

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-001603

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

v.

CNA Holdings, LLC, Defendant/Appellant.

**PLAINTIFFS/RESPONDENTS' REPLY IN SUPPORT OF
EMERGENCY MOTION TO DISMISS**

To The Honorable Court of Appeals:

Respondents' Emergency Motion to Dismiss should be granted because Defendant/Appellant CNA Holdings, LLC, has attempted to appeal an unappealable order.

As Judge Hill's order of July 28, 2015, states, he was deciding motions brought under Rule 12(b)(6) and 56, SCRPC. Longstanding South Carolina law holds that denials of motions brought under Rule 12(b) are not immediately appealable. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000); *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). Neither are denials of motions brought under Rule 56, SCRPC. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167-168, 580 S.E.2d 440, 443-444 (2003); *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (S.C. 1994); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011).

CNA attempts to circumvent this established law by relying on *Cooke v. Palmetto Health Alliance*, a case that was decided after a non-jury trial by the circuit court. 367 S.C. 167, 173, 624 S.E.2d 439, 442 (Ct. App. 2005). *Cooke* specifically contrasted the situation before it as procedurally distinguishable from a motion to dismiss, which would not have been immediately appealable. *Id.* It explained that, “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.*

Indeed, the record in *Cooke* bears out that the parties in that case asked the circuit court for a “hearing on the merits” on the defendant’s workers’ compensation exclusive remedy defense. **Exhibit A**, Record on Appeal, *Cooke v. Palmetto Health Alliance*, Civil Action No. 01-CP-40-4814, at 0024. Rather than a motion to dismiss or motion for summary judgment, the parties made a “Consent Motion for Non-Jury Trial on the Merits of Jurisdiction.” *Id.* The hearing transcript also shows that the parties disclaimed that the matter was before the court on summary judgment, and was instead brought for a decision on the merits. *Id.* at 0044. Plaintiffs respectfully ask the Court to take judicial notice of the contents of the appellate record in *Cooke*. See *Shores v. Weaver*, 315 S.C.

347, 355, 433 S.E.2d 913, 917 (Ct. App. 1993)¹; *Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (1993).

Cooke is thus not inconsistent with the Supreme Court's ruling that the denial of a motion raising the exclusivity defense is not immediately appealable because it does not address the merits. 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).

Of course, here CNA's motion was decided via a motion to dismiss or motion for summary judgment. There is absolutely no dispute about that. CNA even makes the point in its Return that Judge Hill's ruling is properly characterized as a ruling on a summary judgment motion because he considered evidence submitted by the parties. Denials of summary judgment motions, even those that have the effect of striking a defense, are not immediately appealable. As held in *Ballenger*, "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." 313 S.C. at 476, 443 S.E.2d at 380. There are no exceptions to this rule. This Court has observed that in *Olson*, "the supreme court unequivocally held the denial of summary judgment was *never subject to review*," even when other issues are properly on appeal. *AJG Holdings*, 392 S.C. at 167, 708 S.E.2d at 222 (citing *Olson*, 354 S.C. at 168, 580 S.E.2d at 444) (emphasis added).

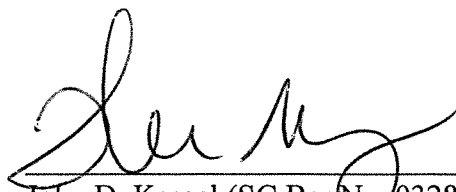
¹ *Shores* remains good law under *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 627, 594 S.E.2d 275, 276 (2004).

Contrary to CNA's attempt to categorize Judge Hill's summary judgment ruling as a final order on the merits, the fact is that the parties are about to start a trial on Plaintiffs' claims that decedent Dennis Seay developed mesothelioma from exposure to asbestos at the Hoechst Celanese plant in Spartanburg. Trial will be proceeding against a manufacturer of the asbestos products used by Mr. Seay at Hoechst Celanese, defendant John Crane, Inc. It entirely possible that additional evidence relevant to the statutory employer issue will be presented during the course of the trial. CNA will have numerous opportunities to revisit its statutory employer argument, including by way of a motion for directed verdict under Rule 50(a), SCRPC, and if Plaintiffs/Respondents prevail at trial, by way of a motion for judgment notwithstanding the verdict and motion for new trial under Rules 50(b) and Rule 59, SCRPC, respectively. If CNA then wishes to raise its exclusivity defense on appeal, it can do so along with any other appellate issues raised by the parties.

