

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  
Appellate Case No. 2016-000227

**RECEIVED**  
JAN 31 2019  
SC Court of Appeals

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

v.

CNA Holdings, LLC,..... Appellant.

**Reply in Support of Motion For Leave to Provide  
Unpublished Decisions to the Court**

Appellant CNA Holdings hereby files this Reply in support of its Motion for leave to provide unpublished decisions to the Court. Appellant filed this motion rather than simply submit the federal cases to this Court to review as it saw fit because it suspected the Respondent might take the position it has. Respondent's position is overly technical and should be rejected. The spirit of the rules do not prohibit this Court from reviewing the unpublished federal court cases for whatever persuasive value they may have.

The rules for citation of unpublished federal district court opinions are not the same as Rule 208, SCACR and do not perform the same function as those controlled by Rule 268, SCACR. Whether published or not, federal district court cases are never binding.<sup>1</sup>

<sup>1</sup> See, e.g., *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. BP Amoco P.L.C.*, 319 F.Supp.2d 352, 362 n. 6 (S.D.N.Y. 2004) ("Whether a district court decision is reported in the Federal Supplement is insignificant in the modern era of computerized legal research. District judges may decide to

Moreover, Federal District Judges have complete discretion as to whether opinions are published in the Federal Supplement. *See* Hon. Douglas O. Tice Jr., *Published Opinions, Revisited*, Am. Bankr. Inst. J., Feb. 2008, at 46, 47 (explaining that West's Federal Supplement includes district court decisions which the issuing court designates for publication **and** which West selects via its editorial decision making, but noting that West will take into account where the judge explicitly designates an opinion as "not for publication"); K. K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. App. Prac. & Process 397, 400 (2001) (noting that each federal judge "decides what to submit for publication," and the publishers look to the Court's website to determine what they want to publish" in the Federal Supplement).

In the South Carolina appellate courts, however, the published/unpublished designation serves a specific purpose. The Appellate Court Rules generally require that opinions be published and appear in the official reports. *See generally* Rule 220(a), SCACR. The exception to this in the rules is that a memorandum opinion is permitted where, "in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value," and one or more of the following is dispositive of the issues submitted:

- (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous;
- (B) that the evidence to support a jury verdict is or is not insufficient;
- (C) that the order of an administrative agency is or is not supported by

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publish or not publish a given decision in West's bound volumes for any number of reasons, but the fact of publication in hard copy does not make a district court decision any more or less precedential or persuasive than one that is only published electronically."); *Miner v. Clinton Cnty.*, No. 8:06-CV-728 (GLS/RFT), 2009 WL 2156969, at \*2 (N.D.N.Y. July 16, 2009) ("Contrary to plaintiffs' counsel's contention, the fact that [a district court opinion] was not published in the Federal Supplement is entirely immaterial to its weight.").

such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.

Rule 220(b)(1), SCACR; see also S.C. Code Ann. § 18-9-280 (same). The state rules thus give the court less discretion and publication is the norm unless a case is unremarkable.

Here, the Court should consider the federal cases identified by Appellant because they involve the same issues and arguments as this matter and they reflect other South Carolina jurists' assessment of those arguments. Nothing in the South Carolina Appellate Court Rules prohibits the Court from granting leave for Appellant to submit them. It appears Respondent opposes Appellant's request because it does not want the Court to see how the Federal District Judges responded to and assessed the arguments made.<sup>2</sup>

Therefore, Appellant respectfully requests leave to present the Court with copies of these cases<sup>3</sup> and any subsequent unpublished decisions on these issues.

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**SC Court of Appeals**

January 31, 2019

<sup>2</sup> Counsel for the Respondent, Attorney McVey, requested that the undersigned Attorney Brown provide copies of the decisions to her prior to Respondent's opposition to this motion, which was done.

<sup>3</sup> Previously, the Appellant had represented the four decisions were from four different federal district court judges. The correct number is three different judges, and Appellant apologizes to the Court for that error.

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-42-03915  
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Representative of the Estate of Dennis Seay, Deceased,  
and Linda Seay, .....

Respondents,

v.

CNA Holdings, LLC, .....

Appellant.

**PROOF OF SERVICE**

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for CNA Holdings, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Reply in Support of Motion For Leave to Provide Unpublished Decisions to the Court**

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\_\_\_\_\_  
Kelli Diamond Martin  
Sr. Administrative Assistant

Dated: January 31, 2019.

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SC Court of Appeals



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January 31, 2019

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SC Court of Appeals

**Hand Delivered**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia SC 29201

RE: Angie Keene, as Personal Representative of the Estate of Dennis Seay and Linda Seay, Individually v. 3M Company, et al.  
Civil Action No. 2013-CP-42-03915  
Appellate Case No. 2016-000227  
Our File No. 46697/01501

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of a *Reply in Support of Motion For Leave to Provide Unpublished Decisions to the Court* in the above-referenced matter. We would appreciate it if you would file the original and return a clocked copy to us via our office's courier.

By copy of this letter to all counsel, we are hereby serving them with a copy of the above referenced pleading.

Very truly yours,

Blake T. Williams

BTW:kdm

Enclosures

cc: Theile B. McVey, Esquire  
Blake A. Hewitt, Esquire

The Honorable Jenny Abbott Kitchings  
January 31, 2019  
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