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 REPLY BRIEF OF APPELLANT TO RESPONDENT ARTHUR C. NIVERSON'S BRIEF

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Cases

Appellant Charles Waymon Murphy submits this Reply to Respondent Arthur C. Niverson's brief.

FACTS

Murphy incorporates the statements of facts in his initial brief and reply to Starr Distributing's brief.

ARGUMENT

The central issue in this case is whether Murphy presented a scintilla of evidence that three exceptions to the going and coming rule apply, viewing the evidence in a light most favorable to him. A finding by this Court of a scintilla of evidence as to even one exception is a basis to reverse the order granting summary judgment. Further, the lower court erred by granting summary judgment on the negligent supervision claim as a matter of law.

I. MURPHY PRESENTED AT LEAST A SCINTILLA OF EVIDENCE THAT THREE EXCEPTIONS TO THE GOING AND COMING RULE APPLY TO THE FACTS OF THIS CASE.

Murphy incorporates the arguments on the going and coming rule from his initial brief and brief in reply to Starr Distributing. Murphy replies below to some specific arguments and assertions made by Mr. Niverson.

As to the first exception, Mr. Niverson relies on a distinction between payment for the "service" of picking up the newspapers versus for the "time or travel" from Savannah to Bluffton to pick them up. (Br. of A. Niverson p. 8). Mr. Niverson relies on *McMillan v. Huntington & Guerry Elec. Co.*, 277 S.C. 552, 290 S.E.2d 810 (1982), for this supposed distinction in the first exception to the coming and going rule. (Br. of A. Niverson p. 8). *McMillan* does not create that distinction. The Supreme Court in *McMillan* stated that "[f]acts . . . breed the law" and addressed a factual scenario where the employer paid employees a higher hourly rate for work performed more than 15 miles from the employer's office, regardless of where the employee lived. *Id.* at 553,

555, 290 S.E.2d at 810-12. The Court affirmed the workers' compensation commission finding that the facts fell within the first exception because the evidence supported a finding that the additional payment "was for the purpose of covering his travel time and in payment of his travel time to and from the job site." *Id.* at 555, 290 S.E.2d at 811. It did not hold that the factual scenario in *McMillan*—where the payment is for a specific hourly rate (rather than a flat fee)—is the only one that falls within the first exception.

In this case, the evidence shows that picking up the newspapers added "[t]wenty to 30 minutes" to Mrs. Niverson's route. (R. p. 165). The agreement between Starr Distributing and Mr. Niverson states the $25.00 is a "car allowance for relay"—of which a reasonable jury could find is for time in the car. (R. p. 169).

Mr. Niverson accuses Murphy of mischaracterizing the evidence as showing that Starr Distributing paid the $25.00 flat fee car allowance whether or not Mrs. Niverson picked up the newspapers because there is allegedly not evidence of payment of the fee for the pay period when the accident occurred. (Br. of A. Niverson p. 9). It is not a mischaracterization at all but, instead, is supported by the evidence.[1] Mrs. Niverson testified that Starr paid her every two weeks. (R. p. 156). Starr Distributing agreed to pay the Niversons a $25.00 car allowance for relay for each week. (R. pp. 169, 157). Mrs. Niverson 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). The accident occurred on September 30, 2017—a Saturday—such that Starr Distributing owed the Niversons the $25.00 flat fee.

[1] Mr. Niverson wrote in his memorandum in support of summary judgment that "Starr paid a ***flat*** $25 per week payment for the Niversons' picking up the Savannah Morning Paper in Bluffton and delivering them to Beaufort." (R. pp. 59, 62) (emphasis added). The lower court also found that "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." (R. p. 5).

If a specific line-item payment for the additional task of picking up the newspapers is not ***some scintilla*** of evidence that Starr Distributing paid for or included in the wages the time for Mrs. Niverson to drive to Bluffton to pick up the newspapers, then Mr. Niverson does not explain what is sufficient evidence.