WHEREFORE, because the circuit court's July 28, 2015 denial of CNA's motion to dismiss and motion for summary judgment is not an immediately appealable order, CNA's Notice of Appeal should be dismissed.

Respectfully submitted,

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EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ALISON RENEE LEE,
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 01-CP-40-4814

John E. Cooke and Barbara Cooke,

RESPONDENTS,

versus

Palmetto Health Alliance d/b/a
Palmetto Richland Memorial Hospital,
and Latisha C. Corley,

APPELLANTS.

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**JOHN E. COOKE AND BARBARA COOKE V. PALMETTO HEALTH ALLIANCE
D/B/A PALMETTO RICHLAND MEMORIAL HOSPITAL AND LATISHA C. CORLEY**

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ATTORNEYS FOR PLAINTIFFS

1 THE COURT: THIS IS NUMBER 24 ON THE ROSTER. IT'S
2 DOCKET NUMBER 01-CP-40-4814, JOHN COOKE AND BARBARA COOKE
3 VERSUS PALMETTO HEALTH ALLIANCE, ET AL. REPRESENTING THE
4 PLAINTIFF IS?

5 MR. RANSOM: ROB RANSOM.

6 MR. NICHOLS: I'M JOHN NICHOLS, YOUR HONOR.

7 THE COURT: OKAY. I'M SORRY. I DIDN'T LOOK AND SEE
8 WHO EVERYBODY WAS.

9 AND REPRESENTING THE DEFENDANT IS?

10 MR. BUTLER: DREW BUTLER. I HAVE WITH ME, YOUR
11 HONOR, MY LAW CLERK, KENYA CARVER (PHONETIC). SHE'S HERE
12 WITH US TODAY TO OBSERVE AND HELP ME.

13 THE COURT: NICE HAVE YOU WITH US.

14 CLERK: THANK YOU.

15 THE COURT: ALL RIGHT. AS I UNDERSTAND IT, WHAT THIS
16 IS IS MORE OR LESS A MOTION HEARING; IS IT NOT, ON
17 JURISDICTIONAL ISSUES? I MEAN, ASSUMING THAT IF I --

18 MR. BUTLER: YOUR HONOR, THIS NOT A MOTION. IT WAS
19 ORIGINALLY A MOTION FOR SUMMARY JUDGMENT. WE'RE HERE
20 TODAY ON THE MERITS OF WHETHER OR NOT MR. AND MRS.
21 COOKE -- I GUESS MR. COOKE QUALIFIES AS A STATUTORY
22 EMPLOYEE OF THE HOSPITAL; AND, THEREFORE, BARRED UNDER
23 WORKMEN'S COMPENSATION.

24 THE COURT: WHICH IS A LEGAL DEFENSE; IS IT NOT, SO
25 IT'S, I GUESS --

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0044

1 MR. NICHOLS: THAT'S RIGHT, YOUR HONOR. MR. BUTLER
2 IS RIGHT. WE'RE HERE TODAY TO DECIDE THE MERITS OF THAT.
3 IT'S A QUESTION OF LAW ANYWAY, SO IT WOULD BE FOR YOUR
4 DECISION. BUT WE DECIDED TO TEE THIS ISSUE UP BEFORE WE
5 GO FURTHER WITH THE CASE, SINCE THIS ISSUE MAY DECIDE
6 THE -- WILL OBVIOUSLY DECIDE THE FUTURE COURSE OF THE
7 CASE.

