



# The South Carolina Court of Appeals

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September 24, 2015

The Honorable M. Hope Blackley  
PO Box 3483  
Spartanburg SC 29304-3483

## REMITTITUR

Re: Angela D. Keene v. CNA Holdings, LLC  
Lower Court Case No. 2013CP4203915  
Appellate Case No. 2015-001603

Dear Clerk of Court:

The parties filed a joint consent request for this Court to send the remittitur. Accordingly, the above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

Enclosure

cc: Erin Elaine Shofner, Esquire  
Theile Branham McVey, Esquire  
John D. Kassel, Esquire  
The Honorable D. Garrison Hill

# The South Carolina Court of Appeals

Angela D. Keene, Individually and as Personal  
Representative of the Estate of Dennis Seay, Deceased,  
and Linda Seay, Respondents,

v.

CNA Holdings, LLC, Appellant.

Appellate Case No. 2015-001603

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## ORDER

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The appellant filed a notice of appeal from a pretrial order<sup>1</sup> of the circuit court denying its motion to dismiss pursuant to Rule 12(b)(6), SCRCP, and its alternative motion for summary judgment pursuant to Rule 56, SCRCP. After considering whether the deceased plaintiff was a statutory employee at the time of his asbestos exposure, the circuit court found he was not a statutory employee whose exclusive remedy falls under the South Carolina Workers' Compensation Law, S.C. Code Ann. § 42-1-10, *et. seq.* The respondents filed a motion to dismiss the appeal as interlocutory. After considering the motion to dismiss, the return, and the reply, we dismiss the appeal.

Generally, the denial of a motion to dismiss is not immediately appealable. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (holding the right of appeal arises from and is controlled by statutory law); S.C. Code Ann. § 14-3-330 (1976 & Supp. 2014) (allowing for immediate appeal of an interlocutory order in certain situations); *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (interpreting section 14-3-330 and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case

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<sup>1</sup> The parties requested expedited review of the respondent's motion to dismiss because the trial court, parties, witnesses, and jury pool are all ready to commence the trial scheduled to begin July 27, 2015.

and the issue raised by the motion can be raised again at a later stage of the proceedings and, therefore, is not directly appealable). It is well-settled that an order denying summary judgment is never reviewable on appeal. *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010).

In *Woodard v. Westvaco Corp.*, the Supreme Court of South Carolina found interlocutory an appeal from the denial of a motion for summary judgment concluding the plaintiff was not a statutory employee. 319 S.C. 240, 242-43, 460 S.E.2d 392, 393-94 (1995). The Court affirmed the Court of Appeals' conclusion that the motion for summary judgment was more appropriately categorized as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, then noted a Rule 12(b)(1) motion to dismiss does not fall into any of the categories of immediately appealable interlocutory orders under section 14-3-330. *Id.* *Woodard* was subsequently overruled by *Sabb v. South Carolina State University*, where the Court disagreed with the characterization of the issue as one of subject matter jurisdiction. 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). Based on the Court's reasoning in *Sabb*, the present motion is properly not categorized as a motion to dismiss for lack of subject matter jurisdiction. When deciding whether a plaintiff is an employee subject to the Workers' Compensation Law, the Court reasoned that the inquiry is whether the Workers' Compensation Law provides the exclusive remedy for the injury. *Id.* "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Id.* A tort action such as this alleging negligence resulting in the plaintiff's death from malignant mesothelioma is part of the general class of cases which the court of common pleas has jurisdiction to hear. *See id.* Therefore, the question before this Court is whether an appeal from the circuit court's decision that the Act does not provide an exclusive remedy is immediately appealable.

The denial of a motion to dismiss pursuant to Rule 12(b)(6), SCRCPP, is not immediately appealable. *See Levi v. Northern Anderson Cnty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (2014) ("The denial of a motion to dismiss [] under Rule 12(b)(6), SCRCPP . . . [is] not immediately appealable."); *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012) ("Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRCPP, is not immediately appealable."); *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) ("The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case."); *cf. Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005) ("To involve the merits, an order 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . .'") (*quoting*

*Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)); *id.* at 173, 624 S.E.2d at 442 ("[T]he 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."); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, \_\_ S.C. \_\_, 773 S.E.2d 144 (2015) (declining to constrain review of appealability based upon the way an order is styled and looking instead to the effect of an interlocutory order). Accordingly, this appeal is dismissed and remanded to the circuit court for further proceedings. The remittitur will be sent as provided in Rule 221(b), SCACR.



, J.

FOR THE COURT

Columbia, South Carolina

**FILED**

July 30, 2015 JAK

cc:

Erin Elaine Shofner, Esquire  
Theile Branham McVey, Esquire  
John D. Kassel, Esquire  
James Elliott, Esquire  
Samia H. Nettles, Esquire  
The Honorable D. Garrison Hill