

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefler Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2018-000618

James Coleman Sizemore, as Personal Representative of the Estate of
James Calvin Sizemore, Decedent,Respondent,

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley Power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc., Defendants,

Of which Resolute FP US, Inc. is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of
Charlotte Gaye, Smith,Respondent

v.

CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CNA

Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation, Defendants

Of which Resolute FP US, Inc. is the Appellant.

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STATEMENT OF THE ISSUES

- I. Under Rule 241 of the South Carolina Rules of Appellate Procedure, the service of a notice of appeal automatically stays only those “matters decided in the order, judgment, decree or decision on appeal” and stays only “the relief ordered in the appealed order, judgment, or decree or decision.” Jean Hofer Toal, Chief Justice of the South Carolina Supreme Court, Retired, acting as Circuit Court Judge, denied Resolute’s motion for a stay premised upon a separate, unrelated appeal by another defendant. Did Justice Toal act within her discretion in denying the motion for stay?
- II. Are the circuit court’s orders denying a stay, denying summary judgment, and denying a motion to dismiss immediately appealable?
- III. Did the circuit court properly deny Resolute’s motion to dismiss Mr. Sizemore’s case where the record establishes that Mr. Sizemore is not a statutory employee of Resolute?
- IV. Did the circuit court properly deny Resolute’s motion for summary judgment where the record establish that Resolute owed a duty to Mrs. Smith for her asbestos-related disease and death?

STATEMENT OF THE CASE

There are two underlying lawsuits in this case; they are maintained by the heirs of family members who died from mesothelioma which they contracted from asbestos-containing products at the paper mill of Appellant Resolute (formerly Bowater). Specifically, James Sizemore and Charlotte Smith each died from exposure to asbestos from Bowater. The underlying case of each is as follows.

- I. **Decedent James Sizemore was exposed to and died from asbestos at Bowater.**

James Sizemore was exposed to asbestos during his work as a pipefitter and millwright at various facilities throughout South Carolina and Louisiana. [*Sizemore Comp.*] Mr. Sizemore's work included the maintenance and repair of turbines and boilers. [*E.g.*, Ex. A to MTD Opp. at 31:18-42:2.] He was called in to repair the boiler tubes at various locations because this was not work that was typically done by the normal maintenance crew. [*Id.* at 141:18-142:7.] Mr. Sizemore was specifically trained and certified to perform boiler repairs, which is required by South Carolina law. [*Id.* at 142:1-143:6.] The sites where he worked, such as Bowater, needed Mr. Sizemore to come in from the outside to do the boiler tube repairs because the sites did not have people who were doing the types of boiler work that Mr. Sizemore was doing—they were not trained or certified to do the work. [*Id.* at 140:25-142:7, 143:2-6.]

Mr. Sizemore worked as a pipefitter and millwright at Bowater 40 to 50 times. [Ex. A to MTD Opp. at 78:15-79:6.] He worked on the digesters, tanks, paper machines, boilers, and pipe leading into that equipment; he welded boiler tube and headers; he rolled tubes and boilers. [Ex. B to MTD Opp. at 1261:3-15.] While Mr. Sizemore was doing this specialized work at Bowater, Bowater employees “would be doing things that other maintenance men do such as replacing valves, working with contractors, running the tool room, electrical, a lot of things. Anything that the maintenance man would normally do the Bowater employees was doing the maintenance.” [Ex. B to MTD Opp. at 1270:18-21.] That is to say, Bowater employees were doing standard maintenance work, not the specialized work that Mr. Sizemore was performing. [*See id.*] Mr. Sizemore's work at Bowater required him to tear insulation off the boilers, turbines, and digesters, and he would breathe the dust from that insulation. [Ex. B to MTD Opp. at 81:15-82:3, 85:20-86:21; Ex. A to MTD Opp. at 31:18-42:2.]

Resolute's corporate representative testified that Bowater's primary business purpose was the manufacture of paper and market pulp. [Ex. D to MTD Opp. at 58:16-18.] Resolute conceded that outside contractors, such as Mr. Sizemore's employer, Daniel, worked on Bowater's technically challenging and highly specialized pieces of equipment, including boilers, steam headers, and steam piping in the powerhouse. [*Id.* at 65:13-67:12.] Bowater's corporate representative testified that even though Bowater had a maintenance department, the employees were not responsible for the same tasks that were performed by contractors like Mr. Sizemore: for example, a Bowater maintenance pipefitter would have no reason to be doing any repairs or maintenance on pumps or valves. [Ex. E to MTD Opp. at 217:10-218:1.]

II. Decedent Charlotte Smith was exposed to and died from asbestos from Bowater.

From 1967 to 1991, Charlotte Smith lived with her husband, Lewis Childers. [Smith Compl.] Mr. Childers was exposed to asbestos from insulation during his career as an insulator. [*Id.*] One of the facilities where he worked was the Bowater paper mill, where he insulated steam pipes and valves. [Ex. 1 to MSJ Opp. at 16:25-17:6, 18:15-19.] He cut the insulation "every day, continuously" to make it fit. [*Id.* at 21:14-21, 28:23-29:2, 36:15-37:18.] Much of the insulation contained asbestos. [*Id.* at 40:3-7.] Cutting the insulation produced "quite a bit" of dust that got "everywhere," including "all over" Mr. Childers' clothes. [*Id.* at 26:1-4, 27:2-28:15.]

Mr. Childers also mixed a high temperature "mud," which was labeled "asbestos." [*Id.* at 61:17-63:6.] Pouring the mud into a bucket produced dust which got on Mr. Childers. [*Id.*]

When he was at Bowater Mr. Childers was not provided with training or information concerning work with asbestos insulation, he was not told that he needed to get the dust off before he went home, and there was no procedure for workers to clean up before returning home from Bowater. [*Id.* at 22:20-23:9, 28:16-20, 64:24-65:4.]

