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.

RETURN TO RESPONDENTS' EMERGENCY MOTION TO DISMISS

To The Honorable Court Of Appeals:

The Court should deny the Respondents' motion to dismiss the appeal for the following reasons:

I.

The Court has jurisdiction to hear this appeal under S.C. Code Ann. § 14-3-330. *See Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 173-74 (Ct. App. 2005). Appellant's statutory-employer defense was brought before the trial court via a motion to dismiss or in the alternative motion for summary judg-

IV.

The circuit court has heard all of the evidence bearing on this question of law. The court's decision is based on its conclusion that Hoechst Celanese did not itself perform maintenance before or while Mr. Seay was working at its facility. All evidence concerning Hoechst Celanese's maintenance activities or lack thereof has already been placed before the circuit court and the court's ruling on the statutory employer defense is on its face final. The circuit court has not left open any possibility that it will reconsider its ruling at trial. Thus, just as in *Cooke*, the court's ruling in this case on the statutory employer defense is appealable under S.C. Code Ann. § 14-3-330.

V.

Appellant's Notice of Appeal was not filed solely to delay and avoid the trial of this matter; otherwise, Appellant would not have agreed to an expedited review. The Notice of Appeal was filed to allow this Court to decide the most significant legal issue in the case, insofar as Appellant is concerned. The Notice of Appeal was also filed because the cases cited in the lower court's order as the basis for its ruling, when applied to the actual facts of this case, do not support the denial of Appellant's motion. Appellant requests that its Notice of Appeal be accepted and that a briefing schedule to address this significant legal issue be issued.

Conclusion

The Court should deny the Respondents' emergency motion to dismiss.

This 29th day of July, 2015.

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

Respondents,

v.

CNA Holdings, LLC,

Appellant.

PROOF OF SERVICE

This is to certify that I caused the foregoing **DEFENDANT CNA HOLDINGS, LLC'S RETURN TO RESPONDENTS' EMERGENCY MOTION TO DISMISS 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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Exhibit A

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG — SEVENTH JUDICIAL CIRCUIT

ANGELA D. KEENE, Individually and as Personal Representative of the Estate of DENNIS SEAY, Deceased, and LINDA SEAY,

Plaintiffs,

v.

3M COMPANY, a/k/a/ MINNESOTA MINING & MANUFACTURING COMPANY, et al.,

Defendants.

Civil Action No. 2013-CP-42-3915

TRIAL

BEFORE THE HONORABLE D. GARRISON HILL

Day 1 Second Section (Pages 60 - 111)

DATE TAKEN: Monday, July 27, 2015

TIME BEGAN: 11:32 a.m.

TIME ENDED: 12:45 p.m.

LOCATION: Spartanburg County Courthouse
180 Magnolia Street
Courtroom
Spartanburg, South Carolina

REPORTED BY: Karen Kidwell, RMR, CRR, CCP
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I N D E X

P R O C E E D I N G S

(Clerk entered courtroom at 11:32 a.m.)

THE CLERK: We're going to go into Judge Mark Hayes' courtroom and poll the jury. We're going to ask all the jurors to line up and move this way.

That courtroom is a little smaller, so we're going to have to squeeze in a little tighter. Okay?

(Whereupon Court was not in session from 11:33 a.m. until 11:50 a.m.)

THE COURT: Keep your seats. So this is Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay and Linda Seay. Is it "see" or "say"?

MR. PANATIER: "See."

THE COURT: Seay versus 3M Company and others, 2013-CP-42-03195. And this is -- we're going to do the motion of CNA Holding LLC's to dismiss or for summary judgment based on the statutory employer doctrine and --

MS. SHOFNER: Your Honor, I've lost Chris Collier from your chambers to here. He should be right here. There he is. He's going to be handling the motion.

THE COURT: Okay. All right.

Mr. Collier.

MR. COLLIER: Your Honor, do you want me at the podium here, or do you have a preference?

THE COURT: Wherever you want to be.

MR. COLLIER: Okay. I'll come to the podium.

Good morning, Your Honor. This is CNA's motion to dismiss or, in the alternative, motion for summary judgment based on the statutory employee doctrine. You've granted this motion in past asbestos cases involving similar facts and the same law.

THE COURT: How -- was that really that similar? I mean, that was DuPont. They had a construction division, they had a history of construction activity, and they were in the construction business, pretty much, building plants all over the country.

This is a far different situation, isn't it?

MR. COLLIER: Well, yes, Your Honor. I was actually going to say that Mr. Seay's work at the Hoechst Celanese plant was even more necessary, essential, and integral because he

was doing the daily maintenance on all the equipment and the systems in the plant.

THE COURT: So CNA is in the maintenance business?

MR. COLLIER: Well, Your Honor, CNA, as I know, I believe, they manufacture polyester materials.

THE COURT: Were they in the construction business, construction maintenance business?

MR. COLLIER: Is CNA in the maintenance and construction --

THE COURT: Right, when they were here in Spartanburg.

MR. COLLIER: No, Your Honor. They manufactured polyester materials, but it's our argument that you could not manufacture and continue manufacturing polyester or any other materials without the continual maintenance and upkeep work on the systems and the equipment, which is what Mr. Seay did.

