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.

BRIEF OF RESPONDENT STARR DISTRIBUTING LLC

FORD WALLACE THOMSON LLC
Ian S. Ford
Ainsley F. Tillman
715 King Street | Charleston, SC 29403
843-277-2011

Attorneys for Respondent Starr Distributing, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. The lower court correctly held that Mrs. Niverson's conduct did not fall within the first exception to the going and coming rule.

II. The lower court correctly held that Mrs. Niverson's conduct did not fall within the second exception to the going and coming rule.

III. The lower court correctly held that Mrs. Niverson's conduct did not fall within the fifth exception to the going and coming rule.

IV. The lower court correctly granted summary judgment as to negligent supervision.

COUNTER-STATEMENT OF THE CASE

This case arises out of injuries sustained by Appellant Charles Waymon Murphy ("Murphy") when Lori Niverson hit Murphy's vehicle from behind. At the time of the accident, Mrs. Niverson had no legal relationship whatsoever with Respondent Starr Distributing, LLC ("Starr Distributing"). Instead, Mrs. Niverson was on her way to Starr Distributing's facility to fulfill *her husband's duty* to Starr Distributing as an independent contractor.

Murphy filed the underlying lawsuit on October 19, 2018, and the case proceeded as set forth in Appellant's Statement of the Case.

UNDISPUTED FACTS

The following facts are undisputed, and they compelled the lower court to grant summary judgment in favor of Starr Distributing:

Lori Niverson hit Murphy's vehicle.

Lori Niverson's husband, Arthur Niverson, had an independent contractor relationship with Starr Distributing, pertaining to his delivery of newspapers to Starr Distributing's customers.

Lori Niverson was acting on behalf of her husband, Arthur Niverson, at the time of the accident. Arthur Niverson was not present at the accident.

Arthur Niverson's contract with Starr Distributing—the "Independent Contractor Distribution Agreement"—is clear that Arthur Niverson "alone is responsible for any property damage, bodily injury or death caused by Contractor, his/her agents and employees." (R. p. 40 ¶ 11).

Starr Distributing paid only Arthur Niverson under the Independent Contractor Distribution Agreement.

Lori Niverson had not picked up or begun to deliver any newspapers at the time of the accident. (Appellant concedes this fact on p. 5 of his Initial Brief). There were no newspapers in Lori Niverson's car at the time of the accident.

During the time-period of the accident, there is no evidence that Lori Niverson was receiving any kind of payment from Starr Distributing, in the form of salary or otherwise. That is because she worked for her husband, Arthur Niverson.

Each Lori Niverson, Arthur Niverson, and Starr Distributing agree that Lori Niverson was not an employee of Starr Distributing, and had no legal relationship with Starr Distributing at all. They all agree that she worked for her husband, Arthur Niverson. Only Murphy—a stranger to the parties, and to their relationship—now claims that Lori Niverson worked for Starr Distributing.

Murphy has not sued Arthur Niverson.

BACKGROUND

A. Automobile accident

This lawsuit arises from a motor vehicle accident that took place during the early morning hours of September 30, 2017, while Appellant Charles Murphy and Defendant Lori Niverson each were traveling straight on Highway 17 near Hardeeville, South Carolina. (R. pp. 15: Pltf's Compl. ¶¶ 6 & 7; R. p. 109: Murphy Dep. 32:16–19). Murphy alleges that as he was stopped for roadwork on Highway 17, he was struck from behind by Lori Niverson's vehicle. (R. pp. 15: Pltf's Compl. ¶ 8; R. p. 68: Murphy Dep. 33:11– 16). His air bag did not deploy. (R. p. 110: Murphy Dep. 35:4–5).

Following the accident, Murphy drove Lori Niverson to Respondent Starr Distributing (a newspaper distribution company) so she could deliver newspapers. (R. p. 111: Murphy Dep. 39:1–8). Lori Niverson did not have newspapers in her car at the time of the accident, and did not take any to Starr Distributing that morning. (R. p. 118: Murphy Dep. 66:5–7: "She didn't have papers with her, no.").

Murphy later claimed personal injuries and other damages as a result of the accident.[1] (R. p. 15: Pltf's Compl. ¶¶ 10–12, 14–15). Murphy has settled with Lori Niverson. (R. p. 118: Murphy Dep. 69:8–25).

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[1] Lori Niverson hurt her finger in the accident, but did not file a Workers' Compensation claim because "It wouldn't have been work-related. I was not at work. It wouldn't have been work-related." (R. p. 162: L. Niverson Dep. 85:24–25).

Moreover, Arthur Niverson's independent contractor agreement with Starr Distributing expressly provided: "Contractor agrees, as an independent contractor, that neither Contractor nor Contractor's agents, sub-contractors or employees is eligible for worker's compensation benefits from Starr Distributing in the event the Contractor and/or Contractor's agents, sub-contractors or employees is injured while performing Contractor's services pursuant to this Agreement." (R. p. 40).

