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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arises out of injuries Appellant Charles Waymon Murphy suffered when Lori Ann Niverson hit his vehicle from behind while driving on her way to pick up newspapers as part of her job duties for Respondent Starr Distributing, LLC, a newspaper distribution company.

On October 19, 2018, Murphy filed a complaint against Mrs. Niverson and Starr Distributing alleging negligence, gross negligence, and negligent hiring/supervision. (R. pp. 14-19). Starr Distributing and Mrs. Niverson filed answers generally denying the allegations. (R. pp. 20-32).

On June 24, 2019, Starr Distributing filed a third-party complaint against Respondent Arthur C. Niverson asserting equitable and contractual indemnity, negligence, and breach of contract. (R. pp. 34-39). On July 19, 2019, Mr. Niverson filed an answer to the third-party complaint generally denying the allegations. (R. p. 43).

On December 21, 2020, Starr Distributing filed motions for summary judgment against Mrs. Niverson as to her complaint and Mr. Niverson as to the third-party complaint. (R. pp. 49-54). On December 29, 2020, Mr. Niverson filed a motion for summary judgment as to the third-party complaint. (R. p. 55). All parties filed memoranda in support of their positions.

On January 26, 2021, the lower court held a hearing on the motions. On February 1, 2021, the lower court granted Starr Distributing's motion for summary judgment as to Murphy's claims against it. (R. pp. 204-12). It also granted Mr. Niverson's motion for summary judgment as to Starr Distributing's claims based on respondeat superior against him. (R. p. 212). On February 11, 2021, Murphy filed a motion to reconsider. (R. p. 214). On February 22, 2021, the lower court filed an amended order granting the motions. (R. p. 3). On March 19, 2021, Murphy timely filed this appeal. (R. p. 1).

FACTS

In the early morning hours of September 30, 2017, Mrs. Niverson rear-ended Murphy. (R. p. 109). Mrs. Niverson lived in Savannah and was driving to Bluffton to pick up newspapers as part of her work for Starr Distributing. (R. pp. 143, 157, 111). She fell asleep at the wheel. (R. pp. 134, 158).

Mr. Niverson, Mrs. Niverson's husband, had a written independent contractor agreement with Starr Distributing to pick up the Savannah Morning News in Bluffton, deliver those newspapers to a Starr Distributing warehouse in Beaufort, and then make newspaper deliveries to Starr Distributing's customers. (R. pp. 167-69). The Niversons shared the work every week. (R. pp. 128, 149-50). The day of the accident was Mrs. Niverson's day to do the work. (R. p. 150).

After the accident, Murphy called his wife, who came to the scene. (R. p. 112). The paramedics let Murphy's wife take him to the hospital because they needed to respond to a call to help seven people in another accident. (R. p. 112). Mrs. Niverson asked the Murphys to "take her to work, because her boss wanted her to come to work." (R. p. 111). They drove her to work in Bluffton on their way to the hospital. (R. p. 111).

As a result of the accident, Murphy had neck surgery in January 2018, and missed about three months of work. (R. pp. 106, 113). He felt better after the surgery but never recovered to his pre-accident condition. (R. p. 116).

On October 19, 2018, Murphy filed a complaint against Mrs. Niverson and Starr Distributing. (R. p. 14). Only the action against Starr Distributing is relevant to this appeal.[1]

Murphy alleged Mrs. "Niverson was an agent and employee of Starr Distributing" and was performing work for Starr Distributing at the time of the accident. (R. p. 16). He alleged Starr Distributing is responsible for Mrs. Niverson's actions under the doctrine of respondeat superior. (R. p. 16). He also alleged that, even if Mrs. Niverson was not an employee of Starr Distributing, it is directly responsible for its own negligent supervision and training of her. (R. pp. 17-18).

Starr Distributing denied the allegations and filed a third-party complaint against Mr. Niverson based on an independent contractor agreement between Starr Distributing and Mr. Niverson. (R. pp. 34-39). Starr Distributing alleged it "had no relationship" with Mrs. Niverson and she acted solely as the agent of Mr. Niverson at the time of the accident. (R. p. 35).

Starr Distributing and Mr. Niverson filed similar motions for summary judgment. Starr Distributing argued the lower court should grant summary judgment because (1) Mrs. Niverson was neither its employee nor its independent contractor and, (2) even if she was its employee, she was not acting within the course and scope of her employment at the time of the accident because she was on the way to work. (R. pp. 93-98). Mr. Niverson moved for summary judgment on the third-party complaint based on the second argument. (R. pp. 93-95).