As to the second exception, the legal argument is adequately stated in Murphy's initial brief. Mr. Niverson makes two factual arguments as to this exception: (1) Mrs. Niverson had not picked up the newspapers or started her newspaper delivery route at the time of the accident, and (2) Mrs. Niverson would have had to drive on "the same stretch of road" regardless of whether she was going to Bluffton to pick up newspapers or Beaufort to start her delivery route. (Brief of A. Niverson p. 10). Neither of these are dispositive of the second exception as a matter of law, and both arguments fail to view the evidence in a light most favorable to Murphy.

The evidence shows that Mrs. Niverson was on her way to Bluffton to pick up the newspapers when she hit Mr. Murphy. (R. pp. 111, 157). That she did not yet have the newspapers does not mean that she was not "charged with some duty or task in connection with h[er] employment," *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998), because she was acting in furtherance of Starr Distributing's business, *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990), and Starr Distributing would have had to arrange for other means of accomplishing picking up the newspapers, *Stough v. Westinghouse Savannah River Co.*, 311 S.C. 129, 130, 427 S.E.2d 716, 717 (Ct. App. 1993). Mr. Niverson does not respond to any of this case law.

The lower court necessarily found some evidence that, at the time of the accident, Mrs. Niverson was going to pick up the newspapers in Bluffton. This is so because the lower court initially held that "there is no evidence that Lori Niverson was going to pick up the Savannah

Morning News from the Bluffton Location" (R. p. 206), but then changed its holding to find that "there is not evidence that Lori Niverson had actually picked up the Savannah Morning News from the Bluffton Location" (R. p. 5).

That Mrs. Niverson was not on her delivery route does not negate the second exception because the separate $25.00 car allowance for relay was undeniably for some time prior to the start of the regular newspaper route.

Finally, that Mrs. Niverson would have been on the same stretch of road is not dispositive of the second exception as a matter of law 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.

As to the fifth exception, the legal argument is adequately stated in Murphy's initial brief. In reply, Murphy notes that there is evidence that Mrs. Niverson was on her way to Bluffton to pick up the newspapers at the time of the accident. Mr. Niverson testified she was on her way to Bluffton to get the papers. (R. p. 156). Mrs. Niverson 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).

As to whether picking up the newspapers was unusual or special, Mr. Niverson misses Murphy's argument that Mrs. Niverson was performing a "service to her employer while enroute to or from her place of employment" and the trip itself was "a substantial part of the service for which she was employed." *McDaniel v. Bus Terminal Restaurant Mgmt. Corp.*, 271 S.C. 299, 303, 247 S.E.2d 321, 323 (1978).

II. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO NEGLIGENT SUPERVISION.

Murphy incorporates the arguments on this issue from his initial brief and brief in reply to Starr Distributing.

Mr. Niverson's response to this argument is that the lower court's factual finding that "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" necessarily precludes a negligent supervision claim. (Br. of A. Niverson p. 11). This is incorrect.

First, as to Mrs. Niverson, the lower court found only that she was filling in for her husband. It did actually rule on her employment or agency status. Further, it did not make a legal finding of Mr. Niverson's employment status but just stated as a fact what the independent contractor agreement states. *See Kilgore Group v. S.C. Employment Sec. Comm'n*, 313 S.C. 65, 69, 437 S.E.2d 48, 50 (1993) ("[L]anguage in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.").

Second, the lower court said that it "assum[ed] *arguendo* that Mrs. Niverson was an employee" of Starr Distributing when it addressed the going and coming rule. (R. p. 6). If the lower court assumed Mrs. Niverson was an employee, then it should have ruled on the negligent supervision cause of action, which neither Respondent even addressed in their motions for summary judgment.

CONCLUSION

For the reasons stated above, the Court should reverse the lower court and allow this action to proceed as pled.

Respectfully submitted,

December 31, 2021

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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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