THE COURT: You probably couldn't stay in the fishing rod business too long either if you couldn't deliver your supplies by truck. But isn't that what the Court said in the Olmstead v. Shakespeare, that the delivery part of a

business, such as Shakespeare, wasn't enough to make them statutory employer truck drivers?

MR. COLLIER: Well, yes, Your Honor, that is what was said in Olmstead. But from the standpoint of actually manufacturing a product, being able to continue to manufacture a product, you have to have systems and equipment in place to be able to do that and to -- you have to perform maintenance on those systems and equipment or they're not going to continue to work after a period of time.

THE COURT: That's true of every business.

MR. COLLIER: Well, it's true in certain businesses, Your Honor.

THE COURT: Have they invented some maintenance-free business that I'm not aware of?

MR. COLLIER: I wish my house were maintenance-free, but it's not.

THE COURT: Yeah, me too.

MR. COLLIER: Your Honor, under 42-15-40, the South Carolina Workers' Compensation Act provides the exclusive remedy for employees injured in the scope of employment and excludes all other rights and remedies, and South Carolina courts have held that this rule extends

to workers who may not be directly employed but who are considered statutory employees of an owner, such as Hoechst Celanese who is contracted with an independent contractor, such as Daniel, under the Voss v. Ramco, 325 S.C. 560 case from 1997.

To obtain the protections of the South Carolina workers' compensation law, a company must subscribe to approved insurance as provided in 42-5-20, and Hoechst Celanese is provided copies of those policies.

The purpose of this legislation was described in Adams v. Davison-Paxon 230 S.C. 532 from 1957 is protecting employees of irresponsible contractors who do not provide workers' comp coverage for their employees.

THE COURT: You're not saying Daniel Corporation was irresponsible, are you, certainly?

MR. COLLIER: Your Honor, we actually -- we paid -- we reimbursed Daniel for the workers' compensation coverage on Mr. Seay, and so this is consistent with what Your Honor concluded in the 2010 Ewing case that the entire concept of statutory employment is designed to protect the

employee by assuring that workmen's compensation coverage by either the subcontractor or the general subcontractor or the owner, if the work is part of the owner's business.

And a worker's employment status, as it affects jurisdiction, as a matter of law for the Court in any dispute and facts giving rise to the issue should be resolved by the Court and not a jury under Wheeler v. Morrison Machine 313 S.C. 440 from 1993.

Under the Voss case, only one of the three following criteria must be met to conclude that the activity of an employee of a contractor is sufficient to make him a statutory employee, the first being that the activity of the subcontractor is an important part of the owner's trade or business; or the activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or the identical activity performed by the subcontractor has been performed by employees of the owner.

And so if either one of those three tests is met, the individual is considered a statutory employee.

And Hoechst Celanese would submit that it meets all three of the tests, but specifically 1 and 2; and, therefore, any doubt as to Mr. Seay's status is to be resolved in favor of coverage under the Act.

Mr. Seay testified that he was responsible for repairs to and preventative maintenance on the equipment at Hoechst Celanese and that he worked on this equipment on a daily basis, including pumps and valves and gearboxes that were used in the process and production lines.

He testified that the process lines were vital to the operation of Hoechst Celanese's business. He testified that each piece of equipment was essential to the manufacturing operation. And he testified that repairs and preventative maintenance he performed were necessary for the continued operation of the plant.

In short, he testified that the work that he was performing was necessary, essential, and an integral part of Hoechst Celanese's business. And other witnesses offered by the plaintiffs, including Mr. Thompson, mirror that testimony.

Mr. Thompson confirmed that the purpose of

Daniel's maintenance was to ensure that the Hoechst Celanese production lines remained operational. He testified that keeping the production lines operating was important to Hoechst Celanese's manufacturing business, and most telling is Mr. Seay's counsel's own question to Mr. Thompson during the plaintiffs' direct examination of him, quote, "Do you believe that the work that Dennis and you all did at the Hoechst plant, do you believe that was an integral, important part of the operation of the plant to which, if it wasn't done, it could not function?"

And Mr. Thompson answered, "Yeah."

As was true in Wheeler, maintenance and repair of equipment was necessary to the continued production of materials at Hoechst Celanese.

And Hoechst Celanese corporate representative Bruce Bowyer, who was deposed in this case and also offered an affidavit that's been attached to our motion, and he confirmed what both Mr. Seay and Mr. Thompson said, that it was essential for Hoechst Celanese to have maintenance workers on-site to maintain, repair,

and replace equipment.

He testified that maintenance and upkeep of the production lines was a regular ongoing part of Hoechst Celanese's business, and without the ongoing maintenance performed by Daniel millwrights, like Mr. Seay and Mr. Thompson, Mr. Bowyer testified that the Hoechst Celanese facility could not have functioned properly and would not have been able to continue to make products. So Mr. Seay, Mr. Thompson, and Mr. Bowyer all agree with this because it makes sense. Without maintenance to the plant, it couldn't operate.

So Hoechst Celanese would submit that it meets the first and second test under Voss, such that the work that Mr. Seay performed was an important part of Hoechst Celanese's trade or business; and also the ongoing maintenance was a necessary, essential, and integral part of Hoerscht Celanese's business under Voss.

And although I don't think it's necessary, since the first and second tests are covered, but Hoechst Celanese would also submit that it meets the third test, since Hoechst Celanese ultimately ended up hiring Daniel's maintenance

workers as its own employees. This was some number of years after Mr. Seay left.

