

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

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Case No. 2013-cp-42-03915

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Angie Keene, Individually  
and as Personal Repre-  
sentative of Dennis Seay,  
Deceased, and Linda  
Seay,

Respondents,

v.

CNA Holdings, LLC,

Appellant.

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RETURN TO RESPONDENTS' EMERGENCY MOTION TO DISMISS

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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-

ment. In ruling on the motion, the circuit court considered evidence submitted by the parties. Thus, the court ruled not on the motion to dismiss but instead on the motion for summary judgment. *See Baird v. Charleston County*, 333 S.C. 519, 527 (1999).

## II.

Denial of a summary judgment motion ordinarily is not appealable. *Bal-lenger v. Brown*, 313 S.C. 476, 476-77 (1994). But in ruling on Appellant’s motion for summary judgment, the circuit court did precisely what the circuit court in *Cooke* did: It “weighed the evidence and concluded the exclusivity provision did not apply because [Mr. Seay] was [not] a statutory employee” of Appellant. *Cooke*, 367 S.C. at 174.

## III.

The circuit court in *Cooke* weighed the evidence in a “non-jury hearing on the merits” of the defendant’s exclusivity defense. *Id.* The hearing in this case was also a “non-jury hearing on the merits” of the defendant’s exclusivity defense. (Exh. A). There is no meaningful distinction between the hearing in *Cooke* and the hearing in this case. And in reaching its holding, the circuit court, just like the circuit court in *Cooke*, “finally determined a substantial matter forming a part of [Appellant’s] defense . . . .” *Id.* (internal quotation marks omitted). Thus, “the order is appealable.” *Id.*

#### 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.

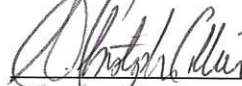
Appellant's Notice of Appeal was not filed solely to delay and avoid the trial of this matter; otherwise, Appellant would not have agreed to an expedited review. The Notice of Appeal was filed to allow this Court to decide the most significant legal issue in the case, insofar as Appellant is concerned. 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 29<sup>th</sup> day of July, 2015.

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**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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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.

1 THE COURT: Okay. All right.

2 Mr. Collier.

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

5 THE COURT: Wherever you want to be.

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

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

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

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

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

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

3 THE COURT: So CNA is in the maintenance  
4 business?

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

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

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

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

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

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

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

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

12 THE COURT: That's true of every business.

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

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

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

19 THE COURT: Yeah, me too.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25          Mr. Thompson confirmed that the purpose of

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

14 And Mr. Thompson answered, "Yeah."

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

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

1 and replace equipment.

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

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

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

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

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

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

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

25 Hoechst Celanese was contractually

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

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

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

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

1 worked on at Hoechst Celanese.

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

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

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

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

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

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

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

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

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

1 theory is meant to cover.

2 This is the same relationship between  
3 Hoechst Celanese and Daniel.

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

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

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

20 Moreover, Hoechst Celanese has produced  
21 policies showing that it maintained workers'  
22 compensation coverage during the time period at  
23 issue, thus complying with Sections 42-5-10 and  
24 42-5-20.

25 And, finally, plaintiffs point to Section

1 42-11-70 in an effort to suggest to this Court  
2 that plaintiff cannot file a workers' comp  
3 claim. Plaintiffs' citation is incorrect,  
4 however, as 42-15-40 governs the time frame for  
5 filing a claim. And under 42-15-40, plaintiffs  
6 have until August 8th of this year to file a  
7 workers' comp claim.

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

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

25 Even if you accept plaintiffs'

1 interpretation of the interaction between  
2 42-11-70 and 42-15-40, it does not excuse  
3 plaintiffs from first filing the workers' comp  
4 claim. Even the commission decisions that they  
5 attach to their response support our position in  
6 that regard.

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

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

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

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

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

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

22 THE COURT: All right. Thank you, sir.

23 MR. COLLIER: Thank you, Your Honor.

24 THE COURT: Yes, sir.

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

1 stand here?

2 THE COURT: Wherever you want.

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

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

14 THE COURT: I think we got it, yeah.

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

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

1 to disallow the claim.