8 THE COURT: OKAY.

9 MR. RANSOM: THAT'S RIGHT.

10 THE COURT: AND SO IT'S SOMETHING THAT -- A DEFENSE
11 THAT'S BEEN RAISED BY THE DEFENDANT?

12 MR. BUTLER: YES, YOUR HONOR. WHILE WE'RE HERE ON
13 THAT -- I GUESS, CONSIDER THE AWKWARDNESS OF WHERE WE
14 STAND. BUT WE'RE HERE UNDER THE PREPONDERANCE OF THE
15 EVIDENCE STANDARD AND NOT ONE THAT WOULD NORMALLY BE
16 PRESENT UNDER SUMMARY JUDGMENT.

17 IF IT ALSO HELPS THE COURT, RECENT SOUTH CAROLINA
18 SUPREME COURT HAS SPOKEN TO THIS ISSUE AND HAS SAID THAT
19 THERE IS NO DIFFERENT STANDARD INVOLVED WHEN WEIGHING --
20 WHEN THE EXCLUSIVE REMEDY PROVISION, STATUTORY EMPLOYEE IS
21 USED AS A SHIELD OF LIABILITY, RATHER THAN AN INCLUSIVE
22 STATUTE, WHEN SOMEONE IS TRYING TO GAIN WORKERS'
23 COMPENSATION.

24 IS THAT A FAIR ASSESSMENT?

25 MR. NICHOLS: YES, YOUR HONOR, I THINK THAT'S

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0045

1 CORRECT. I MEAN, YOU WILL BE JUDGING THIS --

2 MR. RANSOM: BY THE MERITS.

3 MR. NICHOLS: -- ON THE MERITS STANDARD -- STANDARD
4 OF PROOF FOR A STANDARD.

5 MR. BUTLER: FOR WHAT IT'S WORTH, YOUR HONOR, I THINK
6 THE PLAINTIFF ALSO RAISED IN HIS COMPLAINT THAT HE WAS NOT
7 AN EMPLOYEE OF THE HOSPITAL. THEREFORE, IT WOULD BE UP TO
8 THE PLAINTIFF TO PROVE THE ALLEGATIONS OF THIS COMPLAINT.

9 THE COURT: WELL, THAT'S WHY IT SEEMS TO COME UP AS A
10 MOTION TO DISMISS THE CASE OR WHETHER IT'S FOR SUMMARY
11 JUDGMENT OR WHETHER IT'S TO DISMISS, CLAIMING THAT THERE'S
12 A REASON WHY THE CASE CANNOT GO FORWARD. AND I DIDN'T --
13 THAT'S WHY I DIDN'T CONSIDER IT TO BE A HEARING ON THE
14 MERITS WHERE THERE WOULD BE TESTIMONY FROM AN INDIVIDUAL
15 WHO WOULD PROVIDE INFORMATION ABOUT WHO HIS EMPLOYER WAS
16 AND THE CONTRACT, AND ALL THAT INFORMATION.

17 MR. RANSOM: MAY IT PLEASE THE COURT, YOUR HONOR.
18 THE ISSUE IS SUBJECT MATTER JURISDICTION. SO, OBVIOUSLY,
19 THE COURT HAS THE POWER TO INQUIRE INTO THE FACTS, AND IN
20 FACT, DETERMINE ANY DISPUTED FACTUAL ISSUE.

21 WE DON'T HAVE ANY LIVE WITNESSES, BUT WE ARE
22 SUBMITTING SOME DOCUMENTS AND ALSO SOME DEPOSITIONS.

23 SO THAT WILL CONSTITUTE THE EVIDENTIARY RECORD. THAT
24 WAS THE PURPOSE OF HAVING IT ON THE NON-JURY ROSTER SO
25 THAT WE COULD HAVE AN EVIDENTIARY HEARING. BUT THE ISSUE

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1 IS SUBJECT MATTER JURISDICTION.

2 MR. BUTLER: ESSENTIALLY, YOUR HONOR, WE CAME BEFORE
3 THE COURT ORIGINALLY UNDER A MOTION FOR SUMMARY JUDGMENT
4 BUT FELT THAT THE PLAINTIFF HAD SOME FACTUAL ISSUES IN
5 THIS COURT. AND HAD THE PLAINTIFF RAISED THEIR OWN MOTION
6 FOR SUMMARY JUDGMENT, WE HAD SOME FACTUAL ISSUES IN OUR
7 CORNER.

