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 STARR DISTRIBUTING, LLC'S BRIEF

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Appellant Charles Waymon Murphy submits this Reply to Respondent Starr Distributing, LLC's brief.

FACTS

Murphy incorporates the statement of facts in his initial Brief and adds the following in reply to Starr Distributing's representations.

There is some evidence that Starr Distributing paid Lori Niverson. She testified as follows:

Direct Examination by Murphy's Counsel:

Q. And how often would ***you*** get paid by Starr?

A. Bi-weekly.

Q. Every two weeks?

A. Right.

Q. Did Starr take taxes out of ***your*** paycheck?

A. No.

Cross-examination by Starr Distributing's Counsel:

Q. . . . When you were – was it Arthur who was paid by Starr Distributing or was it you?

A. Arthur.

Q. Did you ever receive a check from Starr Distributing?

A. I don't remember.

(R. pp. 156, 160) (emphasis added) (lawyer objections omitted).[1]

[1] *Cf.* Brief of Resp't Starr Distributing pp. 3, 19, 20 n.10 ("[T]here is no evidence that Lori Niverson was receiving any kind of payment from Starr Distributing, in the form of salary or otherwise.").

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.

In this reply, Murphy first addresses Starr Distributing's arguments related to the going and coming rule and then dispenses with its other arguments.

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 reply to Mr. Niverson's brief. Murphy replies below to some specific arguments and assertions made by Starr Distributing.

As to the first exception, Starr Distributing misstates Murphy's argument. Murphy argues that there is evidence that Mrs. Niverson was on her way to pick up the newspapers and that time is included in her wages through the $25.00 relay fee. The evidence that Mrs. Niverson was on her way to pick up the newspapers that morning is that (1) after the accident, Mrs. Niverson asked the Murphys to take her to work at the Bluffton newspaper pick-up location and not the Beaufort warehouse where she started her delivery route (R. p. 111); (2) Mr. Niverson testified that Mrs. Niverson was on her way to pick up the newspapers (R. p. 136); and (3) Mrs. Niverson testified she picked up the papers every day unless she was either running late or someone called to tell her the papers were already on a truck, and there is no evidence that either of those things occurred on the morning of the accident (R. p. 164). Regardless, Starr Distributing paid the Niversons the relay fee *whether or not they actually picked up the papers*.

Starr Distributing's reliance on *Byrd v. Stackhouse Sheet Metal Works*, 317 S.C. 35, 451 S.E.2d 405 (Ct. App. 1994), is misplaced because cause *Byrd* involved money paid to induce someone who lived far from the employer's premises to take the job. *Id.* at 37, 451 S.E.2d at 406. The employee in *Byrd* "did not have any duties requiring him to be on the road" and "the employer received no benefit from the decedent's travels." *Id.* at 37, 39, 451 S.E.2d at 406-07. Here, Mrs. Niverson's job to pick up the newspapers in Bluffton and take them to Beaufort required her to be on the road and benefitted Starr Distributing.

As to the second exception, the legal argument is adequately stated in Murphy's initial brief. In reply, Murphy notes that Starr Distributing repeatedly states that this was Mr. Niverson's job. The facts, viewed in a light most favorable to Murphy, show that the Niversons *and Starr Distributing* worked for over four ***years*** under the arrangement that Mrs. Niverson regularly worked for Starr Distributing on a weekly basis. (R. pp. 128, 149-50). At the time of the accident, there were even "certain days that [Mrs. Niverson] was doing" the work. (R. p. 150). Finally, there is nothing ironic or hobbling about Murphy citing to the independent contractor agreement provision about the relay fee as evidence of the second exception to the going and coming rule. (Br. of Starr pp. 20, 22). That the agreement does not establish as a matter of law the Niversons' and Starr Distributing's legal relationship does not mean that its terms cannot be evidence of an exception to going and coming rule.

As to the fifth exception, the legal argument is adequately stated in Murphy's initial brief. In reply, Murphy notes that there is no evidence that picking up the newspapers from one location and transporting them to the distribution warehouse is a "normal part" of a newspaper carrier's job. The evidence is to the contrary—that Starr Distributing paid the Niversons an extra amount of money for this special task that no other newspaper carrier performed.

II. STARR DISTRIBUTING'S "ADDITIONAL SUSTAINING GROUNDS" ARE WITHOUT LEGAL MERIT AND, ON THE MERITS, THERE IS A SCINTILLA OF EVIDENCE TO DEFEAT THEM.

First, Starr Distributing argues that a lawsuit regarding the going and coming rule is "typically" between a worker and an employer regarding workers' compensation and that is not the case here. (Br. of Starr p. 10). However, this Court previously addressed an injured party seeking to hold an employer liable for its employee under the going and coming rule. *See Wade v. Berkeley Cnty.*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998) (finding in an action brought by a plaintiff injured by an employee that a jury question existed as to whether the employee was performing work duties during his commute and reversing the workers' compensation decision to the contrary).