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

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

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

19 42-11-70 is abundantly clear in its intent  
20 to disallow compensation for disability or death  
21 for an occupational disease of a pulmonary  
22 nature that was not contracted within two years  
23 of the date of the last injurious exposure and  
24 the last injurious exposure in this case,  
25 depending on what records we look at, is either

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

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

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

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

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

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

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

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

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

19 And lastly on that issue, they don't have  
20 workers' comp insurance for the whole time, much  
21 less proof of it. What they have is they have  
22 located workers' comp insurance from 1968  
23 through November of 1972 and again from May of  
24 '78 through May of '80. There is a  
25 five-and-a-half-year gap that Celanese has no

1 proof they maintained this insurance for.

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

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

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

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

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

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

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

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

20 THE COURT: Thank you.

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

23 THE COURT: Sure.

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

1 whether they can file a claim versus whether  
2 they can collect on a claim. Nothing in  
3 42-11-70 bars them from filing a claim.

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

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

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

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

4 If you accept their interpretation of the  
5 interaction between 42-11-70 and 42-15-40, for  
6 anyone in South Carolina to file a workers' comp  
7 claim today for a disease related to asbestos  
8 exposure, they would have had to have last been  
9 exposed to asbestos no earlier than July 27th,  
10 2013. That would effectively abrogate any sort  
11 of workers' comp claim related to asbestos  
12 exposure in South Carolina.

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

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

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

1 correct that we cannot produce every policy from  
2 1968 until 1978, but we have produced the  
3 policies that were in place when Mr. Seay  
4 started working at Hoechst Celanese and when he  
5 stopped working at Hoechst Celanese. And,  
6 frankly, I'm somewhat surprised that we were  
7 able to find the ones that we did, given the  
8 passage of more than 40 years.

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

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

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

25 Thank you, Your Honor.

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

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

9 THE COURT: When was that?

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

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

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

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

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

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

1 "manufacturer must have a plant, but this fact  
2 alone does not make the work of constructing a  
3 plant part of the trade or business of every  
4 manufacturer who engages a contractor to  
5 construct a plant. Otherwise, the employees of  
6 every contractor so engaged would be statutory  
7 employees of every such manufacturer. We are  
8 aware of no case in any jurisdiction holding  
9 this and we do not believe this is what the  
10 legislature intended when it enacted the South  
11 Carolina Workers' Compensation Act."

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

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

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

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

11 Okay. So I respectfully deny the motion.

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

14 THE COURT: Okay.

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

21 THE COURT: Okay.

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

1 the Court of Appeals.

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

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

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

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

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

1 issue at this point as well.

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

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

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

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

1 judicial resources because the case should be  
2 tried one time.

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

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

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

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

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

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

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

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

25 MS. SHOFNER: The case law that I found

1 that I believe supports our position that this  
2 is immediately appealable is Watson v. Underwood  
3 756 S.E.2d 155 is a 2014 case. And it says that  
4 "The determination of whether a party may  
5 immediately appeal an order issued before or  
6 during trial is governed primarily by Section  
7 14-3-330 of the South Carolina code."

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

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

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: What did he do?

25 MR. ELLIOTT: He stayed the whole case.

1 THE COURT: Did he?

2 MR. ELLIOTT: He did.

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

5 MR. ELLIOTT: For the stay? Yes.

6 THE COURT: Yes. He did?

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

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

25 And our argument would be we would be

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

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

12 And so clearly we're directly impacted by  
13 that.

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

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

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

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

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

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

20 THE COURT: Who are you asking?

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

25 THE COURT: Yeah.

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

9 THE COURT: Well --

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

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

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

23 THE COURT: It usually does.

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

1 out there as an option.

2 THE COURT: I appreciate your creativity.

3 Okay.

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

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

17 THE COURT: That's fine.

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

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

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

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

5 THE COURT: Yeah.

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

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

14 MR. PANATIER: Okay.

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

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

19 THE COURT: Yeah.

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

1 black and white to you.

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

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

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

16 THE COURT: Thank you, ma'am.

17 Mr. Paul?

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

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

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

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

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

17 THE COURT: Okay. Good to see you.

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

22 MR. ELLIOTT: Issued a written order?

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

25 MR. ELLIOTT: I can call the office. It

1 might have been a verbal.

2 MS. NETTLES: We'll check.

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

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

10 Does that make sense?

11 THE COURT: Okay. We'll just come back at  
12 2:00. Give everybody -- all right. Thank you.

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



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