8 SO WE FELT THAT BRINGING IT TO YOU ON THE MERITS WAS
9 A WAY TO, YOU KNOW, APPROACH THIS IN THE BEST WAY.

10 THE COURT: ALL RIGHT. SO I STILL DON'T KNOW WHO I
11 GET TO HEAR FROM FIRST.

12 MR. RANSOM: I'M SORRY, YOUR HONOR, I DIDN'T HEAR
13 YOU.

14 THE COURT: I STILL DON'T KNOW WHO I GET TO HEAR FROM
15 FIRST. I MEAN --

16 MR. RANSOM: YOUR HONOR, OUR POSITION IS THAT THE
17 JURISDICTIONAL ISSUE IS ONE THAT'S BEEN RAISED BY WAY OF
18 DEFENSE, AND SO I THINK THE PARTY WHO IS CHALLENGING THE
19 COURT'S JURISDICTION HAS THE BURDEN OF PROVING THAT THERE
20 IS NO JURISDICTION.

21 MR. BUTLER: THIS MAY JUST BE SEMANTIC. WE'RE BOTH
22 PREPARED TO GO.

23 WE WOULD ARGUE THAT IT'S AN ALLEGATION RAISED IN THE
24 COMPLAINT, AND IT'S NOT AN AFFIRMATIVE DEFENSE THAT WE'VE
25 RAISED, IT'S SIMPLY A DEFENSE. HE'S ASKING US TO

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1 ESSENTIALLY PROVE A NEGATIVE, WHICH -- WHICH WE CAN'T.

2 THE COURT: WELL, I TELL WHAT, I'LL MAKE THE
3 DEFENDANT GO FIRST, BECAUSE I THINK IT IS THE DEFENSE'S
4 BURDEN TO SHOW THAT THE COURT DOES NOT HAVE JURISDICTION.
5 THE ALLEGATIONS, AT LEAST, CONTAINED WITHIN THE COMPLAINT
6 SEEM TO AT LEAST PROVIDE THE COURT WITH -- THERE IS SOME
7 PRIMA FACIA EVIDENCE THROUGH THE ALLEGATIONS. I KNOW
8 ALLEGATIONS ARE NOT FACTS, BUT THEY'RE -- YOU KNOW, TO
9 CHALLENGE MY JURISDICTION, YOU'VE GOT TO RAISE SOMETHING
10 THAT CHALLENGES THE JURISDICTION. SO --

11 MR. BUTLER: DO YOU CARE FOR ME TO GO FIRST, YOUR
12 HONOR?

13 THE COURT: YES, SIR.

14 MR. BUTLER: WE'LL HAVE A CHANCE TO RESPOND ONCE THE
15 PLAINTIFF --

16 THE COURT: YES, YOU WILL.

17 MR. BUTLER: JUST A MOMENT, YOUR HONOR.

18 THE COURT: YES.

19 (PAUSE.)

20 MR. BUTLER: BEFORE I BEGIN, YOUR HONOR, I DO WANT TO
21 MAKE SURE THAT THE COURT IS AWARE THAT WE HAVE
22 SUBMITTED -- BOTH PLAINTIFF AND DEFENDANT HAVE SUBMITTED
23 MEMORANDUMS IN SUPPORT OF THEIR CASE.

24 I'D ALSO LIKE TO POINT OUT THAT THE DEPOSITIONS THAT
25 WE'RE GOING TO BE REFERRING TO IN THIS MATTER HAVE ALSO

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM SPARTANBURG COUNTY

D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-42-3915

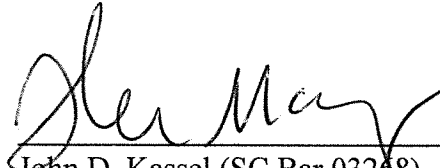
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PROOF OF SERVICE

I certify that on the 29th day of July 2015, I served the RESPONDENTS' REPLY 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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