Your Honor, there are multiple cases that are cited in our brief that establish that South Carolina courts had concluded that cases involving maintenance workers are necessary, essential, and integral to an owner's business so as to conclude that the individuals were statutory employees.

And these cases include Smith v. T.H. Snipes, 306 S.C. 289 from 1991; Gentry v. Milliken, 307 S.C. 235 from 1992; Marchbanks v. Duke Power from 190 S.C. 336 from 1939; Wheeler v. Morrison Machinery, 313 S.C. 440 from 1993; and Harrell v. Pineland Plantation, 337 S.C. 313 from 1999, among others.

And I'm sure you're familiar with those cases from prior statutory employee motions, like those in Ewing and Bumgarner, so I'm not going to go through all of them unless you want me to. But I'll note that two of the cases, Gentry and Wheeler, are particularly instructive here based on the arguments that are contained in plaintiffs' response.

Hoechst Celanese was contractually

obligated under the maintenance contract with Daniel to reimburse Daniel for workers' comp coverage. Exhibit J to our memo includes the contract provisions under Section 4(c) and specifically states that Hoechst Celanese is to reimburse Daniel for "workmen's comprehensive statutory employee liability insurance."

This is consistent with Mr. Bowyer's testimony that Hoechst Celanese paid Daniel for the workers' comp insurance.

Like Hoechst Celanese's payment to Daniel for workers' comp insurance for all millwrights that were used on its premises, Milliken, in the Gentry case, required the contractor working on its premises to obtain workers' comp coverage. Also, like Milliken's payment to the contractor in Gentry for the workers' comp coverage, Hoechst Celanese reimbursed Daniel for all of its workers' comp coverage for the millwrights.

The Court in Gentry found Gentry to be a statutory employee of Milliken in connection with the maintenance work he was performing on-site by installing scouring equipment, which was determined to be necessary to Milliken's business, like the equipment that Mr. Seay

worked on at Hoechst Celanese.

In Wheeler, the plaintiff was an asbestos abatement worker at a Springs textile mill. The Springs mill was not in the business of performing abatement work, but it was a vital component of the plant's maintenance plan.

Plaintiffs' argument in this case is that Hoechst Celanese was not in the maintenance business and thus can't claim Mr. Seay as a statutory employee. But this flies in the face of Wheeler, where the Court concluded that the plaintiff was a statutory employee of Springs because the maintenance abatement work he was performing was a necessary part of an ongoing process at the textile mill, like Mr. Seay's work at Hoechst Celanese.

Plaintiffs' response is an effort to try and get around your prior rulings in Ewing and Bumgarner.

The cases that are cited in plaintiffs' response relate to delivery drivers and transportation of goods, like you mentioned a few minutes ago. And under this line of cases, if Mr. Seay had delivered materials to Hoechst Celanese or had taken finished material from

Hoechst Celanese, he could not be considered a statutory employee of Hoechst Celanese.

But this is a far cry from the necessary, essential, and integral nature of the maintenance work that Mr. Seay performed at this plant on a day-in and day-out basis to keep the equipment and production lines running.

Plaintiffs point to Harrell in an effort to defeat our motion, but Harrell actually supports the Hoechst Celanese motion in two ways.

First, Harrell concluded that the responsibilities that the outside contractor had in relation to the property owner met both the first and second test of the statutory employee doctrine because the contractor maintained every aspect of the daily operations of the property owner's land, like Daniel did for Hoechst Celanese.

The Court stated that the first and second tests may be met if the owner otherwise, quote, would have to -- would have had to hire direct employees to complete those duties. In fact, the Court stated that, quote, their relationship is exactly the type that the statutory employer

theory is meant to cover.

This is the same relationship between Hoechst Celanese and Daniel.

Second, plaintiff misconstrues Harrell, its conclusion, with respect to an owner's workers' comp coverage requirements.

In Harrell, Pineland did not provide any workers' comp coverage to protect Harrell. That's 180 degrees difference from the facts that we have in this case where Hoechst Celanese was obligated under the contract to pay for Mr. Seay's workers' comp coverage.

Plaintiffs' citations to Harrell were taken out of context and ignore that Hoechst Celanese reimbursed Daniel for workers' comp coverage, just like DuPont did in the Ewing and Bumgarner cases in which you determined that Mr. Ewing and Mr. Bumgarner were statutory employees of DuPont.

Moreover, Hoechst Celanese has produced policies showing that it maintained workers' compensation coverage during the time period at issue, thus complying with Sections 42-5-10 and 42-5-20.

And, finally, plaintiffs point to Section

42-11-70 in an effort to suggest to this Court that plaintiff cannot file a workers' comp claim. Plaintiffs' citation is incorrect, however, as 42-15-40 governs the time frame for filing a claim. And under 42-15-40, plaintiffs have until August 8th of this year to file a workers' comp claim.

This is a covered claim under the South Carolina Workers' Compensation Act. Mr. Seay was diagnosed with an occupational disease which is covered under the Act. Nothing in 42-11-70 bars plaintiffs from filing a workers' compensation claim here. Plaintiffs have not even tried to file a workers' comp claim yet, to our knowledge, to be able to assert that they can't do it. They're jumping the gun by predicting what the commission would hold rather than filing the claim and actually having it be denied.

