THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-cp-42-03915

Angie Keene, Individually and as Personal Representative of Dennis Seay, Deceased, and Linda Seay, Respondents,

v.

CNA Holdings, LLC, Appellant.

NOTICE OF APPEAL

CNA Holdings, LLC appeals the order of the Honorable D. Garrison Hill dated July 28, 2015. Appellant received written notice of entry of this order on July 28, 2015. This interlocutory order is appealable under S.C. Code Ann. § 14-3-330. *Cooke v. Palmetto Health Alliance,* 367 S.C. 167, 173-74 (App. 2005). The order finally determines a substantial matter forming a part of Appellant's defense. CNA Holdings, LLC does not oppose a Motion to Expedite the review of this matter.

July 28th, 2015

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CERTIFICATE OF SERVICE

This is to certify that I caused the foregoing **DEFENDANT CNA HOLDINGS, LLC'S NOTICE OF APPEAL** on all defense counsel of record via electronic mail and Plaintiff's counsel, via electronic mail and U.S. Mail as follows:

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This the 28th day of July, 2015.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay,	)	C/A No. 2013-CP-42-03915
Plaintiffs,	)	**ORDER**
vs.	)	
3M COMPANY., *et al.*,	)	
Defendants.	)	

In this asbestos case, Defendant CNA Holdings, LLC's ("CNA") moves to Dismiss Plaintiff's Complaint for Failure to State a Claim or in the Alternative for Summary Judgment, based on the Statutory Employee Doctrine. CNA's motions were brought under Rule 12(b)(6) and 56, SCRCP and heard on July 27, 2015. After considering the evidence of record, the arguments of counsel, and the applicable law, the Court denies the motions.

I. Facts

Plaintiffs allege Mr. Dennis Seay worked with or around various asbestos-containing materials while employed by Daniel Construction Company at Hoechst Celanese in Spartanburg, South Carolina. Mr. Seay testified in his deposition that he worked at Hoechst Celanese for Daniel Construction from 1969 until about 1978. Mr. Seay was a Daniel employee during the entire time that he worked at the Hoechst Celanese facility. As a millwright helper and millwright, Mr. Seay was responsible for repairs and preventive maintenance work on equipment at Hoechst Celanese.

Daniel was the exclusive maintenance provider at the Hoechst Celanese facility. Hoechst Celanese did not have its own maintenance or construction division before or during the time Mr. Seay worked at the facility. All maintenance work at the facility was performed by Daniel employees.

II. Issue

The question presented is whether Dennis Seay—a direct employee of Daniel—was a statutory employee of Hoechst Celanese at the time of his alleged asbestos exposure and engaged in an activity that was part of Hoechst Celanese's "trade, business or occupation," S.C. Code § 42-1-400.

III. Law/Analysis

The statutory employment concept is derived from South Carolina Code Ann. § 42-1-400. Olmstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003). That section provides,

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute *any work which is a part of his trade, business or occupation* and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as " subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C.Code Ann. § 42-1-400 (Supp.2002) (emphasis added). Our supreme court has found that this legislation "is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees." Adams v. Dawson-Paxon Co., 230 S.C. 532, 545, 96 S.E.2d 566 (1957) (emphasis added). Whether an individual is a statutory em-

ployee is not an issue of subject matter jurisdiction, but rather one of exclusive jurisdiction. Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002).

In deciding whether an employee was doing something that was "part of the trade, business or occupation" of the owner, our supreme court has devised the following disjunctive inquiry: (1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, or (3) whether the identical activity in question has been performed by employees of the principal employer. Glass v. Dow Chemical Co., 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997).

If the activity meets even one of these criterion, then the injured worker becomes a statutory employee of the owner within the meaning of the Workers Compensation Act. However, unless a court wishes to flee reality and be led down a rabbit hole of terminology it must remember that despite the three-fold test, "there is no easily applied formula", and "'the guidepost is whether ... that which is being done is or is not a part of the general, trade, business or occupation of the owner.'" Abbott v. The Limited, Inc., 338 S.C. 161, 163, 526 S.E.2d 513 (2000) (quoting Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)).

In deciding whether Hoechst Celanese can meet the first two Glass tests – i.e., whether the activity at issue was either an "important part," or a "necessary, essential, and integral part" of Hoechst Celanese's business - this court must apply Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000) and Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003). In Abbott, the court held that an employee of a common carrier who had slipped and injured himself while delivering and stocking goods which in turn were sold by a retailer did not render the worker a statutory employee of retailer. The

court reasoned that while the receipt of goods was integral to retailer's business, the actual delivery of the goods was not a "part or process" of retailer's business. Abbott, 338 S.C. at 163 ("The fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of Retailer's business.") (emphasis in original). As the supreme court later emphasized, "Abbott represents a change in this state's jurisprudence on what activity constitutes 'part of [the owner's] trade, business or occupation' under section 42-1-400." Olmstead v. Shakespeare, 354 S.C. 421, 426, 581 S.E.2d 483 (2003). In Abbott, the court had overruled two Court of Appeals cases. Abbot, 338 S.C. at 164 n.1. Expanding on Abbot, the Court in Olmstead announced that "we now overrule all prior cases to the extent they are in conflict with our holding in Abbott and now in this case." Olmstead, 354 S.C. at 427.