[1] Murphy settled with Mrs. Niverson, who received a release. She remains named in this action for purposes of recovering underinsured motorist coverage. S.C. Code Ann. § 38-77-160 (2015).

Murphy responded in opposition to the motions that the circumstances of this case fall within exceptions to the rule that an employer is not liable for an employee's conduct while he or she is going to and from work, known as the "going and coming rule." (R. pp. 170-77).

Because the issue on appeal is whether Mrs. Niverson's conduct at the time of the accident falls within an exception to the going and coming rule, an understanding of the Niversons' relationship with and work for Starr Distributing is essential.

Prior to 2012, Mrs. Niverson worked for Starr Distributing[2] and had an agreement with it in her name. (R. pp. 126, 146). In 2012, when Mrs. Niverson had back surgery and Mr. Niverson lost his job, Mr. Niverson took over the paper delivery and changed the contract with Starr Distributing to his name. (R. pp. 126-27). By the summer of 2013, Mr. Niverson got his job back. (R. p. 127). Mrs. Niverson started driving the paper delivery again on some days but the agreement with Starr Distributing remained in Mr. Niverson's name. (R. p. 127).

For over four years—from the summer of 2013 until the day of the accident—the Niversons shared the work every week. (R. pp. 128, 149-50). Mr. Niverson worked for Starr Distributing on the two days off from his other job, Mrs. Niverson worked on the other days, and sometimes they rode together to do the work. (R. p. 128). Starr Distributing knew that Mrs. Niverson would be working on the day of the accident because "there were certain days that [she] was doing it." (R. p. 150).

Mr. Niverson's primary agreement with Starr Distributing required arrival at the Starr Distributing warehouse in Beaufort by 3:00 a.m. and delivery of newspapers to all customers on a route that began in Beaufort. (R. pp. 164, 167-69). However, on the schedules of fees Starr

[2] Mrs. Niverson originally worked for the Beaufort Gazette, which was later taken over by Starr Distributing. (R. pp. 126-27). There is no testimony as to the date of this change.

Distributing paid, it handwrote in an *additional* $25.00 weekly "car allowance for Relay." (R. p. 169). The Niversons testified this payment was for the "additional responsibility" to drive to the Bluffton location to pick up the Savannah Morning News and bring those newspapers to the Beaufort warehouse. (R. pp. 132, 151, 157). Mrs. Niverson testified it was part of her job to get the papers from Bluffton and take them to Beaufort. (R. p. 161). She picked up these papers every day unless either she was running late or someone called to tell her the papers were already on a truck. (R. p. 164).

At the time of the collision, Mrs. Niverson had not yet picked up the Savannah Morning News in Bluffton and does not remember if she was going to pick it up that morning. (R. p. 157). However, Mr. Niverson testified she was on her way to Bluffton to get the papers. (R. p. 136). When Mrs. Niverson left the accident scene, she had the Murphys take her to "work" in Bluffton—not the Beaufort warehouse. (R. p. 111).

The lower court issued an order granting Starr Distributing and Mr. Niverson's motions for summary judgment. (R. pp. 204-12). It did not rule on whether Mrs. Niverson was an employee of Starr Distributing but held, even assuming she was an employee, she was not acting within the course and scope of her employment. (R. pp. 207, 212). It found Mrs. Niverson was on the way to work at the time of the accident and Mr. Murphy did not show the accident fell within any of the exceptions to the going and coming rule. (R. pp. 205-12).

The lower court based its decision primarily on the fact that, at the time of the accident, Mrs. Niverson had not yet picked up the newspapers from Bluffton. (R. pp. 205-06, 209-12). It held Mrs. Niverson "was not working, but was on her way to work, at the time of the accident" and that, "on the date of this accident, there is no evidence that Lori Niverson was going to pick up the Savannah Morning News from the Bluffton Location." (R. pp. 205-06).

Murphy filed a motion to reconsider making three main arguments. (R. pP. 214-25). First, he argued the lower court erred in finding (1) no evidence that Mrs. Niverson was on her way to pick up the newspapers in Bluffton on the day of the accident and (2) that Mrs. Niverson was not paid for her commute. (R. pp. 217-20). Second, he argued the lower court erred in finding three of the exceptions to the going and coming rule do not apply. (R. pp. 221-23). Third, Murphy argued the lower court failed to address his claim for Starr Distributing's direct negligence in failing to properly supervise and train Mrs. Niverson. (R. pp. 224-25).