Second, Starr Distributing argues that it and the Niversons agree that Mrs. Niverson was not working at the time of the accident, and Murphy is "a third party . . . not privy to the relationship" who cannot argue to the contrary. (Br. of Starr p. 10). However, this Court previously allowed an injured "third party" like Murphy to challenge an employee's work status at the time of his injury. *See Wade*, 330 S.C. at 318, 498 S.E.2d at 687 ("Although [plaintiff]'s interest is almost identical to [employee]'s as to [employer]'s liability, he is not in privity with [employee], and due process precludes the use of collateral estoppel against him.").

Third, Starr Distributing argues as additional sustaining grounds that Mrs. Niverson did not have a "legal relationship" with it, *i.e.*, she was acting only as Mr. Niverson's agent and even he was an independent contractor and not an employee of Starr Distributing. (Br. of Starr pp. 11-17). The lower court did not rule on this issue but, instead, ruled that "[e]ven assuming" Mrs. Niverson was Starr Distributing's employee, it could not be held liable for her conduct under the going and coming rule. (R. p. 6). On appeal, Starr Distributing argues the Court should affirm the order granting it summary judgment because Mr. Niverson's independent contractor agreement

with it is "clear and unambiguous", negating the need to look at evidence beyond it, and that Murphy's evidence of an employee-employer relationship does not create a genuine issue of material fact. Starr Distributing is incorrect.

As to the independent contractor agreement, whether or not it is clear and unambiguous is irrelevant because the agreement alone is not dispositive of the employment relationship. *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.").

As to evidence of an employee-employer relationship, Murphy presents more than a scintilla of evidence to show a genuine issue of material fact. "If there are any facts tending to prove an agency relationship, the question is one for the jury." *Gamble v. Stevenson*, 305 S.C. 104, 108, 406 S.E.2d 350, 352 (1991) (holding that while an agreement stated "that Thomas is an independent contractor, Southern Bell's own employee, Hendrix, instructed Thomas where to dig the pit and how to replace the sign. Clearly, this rendered agency a jury issue.").

"Under South Carolina common law, the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has the right to control the servant in the performance of his work and the manner in which it is done." *Kilgore Group v. S.C. Employment Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49-50 (1993). "The proper test to be applied is not the actual control exercised by the alleged master, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Anderson v. West*, 270 S.C. 184, 187, 241 S.E.2d 551, 553 (1978) (internal citation and alteration marks omitted). "The principal factors indicating the right of control are (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3)

furnishing of equipment; and (4) right to fire." *Kilgore Group*, 313 S.C. at 68, 437 S.E.2d at 49-50. Murphy presented evidence that Starr Distributing had the right to and did exercise control of the route Mrs. Niverson used to deliver the newspapers and what time to begin and end the route. (R. pp. 151-52, 154, 158). Murphy presented evidence that Starr Distributing paid her based on each paper delivered and paid bonuses to carriers with no customer complaints. (R. p. 155). Murphy presented evidence that Starr Distributing provided the daily delivery list, the newspapers, and a loaner car if a carrier was without a vehicle. (R. pp. 145, 151-52). Murphy presented evidence that Starr Distributing could take away the newspaper route from the Niversons if it was not satisfied with their performance. (R. pp. 156-57). Viewing all of this in a light most favorable to Murphy, there is more than a scintilla of evidence that Starr Distributing employed the Niversons.

The Court should reject Starr Distributing's additional sustaining grounds.

III. 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 Mr. Niverson.

Starr Distributing's response to this argument is that the Niversons did not have an employee-employer relationship with it to support a cause of action for negligent supervision. (Br. of Starr pp. 26-27). Murphy's reply to the argument about an employee-employer relationship is addressed above. The legal error of the lower court was to dismiss the cause of action without finding *as a legal matter* that no employment relationship existed. It wrote in a fact section that Mr. Niverson was an independent contractor, which his independent contractor agreement states, but made no legal finding of that status. Without any such legal finding, there was no basis (and the lower court certainly articulated none) to grant summary judgment as to negligent supervision.

Finally, Starr Distributing states that Murphy did not argue as to "how employer supervision would have prevented Lori Niverson from hitting Murphy on a straight, flat road on her way to work." (Br. of Starr p. 26). To the extent Murphy needs to respond to this argument that Starr Distributing did not previously raise, there is evidence that Starr Distributing's evaluation of medical fitness and qualifications to drive could have prevented the accident. Mrs. Niverson hit Murphy because she fell asleep at the wheel. (R. p. 158). She suffered from sleep apnea at the time of the accident and did not know if Starr Distributing knew about that medical condition. (R. p. 150).

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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