Mr. Childers wore regular clothes to work and wore the same clothes home. [*Id.* at 23:5-16.] He witnessed his wife, Charlotte Smith, launder his work clothes when he got home. [*Id.* at 32:15-33:6.] She would have to shake out the clothes; dust would come off the clothes and into the air. [*Id.* at 32:15-33:6, 35:18-36:25.] After doing the laundry, Mrs. Smith would sweep up, which stirred up more dust in the air. [*Id.* at 34:6-21, 36:1-3.] Mrs. Smith testified that she would inhale the dust from her husband's clothes. [Ex. 2 to MSJ Opp. at 169:7-16.] Mrs. Smith did this procedure of shaking out her husband's work clothes and inhaling the dust from them three to four times per week for 20 years. [*Id.* at 170:20-171:17.]

III. The circuit court sanctions Covil Insulation.

On February 23, 2018, the circuit court sanctioned Covil for its repeated discovery abuses by striking Covil's pleadings in three cases—*Sizemore*, *Smith*, and a case not at issue in this appeal, called *Howe*. [2/23/18 Orders in *Sizemore* and *Smith*.] On March 1, 2018, Covil commenced an appeal in those three cases, which were consolidated under Appellate Case Number 2018-00385. The Covil appeal was fully briefed by the parties as of December 6, 2018.

IV. The circuit court denies Resolute's motion for a stay.

After Covil filed its notice of appeal, Resolute moved for a stay pursuant to Rule 241, SCACR. [Motion to Stay.] Resolute argued that Covil was a necessary party to the trial. [*Id.*] Plaintiffs pointed out that defendants have no right to determine who is or is not a co-defendant at trial; defendants thus have no basis on which to seek a stay of a trial when a co-defendant files an appeal. [Plaintiffs' Response to Motion for a Stay.]

At a hearing on March 9, 2018, the circuit court denied the motion to stay. [3/9/18 Trans. at 111.] Relying on opinions from the South Carolina Supreme Court, the circuit court explained:

[B]ecause of the *Smith vs. Tiffany* and *Machin vs. Carus Corporation* cases, it matters not that Covil is not in this case because Covil's responsibility is not some kind of comparative responsibility, as is argued, that the jury has to determine. The jury has one thing that they can use to determine anybody that is not here and that is the empty chair. Whether it would apply to Covil's particular situation, I have no idea. We'll find out when the case is tried, but there is no disadvantage because of what our law says about how absent parties or settling defendants or appealing defendants or people who've never been named are treated. They're not on the verdict form. They are not to be – the jury is not asked to compare their responsibility to those that are in the case. That's all forbidden by a very clear decision of the South Carolina Supreme Court and, therefore, I would deny any motion to postpone these cases because of Covil's situation.

[3/9/18 Trans. at 103:11-104:3.]

V. The circuit court denies Resolute's motion to dismiss Mr. Sizemore's case against it.

Resolute moved to dismiss Mr. Sizemore's case, arguing that Mr. Sizemore is classified as a "statutory employee" pursuant to South Carolina's Worker's Compensation Act thus making litigation pursuant to the Act his family's exclusive remedy. [MTD.] Plaintiff argued that Resolute failed to show that it has immunity under the exclusive remedy provision of the Act as it had not demonstrated that Mr. Sizemore was a statutory employee. [MTD Opp.]

On March 9, 2018, the circuit court heard argument on Resolute's motion to dismiss Mr. Sizemore's case against it. [3/9/18 Trans. at 175-84.] The court found that Mr. Sizemore was not a statutory employee of Resolute and denied the motion to dismiss. [*Id.* at 183-84.] The court pointed out that Mr. Sizemore was "a specialty employee or contractor who contracted for specialty services with Bowater. That's the classic definition of someone who is not a statutory employee." [*Id.* at 178-79.] Moreover, in contrast to Mr. Sizemore's boiler work, the court found that Bowater was "not in the business of servicing boilers and pipes." [*Id.* at 179.]

VI. The circuit court denies Resolute's motion for summary judgment in *Smith*.

Resolute sought summary judgment in the *Smith* case on the basis that as a premises owner, it allegedly owed no duty to Charlotte Smith. [MSJ.] Plaintiff pointed out that South Carolina law imposes a common law duty not to injure reasonably foreseeable third parties, which would include family members of those who work on Resolute's premises. [MSJ Opp.] Plaintiff further maintained that Resolute owed a duty created by the Occupational Safety and Health Administration ("OSHA") regulations that required employers to take specific precautions to protect family members from asbestos exposure as early as 1971. [*Id.*]

On March 9, 2018, the circuit court heard argument on Resolute's motion. [Trans. at 168-75.] The circuit court found that under South Carolina precedent, "[i]f Bowater Resolute, or Bowater at that time, had knowledge that asbestos was something that could (A) cause lung disease and (B) could be carried home on the clothes and impact third parties, particularly those who are in very regular contact with their employees, then that created the foreseeability that our court discussed in *Hardy* of danger to third parties from their conduct." [*Id.* at 175:1-7.] Finding that Resolute owed a duty to Mrs. Smith, the circuit court denied the motion for summary judgment. [*Id.* at 174-75.]

VII. Resolute appeals.

On April 5, 2018, Resolute filed notices of appeal in *Sizemore* and *Smith*. The appeals were consolidated.

