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.

MOTION TO RECONSIDER ORDER DISMISSING APPEAL

To The Honorable Court Of Appeals:

The Court should reconsider its order dismissing this appeal for the following reasons:

I.

The cases holding that an order denying a motion to dismiss is not appealable do not apply here. In ruling on the Appellant's Motion to Dismiss or in the Alternative Motion for Summary Judgment, the circuit court considered evidence submitted by the parties. This means the portion of the motion

requesting dismissal fell by the wayside, and the court *necessarily* ruled on the motion's request for summary judgment. *See Baird v. Charleston County*, 333 S.C. 519, 527 (1999). This raises the following question: Is there any legally-significant difference between the circuit court's ruling here and the circuit court's appealable ruling in *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 173-74 (Ct. App. 2005)? The answer is a clear "NO." If it were "YES," then the lesson to be learned would be that a defendant seeking to prove it is a statutory employer should call its moving paper a "Motion for Non-Jury Evidentiary Hearing" instead of a "Motion for Summary Judgment," because the purely semantic difference determines whether the resulting order is appealable.

II.

It is true that denial of a summary judgment motion ordinarily is not appealable. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338 (2002) (discussing an exception to the non-appealability rule). The reason is that the ruling does not establish the law of the case, and the issue thus may be raised again at a later stage of the proceedings. *McLendon v. S. Carolina Dept. of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2 (1994). The same may, of course, be said of the interlocutory ruling on the statutory employer issue in *Cooke*. By their very nature, interlocutory rulings of any type may be reconsidered and set aside by the trial court before final judgment. Yet this

Court nevertheless concluded that the indisputably interlocutory ruling in *Cooke* was appealable under S.C. Code Ann. § 14-3-330.

III.

The difference between this case and *Cooke* cannot be the *mode* of disposition. The trial court in *Cooke* weighed evidence in a "non-jury hearing on the merits" of the defendant's exclusivity defense. *Id.* at 174. In ruling on Appellant's motion for summary judgment, the circuit court did precisely the same thing: It conducted a non-jury hearing and "weighed the evidence and concluded the exclusivity provision did not apply because [Mr. Seay] was [not] a statutory employee" of Appellant. *Id.*

IV.

The only difference between this case and *Cooke* is that here the non-jury evidentiary hearing was instigated by a motion asking for "summary judgment," instead of a "motion for hearing on the merits to determine whether 'the exclusive jurisdiction and exclusive remedy' was with the workers' compensation commission or with the circuit court." *Cooke*, 367 S.C. at 171. That difference cannot be legally significant for this simple reason: *The results in the two cases are identical.* In both cases, the circuit court heard the evidence bearing on a question of law and issued an interlocutory order that, in theory, could be revisited until rendition of final judgment. But in reality, the courts' rulings in both cases were final dispositions of the law question before the court. Having heard all the relevant evidence, neither court was

going to revisit the matter. That is why the court permitted an appeal in *Cooke,* and that is why it should permit an appeal in this case.

V.

As a matter of law, the Respondents' claims are barred by the exclusivity provision of the workers' compensation statute, and the circuit court erred in ruling to the contrary. An appeal from the circuit court's denial of summary judgment is appropriate to protect Appellant from the trouble, time, and expense of an unnecessary trial. *See Davis v. Lunceford*, 287 S.C. 242 (1985) (permitting appeal from denial of summary judgment to end protracted litigation). If the title of Appellant's trial court motion is the reason the Court distinguished *Cooke*—and as shown above there is no other basis *to* distinguish *Cooke*—the Court should look beyond the motion's title to its substance. Just as in *Cooke*, the substance of the Appellant's summary judgment motion was a "motion for hearing on the merits to determine whether 'the exclusive jurisdiction and exclusive remedy' was with the workers' compensation commission or with the circuit court." *Cooke*, 367 S.C. at 171.[1]

VI.

CNA Holdings, LLC, does not oppose an expedited review of this matter.

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[1] If there is some other reason *Cooke* is distinguishable, it would be helpful to the defense bar to know what it is. That way, in future cases, counsel will know how to ensure a right of immediate appeal from an order erroneously denying a defendant's motion to be deemed a statutory employer.

Conclusion

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. The Court should reconsider its order dismissing the appeal and reinstate the appeal.

This 3rd day of August, 2015.

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PROOF OF SERVICE

This is to certify that I caused the foregoing **Defendant CNA Holdings, LLC's Motion to Reconsider Order Dismissing 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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