This Court concluded that Mr. Ewing's and Mr. Bumgarner's claims were subject to the exclusive remedy provision of the South Carolina Workers' Compensation Act, and the same facts in law apply in this instance.

Even if you accept plaintiffs'

interpretation of the interaction between 42-11-70 and 42-15-40, it does not excuse plaintiffs from first filing the workers' comp claim. Even the commission decisions that they attach to their response support our position in that regard.

In the conclusions of law sections in those decisions, the commission states that it has jurisdiction over the claims. Nothing in either decision suggests that such claims are barred from being filed, and they certainly don't confer jurisdiction to a civil court.

So as this Court found in the Ewing case in 2010 and in the Bumgarner case in 2011 that those gentlemen were statutory employees of DuPont, it should find that Mr. Seay is a statutory employee of Hoechst Celanese, thus conferring exclusive jurisdiction to the South Carolina Industrial Commission.

Mr. Seay's work was necessary, essential, and integral to the maintenance and upkeep and continued production of the Hoechst Celanese plant. Any doubt is to be resolved in favor of coverage under the South Carolina workers' compensation law, as held in Revels. And under

Gentry and Wheeler, this Court lacks jurisdiction over plaintiffs' workers' compensation claim, and the case should be dismissed as to Hoechst Celanese because it's barred by the exclusive remedy provisions of the South Carolina workers' compensation law.

Mr. Seay is a statutory employee of Hoechst Celanese, and plaintiffs' exclusive remedy is to pursue a workers' compensation claim. Whether or not coverage is granted as to Mr. Seay is a decision for the commission, not a decision for this Court. And it's the commission, not this Court, that has jurisdiction over the claim.

And because plaintiffs' common law claims are barred, any loss of consortium claim would also be barred under Lowery v. Wade Hampton, 270 S.C. 194 from 1978. And CNA would thus submit -- thus request that this Court grant its motion to dismiss or, in the alternative, motion for summary judgment.

THE COURT: All right. Thank you, sir.

MR. COLLIER: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. PANATIER: Your Honor, is it okay if I

stand here?

THE COURT: Wherever you want.

MR. PANATIER: So, honestly, I think the best thing to do is start at the end.

The Truax case, which we attached to our last response -- and we went back and forth three or four times -- I think addresses this issue squarely with very little analysis of trying to determine subjective facts about statutory employer. Truax was an asbestosis workers' compensation claim. This was 2009. I have a copy of the case. You may have it already, or I can --

THE COURT: I think we got it, yeah.

MR. PANATIER: So Truax, this was the first one we're aware of where the Workers' Compensation Commission actually analyzed the statute for whether or not there was a cognizable claim for pulmonary injury that was diagnosed more than two years after the exposure.

And they say, point blank, there is no claim. If a pulmonary disease occurs more than two years after, with the exception of ionizing radiation, that was the intent of the statute,

to disallow the claim.

And this was a case of asbestosis. This man, his last exposure was 1972. He applied 32 years later, and they said claim denied. Very clearly, bright-line rule.

He could have filed under the statute of limitations. He would have had two years beyond the two years after his exposure. So he would have had four years after his exposure to file the claim. It would have been recognized at that point. But anything after four years -- the two years post-exposure plus the statute of limitations -- is not going to be compensable.

And on -- it's a four-page decision. But on page 4 under their findings, they state that under the plain-meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute.

42-11-70 is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that was not contracted within two years of the date of the last injurious exposure and the last injurious exposure in this case, depending on what records we look at, is either

going to be '79 or '80. And so Mr. Seay would have had two years to file a claim for a disease that had not manifested.

They go on to say, "Notwithstanding the latency period of asbestos-related diseases, such as asbestosis, the legislature has never amended this provision, and its intent is abundantly explicit any doubt as to intent of the legislature to exclude any pulmonary-related diseases from compensation unless contracted within two years of the claimant's last exposure is removed when looking at the lone exception to this rule, that being for ionizing radiation.

And then they define what is contracted: "Under the plain language of 42-11-70, it is impossible to reconcile the 32-year gap in this case between the claimant's last date of employment, '72, and when he contracted this disease, i.e., became disabled in 2006."

He said -- later they say, "As a result, the claimant has not met his burden of proof in showing that the occupational disease was contracted within two years after his last exposure in 1972 under 42-11-70, and his claim is denied."

Certainly, Your Honor is not here as part of the Workers' Compensation Commission, but you can determine whether or not there is a claim for this individual and whether or not he would have relief within the workers' compensation area. But he does not, obviously, under that part of the statute.

My next point goes to whether or not Celanese was even a subscriber. Now, in Harrell, Harrell makes it very clear that it doesn't matter if the man was able to recover workers' compensation from his direct employer, which he did. They both had a duty to, both the owner of the premises and his own contractor.

In this case, based on the contract, Daniel entered a good contract where they said, Celanese you're going to pay our workers' compensation costs. That doesn't obviate Celanese's obligation to have workers' compensation. And Harrell makes that very, very clear when they discuss the dissent in the case. They say, "The dissent mistakenly looks at Harrell's situation in hindsight, denying a tort suit against Pineland because, as it turns out, Harrell successfully recovered some compensation

from Folk" -- that's the contractor, his employer -- "ignores policy behind requiring a statutory employer, as well as the direct employer to secure payment of compensation in order to guarantee tort immunity. It is true that, in this situation, Harrell may recover in both tort and in workers' compensation. However, Harrell is recovering from two separate entities, each that owed him a responsibility to secure compensation."

