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 RESPONDENT ARTHUR C. NIVERSON

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III. Did the trial court correctly determine that Mrs. Niverson's conduct did not fall within the fifth exception to the going and coming rule?

IV. Did the trial court properly grant summary judgment as to the claim of negligent supervision?

Statement of the Case

This action arises out of a motor vehicle accident that took place on September 30, 2017, at approximately 2:23 a.m., in the right, northbound lane of Highway 17, near Hardeeville, South Carolina. (R. p. 15). The subject accident occurred when the vehicle operated by Lori Niverson ("Ms. Niverson") struck the rear of the vehicle operated by Charles Waymon Murphy ("Murphy").

On October 19, 2018, Murphy filed a Summons & Complaint against Ms. Niverson and Starr Distributing, LLC ("Starr Distributing"), claiming personal injuries arising from the accident. (R. pp. 14-19). In the Complaint, Murphy alleged that Ms. Niverson was an agent and employee of Starr Distributing and was in the process of executing her morning route of delivering newspapers for Starr Distributing at the time of the accident. (R. p. 16). The causes of action raised against Ms. Niverson and Starr Distributing were negligence, gross negligence, and negligent hiring/supervision. (R. p. 16). Ms. Niverson and Starr Distributing were the only two named Defendants in the case. Starr Distributing filed its Answer on December 20, 2018, and Ms. Niverson filed her Answer on January 19, 2019, both denying that Ms. Niverson was an agent and employee of Starr Distributing, as well as denying that she was working at the time of the

accident. (R. pp. 21, 27). With regards to the facts of the accident, Ms. Niverson admitted that she steered her vehicle to the right to avoid hitting Murphy's vehicle and ultimately made contact with his vehicle. (R. p. 27).

On June 24, 2019, Starr Distributing filed a Third-Party Complaint against Arthur C. Niverson ("Mr. Niverson"), asserting causes of action for equitable indemnity, negligence, and breach of contract. (R. pp. 34-39). Starr Distributing alleged that Mr. Niverson was an independent contractor for Starr Distributing, and attached his contract as Exhibit 1 to the Third Party Complaint. (R. pp. 35, 40-42). Starr Distributing further alleged that it had no relationship to Ms. Niverson, and that she was the agent of Mr. Niverson and acting exclusively under his direction and control. (R. p. 35). Mr. Niverson filed his Answer to the Third-Party Complaint on July 19, 2019, admitting that Mr. Niverson was an independent contractor for Starr Distributing and Exhibit 1 was a copy of his contract with Starr Distributing. (R. p. 44).

The parties then engaged in written discovery, and the depositions of Ms. Niverson, Mr. Niverson, and Mr. Murphy were taken. Starr Distributing then filed Motions for Summary Judgment on December 21, 2020. (R. pp. 49-54). On December 29, 2020, Mr. Niverson filed a Motion for Summary Judgment as to the Third-Party Complaint, on the grounds that Mr. Murphy's claims against Starr Distributing fail as a matter of law, and therefore, Starr Distributing's third-party claims against Mr. Niverson also fail. (R. pp. 55-65).

A hearing was then held on January 26, 2021. (R. p. 226). On February 1, 2021, the trial court granted Starr Distributing's Motion for Summary Judgment as to Murphy's claims against it. (R. pp. 204-213). The trial court further granted Mr. Niverson's Motion

for Summary Judgment as to Starr Distributing's claims against him. (R. pp. 212-213). On February 11, 2021, Murphy filed a Motion to Reconsider. (R. pp. 214-225). An Amended Order granting the Motions was filed on February 22, 2021. (R. pp. 3-12). Murphy then filed this appeal on March 19, 2021. (R. p. 1-2).