B. Lori Niverson's work status

Lori Niverson was working for her husband, Arthur Niverson, who delivered newspapers. Arthur Niverson was an independent contractor of Starr Distributing.[2] (R. pp. 159: L. Niverson Dep. 72:4–14). Mr. Niverson was not delivering papers on this particular day. (R. pp. 136, 159: A. Niverson Dep. 53; L. Niverson Dep. 73:19). Arthur Niverson was not involved in the accident and was not present at the scene of the accident. (R. p. 14: Pltf's Compl.).

Some days, Mrs. Niverson or Mr. Niverson would stop and pick up the Savannah Morning News before driving to the Starr Distributing warehouse. (R. pp. 151, 157: L. Niverson Dep. 38:10 to 39:11, and 64:1–25). However, on the date of this accident, Mrs. Niverson had not gone to pick up the Savannah Morning News. (R. pp. 136, 158, 160: A. Niverson Dep. 53:7; L. Niverson Dep. 68:6–8, 77:1–10).[3]

The facts show that Lori Niverson was not working, but was on her way to work, at the time of the accident. Work did not start until she arrived.[4] Murphy admits that Mrs. 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. (R. pp. 110–111, 118: Murphy Dep. 37:19–39:24, 66:11–13).

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2 All the newspaper deliverers were independent contractors.

3 Starr Distributing paid a flat $25 per pay period for Arthur Niverson sometimes picking up the Savannah Morning Paper in Bluffton and delivering them to Beaufort. (R. p. 157: L. Niverson Dep. 63:6–8).

4 R. p. 161: L. Niverson Dep. 78:2–80:15 "Until I reach a location I am not considered at work."; "Correct. But I hadn't gotten there."; R. p. 136: A. Niverson Dep. 53:7; R. pp. 158, 160: L. Niverson Dep. 68:6–8, 77:1–10.

Murphy also testified that Lori Niverson did not have any newspapers with her in her vehicle at the time of the accident. (R. p. 118: Murphy Dep. 66:2–10). When asked if she had picked up newspapers that day, Lori Niverson testified:

> Q. And then you were—where were you going to and from?
>
> A. From my home to Beaufort.
>
> Q. Okay. Had you picked up the Savannah Morning News at the time the accident took place?
>
> A. No.
>
> Q. So you were on the way to pick up the Savannah Morning News when the accident occurred?
>
> A. I don't remember if I was picking them up that day or not.

(R. pp. 157: L. Niverson Dep. 63:21–64:5).[5]

> Q. I see. And you said you couldn't remember if you were picking up the

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[5] At deposition, Murphy's counsel repeatedly tried to get Lori Niverson to say she was on her way to pick up newspapers. However, Mrs. Niverson adamantly denied recalling it one way or the other:

> THE WITNESS: I don't recall whether I was picking them up or not. . .
>
> **Q. Didn't you have to get them every morning?**
>
> **A. Sometimes no.**

(R. pp. 157: 65:14–22) (emphasis added).

> THE WITNESS: I didn't agree or say that. I said I don't remember. **There were times I did not pick them up and times I did pick them up. Sometimes they would get put on the truck before I'd get there if I didn't get there early.** So I never told you that I was for sure going there. I told you I didn't remember.
>
> Q. All right. So you don't remember whether or not you were going to get the papers from Bluffton or not, right?
>
> [Objection]
>
> THE WITNESS: Correct. I've told you that answer each time you've asked me.

(R. p. 161: L. Niverson Dep. 81:5–18) (emphasis added).

Savannah papers; is that correct?

A. Correct.

Q. And if you didn't pick up the Savannah papers then what would you do?

A. Just go straight to Beaufort.

Q. Did you have any newspapers in your car at the time that the accident occurred?

A. No.

(R. p. 160: L. Niverson Dep. 77:1–10). As stated above, after the accident Mrs. Niverson went to Starr Distributing to deliver the newspapers.

C. Independent Contractor Agreement

Only Arthur Niverson had an agreement with Starr Distributing to deliver newspapers. (R. pp. 159, 129, 135: L. Niverson Dep. 72:8–14; A. Niverson Dep. 22; 49:12–21). That agreement is titled "**Starr Distributing Independent Contractor Distribution Agreement.**" (R. p. 40). 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. . . .

(R. pp. 40: p. 1, ¶ 11(C); *see also* R. p. 136: A. Niverson Dep. 50:9–52:19).

Starr Distributing would pay Arthur Niverson, not Lori Niverson. Starr did not deduct taxes for Arthur Niverson because he was an independent contractor. (R. pp. 156, 160: L. Niverson Dep. 60:6–8; 76:8–11).