In response to the motion to reconsider, the lower court filed an amended order granting summary judgment. (R. pp. 3-12). The only amendment was a change to the wording of one sentence. The original order stated: "[O]n the date of this accident, there is no evidence that Lori Niverson ***was going to pick up*** the Savannah Morning News from the Bluffton Location." (R. p. 5) (emphasis added). The amended order stated: "[O]n the date of this accident, there is no evidence that Lori Niverson ***had actually picked up*** the Savannah Morning News from the Bluffton Location." (R. p. 5) (emphasis added).

Murphy timely filed this appeal.

STANDARD OF REVIEW

"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 below." *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588-89, 832 S.E.2d 294, 299 (Ct. App. 2019) (internal quotation marks omitted). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is "the smallest trace" of

evidence or "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." *Loflin*, 427 S.C. at 589, 832 S.E.2d at 299 (internal quotation marks omitted).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts" and "is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 588-89, 832 S.E.2d at 299 (internal quotation marks omitted). When ruling on a summary judgment motion, "the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.* at 589, 832 S.E.2d at 294.

ARGUMENT

Murphy presented at least a scintilla of evidence that three exceptions to the going and coming rule apply to this case. The lower court's incorrect findings to the contrary did not preclude recovery for Starr Distributing's direct liability for negligent supervision. Therefore, this Court should reverse the lower court.

Under the doctrine of respondeat superior, an employer is liable for the torts of its employee "when those acts occur in the course and scope of the employee's employment." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). The doctrine "allocates the risk of the servant's negligence to the master, not because he is at fault, but because he is normally in a better position than the servant to respond in damages and is better able than the victim to spread the risk by treating third party liability as a cost of doing business." *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 182-83, 348 S.E.2d 617, 623-24 (Ct. App. 1986).

Generally, injuries sustained while an employee is going to and coming from the place of work do not arise out of and in the course of employment because the employee "is not engaged in performing any service growing out of and incidental to his employment." *Sola v. Sunny Slope*

Farms, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964). However, exceptions do apply. Three exceptions are applicable to this case.

> (1) Where, in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages;
>
> (2) Where the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment;
>
> . . .
>
> [5] [W]here an employee sustains an injury 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.

Medlin v. Upstate Plaster Serv., 329 S.C. 92, 95-96, 495 S.E.2d 447, 449 (1998).

There is a scintilla of evidence that these exceptions apply. A scintilla of evidence as to even one exception is a basis to reverse the lower court's order. "Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of ***requiring*** that the question be submitted to the jury." *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998) (emphasis added).

The lower court ruled as a matter of law that Mrs. Niverson must have actually picked up the newspapers in Bluffton to come within the course and scope of her employment. (R. p. 5). As explained below, this is error and does not preclude application of three exceptions to the going and coming rule.

I. <u>The first exception to the going and coming rule applies because there is at least a scintilla of evidence that Mrs. Niverson's time driving to pick up the newspapers in Bluffton was paid for or included in the wages.</u>

The first exception to the going and coming rule is where "the means of transportation is provided by the employer, ***or*** the time that is consumed is paid for or included in the wages." *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998) (emphasis added).

The 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.

In addition to paying for the Niversons to complete the newspaper route that began in Beaufort, Starr Distributing also paid $25.00 per week for "car allowance for relay" for the Niversons to travel to Bluffton each morning to pick up other newspapers in Bluffton and relay them to Beaufort. (R. pp. 169, 132, 157).

Even with these undisputed facts, the lower court held that Starr Distributing did not compensate Mrs. Niverson "for her travel on the morning of the accident" and "she was not paid for her commute." (R. pp. 6, 8). While the lower court acknowledged that Starr Distributing paid "a flat $25 per week payment for, on some mornings, picking up the Savannah Morning Paper," it discounted that payment here because it concluded that Mrs. Niverson "had not picked up any papers on the day of the accident." (R. p. 8). There is at least a scintilla of evidence that Starr Distributing paid the Niversons for the travel to Bluffton to pick up those newspapers and relay them to Beaufort.

First, Starr Distributing paid $25.00 per week for "car allowance for relay." (R. p. 169). That plain language, at the very least, disputes the lower court's finding that Starr Distributing did not compensate Mrs. Niverson for her travel.