On April 17, 2018, Plaintiffs moved to dismiss the appeals as the challenged orders were not immediately appealable. [MTD Appeals.] On June 25, 2018, this Court granted the motions to dismiss the consolidated appeal. In so doing, this Court cited *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006), which held that an order granting a motion to stay is not

immediately appealable and expressly overruled *Dill v. Moon*, 14 S.C. 338 (1880), which held a refusal to stay an action was immediately appealable.

On July 10, 2018, Resolute filed a petition for rehearing of the dismissal of the appeals.

On September 27, 2018, this Court granted the petition and reinstated the appeals.

ARGUMENT

I. The circuit court did not abuse its discretion in denying the stay.

A. Standard of review

The granting of a stay is discretionary and should be exercised with caution after balancing competing interests. *Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 153, 625 S.E.2d 227, 233 n.2 (Ct. App. 2006), *rev'd on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007). “An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.” *Id.* (quoting *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999)).

B. There was no automatic stay.

Resolute’s argument is premised upon its misperception that there was an automatic stay in place. On the contrary, “the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” Rule 241, SCACR. Accordingly, matters that are stayed are only those that are actually decided in the order, judgment, decree or decision on appeal. *Id.* Further, the relief that is stayed is only that which was actually ordered in the appealed order, judgment, or decree or decision. *Id.*

Resolute contends that Covil's appeal created an automatic stay of the *Sizemore* and *Smith* lawsuits against Resolute. Covil's appeal pertains to a sanction against Covil, and Covil only. It has no bearing on the lawsuits against Resolute. Put otherwise, the matters at issue in the order from which Covil appeals do not pertain to Resolute or the lawsuits against Resolute, and the relief in the order from which Covil appeals does not pertain to Resolute or the lawsuits against Resolute.

The only portion of the lawsuits that is being appealed by Covil pertains to Covil. Meanwhile, the circuit court "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Rule 241, SCACR. Indeed, it is well established that nothing in the South Carolina Appellate Court Rules "shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. *See, e.g., Arnal v. Fraser*, 371 S.C. 512, 641 S.E.2d 419 (2007) (trial court retained jurisdiction to order parents to pay child's educational expenses while appeal from divorce decree was pending, where issue of educational expenses was not addressed in final decree, and therefore was not affected by appeal). As in *Arnal*, the circuit court retained jurisdiction over all remaining aspects of the *Sizemore* and *Smith* cases while Covil's appeal proceeded in this Court. Issues pertaining to non-Covil defendants were not addressed in the ruling against Covil, and therefore the circuit court retained jurisdiction over the lawsuits against the non-Covil defendants. Resolute cannot show how the circuit court abused its discretion in choosing to retain its jurisdiction over matters that had not been decided and that were not on appeal.

C. Resolute does not control fault apportionment or setoff.

Resolute complains that going forward without Covil will somehow prejudice it. On the contrary, Resolute does not have any “right” to have fault apportioned to other defendants. As it acknowledges, only trial defendants are allocated fault at trial under settled law. S.C. Code Ann. § 15-38-15; *Smith v. Tiffany*, 419 S.C. 548, 559-60, 799 S.E.2d 479, 485 (2017). Resolute has no right to determine who is a trial defendant. It is plaintiff that chooses what parties to sue and whether to settle before trial.

Resolute itself concedes that it is the plaintiff, and not the defendant, that controls the parties named as defendants in a case. *See* Appellant’s Br. at 18 n.6; *see also Smith v. Tiffany*, 419 S.C. 548, 563, 799 S.E.2d 479, 487 (2017) (“this right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years”); *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) (the right of the plaintiff to choose his defendant is a substantial right); *Chester v. South Carolina Department of Public Safety*, 388 S.C. 343, 345, 698 S.E.2d 559 (2010) (“It is well-settled that a plaintiff has the sole right to determine which co-tortfeasors(s) she will sue.”). It is likewise the plaintiff who chooses whether to accept a reasonable settlement offer before trial, thereby determining the amount of any setoff of the jury verdict. S.C. Code Ann. § 15-38-15(E).

Because Resolute has no right to determine who is or is not a co-defendant at trial, it has no basis on which to seek a stay of trial when a co-defendant files an appeal. In seeking a stay, Resolute attempts to circumvent South Carolina law and policy that allows plaintiffs the choice of what defendants to seek a verdict against at trial. Granting a stay under such circumstances would have encouraged and even incentivized co-defendants to appeal any manner of pre-trial rulings as a tactic for delaying trial. Such gamesmanship should not be permitted. For this

reason, too, the circuit court's refusal to grant a stay was a sound exercise of discretion, was properly based on the interests of justice, and should not be disturbed.

Finally, it bears noting that even if this Court accepts Resolute's argument that the Covil appeal has ramifications for the current actions, South Carolina courts have found that the circuit court retains jurisdiction over the matters not appealed even where the appeal may have significant consequences for the case presided over by the circuit courts. *See, e.g., Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) (after defendants' timely appeal of the jury's verdict, trial judge had jurisdiction to determine attorney's fee award to plaintiffs where plaintiffs had requested attorney's fees prior to the appeal and defendants failed to appeal the propriety of awarding attorney's fees); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) (finding circuit court retained jurisdiction over motion to compel workers' compensation payments even where issue of awarding them was on appeal, where the motion to compel payments is a separate issue from the propriety of awarding them in the first place). Accordingly, to the extent that the Covil appeal might have any relation to the personal injury lawsuits, the circuit court is nevertheless correct to proceed with the personal injury trials, which involve separate issue and are not part of the Covil appeal.

