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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr.

Appellate Case No. 2021-000301

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

RESPONDENT ARTHUR C. NIVERSON'S RETURN TO APPELLANT'S MOTION TO STRIKE TWO OF RESPONDENT ARTHUR C. NIVERSON'S DESIGNATIONS OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL AND TO STAY DEADLINES UNTIL THE COURT RULES ON THE MOTION

Respondent Arthur C. Niverson presents this Return to Appellant's Motion to Strike, which seeks to strike portions of the transcript of Charles A. Starr's deposition and Invoices #1196, #1762, and #1790 from the Record on Appeal. Respondent Niverson seeks to use the

Starr testimony and subject invoices to challenge Appellant's assertion that there is evidence that Mrs. Niverson was engaged in, and paid for, a relay service at the time of the subject accident. The Invoices were marked as exhibits to Mr. Niverson's deposition, and they were referred to in his deposition testimony. Murphy filed Mr. Niverson's deposition in the trial court, but did not file the corresponding exhibits. The Appellant has also designated Mr. Niverson's deposition in its entirety in the Appellant's Designation of Matter for the Record on Appeal, and he has cited to portions of Mr. Niverson deposition which refer to the invoices. Therefore, this evidence undoubtedly relates to a matter that was presented to the lower court, as required by Rule 210(c), SCACR.

The specific matter taken up by the trial court was whether Mrs. Niverson was working, or on her way to work, at the time of the subject accident. The trial court found that Ms. Niverson was not working at the time of the accident, but was on her way to work and she did not have any newspapers in her vehicle. (Amd. Order, p. 2-3). The Court further found that, "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." (Amd. Order, p. 6-7). Having reached this principal finding, the trial court did not need to conduct additional inquiry or make additional findings as to the Starr deposition testimony or Invoices #1196, #1762 and #1790, which show that, although Mr. Niverson was routinely paid for the relay service, he was not, in fact, paid for the relay service on the date of the accident in question. This evidence is material now to challenge issues and facts as framed by the Appellant in his initial brief.

It is important to note that this Court visits this issue with the same standard of review as the trial court: "On appeal from an order granting summary judgment, the appellate court will

review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." (Murphy Initial Brief, p. 7). Appellant states in his Initial Brief that the trial court erred in ruling as a matter of law that Mrs. Niverson must have actually picked up the newspapers in Bluffton, and by ending its analysis there. The Appellant then argues that this finding did not preclude the application of three exceptions to the going and coming rule – that Mrs. Niverson's time driving to pick up the newspapers in Bluffton was paid for or included in the wages, that Mrs. Niverson was charged with a duty or task in connection to her employment, and/or that Mrs. Niverson was performing a special task, service, mission, or errand for Starr Distributing. The Appellant states numerous times in his brief that there is a "scintilla of evidence" to support the application of these exceptions.[1] Repeating it often, though, does not make it so. If this Court, sitting in *de novo* review, is inclined to take the analysis further

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[1] For example:

- "The [first] exception applies in this case because there is a scintilla of evidence that Starr Distributing paid for or included in the wages Mrs. Niverson's drive to pick up the newspapers in Bluffton and relay them to Beaufort." (Murphy Initial Brief, p. 9)
- "There is at least a scintilla of evidence that Starr Distributing paid the Niversons for travel to Bluffton to pick up those newspapers and relay them to Beaufort." (Murphy Initial Brief, p. 10)
- "…[T]hat Mrs. Niverson did not actually pick up the papers yet does not affect Starr Distributing's agreement and obligation to pay her the relay allowance." (Murphy Initial Brief, p. 10)
- "This evidence, viewed in the light most favorable to Murphy, at the very least, disputes the lower court's finding that the fact that Mrs. Niverson had not yet picked up newspapers at the time of the accident means that Starr Distributing did not pay for or include in the wages the time consumed in traveling to the pick up location." (Murphy Initial Brief, p. 10)
- "Because there is a scintilla of evidence that Mrs. Niverson's time going to pick up the newspapers in Bluffton and relaying them to Beaufort is paid for or included in the wages paid by Starr Distributing, the Court should reverse the lower court." (Murphy Initial Brief, p. 11).
- "The [second] exception applies in this case because there is a scintilla of evidence, viewing in a light most favorable to Murphy, that Mrs. Niverson was charged with the duty or task of picking up the newspapers on the way to Starr Distributing's Beaufort warehouse." (Murphy Initial Brief, p. 11).
- "The duty or task of picking up the newspapers on the way to Beaufort is in furtherance of Starr Distributing's business, and the evidence of that task is at least a scintilla of evidence that the second exception applies." (Murphy Initial Brief, p. 14)
- "Because there is a scintilla of evidence that Mrs. Niverson was charged with a duty or task in connection with her employment while on the way to work, the Court should reverse the lower court." (Murphy Initial Brief, p. 17).
- "There is a scintilla of evidence that Mrs. Niverson's conduct falls within the fifth exception, and this Court should reverse the lower court." (Murphy Initial Brief, p. 18).

than the trial court, and as framed by the Appellant, then the Court should review the evidence which totally negates the facts as set forth by the Appellant. This evidence would then be additional sustaining grounds.

In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina Supreme Court offered guidance and clarification on additional sustaining grounds. In that case, the Developer, the prevailing party below, raised several additional issues and arguments that were not ruled upon by the circuit judge. In offering clarification of the law regarding additional sustaining grounds, the Court stated:

> Under the present rules, a respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." *I'on*, at 419.

The Court continued:

> Consequently, it is not always necessary for a respondent – as the winning party in the lower court – to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. This approach is in keeping with the view, as expressed in Rule 220(C), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. *I'on*, at 420-421.

The actual copies of the subject invoices and Starr's testimony were not necessary for the trial court to conduct its analysis and to properly grant summary judgment to Starr Distributing and to Arthur Niverson. However, it was directly tied to the evidence that was presented to the trial court. This evidence is at issue on appeal because the Appellant has stated there are ambiguities in the facts. Indeed, the only matter which should not appear in the record are those items a party believes to be "not relevant to the appeal." See *Forner v. Butler*, 319 S.C. 275, 460 S.E.2d 425 (Ct. App. 1995), citing Rule 208(b), SCACR.

The Respondent therefore requests that the Court deny the Appellant's Motion to Strike Two of Respondent Arthur C. Niverson's Designations of Matter to be Included in the Record on Appeal. The Respondent consents to the Appellant's request to stay the deadlines for filing Appellant's reply briefs until the Court rules on the motion to strike.

s/Kelly D. Dean

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Beaufort, South Carolina

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PROOF OF SERVICE

The undersigned certifies that, on October 4, 2021, a copy of *Respondent Arthur C. Niverson's Return to Appellant's Motion to Strike Two of Arthur C. Niverson's Designations of Matter to be Included in the Record on Appeal and to Stay Deadlines Until the Court Rules on the Motion* has been served upon counsel of record via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

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Dated: October 4, 2021