And they reiterate that two or three times in that case, that it doesn't matter whether or not the direct employer had workers' comp. Daniel did, and Celanese paid for it. But there's no case law to support their position that, because we reimbursed them for their costs, we no longer have an obligation to maintain workers' comp insurance.

And lastly on that issue, they don't have workers' comp insurance for the whole time, much less proof of it. What they have is they have located workers' comp insurance from 1968 through November of 1972 and again from May of '78 through May of '80. There is a five-and-a-half-year gap that Celanese has no

proof they maintained this insurance for.

So at best -- at their best case is that there would be no claim up through '72 if Mr. Seay worked through November of '72 or if he worked after May of '78. But he worked the -- continuously during that period of time right there in the middle, five and a half years. And they've supplied their policies for the early period and the later period.

But there's a five-and-a-half-year gap that there is no proof. And that's undisputed. They have an affidavit from an individual, Gary Allen, who says we believe we maintained it, but we don't have the actual proof. Harrell says you have to maintain the actual records.

Lastly, on the issue of statutory employer, most of the cases cited by Celanese on the issue of the three prongs of analysis for statutory employer are pre-Olmstead, and Olmstead made it clear, Look, we can't just analyze this on whether it's important to the business.

Certainly -- and plaintiffs agree -- the maintenance of the facility was extremely important to Celanese's business, but it wasn't

part of the business. Celanese didn't have a construction division. They didn't do construction.

And all of these cases post Olmstead have analyzed it in a way where they say, Look, even though it's important, was it part of the business?

And it was undisputed, not part of Celanese's business. And they didn't ever prior to that time -- prior to Mr. Seay's time -- do construction or maintenance. It was all done by Daniel people.

But that -- I think that that is a -- the three-prong thing is a much more subjective thing other than just -- there is no claim under the workers' compensation statute of the two years. And then it's undisputed that Celanese doesn't have the insurance for five and a half years.

THE COURT: Thank you.

MR. COLLIER: Your Honor, may I reply briefly?

THE COURT: Sure.

MR. COLLIER: As to Section 42-11-70, plaintiffs are jumping the gun and misconstruing

whether they can file a claim versus whether they can collect on a claim. Nothing in 42-11-70 bars them from filing a claim.

In the case law attached by the plaintiffs to their response, the commission states that it has jurisdiction over the claims. While the commission denied coverage in two instances, it's awarded coverage in other instances where the last exposure occurred more than two years before the claim was filed. 42-11-70 doesn't authorize plaintiffs to file a civil suit because they think or are predicting the claim will be denied.

Truax doesn't say that you can file a civil suit. Plaintiffs are essentially asking this Court to conclude that the commission would deny their claim if they did file it. It would be like, you know, filing an appeal before you receive a decision from the trial court because you think it will be denied.

Both of the decisions cited by plaintiffs, as well as the ones cited in our surreply, make it clear that the commission has the exclusive jurisdiction over these cases. It's for the commission to decide whether the plaintiffs have

a compensable claim under this act, and this Court doesn't have that jurisdiction to make that decision.

If you accept their interpretation of the interaction between 42-11-70 and 42-15-40, for anyone in South Carolina to file a workers' comp claim today for a disease related to asbestos exposure, they would have had to have last been exposed to asbestos no earlier than July 27th, 2013. That would effectively abrogate any sort of workers' comp claim related to asbestos exposure in South Carolina.

In speaking with practitioners and the staff attorney at the workers' comp office, plaintiffs' interpretation that the claim must be filed within two years of the last exposure is not how the cases are reviewed and decided in South Carolina, and workers' comp claims for asbestos exposure are still being pursued under the proper jurisdiction of the commission.

It's not within this Court's jurisdiction to determine that workers' comp coverage doesn't exist, because 42-15-40 is what governs it.

As to Hoechst Celanese's workers' comp policies on your own employees, plaintiffs are

correct that we cannot produce every policy from 1968 until 1978, but we have produced the policies that were in place when Mr. Seay started working at Hoechst Celanese and when he stopped working at Hoechst Celanese. And, frankly, I'm somewhat surprised that we were able to find the ones that we did, given the passage of more than 40 years.

But just because we can't find the remainder of them doesn't mean that they don't exist. It doesn't mean that we didn't have coverage during that period of time, as Mr. Allen stated in his affidavit.

Plaintiffs haven't put forth any evidence that we didn't have coverage during that period of time. And it should be reasonably construed that we wouldn't have just dropped workers' comp coverage for a period of five years.

Finally, with respect to your prior rulings in the Ewing and the Bumgarner cases, I don't think there's anything that could be more necessary, essential, and integral to a plant's operation than the maintenance of the equipment and the piping systems inside it.

Thank you, Your Honor.

THE COURT: Is there any evidence that Celanese employees ever did maintenance?

MR. COLLIER: They did do maintenance, yes, Your Honor, after -- we're not sure of the exact date, but at some point in time, the group of Daniels folks who were there doing the maintenance were hired on as Hoechst Celanese employees.

THE COURT: When was that?