D. A stay would result in inefficiency, waste of judicial resources, and injustice.

As Resolute points out, the question of whether to grant a stay turns on the interests of justice. *See* Appellant's Br. at 9-10 (citing *City of Spartanburg v. Belk's Dep't Store*, 199 S.C. 458, 20 S.E.2d 157 (1942)). Thus, for example, in *City of Spartanburg*, the South Carolina Supreme Court found that in the city's proceeding to condemn land, the trial court did not err in denying the defendant's motion for stay of proceedings pending defendant's appeal from an

order entitling the city to immediate possession. *Id.* In this case, the interests of justice likewise weigh heavily against a stay.

Mr. Sizemore's action was filed in 2016, and he was deposed that year. Mrs. Smith's action was filed in 2015, and she was deposed that year. Both have passed away without seeing their lawsuit go to trial, and their surviving family members have been waiting years to go to trial.

At the time of the court's ruling on March 9, 2018, trial was set to commence on Monday, March 12, 2018. The court, parties and their counsel, and the witnesses had all been preparing for trial on that date. Potential jurors had been summoned, the courthouse in York County had made arrangements, Plaintiffs' families had taken off work for their trial, and the experts had been retained and scheduled to testify. The circuit court had expended considerable time and resources to shepherd these cases to this trial date, presented with numerous discovery disputes, more than forty opposed summary judgment motions, and voluminous motions in limine. Staying the trial at that late date would have resulted in inefficiency and a waste of the court's resources.

A stay now would also manifest in an injustice to the Sizemore and Smith families. It is time for these families to bring their cases to trial. Yet it is apparent that Resolute's main goal is delay. This is evidenced not just by its demand for a stay but also, for example, by Resolute's suggestion that it would proceed to a damages hearing against Covil before trial if the sanctions order against Covil is affirmed. Appellant's Br. at 10. That is, Resolute announces that it will find yet more ways to delay Plaintiffs' day in Court, even if this Court grants a stay. Such gamesmanship should not be countenanced.

Issuing a stay now would result in inefficiency, waste of judicial resources, and injustice to the families. This is particularly true, as the Plaintiffs have new trial dates—the Sizemore trial has been moved to May 20, 2019, and the Smith trial has been moved to September 9, 2019, and the parties are already largely prepared for trial, having prepared for trial last March. Further delay is not warranted by the fact that one defendant, Covil Corporation, had chosen to take an appeal on the eve of trial. As discussed above, Covil’s appeal of its discovery sanction does not affect the claims or defenses regarding the personal injury claims set for trial. The circuit court’s ruling properly reflects the fact that it was not in the interests of justice to grant a stay of trial.

II. The circuit court’s orders denying a stay, denying summary judgment, and denying a motion to dismiss are not immediately appealable.

Resolute improperly seeks to appeal from the orders denying its motion for stay, denying its motion for summary judgment, and denying its motion to dismiss. Plaintiffs re-urge their motion to dismiss Resolute’s appeals on the grounds that there is no final and appealable order from the Court of Common Pleas. Under the well-settled law of this state, the circuit court’s rulings are not immediately appealable. This appeal is premature and should be dismissed.

A. Resolute has not appealed a final judgment or order.

Resolute’s attempt to appeal is improper because there is no immediately appealable order. Appeals from the circuit court are governed by Rule 201, SCACR, which is clear that “[a]ppel[s] may be taken . . . from any final judgment, appealable order or decision.” Thus, only “final” orders are appealable. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that South Carolina adheres to the final judgment rule, which provides that, with certain exceptions, an appeal lies only from a final judgment) *abrogated in part on other grounds by Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 791 S.C.2d

719 (2016); *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (explaining that an order is interlocutory if some further act must be done by the court prior to the determination of the rights of the parties).

Similarly, section 14-3-330, which governs appellate jurisdiction “for correction of errors of law in law cases,” states that the supreme court shall have appellate jurisdiction to review:

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Code Ann. §14-3-330. The circuit court’s orders do not fall into either the category described in Rule 201 or section 14-3-330.

Resolute admits that “the circuit judge’s order did not expressly strike any of Resolute’s defenses,” Appellant’s Br. at 17 (emphasis in original), yet urges this Court to find appealability under § 14-3-330(2)(c). A ruling “in effect” is appealable only under § 14-3-330(2)(a), which even Resolute does not argue applies. By its plain terms, this case is not appealable under § 14-3-330(2)(c), or any other section.

B. The denial of Resolute’s motion to stay is not immediately appealable.

1. Black letter law establishes that Resolute’s motion to stay is not immediately appealable.

The law is well established that a trial court order on a motion to stay is not immediately appealable, regardless of whether the motion is granted or denied. *See Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm’n*, 373 S.C. 96, 97-98, 644 S.E.2d 681, 682 (2007) (order lifting stay); *Williamsburg Rural Water & Sewer Co. v. Williamsburg Cty. Water & Sewer Auth.*, No. 2007-MO-071, 2007 WL 8434643, at *2 (S.C. Dec. 17, 2007) (order denying motion to stay); *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006)

(order granting motion to stay); *Serv. Corp. of S.C. v. Bahama Sands Dev., LLC*, No. 2011-UP-300, 2011 WL 11734673, at *2 (S.C. Ct. App. June 14, 2011) (order denying motion to stay).

In dismissing an appeal of a ruling on a stay, the supreme court has noted that such ruling does not discontinue the proceedings, “involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken.” *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530. First, to involve the merits, the order being appealed from “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Id.* (quoting *Mid-State Distribs. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Even Resolute does not contend that this applies here, as it does not. Second, to affect a substantial right, the order must “discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Again, that is not the case here. *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530 (quoting *Mid-State Distribs.*, 310 S.C. at 335 n. 4, 426 S.E.2d at 780 n. 4). Third, where, as in *Edwards*, the order does not discontinue the proceeding, the order on the stay is not immediately appealable. *Edwards*, 369 S.C. at 95, 631 S.E.2d at 531. The fact that there is no discussion of the effects of the order in *Edwards*, as Resolute complains, is of no moment, as the entire purpose of the case is to lay out when an order granting a stay is immediately appealable. In failing to mention the effects of the underlying stay, the court clearly found it irrelevant to the appealability of the stay. So, too, here, Resolute’s argument regarding the effects of the court’s failure to grant the stay is irrelevant to the appealability of the order.