As stated above, Lori Niverson was assisting her husband with deliveries. (R. pp.

159, 136: L. Niverson Dep. 73:19; A. Niverson Dep. 53:7). At the time of the accident, she was driving her personal vehicle, which was not owned or controlled by Starr Distributing. (R. pp. 136, 160: A. Niverson Dep 50:19; L. Niverson Dep. 75). Only after she arrived at the work location was she considered working, and she was not paid for her commute. (R. p. 161: L. Niverson Dep. 80:12–15). Lori Niverson testified that Starr Distributing did not supervise her in any way, did not evaluate her performance in any way, and did not have a set time that she was required to start the route. (R. p. 154: L. Niverson Dep. 52:23–53:17). The carriers themselves provided the route that they would follow to deliver the newspapers. (R. pp. 160, 162: L. Niverson Dep. 74:16–75:12; 84:18–85:4). Arthur Niverson testified that he alone decided who, if anyone, worked for him. (R. p. 128: A. Niverson Dep. 20:11–21:11).[6]

As Lori Niverson testified, "I knew for a fact I was not at work . . . ". (R. p. 163: L. Niverson Dep. 86:8).

[6] Arthur Niverson testified "An independent contractor pretty much is just you can do what you want to with your customers just in your area. Starr Distributing can't tell us, you know, we have to go in a certain order to our customers. We had the right to do like our own—as long as we stay in our area, we can do it any way we want. Just Starr can't tell us how to run it." (R. p. 135: A. Niverson Dep. 46:9–16).

ARGUMENT

This case involves the "going and coming rule," which holds that "an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment." *Davaut v. Univ. of S.C.*, 418 S.C. 627, 682, 795 S.E.2d 678 (S.C. 2016). There are five exceptions to this rule. *See id.* at 635.

Typically, cases under the "going and coming rule" involve a worker who is injured on their way to or from work and is seeking Workers' Compensation benefits for the injury. Those lawsuits typically are between the worker and their employer.

Not so here. Here, Lori Niverson and Arthur Niverson adamantly contend that Lori Niverson was not working at the time of the accident, and that she did not work for Starr Distributing at all.[7] Starr Distributing agrees—Lori Niverson was not working at the time of the accident, and she did not work for Starr Distributing at all.[8] They all agree that Lori Niverson worked for her husband, Arthur. Only Murphy—a third party, who is not privy to the relationship, and has no standing to contest it—now claims that Lori Niverson was working for Starr Distributing. (R. p. 16: Compl. p. 3). The actual testimony and evidence support only one conclusion, which the lower court found: Lori Niverson was not working at the time of the accident. In any event, she was not working for Starr Distributing at all.

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7 "I knew for a fact I was not at work . . . ." (R. p. 163: L. Niverson Dep. 86:8).

8 R. p. 35: Third-Party Compl. p. 2 ¶ 7.

In the alternative, to the extent that Lori Niverson was working during the drive that led to the accident, the evidence is clear that she was working for her husband, Arthur Niverson, not for Starr Distributing. Therefore, Murphy's claim would properly be against Mrs. Niverson's employer—Arthur Niverson—and Starr Distributing's motion for summary judgment was properly granted.

ADDITIONAL SUSTAINING GROUNDS

Pursuant to Rule 208(b)(2) and 220(c) of the South Carolina Appellate Court Rules, Starr Distributing urges this Court to affirm on the grounds that Lori Niverson did not have a legal relationship with Starr Distributing that would sustain any of Appellant Murphy's theories of recovery.

Murphy sued Starr Distributing under a theory of *respondeat superior*, contending that Starr Distributing was responsible for the negligent acts of Lori Niverson. As an initial matter—and as additional sustaining grounds for the trial court's grant of summary judgment—it is clear from the evidence that Mrs. Niverson was not an "employee" of Starr Distributing. Instead, she was acting as an agent for her husband, **who was also <u>not</u> an "employee" of Starr Distributing**. Mr. Niverson had an Independent Contractor Agreement with Starr Distributing, which expressly permitted him to fulfill his duties through the use of his own "agents, sub-contractors or employees." (Agreement ¶ 11; R. p. 40). The testimony unequivocally shows that Mrs. Niverson routinely assisted Mr. Niverson with <u>his</u> newspaper route obligation. The lower court's order held: "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." (Order p. 2; R. p. 4). "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." *Duane v. Presley Constr. Co., Inc.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978).