MR. COLLIER: It was -- it was -- I don't know the exact date. It was sometime after Mr. Seay worked there. But it was in the -- it was either in the '80s -- '80s or '90s, and it hasn't been able to be clarified much further than that. But yes, Your Honor, at some point in time, all those Daniel employees were brought on the Hoechst Celanese payroll and continued to do the maintenance and upkeep work of the -- of all the pumps and valves and piping systems just like they did when -- they were just wearing a different hard hat basically.

THE COURT: Thank you. All right. I'm persuaded by the Olmstead decision which overruled quite a body of law about this statutory employer issue. And I don't find that

the maintenance here was a part of the trade business or occupation of Celanese.

The underlying test is whether the activity is an important or an integral part or process of the business. But there is no evidence that the employer here performed maintenance while Mr. Seay was employed there, on its own. So I don't believe it was part or process of Celanese's business.

If you look at cases around the country that have grappled with this language, one of which is the Fourth Circuit, which is -- noted that with a surprising degree of harmony, courts have agreed upon a general rule of thumb that the statute covers all situations in which work is accomplished which this employer would ordinarily do through employees. And I'm paraphrasing, but that's Corollo v. S.S. Kresge Company, 456 F.2nd 306.

At 312, Note 8, quoting Larson in workmen's compensation law, it was applying South Carolina law at the time and also relied on Chief Judge Sanders' opinion in Raines v. Gould, Inc., which was about construction business. But he points out that a

"manufacturer must have a plant, but this fact alone does not make the work of constructing a plant 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 statutory employees of every such manufacturer. We are aware of no case in any jurisdiction holding this and we do not believe this is what the legislature intended when it enacted the South Carolina Workers' Compensation Act."

Maintenance work equates with construction work in this context. I don't see how it meets the plain language of the statute. Even if it did, I find there is some question about the applicability of workers' compensation coverage for Celanese. There's a gap in it. Therefore, they wouldn't qualify as a statutory employer.

As to the question of whether the plaintiff here would have the right to pursue a workers' comp claim in light of Truax, I don't have any comment on that other than to say that it's not entering into my analysis here. I believe the statute says that the Workers' Compensation Act grants rights that -- I forget

the exact phrasing the legislature used, but the idea being that if a person has rights under the Act, the statutory employer doctrine can apply.

So here, there's a question about whether such rights exist because of the gap in coverage, and finding that there is a substantive right is not something I can do. That's something the workers' compensation or some higher court would have to determine. So I'm not relying on that in reaching my decision.

Okay. So I respectfully deny the motion.

MS. SHOFNER: Your Honor, I think I understand your denial and your ruling.

THE COURT: Okay.

MS. SHOFNER: But we would -- we believe that under Code 1976, Section 14330, that this is a final determination of a substantial matter or right as to Celanese on the whole or part of this action. And we would like to have a direct appeal of this order.

THE COURT: Okay.

MS. SHOFNER: And, therefore, I think we need the Court -- we would request the Court to make a final -- to draft a final order as to this issue so that we may directly appeal it to

the Court of Appeals.

THE COURT: Well, I'm certainly going to do whatever you need me to do to enable you to pursue your appellate rights. I don't know how quickly I can draft up an order when I'm getting ready to start a trial, though.

MS. SHOFNER: I mean, I guess that's the -- that's the issue here is, if it's directly appealable, then do we have to go through the trial as to us, for Celanese, while we're appealing this, since we feel it's a substantial -- it's a determination of a substantial matter for -- as to Celanese?

THE COURT: I don't know. That's an interesting question, one that's above my pay grade. I don't --

MS. SHOFNER: So -- and I guess if it is -- if it is a final order, then we can take a notice of appeal. I'm happy to draft that order for you to have tomorrow to take a look at so that we can then file our notice of appeal and not have to go forward with the trial on this issue.

MR. PANATIER: And we'll do some research to figure out whether or not it's an appealable

issue at this point as well.

MR. TIVIN: Your Honor, Mark Tivin on behalf of John Crane.

If Celanese is requesting to stay their portion -- in a sense, they're asking to stay their portion of the case, then John Crane would be severely prejudiced. The entire case has to be stayed at that point in time because it comes to questions of apportionment and other questions, and you can't do the trial half and not half, so if the stay is being granted --

MR. PANATIER: I totally disagree. There isn't any apportionment. And so the case could be tried as to John Crane or it could be tried as to Celanese. But if Celanese wants to appeal, and it's an appealable issue, then they can appeal. But I don't think that the plaintiffs' rights to their trial should be prejudiced because John Crane doesn't want to try the case anymore.

MR. TIVIN: That's incorrect. We have a right to apportion between all -- between the defendants who go to the jury. And if Celanese is -- if their portion of the action is stayed, we would not be able to apportion, to waste the

judicial resources because the case should be tried one time.

And if -- when Celanese goes, if there's -- the apportionment could never work if you try a case one at a time. Both the defendants have to be there. So if they're requesting a stay of this action so they can pursue the direct appeal, John Crane would request a stay so the entire matter could be tried at once or for apportionment purposes.

If Your Honor chooses not to stay the action and continue on with the case with Celanese here, then obviously, we -- if they appeal after any verdict. But if they're appealing now in the middle of the case, it's a waste of judicial resources and prejudicial to John Crane of not having all the defendants in the trial against which whom we could seek apportionment.

THE COURT: So, well, well, the plot thickens.