While there have been cases in which appellate courts had previously entertained immediate appeals from orders granting or denying motions to stay, such cases turned on “broad language which this Court no longer follows.” *Edwards*, 369 S.C. at 95, 631 S.E.2d at 531 (overruling *Hiott v. Contracting Services*, 276 S.C. 632, 633, 291 S.E.2d 224, 225 (1981) and

Dill v. Moon, 14 S.C. 338 (1880)). Pursuant to the law at the time of *Edwards*, which is the law governing Resolute’s appeal, “an order must affect a substantial right *and* prevent a judgment from which an appeal may later be taken in order to be immediately appealed.” *Id.* (emphasis in original). That is not the case here.

Attempting to detract from Plaintiffs’ reliance on *Edwards*, Resolute cites *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015), and *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 301, 705 S.E.2d 475, 478 (Ct. App. 2011), which, like *Edwards*, permit appealability from an order that fits within the statutory provision allowing immediate appeals where a substantial right is implicated. *Morrow* and *Thornton* support, not undermine, *Edwards*.

Resolute cites a handful of other cases that were appealed on other bases, not under S.C. Code Ann. § 14–3–330(2)(c). *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (order granting a motion to disqualify party’s attorney in a civil case “implicitly falls within the statutory definition of a substantial right under Section 14–3–330(2)(a)”); *Lakes v. State*, 333 S.C. 382, 384–85, 510 S.E.2d 228, 230 (Ct. App. 1998) (finding that order had the effect of discontinuing the action under S.C. Code Ann. § 14–3–330(2)(a)); *Knight Pub. Co. v. Univ. of S.C.*, 295 S.C. 31, 32, 367 S.E.2d 20, 21 (1988) (“This order is directly appealable under S.C. Code Ann. § 14–3–330(2)(a) (1976) because it in effect determines the action and prevents an appealable judgment.”). *See also Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) (defining the categories of S.C. Code Ann. § 14–3–330 as “a few, limited categories,” as opposed to broad and sweeping). These cases are inapposite here, as Resolute seeks to appeal on the narrow grounds that the order allegedly “strikes out an answer or any part

thereof or any pleading in any action.” S.C. Code Ann. §14-3-330(2)(c). This provision does not apply to the cases cited by Resolute.

The circuit court’s order denied Resolute’s motion to stay trial. This does not constitute a “final” ruling that is immediately appealable, and Resolute fails to cite any authority that would suggest that *Edwards* is inapposite. Nor has Resolute shown that any provision of S.C. Code Ann. §14-3-330 applies. Further, Resolute’s brief is devoid of any valid assertion that any harm would result from the order denying the motion to stay trial. Resolute retained the right to assert its empty-chair defense and to argue to the jury that Covil is to blame for Mr. Sizemore’s and Mrs. Smith’s injuries and deaths. In this aspect, Covil’s status is no different than a defendant who has settled with the plaintiff prior to trial. To determine otherwise is to deprive a plaintiff of the right to settle her claims against any defendant prior to trial and would grant Resolute, and defendants in future cases, the right to demand that an initially-named defendant remain an active defendant so that the jury may apportion fault. This is not the law in this state.

2. Resolute cannot manufacture a substantive right that renders its motion to stay immediately appealable.

Resolute attempts to carve out an exception to this rule by contending that a substantive right is at stake. It argues that it has a “statutory right to have fault allocated” to other defendants, including Covil, and that the circuit court’s decision not to stay trial proceedings during the pendency of Covil’s appeal infringes on that right.

The premise of Resolute’s argument is flawed. It does not have the right to have any particular defendant in the case or the right to allocate fault to other joint tortfeasors. This was established in two recent opinions of the South Carolina Supreme Court that analyzed the rights and remedies afforded by the South Carolina Contribution Among Joint Tortfeasors Act (“the

Act”), codified at S.C. Code § 15-38-15. See *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017); *Smith v. Tiffany*, 419 S.C. 548, 799, S.E.2d 479 (2017).

In *Smith*, the court reaffirmed the longstanding principle that joint tortfeasors are not necessary parties under Rule 19, SCRPC. 419 S.C. at 562. A defendant generally has no right to bring other joint tortfeasors into the lawsuit. This is based on the “plaintiff chooses” rule. *Id.* That rule provides that “one who is injured by the wrongful act of two or more joint tortfeasors has an election or option to sue each of such tortfeasors separately or to join them as parties in a single action.” *Id.* (quoting *Simon v. Strock*, 209 S.C. 134, 138, 39 S.E.2d 209, 211 (1946)). The choice of whom to sue is given to the plaintiff, not the defendant. *Id.* That has been the law in South Carolina for almost 200 years and was not changed by the Act. *Id.* at 563-64. The supreme court concluded “that absent explicit and unmistakable legislative intent to abrogate this well-established right, a joint tortfeasor remains merely a permissive party and joinder under Rule 19 is not required for complete relief to be accorded.” *Id.* at 564-65.

Further, a tort defendant has no right to have fault allocated to another joint tortfeasor under the Act. *Id.* at 556-58. While one purpose of the Act was to protect nonsettling defendants and fairly apportion damages among joint tortfeasors, that was not the only policy goal. *Id.* at 556. Rather, “the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements.” *Id.* at 557. To this end, section 15-38-15(C) only allows named “defendants” to be listed on the verdict form for the allocation of fault. *Id.* at 559-60; *Machin*, 419 S.C. at 545.