South Carolina law draws a distinction between an "employee" and an "independent contractor" for the purpose of determining whether vicarious liability applies. An employee is a person who "represents the will of that other, not only as to the result, but also as to the means by which the result is accomplished." *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797, 802 (1969). In contrast, an independent contractor is a person who "contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work." *Bates v. Legette*, 239 S.C. 25, 121 S.E.2d 289, 293 (1961); *see also Fulton by Fulton v. Westvaco Corp.*, 930 F. Supp. 1115, 1118 (D. S.C. 1995). Essentially, the law finds that if a master controls the method and means by which his work is fulfilled, then he may be liable for certain torts committed by his servant in the course of that work. However, if a person contracts to undertake responsibility for the details of the master's work, performing it with his own equipment and in accordance with his own chosen method, then the person is alone liable for his own negligence. *Norris v. Bryant,* 217 S.C. 389, 60 S.E.2d 844 (1950).

One reason that the law finds that businesses are not liable for the acts of independent contractors is because the relationship typically is based upon an agreement that allocates liability to the contractor. The law looks to the contract to determine the scope of the relationship. *Id.* Here, Starr Distributing contracted with Arthur Niverson

to allocate the risk of and responsibility for precisely the sort of accident that is at issue here. The Independent Contractor Agreement anticipated that Mr. Niverson might use various vehicles and persons (under Mr. Niverson's direction) in the fulfillment of his contractual duties to Starr Distributing. The Agreement therefore expressly required Arthur Niverson to (*inter alia*): (1) transport newspapers in vehicles under his control; (2) bear sole responsibility "for any property damage, bodily injury or death caused by Contractor, his agents or employees;" (3) obtain and maintain insurance in the state in which he would perform on his contract; (4) and acknowledge that neither he nor his agents were eligible for Worker's Compensation benefits from Starr Distributing. (Agreement, ¶ 11; R. p. 40).

The Independent Contractor Agreement establishes that, as a matter of law, Lori Niverson's husband, Arthur Niverson, was an independent contractor of Starr Distributing. That agreement specifies that Arthur Niverson "alone is responsible for any property damage, bodily injury or death caused by Contractor, his/her agents and employees. . . ." (*Id.*). Lori Niverson testified that she was filling in for her husband on the morning of the accident, and she was acting on his behalf. (R. pp. 159, 136: L. Niverson Dep. 73:19; A. Niverson Dep. 53:7–18). Lori Niverson (a) had no legal relationship at all with Starr Distributing, and (b) in any event, was acting through her independent contractor husband, for which Starr Distributing cannot be liable. Therefore, Starr Distributing cannot be held liable to Murphy for Murphy's accident with Lori Niverson.

Murphy improperly contends that there is a scintilla of evidence that Mrs. Niverson is an "employee" of Starr Distributing. First, because the contract at issue is clear and unambiguous, there is no need to look beyond the contract to determine the relationship of the parties. Second, the evidence that Murphy points to does not create a genuine issue of material fact.

a. The Independent Contractor Agreement is clear and unambiguous.

No one except the Appellant Murphy, who is not a party to the Independent Contractor Agreement, argues that the Agreement is anything other than what it plainly states that it is. Arthur Niverson agrees that he was an independent contractor of Starr Distributing. (R. p. 135–136: A. Niverson Dep. 48:17–52:4). Lori Niverson agrees that Mr. Niverson was an independent contractor of Starr Distributing. (R. pp. 159, 162: L. Niverson Dep. 72:4–14; 82:2–6). Starr Distributing agrees that Mr. Niverson was an independent contractor of Starr Distributing. (R. p. 88–89: Starr Distributing LLC's Memorandum in Support of Motion for Summary Judgment). Only Appellant Murphy now contends that Mr. Niverson was an "employee" and not an independent contractor.

The unambiguous language of the Independent Contractor Agreement clearly defines the relationship between Arthur Niverson and Starr Distributing. The Agreement allocates to Mr. Niverson the responsibility of deciding the method and means by which he would go about delivering newspapers, requiring him to use his own vehicles. (Independent Contractor Agreement; R. p. 40). The Agreement permits Mr. Niverson to allocate the work to subcontractors or agents. (*Id*. ¶ 11). The Agreement requires Mr. Niverson to determine his own route and method of delivery. (*Id*. ¶ 13).

The Agreement compels Mr. Niverson to bear the cost for lost, damaged, or undelivered papers. (*Id*. ¶ 3). The Agreement expressly excludes Mr. Niverson from Worker's Compensation benefits. (*Id*. ¶ 11). Finally, the Agreement obligates Mr. Niverson to bear liability for any damage or injury incurred by himself or his agents in the course of carrying out the contract. (*Id*.). In short, the Agreement itself is clear and unambiguous, and the only reasonable inference to be drawn from it is that Mr. Niverson was an independent contractor of Starr Distributing.

The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Id*. (internal citations omitted). Because the Independent Contractor Agreement is unambiguous, and because the parties to the contract agree that their intent was to create an independent contractor relationship, there is no question of fact as to whether Mr. or Mrs. Niverson was an employee of Starr Distributing—they were not. This Court should uphold the lower court's grant of summary judgment.

b. No genuine dispute of facts exists under the evidence in the Record.

