies, among other things, that:

> As an independent contractor, Contractor [Arthur Niverson] acknowledges and agrees that in performance of this Agreement, he/she alone is responsible for any property damage, bodily injury or death caused by Contractor, his/her agents and employees. . . .

As stated above, Lori Niverson was assisting her husband with deliveries. At the time of the accident, she was driving her personal vehicle, which was not owned or controlled by Starr Distributing. Only after she arrived at the work location was she considered working, and she was not paid for her commute.

STANDARD OF REVIEW

"[A] motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (quoting Rule 56(c), SCRCP). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "Whether a duty exists in a negligence action is a question of law to be determined by the court." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 386, 701 S.E. 2d 776, 779 (S.C. Ct. App. 2010).

CONCLUSIONS OF LAW

A. Even under Plaintiff's "employee" argument, Starr Distributing cannot be found liable as a matter of law for the actions of Mrs. Niverson on her way to work.

Even assuming *arguendo* that Mrs. Niverson was an employee, Starr Distributing cannot be held liable for her accident on the way to work. Under the doctrine of *respondeat*

superior, "a master [is] liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *South Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986); *see also Wade v. Berkeley Cty.*, 330 S.C. 311, 318–19, 498 S.E.2d 684, 688 (Ct. App. 1998). For a plaintiff to recover from a master/employer under the doctrine, he "must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment." *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E. 2d 50, 52 (2006). At the center of the *respondeat superior* theory is that the employee must be acting within the scope of her employment at the time of the tortious act. "An act is within the scope of [an employee's] employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the [employer's] business." *Id*. On the other hand:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time.

Id. (*citing Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E. 2d 713 (1964)).

Generally, where an employee is going to or coming from her place of work, she is "not engaged in performing a service growing out of and incidental to [her] employment;" therefore, no liability will lie with an employer where an employee is involved in an accident while going to or coming from work. *Wofford v. City of*

Spartanburg ex rel. S.C. Mun. Ins. Tr., 415 S.C. 152, 159, 781 S.E.2d 146, 149–50 (Ct. App. 2015) (*citing Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998)); *see also Wade v. Berkeley County*, 330 S.C. 311, 320, 498 S.E. 2d 684, 688 (Ct. App. 1998) ("the general rule is that an employee driving his own vehicle to and from work is on his own business, and not engaged in work for the master").

South Carolina has recognized five exceptions to this rule. An employer may still be liable in those instances where (1) "the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages"; (2) "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment"; (3) the way to work is inherently dangerous and is either the exclusive way or is constructed and maintained by the employer; (4) the injury occurred in close proximity to the workplace and there is an express or implied requirement that the employee use that approach in going to and coming from work; and (5) an employee is injured "while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work." *Id*.

The first exception does not apply because there is no legitimate dispute that the vehicle operated by Lori Niverson on the date of the accident was her personal vehicle and was not owned by Starr Distributing. Nor was Lori Niverson compensated for her travel on the morning of the accident. Although Arthur Niverson received a flat $25 per week payment for, on some mornings, picking up the Savannah Morning Paper and

delivering them in Beaufort, Lori Niverson had not picked up any papers on the day of the accident.

The second exception does not apply because Lori Niverson was not charged with some duty or task in connection with her alleged employment. Under the second exception, an employee will be considered within the scope of her employment if she is "charged with some duty or task in connection with her employment" while on the way to or coming from work. *Id.* In *Whitworth v. Window World, Inc.*, for example, an employee on his way to a window cleaning job was not performing a duty or task for work because he had no work-related duties on his way, but was instead "free to conduct personal business." 377 S.C. 637, 641, 661 S.E. 2d 333, 336 (2008). The South Carolina Supreme Court in *Whitworth* held that the purpose of the window cleaner's trip was a personal objective where he was traveling to the place where he would perform work. *Id.* Likewise, in *Wofford*, the Court of Appeals held that the plaintiff was not performing a duty or task for work at the time of his accident where he was "merely on his way to work to engage in his typical job responsibilities." *Wofford*, 415 S.C. at 161, 781 S.E.2d at 151.

Like the plaintiff in *Wofford*, in the present case Lori Niverson had not yet commenced any duties or tasks associated with delivery of the papers. Rather, Mrs. Niverson was "merely on [her] way to work to engage in [her] typical job responsibilities." 415 S.C. at 161, 781 S.E.2d at 151. Therefore, the second exception does not apply here.

The third exception does not apply because there is no evidence that the route on which Lori Niverson was traveling was inherently dangerous.

The fourth exception does not apply because there is no evidence of an express or implied requirement that Lori Niverson use a particular approach going to work.

The fifth exception does not apply because Lori Niverson was not performing a special task, mission, or errand. Under this exception, an employee is within the course and scope of her employment where she is obligated to take on tasks or perform any services requested by an employer from the time of leaving home to the end of the workday. For example, the South Carolina Supreme Court in *Bickley v. South Carolina Electric and Gas* held that an electrical lineman was performing a special task during his entire workday because he was obligated to make emergency calls and perform work outside his regular work hours. 259 S.C. 463, 471, 192 S.E. 2d 866, 870 (1972). However, where an employee is coming and going from tasks that are not unusual or special, but instead are common and customary in the course of business, those instances will not be considered within the "special task" exception. *See McDaniel v. Bus Terminal Restaurant Management Corp.*, 271 S.C. 299, 301-03, 247 S.E. 2d 321, 322-23 (1978) (S.C. Supreme Court held that cook was not within scope of employment when involved in accident while leaving regularly scheduled employee meeting because it was not unusual or "special").

Similarly, like in *McDaniel*, Mrs. Niverson was not engaging in a "special task" at the time of the accident. The record demonstrates that Arthur Niverson (or Lori Niverson, acting on his behalf) regularly picked up the Savannah Morning Paper in

Bluffton before continuing on to Beaufort, and Arthur Niverson received a $25.00 fee for performing such service. Thus, stopping in Bluffton to pick up the papers would not be considered a "special task" because it is a routine and regular occurrence.

Regardless of this fact, Lori Niverson had not picked up the papers on the date of her accident; rather, she was on her way to work. In South Carolina, it is clearly established that one's commute to work does not fall within the course and scope of their employment. *Wofford*, 415 S.C. at 159; *see also Wade*, 330 S.C. at 320.

Accordingly, even if Lori Niverson were considered an employee of Starr Distributing, she was on her way to work at the time of the accident, and the exceptions to the "going and coming" rule do not not apply to Lori Niverson on the morning of the accident.

CONCLUSION

For these reasons, this Court grants summary judgment in favor of Starr Distributing and against Plaintiff on all his claims against Starr Distributing. For the same reasons, the Court grants summary judgment as to the allegations against Arthur Niverson that are based on the theory of *respondeat superior*.

So ordered this ___ day of _____, 2021.

The Honorable Judge R. Ferrell Cothran, Jr.

Beaufort Common Pleas

Case Caption: Charles Waymon Murphy VS Lori Ann Niverson , defendant, et al

Case Number: 2018CP0702069

Type: Order/Amend

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

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PROOF OF SERVICE

The undersigned certifies that a copy of the Notice of Appeal and the Order challenged on appeal has been served upon counsel of record for the Respondents using their primary email address listed in the Attorney Information System pursuant to the South Carolina Supreme Court's May 29, 2020 Order No. 2020-05-29-02, as shown below:

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