At the same time, in section 15-38-15(D), the legislature preserved defendants’ rights to argue the empty chair defense as to all “potential tortfeasors.” *Smith*, 419 S.C. at 557. The court explained that “the General Assembly took steps to protect nonsettling defendants by codifying a

nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict” *Id.* Under subsection (D), “[a] defendant *shall retain the right* to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.” S.C. Code § 15-38-15(D) (emphasis added). The court found codification of the empty chair defense to be “a critical feature of the statute” by which the legislature recognized that there would be situations in which potential tortfeasors were not parties to the suit. *Id.* at 557-58. The empty chair defense is a powerful defense because it can interrupt the plaintiff’s burden to prove that the defendant was negligent and that such negligence was a proximate cause of the injury. *Id.* at 557 n.2.

Applying these principles to this case, Resolute has no substantial rights at stake in the denial of its motion to stay. Plaintiffs chose to sue Covil, as was their right, and also chose to move the circuit court to sanction Covil’s discovery abuse, as also was their right. The circuit court chose to sanction Covil by striking its pleading, as was within its discretion. That these choices have resulted in the potential absence of Covil from trial during pendency of Covil’s appeal has no legal significance to the remaining nonsettling defendants. If Plaintiffs had chosen not to sue Covil at all, this would be the state of affairs.

Further, Resolute retains the important right, codified in the Act, to argue to the jury that Covil bears responsibility for Plaintiff’s damages. This is the balance of interests established by the General Assembly: while Resolute has no right to allocate fault among all potential tortfeasors, only to other defendants, it still retains the right to argue the empty chair defense. Resolute’s chief complaint is that this system is unfair. This same lament was rejected by the South Carolina Supreme Court in *Smith*, which not only found the empty chair defense to be

“substantial enough to warrant codification,” but also noted that “this is the approach sanctioned by the General Assembly in the Act.” 419 S.C. at 557 n.2.

C. The denial of Resolute’s motion for summary judgment is not immediately appealable.

South Carolina law clearly holds that orders denying summary judgment are not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994). As the supreme court has recognized, “[a] denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” *Id.* at 477, 443 S.E.2d at 380. Further, the denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. *Id.*

In the present case, Judge Toal’s order denying Resolute’s motion for summary judgment does not constitute a “final” ruling that is immediately appealable, and Resolute’s Notice of Appeal fails to cite any authority that would support immediate review by this Court. This Court should dismiss the appeal.

D. The denial of Resolute’s motion to dismiss is not immediately appealable.

Under well-established South Carolina law, the denial of a motion to dismiss is not immediately appealable. *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242-43, 460 S.E.2d 392, 394 (1995) (*overruled on other grounds by Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002)). Resolute concedes this point. Appellant’s Br. at p. 23 n.7. While it urges this Court to accept its appeal of this order as a companion issue to its appeal of the stay order, Resolute has failed to demonstrate that the stay order is, itself, immediately appealable. Resolute has also made no attempt to show how the denial of the motion to dismiss is related to

the issue of whether trial should be stayed. This Court should not accept the appeal of any orders in this case.

III. The circuit court properly denied Resolute's motion to dismiss, where Mr. Sizemore was not Resolute's statutory employee.

A. Standard of review

“The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law.” *Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 216-17, 661 S.E.2d 395, 398-99 (Ct. App. 2008). On this matter, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

B. Background regarding Mr. Sizemore's specialized work at Bowater

Mr. Sizemore worked as a pipefitter and millwright at Bowater 40 to 50 times. [Ex. A to MTD Opp. at 78:15-79:6.] He worked on the digesters, tanks, paper machines, boilers, and pipe leading into that equipment; he welded boiler tube and headers; he rolled tubes and boilers. [Ex. B to MTD Opp. at 1261:3-15.] On a shutdown or outage, he would go in and replace water wall tubes, precipitator tubes, bottoms of the boiler, anything that was worn out. [Ex. A to MTD Opp. at 79:17-20.] Mr. Sizemore explained that his was different from the day-to-day work where others would go around the site to detect a valve or pipe leak, which would occur while the plant was running. [*Id.* at 79:9-16.]

As a pipefitter and millwright, Mr. Sizemore was called in to repair the boiler tubes at various locations because this was not work that was typically done by the normal maintenance

crew. [*Id.* at 141:18-142:7.] The sites where he worked, such as Bowater, needed Mr. Sizemore to come in as a contract worker to do such work as boiler tube repairs because the sites did not have people who were doing the types of work that Mr. Sizemore was doing—they were not trained or certified to do the work. [*Id.* at 140:25-142:7, 143:2-6.] Unlike workers at the facilities, Mr. Sizemore was specifically trained and certified to perform boiler repairs, which is required by South Carolina law. [*Id.* at 142:1-143:6.] And unlike the work that Mr. Sizemore did at Bowater, Bowater employees “would be doing things that other maintenance men do such as replacing valves, working with contractors, running the tool room, electrical, a lot of things. Anything that the maintenance man would normally do the Bowater employees was doing the maintenance.” [Ex. B to MTD Opp. at 1270:16-23.] That is to say, Bowater employees were doing standard maintenance work, not the specialized work that Mr. Sizemore was performing. [*See id.*; *see also* 1266:8-21, 1274:13-15.] In contrast to the general maintenance work performed by Bowater employees, Mr. Sizemore was called in to perform specialty work, such as cutting into the digesters to do tube removal. [Ex. B to MTD Opp. at 1274:22-1275:4.]