In arguing that the evidence creates a factual question as to whether or not Mrs. Niverson was an "employee" of Starr Distributing, Murphy points to Lori Niverson's

testimony that she "worked for" Starr Distributing and that she had previously been "employed" by Starr's predecessor, the Beaufort Gazette. (*See* Murphy's Memorandum in Opposition to Motion for Summary Judgment, pp. 2–4; R. pp. 171–173). First, because the Independent Contractor Agreement is clear and unambiguous, parol evidence should not be considered by this court in determining the relationship of the parties. However, despite her colloquial references to her "work," there is no reasonable inference to be drawn from the evidence other than that Mrs. Niverson was not Starr Distributing's "employee" in the legal sense of the term.

Importantly, both Mr. and Mrs. Niverson consistently testified that the basis of their relationship with Starr Distributing was the Independent Contractor Agreement signed by Mr. Niverson. (*See* A. Niverson Dep. pp. 48–53, R. pp. 135–136; L. Niverson Dep. p. 71:19–p. 78, R. pp. 159–161). The testimony also is clear that Mrs. Niverson was not paid by Starr Distributing—it was Arthur Niverson who received the checks for delivering newspapers. (L. Niverson, p. 76:8–10, R. p. 160). The evidence also indicates that if neither of the Niversons were able to run the paper route, they would be responsible for getting someone else to deliver the newspapers for them, in compliance with the Agreement. (R. p. 150: L. Niverson Dep. pp. 36–37). There is no evidence in the record indicating that Lori Niverson somehow had a relationship (at the time of the accident)[9] with Starr Distributing that was different or distinct from that of her husband.

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[9] Mrs. Niverson did testify that, in the past, she had her own independent contractor relationship with Starr Distributing's predecessor, the Beaufort Gazette, but that her husband Arthur Niverson at some point "took over the contract." (Depo L. Niverson, pp. 17–22: R. pp. 145–146). Murphy incorrectly mixes this testimony about past relationships, attempting to create a factual dispute. Murphy also hijacks vernacular references by Niverson about her "job" or "work" or "employment" in an effort to mischaracterize the relationship as one of legal

In sum, the only reasonable inference to be drawn from the evidence and testimony is that Lori Niverson was not an "employee" of Starr Distributing, in the legal sense of the word; to the contrary, her sole legal relationship in this matter is to her husband, an independent contractor for Starr Distributing.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate "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 judgment as a matter of law." Rule 56(c), SCRCP (emphasis added). Under South Carolina law, where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Hedgepath v. American Tel. & Tel. Co.,* 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

Because there is no dispute that the extent of Lori Niverson's relationship with Starr Distributing was no more than that of an agent of Arthur Niverson—Starr's independent contractor—this Court should hold that Starr cannot be held liable for her alleged negligent driving. It should therefore affirm, pursuant to Rule 220(c), SCACR.

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employer/employee. This Court should not be misled. There is no serious question that the basis of the parties' relationship was Arthur Niverson's Independent Contractor Agreement with Starr Distributing. (R. pp. 40–42).

ARGUMENT ON APPELLANT'S ISSUES ON APPEAL

I. The first exception to the going and coming rule does not apply because there is no evidence the time consumed that morning was paid for or included in her wages.

Murphy first contends that Lori Niverson was working for Starr Distributing at the time of the accident because she fell under the first exception to the "going and coming rule" that "the time that is consumed is paid for or included in the wages . . . ." *Wofford v. City of Spartanburg*, 415 S.C. 152, 159, 781 S.E.2d 146 (S.C. App. 2015) (internal quotations omitted). As an initial matter, the undisputed evidence shows that Lori Niverson had not picked up newspapers that morning. And she was not on her way to pick up newspapers that morning, because (1) Lori Niverson herself never testified that she was picking up newspapers that day, and (2) she later went on to deliver newspapers, which she did not have with her.

Instead, Murphy's argument appears to be that because the Independent Contractor Agreement with Arthur Niverson included a "$25.00 car allowance for relay" per pay period for Arthur Niverson (R. p. 41), therefore all of Lori Niverson's commute to work was always "at work." This is legally incorrect.

First, Murphy cites no law for the startling proposition that when a person *sometimes* performs a task on the way to work, their *entire* commute is *always* covered by this exception (or any other exception). Indeed, such a holding would permit the exception to swallow the rule. Here, as discussed above, Lori Niverson had not picked up newspapers that morning, did not have newspapers with her at the time of accident,

and after the accident Murphy drove her to Starr Distributing so she could deliver the newspapers. Accordingly, there is no evidence that "the time that is consumed [*that morning* was] paid for or included in the wages."

Second, even if (hypothetically) Lori Niverson had been on her way to pick up newspapers that morning, she would not be "working" until she had picked them up. On the way there she would be "going and coming."