The court also noted that Abbott "establishes that transportation of goods is important to nearly all businesses and, that transportation of goods by a common carrier alone, without something more, does not qualify as 'part of [the owner's] trade, business or occupation' under any of the three established tests for statutory employment." Olmstead, 354 S.C. at 426.

Charles Olmstead was a truck driver engaged by his employer to pick up a load of fiberglass poles from Shakespeare's nearby plant for delivery to Shakespeare customers in Montana. As Olmstead was removing some of the poles from his flatbed trailer per Shakespeare's instruction, several poles fell off the trailer and injured him. In affirming the court of appeals' finding that Olmstead was not a statutory employee of Shakespeare, the supreme court held as follows:

> Shakespeare manufactures fiberglass products and was shipping a finished product to a customer via a common carrier. As this Court noted in *Abbott,*

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"[t]he fact that it was important to [defendant retailer] to *receive* goods does not render delivery of goods an important part of the [defendant retailer's] business" for statutory employment purposes. Likewise, the fact that it was important to Shakespeare to deliver its finished product to its customer in order to consummate a sale does not render the delivery of its products an important part of its business for purposes of statutory employment.

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Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare's products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier. Shakespeare's representative testified in his deposition that Shakespeare pays for delivery to its customer only when the order exceeds $3,000. Although delivery by common carrier was certainly important to Shakespeare's operation, it does not follow that such delivery was " 'part or process' " of its manufacturing business.

Id. at 425-26 (citations omitted).

Abbot and Olmstead teach that the three tests for statutory employment must be applied practically rather than mechanically. One could superficially say that maintenance was "important" to Hoechst Celanese's business, but that does not end the normative inquiry Glass, Abbot, and Olmstead demand. If that were true, then virtually anyone directly employed by another who worked on Hoechst Celanease property would by definition be a statutory employee, unless Hoechst Celanease asserts it engages in unnecessary work. The key question is whether the activity is an important or integral "part or process" of the subject business. With regard to maintenance work specifically, "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." Glass v. Dow Chemical Co., 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997).

The Court in Olmstead overruled "all prior cases to the extent they are in conflict with [its] holding in Abbott and now in this case." 354 S.C. at 427. Under Abbott, it is necessary to conduct a case-specific analysis, but the focus must be on what type of business the defendant conducts. Id. at 426. Olmstead acknowledged that the test does "not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged." Olmstead, 354 S.C. at 426. This interpretation is faithful to the actual, plain language of the statute, and appears to be an approach favored by many courts, including the Fourth Circuit, which has noted that courts interpreting the "trade, business or occupation" and similar statutory language have, "with a surprising degree of harmony ... agree[d] upon the general rule of thumb that the statute covers all situations in which work is accomplished which this employer ... would ordinarily do through employees." See Corollo v. S.S. Kresge, Co., 456 F.2d 306, 312 n. 8 (4th Cir. 1972) (quoting 1A Larson, Workmen's Compensation Law, § 49.12 at 859-60) (applying S.C. law)).

While Glass, Abbot and Olmstead provide the analytical framework for deciding Hoechst Celanese's motion, Chief Judge Sanders' opinion in Raines v. Gould, Inc., 288 S.C. 541, 343 S.E.2d 655 (Ct.App. 1987) is acutely relevant authority. Raines was injured while employed by a subcontractor to install an electrical system at a plant being constructed by Gould, a battery manufacturer, by a general contractor. The court observed that "[o]rdinarily construction work, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer." Raines, 288 S.C. at 543 (citations omitted).

The court acknowledged that "[i]f however a business by its size and nature is accustomed to carrying on a more or less ongoing program of construction, perhaps having a

construction division, or has handled its own construction in the past, construction work delegated to a contractor may be considered a part of its trade or business." Raines, 288 S.C. at 545 (citations omitted). Here, there is no evidence Hoechst Celanese had a maintenance division or has in the past performed maintenance projects of the size and scope Mr. Seay worked on.

The Raines court ultimately decided that the work Raines did in constructing the Gould plant was not part of Gould's trade or business. Gould, the court found, was in the business of manufacturing and selling batteries. Id. at 547. Judge Sanders' concluding language is especially pertinent to, and dispositive of, Hoechst Celanease's claims in this case:

> Although Gould has been involved with the construction of numerous facilities on property which it owns or leases and manages, the record does not indicate that it had a construction division or that any construction work was performed by its regular employees. Rather, the record indicates Gould merely "prepares the specific designs for certain parts of the facilities, or oversees such designs, approves engineering plans and, in some instances, provides supervisory personnel to provide general assistance in the contacting of the contractors and subcontractors and coordinating their activities."
>
> Furthermore, the record does not indicate the work being performed by Raines in constructing the plant for Gould was an integral part of its operations without which it cannot function. Every manufacturer must have a plant, but this fact alone does not make the work of constructing a plant a part of the trade or business of every manufacturer who engages a contractor to construct a plant. Otherwise, the employees of every contractor so engaged would be the statutory employees of every such manufacturer. We are aware of no case in any jurisdiction holding this and do not believe this is what the legislature intended when it enacted the South Carolina Workers' Compensation Act.
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> Id.

IV. Conclusion

Because the Statutory Employee defense does not apply, the court respectfully denies Defendant CNA Holdings, LLC's Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment.

IT IS SO ORDERED.

July 28, 2015

D. Garrison Hill
Circuit Judge