According to Bowater’s corporate representative, Art Welker, Bowater’s primary business purpose was the manufacture of paper and market pulp. [Ex. D to MTD Opp. at 58:16-18.] Bowater paper mill has never been a construction contractor. [*Id.* at 58:16-22.] In contrast, contractors that Bowater hired, such as Daniel, were general construction contractors. [*Id.* at 58:10-15.] Bowater’s corporate representative conceded that outside contractors, such as Mr. Sizemore’s employer, Daniel, worked on Bowater’s technically challenging and highly specialized pieces of equipment, including boilers, steam headers, and steam piping in the powerhouse. [Ex. D at 65:13-67:12.] Even though Bowater had a maintenance department, the employees were not responsible for the same tasks that were performed by contractors like Mr.

Sizemore. For example, a Bowater maintenance pipefitter would have no reason to do any repairs or maintenance on pumps or valves. [Ex. E to MTD Opp. at 217:10-218:1.] Contractors such as Daniel would be brought in to perform work associated with things such as boiler outages because they had the ability and manpower to accomplish a task that Bowater would not be able to do given everything else that Bowater would have to accomplish during a shutdown. [*Id.* at 93:2-24.]

Moving to dismiss, Bowater argued that Mr. Sizemore was a “statutory employee” pursuant to South Carolina’s Workers’ Compensation Act thus making litigation under the Act his family’s exclusive remedy. In order to establish statutory employer status, Bowater must show that Mr. Sizemore’s work was “part of [its] trade, business, or occupation.” S.C. Code Ann. §42-1-400.

Denying the motion to dismiss, the circuit court found that Mr. Sizemore was not a statutory employee of Resolute. [Transcript at 183-84.] The court pointed out that Mr. Sizemore was “a specialty employee or contractor who contracted for specialty services with Bowater. That’s the classic definition of someone who is not a statutory employee.” [*Id.* at 178-79.] Moreover, in contrast to Mr. Sizemore’s boiler and pipefitting work, Bowater was “not in the business of servicing boilers and pipes.” [*Id.* at 179.]

C. Mr. Sizemore was not Resolute’s statutory employee.

The statutory employer doctrine is based in Section 42-1-400 of the Act, which provides:

When any person, in this section ... referred to as ‘owner,’ undertakes to perform or execute any work which is part of his trade, business, or occupation and contracts with any person (in this section . . . referred to as ‘subcontractor’) for the execution or performance of the whole or any part of the work undertaken by the owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. §42-1-400.

The question of statutory employment status turns on whether the work performed by the subcontractor is “part of [the owner’s] trade, business, or occupation.” *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 484 (2003); *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). If the work was not part of the trade or business of the employer, then the plaintiff is not a statutory employee and may maintain a suit for damages. *Id.* A worker is only engaged in part of the owner’s trade or business if the activity is: (1) an important part of the owner’s business or trade, (2) a necessary, essential, and integral part of the owner’s business, or (3) has previously been performed by the owner’s employees. *Glass*, 325 S.C. at 201, 482 S.E.2d at 50. The South Carolina Supreme Court has held that there is no bright-line rule for determining whether the work was part of the owner’s trade or business, and that each case must be decided on its own facts. *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000); *Glass*, 325 S.C. at 201, 482 S.E.2d at 51.

Determining whether Mr. Sizemore was a statutory employee is not the easy task that Resolute suggests. There is *no general rule* that maintenance of boilers and other equipment is necessary or integral or that pipefitters and millwrights who do such work are statutory employees. As explained by Bowater’s corporate representative, Bowater was in the business of manufacturing paper and market pulp. [Ex. D to MTD Opp. at 58:16-18.] Bowater was not in the maintenance business. Although Bowater had its own maintenance division, the pipefitters within Bowater’s maintenance department would not be doing repair or maintenance on valves or pumps. [See Ex. E to MTD Opp. at 214:1-218:1.] The maintenance division did not even exist at Bowater during the time that Mr. Sizemore worked at Bowater in the 1960s. [*Id.* at 214:1-9].

Moreover, Bowater has acknowledged that other outside contractors, such as Daniel Construction, performed maintenance work at the facility. [Ex. D to MTD Opp. at 55:22-56:11.]

Bowater's corporate representative testified that maintenance and repair of technically challenging, highly specialized equipment such as boilers and turbines would be performed by outside contractors. [*Id.* at 65:12-67:12.] Generally, "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Glass*, 325 S.C. at 202, 482 S.E.2d at 51. Mr. Sizemore testified that his work was specialized and outside of the type of work that common boilermakers, pipefitters, and millwrights would perform. [Ex. B to MTD Opp. at 1274:22-1275:4.] Mr. Sizemore's work at Bowater was not part of Bowater's trade or business as established by the three-part *Glass* test. *Id.*, 325 S.C. at 201, 482 S.E.2d at 50.

1. **Mr. Sizemore's pipefitter and millwright work was neither an "important part" nor a "necessary, essential, or integral" part of Bowater's paper manufacturing business.**

This Court should conclude that Mr. Sizemore's work at Bowater was not part of the paper manufacturing business of Bowater. The South Carolina Supreme Court's approach to the question of whether work was important, necessary, or integral has evolved over time. In 2000, the *Abbott* case shifted the focus back to whether the work was *part of the business* of the owner. 526 S.E.2d at 163-64, 526 S.E.2d at 514. There, this Court had found that the plaintiff, who drove a delivery truck for a common carrier, was a statutory employee of the retailer to whom he made a delivery. *See id.* at 162, 526 S.E.2d at 514. The worker was injured when he fell while unloading boxes on the retailer's premises. *See id.* This Court reasoned that because the efficient delivery of goods was important to the business of the retailer, whose business depended on such deliveries to restock its stores, the driver was a statutory employee. *See id.* at 163, 526 S.E.2d at

514. The supreme court disagreed, holding that “[t]he fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of the Retailer’s business.” *Id.* Simply because such deliveries were important to the conduct of the business, ““that does not mean that the transportation of the goods is a *part or process* of the business.”” *Id.* at 164, 526 S.E.2d at 514 (citation omitted) (emphasis added).