Third, Murphy's argument is more akin to the "travel money" line of arguments, wherein sometimes an employee may claim to be "at work" during travel if—under certain circumstances—"travel money paid . . . defray[s] all or substantially all of the cost of travel." *Byrd v. Stackhouse Sheet Metal Works*, 451 S.E.2d 405, 407, 317 S.C. 35 (S.C. App. 1994). "[T]he rule requires the provision of transportation to be 'deliberate and substantial' for the employee to meet the exception." *Id.* Here, the hypothetical "travel money" supposedly would be the $25 per pay period "relay fee." However, that fee is in an "Independent Contractor Agreement," paid to Arthur Niverson, not to Lori Niverson. There is no evidence that Lori Niverson was paid **anything** in the way of a "relay fee" or "travel money." In addition, Murphy has failed to make any of the requisite showings for this exception to apply to Lori Niverson's commute or to her personally. *See, e.g.*, *id.* at 407 ("Byrd did not prove the money provided was substantial. Byrd did not provide any evidence of the amount it cost decedent to travel to and from work. Although the gas money was held out as an inducement to employment, it did not substantially compensate the decedent for his travel time or travel expenses."). Indeed, Lori Niverson—the person driving the commute, and who would know best—adamantly

denies she was doing anything work-related when the accident occurred, and she did not testify that she was paid for her commute.

II. The second exception to the going and coming rule does not apply because Lori Niverson was not an employee of Starr Distributing, and because she was not charged with any duty or task in connection with her purported employment.

Murphy wrongly contends that "there is a scintilla of evidence . . . that Mrs. Niverson was charged with the duty or task of picking up newspapers on the way to Starr Distributing's warehouse," thereby invoking the second exception to the "going and coming rule" of employer liability. What is this "scintilla" of evidence, this Court might ask? Ironically, Murphy's "scintilla" is the ***Independent Contractor Agreement*** between Arthur Niverson and Starr Distributing. The Independent Contractor Agreement contains a provision to pay Arthur Niverson[10] a fee to sometimes pick up newspapers. (R. p. 41: Agreement, p. 3).

The "going and coming" rule applies in the context of employees.[11] As discussed above, the Court's analysis may stop at its determination that Lori Niverson was not an employee of Starr Distributing—and there is therefore no legal basis by which to hold Starr Distributing liable for her actions in driving her own car. Rule 220(c), SCACR ("The

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[10] There is no evidence that Starr Distributing paid Lori Niverson. Both Mr. and Mrs. Niverson testified that Starr Distributing paid Mr. Niverson, as delineated in his Independent Contractor Agreement. (R. p. 160: L. Niverson Depo. p. 76:8–10; R. p. 131: A. Niverson Depo. p. 30:12–15; p. 32:2–23).

[11] The "going and coming" rule has its origin in Workers' Compensation law. It is solely applicable to those within an employer/employee relationship. It does not apply in the current, attenuated circumstances, pertaining to Mrs. Niverson's husband's independent contractor relationship with Starr Distributing.

appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); (R. p. 40: Independent Contractor Agreement).

Although the lower court never held that Mrs. Niverson was actually an employee of Starr Distributing, it nonetheless was correct to find that—even if she hypothetically was an employee—the second exception to the going and coming rule does not apply, as a matter of law. This is because there is no evidence whatsoever that Mrs. Niverson was performing a task in connection with her purported employment on the day of the accident. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998) (discussing the second exception to the "going and coming" rule as applying when "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment."). Indeed, the facts show the opposite, as do the factors urged by Murphy in his brief.

Murphy urges this Court to look at two factors to determine whether the second exception applies[12]: (1) whether Mrs. Niverson was acting in furtherance of Starr Distributing's business at the time of the accident; and (2) whether Starr Distributing would have to arrange for other means of accomplishing what Mrs. Niverson was doing at the time of the accident. *See* Br. of Appellant, pp. 11–12, *citing Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990).[13]

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[12] If, *arguendo*, Mrs. Niverson were an employee of Starr Distributing.

[13] Notably, these "two factors" touted by Murphy are actually only two of many indicia discussed by those cases to delineate the scope of employment. For example, the *Hamilton* Court looked at the fact that the employee was making a trip "directed and authorized by her supervisor," while "driving the supervisor's automobile," and that she was "making the trip during regular office hours while being paid her regular hourly wage." Thus, the trip "was neither personal nor beneficial to [employee] in any way." *Id*. In contrast, Lori Niverson was driving her own vehicle, prior to beginning work, and she was not being supervised by Starr