Second, that 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. Starr Distributing paid the flat fee whether or not Mrs. Niverson picked up the newspapers. She testified that she picked up the papers every day unless either she was running late or the papers were already on a truck to the warehouse. (R. p. 164). Starr Distributing paid, at least in part, for Mrs. Niverson's availability

to pick up the newspapers. "The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed." *Sola v. Sunny Slope Farms*, 244 S.C. 6, 15, 135 S.E.2d 321, 326 (1964) (internal quotation marks omitted).

This evidence, viewed in 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.

The Supreme Court found an employer's payment of a higher hourly wage to an employee it required to work out of town fell within this exception where "the time that is consumed is paid for or included in the wages." *McMillan v. Huntington & Guerry Elec. Co.*, 277 S.C. 552, 554-55, 290 S.E.2d 810, 811 (1982). The payment allowance for relay included the act of getting to the pickup location, and Starr Distributing received a benefit from Mrs. Niverson's travel to Bluffton to pick up the newspapers.

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.

II. The second exception applies because there is at least a scintilla of evidence that Mrs. Niverson, while on her way to work, was charged with a duty or task in connection with her employment.

The second exception to the going and coming rule is where " the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment." *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998). The exception applies in this case because there is a scintilla of evidence, viewed 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. (R. p. 157).

The lower court held the exception did not apply as a matter of law because Mrs. Niverson "had not yet commenced any duties or tasks associated with delivery of the papers" but was "merely on her way to work." (R. p. 9) (internal quotation and alteration marks omitted). This holding incorrectly focuses on the "delivery" of papers and is reversible error based on the existence of a scintilla of evidence and the applicable law.

In analyzing the application of the second exception, courts generally consider two factors—(1) whether the employee acted in furtherance of the employer's business at the time of the accident and (2) whether an employer would have to arrange for other means of accomplishing what the employee is doing at the time of the accident. *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990); *Wade v. Berkeley Cnty.*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). There is at least a scintilla of evidence as to both.

"A relevant factor in determining whether [an employee] acted within the scope of her employment is whether she acted in furtherance of [employer]'s business at the time of the accident." *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990). In *Hamilton*, an employee injured the plaintiff while driving her supervisor's car to pick up the supervisor's son during work hours. 301 S.C. at 47, 389 S.E.2d at 653. The lower court granted summary judgment on the basis that the employee was on a personal errand for her supervisor and not acting within the scope of her employment, and the Court of Appeals affirmed. *Id.* The Supreme Court reversed because it found a genuine issue of fact existed as to whether the employee's trip to pick up the supervisor's son furthered the employer's business. *Id.* at 48-49, 389 S.E.2d at 654. It held the Court of Appeals erred in relying on the supervisor's testimony that the trip did not further the

employer's business because there was "other evidence" that the supervisor directed and authorized the trip while the employee was paid her regular wages. *Id.* at 48, 389 S.E.2d at 654.

The existence of a genuine issue of fact is stronger in this case than in *Hamilton*. In both cases there is evidence that the employee was performing a task for the employer. In *Hamilton*, the task was arguably for the employer's personal benefit while, in this case, the task was undeniably in furtherance of Starr Distributing's business. Mrs. Niverson was acting in furtherance of Starr Distributing's business when the accident occurred because her task—picking up the newspapers—required her to be on the road. She was not merely on the way to work but was working. She was separately compensated for the task of picking up the newspapers. (R. p. 169). Mrs. Niverson testified that she was expected "to get up early enough so [she] could stop at Bluffton, get the papers and take them to Beaufort." (R. p. 164). A jury could infer that, if Mrs. Niverson had not been required to stop at the Bluffton location, she would not have been on the road at the time of the accident.

The lower court's characterization that Mrs. Niverson "was filling in" for Mr. Niverson is incorrect. (R. p. 4). Mrs. Niverson worked for Starr Distributing on a ***weekly*** basis for over four years before this accident.

This Court found a jury issue existed as to whether an injury occurred while an employee acted in furtherance of the employer's business in *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). An animal control officer got a call about a dead dog and stopped to check on it while on his way to work. *Id.* at 315, 498 S.E.2d at 686. After checking on the dog, he hit the plaintiff in a head-on collision. *Id.* The workers' compensation commission found the officer was not acting within the course and scope of his employment and did not fall within an exception to the going and coming rule. *Id.* at 316, 498 S.E.2d at 686.