MR. PANATIER: I mean, obviously, they can put on any evidence they want to if Celanese is -- you know, call it causation to influence the jury's ultimate decision. But if they're

the only defendant at trial, then it's not apportioned to anybody else. And they would be the only defendant at trial because Celanese is gone.

So that would be -- that would be our position. But I think, obviously, we should probably look at the issue and see if it really is an appealable issue at this point.

MR. TIVIN: Exactly, Your Honor. If Celanese appeals and loses their appeal, then John Crane is prejudiced because we would have been able to apportion with them at trial, and then we'd lose that right because there's an appellate case going on while we're sitting in the exact same action while we're trying the case.

THE COURT: I don't know if it's immediately appealable. Again, that's not my issue. I mean, that's something I'll have to have ruled upon elsewhere. But I know that if you're denied a mode of trial, such as jury versus nonjury, that's immediately appealable. And I'm just trying to think out loud in terms of --

MS. SHOFNER: The case law that I found

that I believe supports our position that this is immediately appealable is Watson v. Underwood 756 S.E.2d 155 is a 2014 case. And it says that "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by Section 14-3-330 of the South Carolina code."

And an order -- and it involves -- "An order 'involves the merits' as the term is used under that section and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense."

So our defense is that we are a statutory employer. That's a substantial right. You have denied that and said that we are not. And, therefore, we believe it's immediately appealable. And -- and we would need a final order in order to file our notice of appeal that we would immediately take to the appellate court.

If you're saying that it's not your position to determine whether that is an appealable order and it's the court of appeals', then I think we have a right to the final order

so we can appeal it. Because I don't know who else would make that determination or not, unless it was you or the court of appeals.

THE COURT: I don't think I can make the determination.

MS. SHOFNER: Okay. But you know that you have indicated that you will give us a final order to this issue, correct?

THE COURT: I'll do whatever I can, Ms. Shofner, to help you efficiently pursue your appellate rights, and if you just need us to do a form order that says a form order is going to follow so you can go ahead and take it up, I'll be happy to do that. I don't want to, but, you know, the problem is, once you appeal it, I could lose jurisdiction of the issue. And if there's not a formal order out there, then the court of appeals is probably going to say, "What are we looking at here?"

So it seems to me the better thing would be just some short order that -- it's hard for me to do it. We have another motion by another defendant, for instance. It's hard for me to do it efficiently. Maybe you all can hammer it out amongst yourselves, and if it's something I

agree with, I can sign it and then you can take it up.

MR. ELLIOTT: Judge, this is James Elliott for John Crane. Just briefly, we recently had a similar issue with the Shipwatch case with Judge Dennis down in Charleston where there was an appeal taken by one party. It was the plaintiff.

And Judge Dennis likewise says, "I don't know if it's appealable or not; you got to take that up with the appellate courts." And the appellate court ultimately made the decision as to whether or not it was a proper appeal.

But there was a motion to stay the case by the other parties, and that was an issue for the trial judge to take up. It was that he had to determine whether or not that issue which was being appealed impacted the balance of the case, such that it had to be stayed.

So I think that, although the one issue about whether or not it's appealable is not your decision, but whether or not to stay the case, I believe, is a decision for Your Honor.

THE COURT: What did he do?

MR. ELLIOTT: He stayed the whole case.

THE COURT: Did he?

MR. ELLIOTT: He did.

THE COURT: Did he issue an order or just --

MR. ELLIOTT: For the stay? Yes.

THE COURT: Yes. He did?

MR. ELLIOTT: I don't remember if it was a written order. It's been a few months, but I was going to look at -- I was trying to remember the rule what happens with a stay. Sam just handed it to me.

It says, "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree, or decision on appeal and to automatically stay the relief ordered. In the appeal order, judgment, or decree, this automatic stay continues in effect for the duration of the appeal unless lifted by order by the lower court, the administrative tribunal, appellate court, or justice of appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal."

And our argument would be we would be

impacted, because regardless of whether they say we can apportion or not, we do have the right under the statute to argue apportionment. And if they're in the case, they would be on the verdict form and we could perhaps gain apportionment.

But if they're not in the case, Your Honor might rule that they can't be on the verdict form because they're not a defendant, and therefore they can't be apportioned any responsibility for any part of the verdict.

And so clearly we're directly impacted by that.

MR. TIVIN: And just as an aside, Your Honor, if you decide that you can apportion, if you allow the case to go forward and we can apportion against Celanese and they win on their appeal, then the judgment -- the apportionment wouldn't stand because they wouldn't have been a defendant at the time of trial if they prevail on their appeal.

Now, on the flip side, if you don't allow -- if you allow them to appeal and you have us go forward and you don't allow us to apportion and your order here is affirmed, then

that other prior judgment also would be prejudicial to John Crane because we would have been able to apportion.

MR. PANATIER: I have an idea. How about this? In these -- in a lot of these cases around the country, where we can apportion to people who aren't there just so the jury can apportion it, then the only person who pays anything is the trial defendant.

I'll agree you can apportion to Celanese and it's not binding on Celanese. If they come back and we -- we're not going to argue res judicata.

So I'll agree. You can apportion to Celanese, try the case against Celanese, put on the case against Celanese. We'll try the case against you, and the jury can apportion between you and Celanese. And I'll agree it's not res judicata as to Celanese.

THE COURT: Who are you asking?