As to the first factor, Murphy argues that "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." *Id.* at p. 12. This is illogical. Mrs. Niverson's work delivering newspapers (whether employment or contracted or other) could not commence until she picked up newspapers. It is undisputed that there were no newspapers in her car. There is thus no reasonable inference to be made except that she had not begun working, but was on her way to work, at the time of the accident. Put another way, Mrs. Niverson, in driving to pick up newspapers, was not furthering some purpose of Starr Distributing—she was simply *going to work*. In any event, she was not furthering Starr Distributing's purpose at all: she was furthering *her husband's* business (i.e., his contractual responsibility to deliver papers).[14]

Murphy's second factor, and the facts of this case, drives this analysis home.[15] The second suggested factor inquires into whether Starr Distributing would have had to arrange for other means of accomplishing what Mrs. Niverson was doing at the time of the accident in the event she did not pick up the papers in Bluffton. *See Stough v. Westinghouse Savannah River Co.*, 311 S.C. 129, 427 S.E.2d 716 (Ct. App. 1993) (noting travel sometimes is within scope of employment if employer would otherwise have to arrange for someone else to take the trip to perform the work) ("Westinghouse would have had

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Distributing in the performance of the work—the method of which was left by contract to Mr. Niverson's discretion.

[14] Murphy's argument is hobbled by his reliance on an independent contractor agreement to invoke an exception to an employment doctrine.

[15] Pun intended.

to arrange to send the documents via some other person or method had Stough not planned to take them."). But the evidence shows that the burden is on Arthur Niverson—and not on Starr Distributing—to make other arrangements in the event that he cannot perform on his contractual responsibilities. (R. p. 150: L. Niverson Dep. pp. 36–37). In other words, sometimes picking up papers was Mr. Niverson's business, which (if it was occurring, hypothetically) Mr. Niverson would have delegated to Mrs. Niverson on the morning of the accident. It was Arthur Niverson who would have to arrange for another means of transporting the papers, and not Starr Distributing.

Finally, Appellant is arguing that the "task" with which Mrs. Niverson was purportedly charged was the necessity of picking up newspapers. But the testimony reveals that it was not always necessary for Mrs. Niverson to pick up the newspapers, since Starr Distributing had other means of getting them. (R. pp. 157, 161: L. Niverson Depo. p. 65:14–22; p. 80:24–p. 81:18). Moreover, the evidence is undisputed that there were no newspapers in her car at the time of the accident.

There is no reasonable inference to be drawn from these facts except that Mrs. Niverson was not performing Starr Distributing's task of picking up papers, which would require Starr Distributing to find someone else to pick up the papers, at the time of the accident. *See Stough*, 311 S.C. 129, 427 S.E.2d 716. Instead, there is no question or dispute or inference to be drawn except that Mrs. Niverson was on her way to (her husband's) work. Where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Hedgepath,* 348 S.C. 340, 354, 559 S.E.2d 327.

Because there is no question that the second exception to the "going and coming rule" does not apply, this Court should affirm the lower court's Order.

III. The fifth exception to the going and coming rule does not apply because Lori Niverson was not on a "special errand."

Murphy next contends that Lori Niverson was working for Starr Distributing at the time of the accident because she fell under the fifth exception to the "going and coming rule" that "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." *Wofford*, 415 S.C. at 149–150 (internal quotations and citations omitted). This sometimes is called the "special errand exception," and it sometimes applies when an employee is performing a special task for her employer while *en route* to work. An example of a "special errand" is an electrical lineman being called out from Columbia to repair storm damage in Charleston.[16] Examples of what are <u>not</u> a special errands include "typical job duties like retrieving keys and signing forms . . . ."[17]

Murphy contends that this exception applies because, allegedly, Mrs. Niverson "did perform a service to her employer while enroute to the Beaufort location" which "was a substantial part of the service for which she was employed." (App. Br. at 17).

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16 *See Bickley v. South Carolina Elec. & Gas Co.*, 192 S.E.2d 866, 868, 259 S.C. 463 (S.C. 1972).

17 *Wofford*, 415 S.C. at 162 ('Similar to *McDaniel* [271 S.C. 299 (1978)], Wofford was on his way to work to perform his typical job duties like retrieving keys and signing forms, and thus, he did not perform a special errand by driving to the swim center.").

First, as discussed above, the evidence shows that no work was performed during Lori Niverson's commute that morning—she had not picked up newspapers, she did not have newspapers with her at the time of the accident, and Murphy later drove her to Starr Distributing so she could deliver the newspapers.

Second, there is no evidence that picking up newspapers was a "substantial part of the service." The testimony shows that, at most, it was an incidental task that was sometimes performed, and sometimes not performed—the "relay fee" for Arthur Niverson was only $25 for each pay period. (R. p. 157: L. Niverson Dep. pp. 62:14–63:12). "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Aughtry v. Abbeville County Sch. Dist.*, 332 S.C. 453, 460, 504 S.E.2d 830 (Ct. App. 1998) ("Simply put, these facts do not establish a causal relationship between Aughtry's employment and the resulting injury.") (internal quotations and citations omitted). Here, Murphy does not contend, and there is no evidence to support, that the task of sometimes picking up some newspapers (on other days) caused the accident here.