This Court reversed the commission and found "a jury question exists" as to whether the officer was performing duties while he commuted to work. *Id.* at 318, 498 S.E.2d at 687-88. The Court held that "[a]ny doubt as to whether the servant was acting within the scope of his authority when he injured a third person ***must*** be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." *Id.* at 319, 498 S.E.2d at 688 (emphasis added). The conflicting evidence as to whether checking on the dog was part of the officer's job and whether he was on call to perform duties on the way to work created a jury issue as to whether he "was acting in furtherance of his employer's business." *Id.* at 320, 498 S.E.2d at 689.

The lower court erred in finding a jury issue did not exist as to whether Mrs. Niverson was charged with a task or duty on her way to work and in failing to resolve any doubt against Starr Distributing. Mrs. Niverson testified Starr Distributing knew that she would be driving on the day of the accident. (R. p. 150). She testified Starr Distributing paid her $25.00 per week "for me stopping in Bluffton and picking up the Savannah Morning News to transport them with me to the Bluffton location," and "for picking up the Savannah Morning Newspaper and bringing them to Beaufort with me." (R. p. 157). 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.

Respondents will likely dispute that Mrs. Niverson was driving to Bluffton to pick up newspapers on the day of the accident. However, the evidence is that she told the Murphys "her ***boss*** wanted her to get there ***to work*** and he was going to let her use ***his truck***" and the "work" they drove her to was in Bluffton—where she picked up the papers. (R. p. 111) (emphasis added).

When an employer would have to arrange for other means of accomplishing what the employee is doing at the time of the accident, the employee's actions are within the scope of

employment. In *Stough v. Westinghouse Savannah River Co.*, 311 S.C. 129, 427 S.E.2d 716 (Ct. App. 1993), the employee lived in Columbia, worked primarily in North Augusta, and traveled intermittently to Charlotte for work. *Id.* at 130, 427 S.E.2d at 717. On the day of the accident, he worked in North Augusta, packed documents in his car to drive to Charlotte the next day, and got into a car accident while driving home. *Id.* This Court found his injuries within the scope of employment because his employer "would have had to arrange to send the documents via some other person or method had [the employee] not planned to take them." *Id.* at 131, 427 S.E.2d at 717. "[A]n injury incurred during a trip which serves both a business and a personal purpose is within the scope of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey." *Id.* at 130, 427 S.E.2d at 717.

The same result is warranted in this case. Mrs. Niverson's trip to pick up the newspapers in Bluffton involved the performance of a service for Starr Distributing which would have caused the trip to be taken by someone even if it had not coincided with her drive to Beaufort. Mrs. Niverson testified that "for the most part" she went to pick up the newspapers on the way to Beaufort but would not if she "was running late" or "[i]f the papers showed up early and they were put on the truck." (R. p. 164).

The lower court relied on *Whitworth v. Window World, Inc.*, 377 S.C. 637, 661 S.E.2d 333 (2008), and *Wofford v. City of Spartanburg*, 415 S.C. 152, 781 S.E.2d 146 (Ct. App. 2015), to find the second exception did not apply. (R. p. 9). Neither of these cases supports that finding as a matter of law.

In *Whitworth*, the employee loaded a piece of his own work tool into his truck, stopped to get a drink, and then had an accident on his way to the jobsite. 377 S.C. at 639, 661 S.E.2d at 335.

This Court found the accident fell within the second exception to the going and coming rule because the employee "was charged with transporting the breaker [tool] to the jobsite when he was injured." *Id.* The Supreme Court reversed because the employee "was driving his own truck, towing his own tools, and had no work-related tasks to perform on his way to the jobsite" and the "mere transportation" of a work tool owned and stored by the employee did not "transform the event into a work-related duty or task." *Id.* at 641-42, 661 S.E.2d at 336.

In contrast to the employee in *Whitworth*, there is evidence in this case that Mrs. Niverson had a work-related task to perform on her way to the jobsite. She had to pick up the Savannah Morning News in Bluffton on her way to Starr Distributing's Beaufort warehouse. There is no issue in this case about transportation of a work tool owned by an employee. The lower court erred in relying on *Whitworth*.

The employee in *Wofford* was the superintendent of the city parks and recreation department. 415 S.C. at 155, 781 S.E.2d at 147. He got into an accident and died while driving from his mother's house to the recreation center. *Id.* at 155-56, 781 S.E.2d at 147-48. This Court found the injury did not fall into the second exception because the "primary purpose" of his trip "was a personal objective to travel to the recreational center where he performed his work" and "he was not charged with any work-related duties at the time of the accident." *Id.* at 161, 781 S.E.2d at 151.

