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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUL 29 2015

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-42-3915

RECEIVED

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Angie Keene, Individually and as Personal
Representative of the Estate of Dennis Seay,
Deceased, and Linda Seay, Plaintiffs/Respondents,

SC Court of Appeals

v.

CNA Holdings, LLC, Defendant/Appellant.

EMERGENCY MOTION TO DISMISS

This emergency motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. Respondents Angie Keene, Individually and as Personal Representative of the Estate of Dennis Seay, and Linda Seay move this Court to dismiss the Notice of Appeal by Appellant CNA Holdings, LLC ("CNA"). The appeal is from an unappealable order and is being taken solely to delay and avoid the trial of this matter, which was scheduled to commence July 27, 2015. For the reasons stated below, this Court should expedite its review and dismiss this appeal to avoid that delay. Because the trial court, the parties, their witnesses, and the jury pool are all waiting for jury selection and the start of trial, it is requested that CNA's

response to this motion be due by 9:00am on Wednesday, July 29, 2015, and Plaintiffs' reply be due by noon on the same date.

BACKGROUND AND PROCEDURAL POSTURE

This is a tort action involving the death of Dennis Seay from malignant mesothelioma, a cancer uniquely caused by exposure to asbestos. Plaintiffs/Respondents have brought negligence claims against CNA for exposing Seay to asbestos at the Hoechst Celanese plant in Spartanburg, South Carolina, during Seay's work there as a contract employee working on equipment maintenance in the 1970s. The case has been assigned to the Honorable D. Garrison Hill.

Trial was set to begin against CNA and one other defendant, John Crane, Inc., on July 27, 2015. A jury pool has been summoned and sworn, and jury selection was scheduled to begin the morning of July 28, 2015.

Prior to trial, Judge Hill held a hearing on CNA's "Motion to Dismiss for Failure to State a Claim, or in the Alternative, Motion for Summary Judgment Based on the Statutory Employee Doctrine." CNA argued that the case should be dismissed under Rule 12(b)(6), SCRPC, because Seay is a statutory employee whose exclusive remedy is under the South Carolina Workers' Compensation Act, S.C. Code Ann. § 42-1-540. Judge Hill disagreed, finding that CNA was not Seay's statutory employer because CNA is not a maintenance company. Further, CNA could not rely on the exclusivity provision because it failed to demonstrate that it had complied with the requirement that it maintain workers' compensation insurance during all the years of Seay's work at the Hoechst Celanese plant. S.C. Code Ann. § 42-5-40; *Harrell v. Pineland Plantation, Ltd.*, 337 S.C.

313, 325-26, 523 S.E.2d 766, 772 (1999).

Immediately following the denial of CNA's motion, CNA announced in open court that it planned to take an interlocutory appeal of the adverse ruling. CNA agreed to expedited proceedings on its appeal given that a jury pool has already been sworn and is waiting for jury selection. Judge Hill agreed to hold the jury pool until noon on Wednesday, July 29, 2015, to give Plaintiffs/Respondents an opportunity to request that this Court dismiss CNA's Notice of Appeal. Plaintiffs/ Respondents, their attorneys, and their witnesses are now waiting in Spartanburg to resume trial later this week, pending resolution of this Motion to Dismiss.

CNA's Notice of Appeal is an attempt to obtain a delay in the trial set to begin this week. This Court should not allow CNA to benefit from this ill-considered attempt to use this State's appellate procedures for delay.

ARGUMENT

CNA's appeal to this Court is improper because Judge Hill's order denying its motion to dismiss for failure to state a claim, or in the alternative, motion for summary judgment, is not an immediately appealable order. South Carolina law clearly holds that denials of motions to dismiss brought under any part of Rule 12(b), SCRPC, are not immediately appealable. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). *Breland* held that, "this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRPC motion." *Id.* In particular, rulings on the denial of a Rule 12(b)(6) motion, as CNA has brought here, cannot be immediately appealed. *See McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526,

443 S.E.2d 539, 540 (1994); *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986).

Similarly, orders denying summary judgment are not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (S.C. 1994). This is because “[a] denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” *Id.* at 477, 443 S.E.2d at 380. “The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict.” *Id.*