Third, even if (hypothetically) Lori Niverson was on the way to pick up newspapers that morning, there is no evidence that it was a "special" or exceptional task, as required for this exception. The evidence shows that she sometimes did this for her husband, as provided in the Independent Contractor Agreement between Arthur Niverson and Starr Distributing. The South Carolina Supreme Court's reasoning in

McDaniel v. Bus Terminal Restaurant Management Corp., 247 S.E.2d 321, 323, 271 S.C. 299 (S.C. 1978), applies equally here:

> Meetings of this type had been held in the past and were not unusual or "special." Attendance at these meetings was a normal, customary aspect of Ms. McDaniel's job and she did not perform a special errand by attending the meeting held on November 5, 1975.

See also Gregg v. Dorchester County School System, 241 S.E.2d 554, 556, 270 S.C. 189 (S.C. 1978) ("The fact that appellant was required to perform duties at the football game did not render the trip to Orangeburg a special errand connected with his employment. Attendance at football games was a normal part of appellant's duties as assistant principal of the school and, in no manner, required the trip to Orangeburg."). As such, this exception does not apply.

IV. The lower court properly granted summary judgment as to negligent supervision.

Murphy brought a cause of action against Starr Distributing for negligent supervision. The lower court correctly granted summary judgment against Murphy on this and all other causes of action. This is primarily because there was no legal relationship whatsoever between Starr Distributing and the wife of Starr's independent contractor that would sustain a duty by Starr to supervise or train her. As an initial matter, Murphy never explains, and made no argument regarding, how employer supervision would have prevented Lori Niverson from hitting Murphy on a straight, flat road on her way to work.

Moreover, as argued above, the only person in this lawsuit with whom Starr Distributing had any sort of relationship at all at the time of the accident was Arthur Niverson. That relationship was defined by the Independent Contractor Agreement

between Mr. Niverson and Starr Distributing. The Independent Contractor Agreement unambiguously permitted Mr. Niverson to fulfill his contractual responsibilities through his use of "agents, employees and/or subcontractors." (R. p. 40). At the time of the accident between Lori Niverson and Appellant Murphy, Mrs. Niverson was acting on behalf of her husband in the fulfillment of his duties. (Order, p. 2, 4; A. Niverson Depo. p. 53:4–18; R. p. 136).

A cause of action against an employer for its negligent hiring, supervision, or training an employee has a key prerequisite: there must exist an employer/employee relationship in the first place. *James v. Kelly Trucking Co.*, 377 S.C. 628, 661 S.E.2d 329 (2008) ("an **employer** [may] be independently liable in tort . . . where an **employer** knew or should have known that its **employment** of a specific person created an undue risk of harm to the public.") (emphasis added). Because as a matter of law Starr did not have an employee/employer relationship with Lori Niverson (or with Arthur Niverson, for that matter), the lower court correctly granted summary judgment on this cause of action. There is simply no conceivable duty on the part of Starr Distributing to supervise the wife of one of its independent contractors on her way to work.

Murphy argues that the lower court erred in not addressing the negligent supervision argument, despite "assuming *arguendo* that Mrs. Niverson was an employee." (App. Br. p. 17). But this was not error under the facts of this case, in which the Order on appeal clearly found: "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." (Order p. 2, R. p. 4). The Order went on to reiterate: "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." (Order p. 4, R. p. 6). Just because the lower court engaged in a discussion of the "going and coming" rule and its exceptions does not override the finding that Lori Niverson was acting on behalf of her independent contractor husband at the time of the accident.

This Court should find that the lower court's findings—of facts about which there is no other reasonable inference to be drawn other than that Arthur Niverson was an independent contractor and not an employee . . . **and Lori Niverson was neither**[18]—properly support its grant of summary judgment to Starr Distributing on all causes of action by the Appellant against it.

[18] *See supra*, Additional Sustaining Grounds, pp. 11–17.

CONCLUSION

For these reasons, and for the additional sustaining grounds discussed above, the lower court's grant of summary judgment to Starr Distributing should be affirmed.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/ Ian Ford
Ian S. Ford, Bar No. 12463
Ian.Ford@FordWallace.com
Ainsley F. Tillman, Bar No. 70551
Ainsley.Tillman@FordWallace.com
715 King Street | Charleston, SC 29403
843-277-2011

Attorneys for Respondent Starr Distributing, LLC

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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 Respondent Star Distributing, LLC complies with Rule 211(b), SCACR.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/ Ian Ford
Ian S. Ford, Bar No. 12463
Ian.Ford@FordWallace.com
715 King Street | Charleston, SC 29403
843-277-2011

January 11, 2022