In contrast to the employee in *Wofford*, there is evidence in this case that the primary purpose of Mrs. Niverson's trip was to further Starr Distributing's interests by picking up the newspapers in Bluffton on her way to Beaufort and this was a work-related duty. (R. pp. 167-69, 164-65). The task added twenty to thirty minutes to Mrs. Niverson's route. (R. pp. 164-65). Mr.

Niverson testified that at the time of the accident, Mrs. Niverson was "on her way to pick up the newspapers." (R. p. 156).

The fact that Bluffton was also on Mrs. Niverson's way to work in Beaufort does not negate the application of the second exception because, "if the work of the employee necessitates his travel, he is in the course of employment, even though he is serving at the same time some purpose of his own." *Stough*, 311 S.C. at 131, 427 S.E.2d at 717.

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.

III. The fifth exception applies because there is at least a scintilla of evidence that Mrs. Niverson was performing a special task, service, mission, or errand for Starr Distributing.

The fifth exception to the going and coming rule is "where an employee sustains an injury 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." *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95-96, 495 S.E.2d 447, 449 (1998).

The Supreme Court recognized the fifth exception to the going and coming rule in *Bickley v. S.C. Electric & Gas Co.*, 259 S.C. 463, 192 S.E.2d 866 (1972). It applies when an employee performs "some special service or errand ***or*** the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of, his employer." *Id.* at 470, 192 S.E.2d at 869-70 (emphasis added).

A few years later, the Supreme Court addressed this exception in *McDaniel v. Bus Terminal Restaurant Mgmt. Corp.*, 271 S.C. 299, 247 S.E.2d 321 (1978). It explained that "[t]he underlying basis of the 'special errand' doctrine is that the general rule excluding injuries incurred during the trip to or from work should not apply if the journey to or from work was part of a special errand

or mission for the employer ***or*** if the journey itself was a substantial part of the service for which the worker was employed." *Id.* at 302, 247 S.E.2d at 322 (emphasis added). McDaniel's employer required her to attend a meeting on a day she was not scheduled to work. *Id.* at 301, 247 S.E.2d at 322. While riding home in a taxi, she was injured in a collision. *Id.* The Court found her injuries did not fall within the fifth exception to the going and coming rule in part because "[s]he performed no service to her employer while enroute to or from her place of employment and the trip itself was not a substantial part of the service for which she was employed." *Id.* at 303, 247 S.E.2d at 323.

In this case, Mrs. Niverson did perform a service to her employer while enroute to the Beaufort location, and the trip itself to Bluffton to pick up the newspapers was a substantial part of the service for which she was employed. She always picked up the newspapers unless she "was running late" or "[i]f the papers showed up early and they were put on the truck." (R. p. 164). This is a scintilla of evidence that Mrs. Niverson's conduct falls within the fifth exception, and this Court should reverse the lower court.

IV. The lower court erred in granting summary judgment as to negligent supervision when its finding did not preclude Starr Distributing's direct liability for negligent supervision.

Neither Respondent specifically addressed the negligent supervision cause of action in its motion for summary judgment. Starr Distributing argued it had "no legal relationship" with Mrs. Niverson, which Murphy interpreted to mean that "if the Court finds there is a scintilla of evidence to show there was some relationship between Starr and Niverson, summary judgment on [negligent supervision] would fail." (R. p. 177). The lower court did not rule on the legal relationship between Mrs. Niverson and Starr Distributing. Instead, it "assum[ed] *arguendo* that Mrs. Niverson was an employee" and then found her conduct fell within the going and coming rule. (R. p. 6). It did not address the negligent supervision cause of action.

Murphy argued in his motion to reconsider that the court erred in granting summary judgment as to all claims because it did not address negligent supervision. (R. pp. 224-25). The court did not address negligent supervision in the amended order granting summary judgment. (R. pp. 3-12). This is legal error because the court's assumption that Mrs. Niverson is Starr Distributing's employee necessarily means that Starr Distributing could remain directly liable for negligent supervision.

"In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). "[T]he employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, the employer's liability under this theory is not derivative, it is direct." *Id.* at 631, 661 S.E.2d at 331.

The lower court erred in granting summary judgment as to negligent supervision when its findings did not preclude recovery for negligent supervision. The Court should reverse and allow the negligent supervision claim to proceed.

CONCLUSION

This Court should reverse the amended order granting summary judgment in its entirety and allow the case to proceed as pled.

Respectfully submitted,

December 31, 2021

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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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Appellant and Final Reply Briefs of Appellant comply with Rule 211(b), SCACR.

December 31, 2021

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