In its Notice of Appeal, CNA relies on *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), for its contention that this case is immediately appealable. *Cooke* is inapposite because it involved a ruling after a hearing on the merits. *See id.* at 171-73, 624 S.E.2d at 441-42. This Court noted that while a ruling on a motion to dismiss is not immediately appealable, “the issue before the circuit court was not brought via a motion to dismiss; rather, both parties consented to have a non-jury hearing on the merits of the Hospital’s exclusivity defense.” *Id.* at 173, 624 S.E.2d at 442. This Court therefore held that the ruling was an appealable interlocutory order. *See id.* at 174, 624 S.E.2d at 442.

The Supreme Court has already decided that a defendant cannot immediately appeal the denial of a motion to dismiss brought on the basis that the plaintiff is a statutory employee whose exclusive remedy is under the Workers’ Compensation Act. *See Woodard v. Westvaco Corp.*, 319 S.C. 240, 242-43, 243 n.2, 460 S.E.2d 392, 394, 394 n.2 (1995), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416,

567 S.E.2d 231 (2002). In *Woodard*, a motion was brought as a summary judgment motion in the trial court, and this Court and the Supreme Court thought that the issue was better brought as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), SCRPC. *See id.* at 242, 460 S.E.2d at 393. The Supreme Court later overruled that part of *Woodard* and held that a motion raising the exclusive remedy provision of the Workers' Compensation Act does not raise a question of subject matter jurisdiction. *See Sabb*, 350 S.C. at 422 n.2; 567 S.E.2d at 234 n.2. But the core holding of *Woodard*, that the denial of a motion raising the exclusivity defense cannot be immediately appealed, remains good law. Such a conclusion is bolstered by the Court's reasoning that such motions are not immediately appealable given that motions to dismiss and motions for summary judgment are not final determinations that can be immediately appealed. *See Woodard v. Westvaco Corp.*, 319 S.C. at 243 n.2, 460 S.E.2d at 394 n.2. Consequently, such orders do not "involve the merits" in a way that would allow an interlocutory appeal:

[W]hile such orders may involve a substantial right, they do not fall under § 14-3-330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. For the same reason, such orders do not "involve the merits" under § 14-3-330(1).

Id.

Under this controlling case law, there is no validity to CNA's contention that Judge Hill's order denying its motion on the exclusivity defense is immediately appealable. Like any other motion to dismiss under Rule 12(b), SCRPC, or motion for summary judgment under Rule 56, SCRPC, this is not an immediately appealable order.

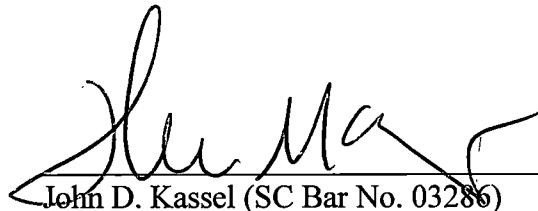
Under *Woodard*, the order cannot be considered an appealable interlocutory order involving the merits of the case.

CONCLUSION

Plaintiffs/Respondents respectfully urge the Court to dismiss CNA's Notice of Appeal for failure to appeal an immediately appealable order. Given that trial is supposed to start this week, Plaintiffs/Respondents further request an expedited review of this Motion to Dismiss.

Respectfully submitted,

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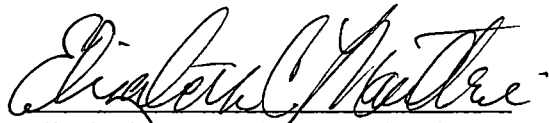
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PROOF OF SERVICE

I certify that on the 28th day of July 2015, I served the Emergency Motion to Dismiss on Defendant CNA Holdings, LLC by depositing a true and correct copy of same in the United States Mail, postage prepaid, return address clearly printed on the envelope and addressed to their attorneys Elaine Shofer, H. Lane Young and S. Christopher Collier, 303 Peachtree Street, NE, Suite 4000, Atlanta, GA 30308-3243.



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