Statement of the Facts

The motor vehicle accident at issue in this case occurred on September 30, 2017, as Ms. Niverson and Mr. Murphy were traveling in the right hand lane of northbound U.S. Highway 17, near Hardeeville, South Carolina. (R. p. 15). Ms. Niverson was operating a personal vehicle, owned by herself and her husband, Mr. Niverson. (R. p. 85). Mr. Murphy was stopped for road work on Highway 17, and was struck in the rear by Ms. Niverson. (R. pp. 15, 109). Ms. Niverson testified that she came off of the Talmadge Bridge, went around a curve, and dozed off briefly. (R. p. 158). When she woke up, she saw that the vehicles ahead of her were stopped. (R. p. 158). She tried to apply her brakes and swerve to the right, but was unable to avoid striking Mr. Murphy's vehicle in the rear. (R. p. 158).

At the time of the accident, Ms. Niverson was on her way to work. (R. p. 161). Ms. Niverson and her husband, Mr. Niverson, live in Savannah, Georgia. (R. p. 143). Mr. Niverson was an independent contractor, and had contracted with Starr Distributing for the delivery of morning newspapers. (R. pp. 40-42). At the time of the accident, Mr. Niverson was working two jobs and therefore his wife would sometimes help him with the paper route. (R. pp. 149, 159). There were certain days that she handled the route. (R. p. 150). Mr. Niverson would handle the route on other days, and sometimes they would do it together. (R. pp. 128). As compensation for the delivery services, Starr Distributing then paid Mr. Niverson directly. (R. p. 160).

On the days that she handled the delivery route, Ms. Niverson would have to stop at a warehouse on Laurel Bay Road in Beaufort, South Carolina, to pick up the newspapers for her route. (R. pp. 78-79). At the warehouse, she would get the amount of papers that she needed to complete the route, roll them, bag them, and put them in her vehicle for delivery along the route. (R. pp. 79, 153). Some days, Ms. Niverson would have to stop the Bluffton location on Buck Island Road to pick up the Savannah Morning News prior to heading to the warehouse Beaufort. (R. pp. 78, 151). If she did not have to pick up the Savannah Morning News, she could go straight to Beaufort from her home in Savannah. (R. pp. 86, 160).

As part of the Agreement with Starr Distributing, Mr. Niverson also executed a Schedule of Fees and Rates, which provided for a $25.00 "car allowance for relay." (R. p. 41). This was a payment for picking up the Savannah Morning Newspapers in Bluffton and bringing them to the warehouse in Beaufort. (R. pp. 80, 152). If the relay service was undertaken during the pay period, the service was paid for under a line item called "Car Allowance." (R. p. 132). Ms. Niverson testified that she did not have to go get the Savannah Morning Newspapers every morning, and she did not recall if she had to go to Bluffton on the morning in question. (R. p. 157). However, there is no evidence in the record of a payment for "Car Allowance" for the pay period covering the date of the subject accident.

The accident occurred on U.S. Highway 17, just over the Tallmadge Bridge, and prior to the turnoff to Bluffton or Beaufort. (R. p. 160). Ms. Niverson did not have any newspapers in her vehicle at the time of the accident. (R. p. 160-161). Mr. Niverson was not involved in the accident and was not present at the scene of the accident. (R. pp. 136,

205).

Standard of Review

In reviewing a summary judgment, the Court of Appeals applies the same standard which governs the trial court: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; *Clinton v. West American Ins. Co.* 364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005). To resist motion for summary judgment, nonmoving party must come forward with specific facts showing genuine issues necessitating trial. *Nations Bank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995).

Argument

Mr. Murphy has not brought a claim against Mr. Niverson; instead, Mr. Niverson was brought into this suit by Starr Distributing under the Agreement between Starr Distributing and Mr. Niverson. (R. p. 4). Therefore, because Mr. Murphy's claims against Starr Distributing fail as a matter of law, Starr Distributing's claims against Mr. Niverson fail.

As an initial matter, Ms. Niverson was not an employee of Starr Distributing at the time of the accident. Under the doctrine of *respondeat superior,* "a master [is] liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986); *see also Wade v. Berkeley Cty.*, 330 S.C. 311, 318–19, 498 S.E.2d 684, 688 (Ct. App. 1998). However, only Mr. Niverson was a party to the Agreement with Starr Distributing, and Ms. Niverson was not directly paid by Starr Distributing for any work performed under the Agreement. (R. p. 160). The only evidence in this case is that Ms. Niverson was assisting her husband with deliveries.