MR. PANATIER: I'm just saying -- I'm proposing that. I'm proposing that to the Court so that -- one, so that the Seay family gets a trial.

THE COURT: Yeah.

MR. PANATIER: So John Crane's concerns about apportionment are addressed. And Celanese's concerns about being able to appeal without having some res judicata as to their apportionment is resolved. So I think that's a proposal that would work. The only prejudiced party would be us because we're agreeing to apportion to a nondefendant.

THE COURT: Well --

MR. TIVIN: Your Honor, that could lead to inconsistent verdicts.

THE COURT: Maybe I'm missing something, but what jumps out to me about that proposal is, if Celanese is gone, how are they going to present their defense? And is John Crane -- do they have the right to a stay instead of having some empty chair that -- even though it's part of a proposal, I don't know. It would have to be by consent, obviously, but I'm having a hard time thinking that through.

MR. PANATIER: If it's by consent, I think that ends the discussion.

THE COURT: It usually does.

MR. PANATIER: Unless Mark wants to try the case right now; but, anyway, I'm putting it

out there as an option.

THE COURT: I appreciate your creativity. Okay.

MR. PANATIER: So should we brief the issue on appealability? I guess -- well, if you're saying it's not your call, I guess it's just going to be --

MS. SHOFNER: I think what I will try to do is, today and tonight, to draft a final order based on your ruling and submit it to them to see if we can agree on it. And if we get close, we can submit it to you and see if you agree on it for a final resolution. And then we may file our notice of appeal once we get the final order signed by you. Does that sound like a proper way to proceed at this point?

THE COURT: That's fine.

MR. TIVIN: Based on that, Your Honor, John Crane would make a motion to stay the proceedings until their appeal is handled, however the appeal gets handled.

MR. PANATIER: And just for clarification, then, I would just like to -- Ms. Shofner just said "may appeal." I think a motion for stay would be ripe if you are appealing.

MS. SHOFNER: I mean, I think we're definitely appealing. I think --

MR. PANATIER: I just wanted to -- all right. Your Honor?

THE COURT: Yeah.

MR. PANATIER: Okay. I'm thinking again. May I -- perhaps I could take a shot in the dark at resolving with Celanese, so maybe I could just chat with their people and just see if there's a way to do it before any stay.

THE COURT: Yeah, why don't you do that while we do Ms. Techman's motion. Okay. Thank you.

MR. PANATIER: Okay.

THE COURT: Well, I guess you can't. Maybe that was --

MS. TECHMAN: Judge, this will be very brief.

THE COURT: Yeah.

MS. TECHMAN: Jennifer Techman, on behalf of Spirax-Sarco. Judge, I know the Court has our summary judgment motion. It is what we call a no-evidence motion in this litigation. Certainly, on the heels of what we just went through, this will look very, very -- pretty

black and white to you.

In this case, we had testimony from Mr. Seay, and we had testimony from three of his former coworkers. None of those individuals gave any testimony regarding my client. So what we don't have is direct or even circumstantial evidence that we were at the job site.

As the Court is aware, the plaintiffs' burden is to put forth evidence of exposure to the product. And the South Carolina Supreme Court has said that the exposure must be sufficient. The sufficiency is measured by the frequency, regularity, proximity test.

Here, we have none of that. And I will save the remainder of my time for rebuttal.

THE COURT: Thank you, ma'am.

Mr. Paul?

MR. PAUL: Thank you, Your Honor. What we have here is Mr. Seay was a millwright in the Spartanburg plant. As part of his responsibilities as a millwright, he was performing maintenance on pumps and valves which were part of an entire steam system. There would have been thousands of steam traps located within the facility where he was doing

maintenance on pumps and valves. We have testimony from coworkers in a plant owned by Celanese in the Shelby, North Carolina, plant that put Spirax-Sarco steam traps all throughout the plant. Although Mr. Seay did not directly work on steam traps, it's plaintiffs' allegations that he would have been with and around maintenance on the Spirax-Sarco steam traps throughout the plant for roughly the eight or nine years that he was at the plant.

THE COURT: All right. I'll grant the motion for summary judgment.

MS. TECHMAN: Thank you, Judge. I have an order.

I'll make sure that gets filed. Thank you, Judge.

THE COURT: Okay. Good to see you.

All right. So why don't we just go ahead and break for lunch, give you time to talk. And do you all -- is there any way you can find out if Judge Dennis --

MR. ELLIOTT: Issued a written order?

THE COURT: -- did a written order, if you've got any other authority about this stay.

MR. ELLIOTT: I can call the office. It

might have been a verbal.

MS. NETTLES: We'll check.

THE COURT: He might have barked -- I mean, spoken --

MR. ELLIOTT: It was a summary judgment motion against the plaintiff with one party, and the plaintiff appealed that. And he just -- similar -- I mean, it was the reverse, but similar to here, in that he granted it.

Does that make sense?

THE COURT: Okay. We'll just come back at 2:00. Give everybody -- all right. Thank you.

(Court adjourned for Day 1 at 12:45 p.m.)

CERTIFICATE OF REPORTER

I, Karen Kidwell, Registered Merit Reporter and Notary Public for the State of South Carolina at Large, do hereby certify: That the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that it is a correct transcript of the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 27th day of July, 2015.

Karen Kidwell,
Registered Merit Reporter
Notary Public
State of South Carolina at Large