For a Plaintiff to recover from a master/employer under the doctrine, he "must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment." *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E. 2d 50, 52 (2006). In other words, at the center of the *respondeat superior* theory is that the employee must be acting within the scope of her employment at the time of the tortious act. "An act is within the scope of [an employee's] employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the [employer's] business. *Id.* On the other hand:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time.

Id. (*citing to Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E. 2d 713 (1964).

Generally, where an employee is going to or coming from her place of work, she is "not engaged in performing a service growing out of and incidental to [her] employment;" therefore, no liability will lie with an employer where an employee is involved in an accident while going to or coming from work. *Wofford v. City of Spartanburg ex rel. S.C. Mun. Ins. Tr.*, 415 S.C. 152, 159, 781 S.E.2d 146, 149–50 (Ct. App. 2015) (*citing to Medlin v. Upstate Plaster Serv.,* 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998)). *See also Wade v. Berkeley County*, 330 S.C. 311, 320, 498 S.E. 2d 684, 688 (Ct. App. 1998) ("the general rule is that an employee driving his own vehicle to and

from work is on his own business, and not engaged in work for the master"). However, South Carolina has recognized five exceptions to this rule. An employer may still be liable in those instances where (1) "the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages;" (2) "the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment;" (3) the way to work is inherently dangerous and is either the exclusive way or is constructed and maintained by the employer; (4) the injury occurred in close proximity to the workplace and there is an express or implied requirement that the employee use that approach in going to and coming from work; and (5) 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." *Id.*

Murphy argues that exceptions (1), (2), and (5) are applicable to this case, and the trial court, examining the facts in the light most favorable to Mr. Murphy, conducted an analysis of these exceptions as if Ms. Niverson were an employee of Starr Distributing.

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

At the time of the accident, Ms. Niverson was operating a personal vehicle, which was not owned or controlled by Starr Distributing. Therefore, the first exception to the going and coming rule would apply only if "the time that is consumed is paid for or included in the wages." See *McMillan v. Huntington & Guerry Elec. Co.,* 277 S.C. 552, 290 S.E.2d 810 (1982). In *McMillan*, the sole question was whether the payment of additional hourly compensation for working out of town fell within the exception. *Id.* at 554. The employer argued that the additional compensation was not related to the

distance traveled or travel time, but was paid purely because of the inconvenience incident to being away from home. *Id*. The employee specifically testified, though, the extra wage was for "travel time," and the Court found that the "scheme of payment" bore a "definite relation to the travel involved," and therefore this was sufficient evidence to fall within the exception. *Id*. By contrast, there is no testimony in this case that the "car allowance for relay" had any relationship to the travel time, or any component of the travel, to Bluffton to pick up the Savannah Morning News. Instead, the Niversons testified that the payment was for the *service* of picking up the newspapers in Bluffton and taking them to Beaufort. The payment was not for the *time* or *travel* incidental to the commute from Savannah to Bluffton, and there is no evidence of any relationship between the payment and the commute from Savannah to Bluffton. Simply put, the "car allowance for relay" had no relationship to the *commute* from Savannah; rather, it was tied to the *service* to be performed- taking the Savannah Morning News to Beaufort. That service did not commence until Ms. Niverson actually had the newspapers in her vehicle.

Additionally, there is no evidence that the line item for "car allowance" was paid at all for the date of the accident in question. It is simply a mischaracterization of the evidence for Murphy to argue that "Starr Distributing paid the flat fee whether or not Mrs. Niverson picked up the newspapers" when there is no evidence in the record that Starr Distributing actually paid the flat fee during that pay period. (Appellant's brief, p. 10). Mischaracterization of the facts, though, does not create an issue of fact, and the trial court properly concluded that Ms. Niverson's time was not paid for or included in the wages.

II. The second exception to the going and coming rule does not apply because Ms. Niverson was not engaged in a duty or task in connection with any employment.

Under the second exception, the "duty or task exception," an employee will be considered within the scope of her employment if she is "charged with some duty or task in connection with her employment" while on the way to or coming from work. *Medlin*, *supra*. In *Whitworth v. Window World, Inc.*, an employee on his way to a window cleaning job was not performing a duty or task for work because he had no work-related duties on his way, but was instead "free to conduct personal business." 377 S.C. 637, 641, 661 S.E. 2d 333, 336 (2008). The Supreme Court determined that the purpose of the window cleaner's trip was a personal objective where he was traveling to the place where he would perform work. *Id.* Likewise, in *Wofford*, the Court of Appeals held that the plaintiff was not performing a duty or task for work at the time of his accident where he was "merely on his way to work to engage in his typical job responsibilities." *Wofford*, 415 S.C. at 161, 781 S.E.2d at 151. In this case, the evidence shows that Ms. Niverson had not yet commenced any duties or tasks associated with the delivery of papers. Rather, she was "merely on [her] way to work to engage in [her] typical job responsibilities," like the plaintiff in *Wofford*. 415 S.C. at 161, 781 S.e.2d at 151. She did not have any newspapers in her vehicle, and was not engaged on the delivery route. Neither Starr Distributing nor Arthur Niverson dictated which route she was to take during her morning commute. The accident occurred on Highway 17, prior to the turnoff to either Bluffton or Beaufort. This is the same stretch of road that she would have been traveling on regardless as to whether her destination was Bluffton or Beaufort. The service to be provided to Starr Distributing had not yet been undertaken. What required her to be on

the road at that point in time was not any task for Starr Distributing or Arthur Niverson, but, rather, the commute to get to her task.

III. The fifth exception to the going and coming rule does not apply because Ms. Niverson was not performing a special task, service, mission, or errand

Under the "special task or mission" exception, an employee is within the course and scope of her employment where she is obligated to take on tasks or perform any services requested by an employer from the time of leaving home to the end of the work day. For example, the Supreme Court in *Bickley v. South Carolina Electric and Gas* held that an electrical lineman was performing a special task during his entire workday because he was obligated to make emergency calls and perform work outside his regular work hours. *Bickley v. South Carolina Electric and Gas,* 259 S.C. 463, 471, 192 S.E. 2d 866, 870 (1972). However, where an employee is coming and going from tasks that are not unusual or special, but instead are common and customary in the course of business, these instances will not be considered within the "special task" exception. *See McDaniel v. Bus Terminal Restaurant Management Corp.*, 271 S.C. 299, 301-03, 247 S.E. 2d 321, 322-23 (1978) (Supreme Court held that cook was not within scope of employment when involved in accident while leaving regularly scheduled employee meeting because it was not unusual or "special").

Similarly, like in *McDaniel*, Ms. Niverson was not engaging in a "special task" at the time of the accident. The record does not support Murphy's contention that she was going to Bluffton to pick up the Savannah Morning News that morning. However, even if she was on the way to Bluffton, picking up the papers was not an unusual task. The relay service was a service that Ms. Niverson and Mr. Niverson had performed on a routine and regular basis in the past. It was a normal, customary aspect of their work. It was such

a routine and regular task that Murphy assumes it was being performed on the date of the accident, even when there is no evidence to support that theory.

IV. The trial court properly granted summary judgment as to the negligent supervision claim

Murphy argues that the trial court did not specifically address the negligent supervision cause of action in its motion for summary judgment. However, the trial court found 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" (Order p. 2). By finding that only Arthur Niverson had a legal relationship with Starr Distributing, the trial court did not need to conduct any further analysis on the negligent supervision claim because it was rendered inapplicable. Negligent supervision only applies in the context of an employer/employee relationship. *James v. Kelly Trucking Co.,* 377 S.C. 628, 661 S.E.2d 329 (2008). Simply put, the trial court's findings as to the relationship of the parties precludes recovery for negligent supervision.

Conclusion

For the reasons stated, the decision by the trial court should be affirmed. Additionally, Mr. Niverson also respectfully requests that this Court affirm for any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the *Final Brief of Respondent Arthur C. Niverson* complies with Rule 211(b), SCACR.

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