In so holding, *Abbott* expressly overruled a line of prior cases, including *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985). *See Abbott*, 526 S.E.2d at 164 n.1, 526 S.E.2d at 514 n.1. In *Hairston*, this Court held that the driver of a truck transporting cars intended for the defendant’s car-leasing business was a statutory employee. 286 S.C. at 497, 334 S.E.2d at 827. Even though the transportation of vehicles was not part of the defendant’s business, the Court held that “if the nature of the work being done is such an integral part of the operations of the company for which it is done that the company cannot function without it, the company falls under the statutory employee situation.” *Id.* This approach was overruled in *Abbott* because the work being done must be a *part of the defendant’s business*.

In *Olmstead*, the court recognized that *Abbott* had permanently altered the standards governing statutory employer status. 354 S.C. at 426-27, 581 S.E.2d at 486. The court explained that, “*Abbott* represents a change in this state’s jurisprudence on what activity constitutes ‘part of [the owner’s] trade, business or occupation’ under section 42-1-400, and likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the *Abbott* opinion.” *Id.* Further, the court stated that, “we now overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case.” *Id.* Under *Abbott*, it is still necessary to conduct a case-specific analysis, but the focus must be on what type of business the defendant conducts. *See id.* at 426, 581 S.E.2d at 486. *Abbott* recognized “that transportation of goods is important to

nearly all businesses,” but that does not make such transportation “part” of the defendant’s business. *Id.*

In *Olmstead*, the defendant was in the business of designing and manufacturing fiberglass products. *See id.* at 426, 581 S.E.2d at 486. The court focused on the nature of the business in holding that a worker involved in transporting the company’s fiberglass products was not a statutory employee:

Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage. All of the raw materials used to manufacture Shakespeare’s products arrive at Shakespeare by common carrier and almost all of its finished products leave the plant by common carrier Although delivery by common carrier was certainly important to Shakespeare’s operation, it does not follow that such delivery was “part or process” of its manufacturing business.

Id. (emphasis added).

Abbott and *Olmstead* provide a framework for the Court’s analysis of Resolute’s statutory employer status. They are not, as Resolute claims, specific only to the common carrier context. *Olmstead* has been applied, for example, by the South Carolina Supreme Court in a case involving the clean-up of a concrete casting worksite. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 363, 747 S.E.2d 757, 759 (2013). Cases from this court similarly apply *Abbott* and *Olmstead* in other non-carrier cases. *See, e.g., Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 240, 647 S.E.2d 691, 693 (Ct. App. 2007) (applying *Olmstead* in case where plaintiff fell from a ladder while painting); *Edens v. Bellini*, 359 S.C. 433, 443, 597 S.E.2d 863, 869 (Ct. App. 2004) (applying *Olmstead* where plaintiff injured while assisting with a modification of a dye vat in the dye package plant); *Provau v. YRC, Inc.*, No. 4:16-CV-00422-RBH, 2016 WL 4475041, at

*1 (D.S.C. Aug. 25, 2016) (applying *Olmstead* where plaintiff injured while performing repairs on a tractor trailer)

Under *Abbott* and *Olmstead*, the focus must be on the type of business that Bowater conducted. Bowater manufactured paper. It was not in the boiler or pipe maintenance business. Furthermore, even though Bowater claims to have had its own maintenance department, there is no evidence that Bowater employees were performing the maintenance and repair of equipment, and certainly not specialized equipment, while Mr. Sizemore worked as an independent contractor at Bowater. Although maintenance of the equipment in the plant may have been important to Bowater's operation, it does not follow that such maintenance was a "part or process" of its paper manufacturing business.

Resolute relies on *Woodard v. Westvaco Corp.*, 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993), *opinion vacated, appeal dismissed*, 319 S.C. 240, 460 S.E.2d 392 (1995), for the proposition that "South Carolina's courts have previously found that boiler maintenance is a necessary part of the paper manufacturing business." Appellant's Br. at 26. Resolute overstates the case. In *Woodard*, which pre-dates *Abbott*, the court found that transporting black liquor offsite was necessary in order to continue normal production of paper. In that case, however, it was *undisputed* that recovery, storage, and reprocessing of "black liquor" was an ordinary and necessary part of Westvaco's paper manufacturing business, and these activities were normally performed on site by Westvaco's employees. *Id.*, 315 S.C. at 338, 433 S.E.2d at 895. Here, whether the type of work Mr. Sizemore performed at Bowater was a necessary part of Bowater's business is absolutely disputed, and Mr. Sizemore's testimony establishes that Bowater employees were not performing the work he did. *Woodard* does not support Resolute's argument.

2. Mr. Sizemore's specialized work was not performed by Resolute's employees.

Cases involving construction workers illustrate most starkly that an evaluation of the nature of the defendant's business is dispositive of the statutory employer question. Where construction is a part of a company's documented business purpose, or the company has a construction division or has handled its own construction in the past, then construction contractors have been found to be statutory employees. *See MacMullen v. South Carolina Elec. & Gas Co.*, 312 F.2d 662, 663 (4th Cir. 1963); *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980); *Fortner v. Thomas M. Evans Const. and Development. LLC*, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013). Conversely, if the defendant is not in the business of construction, and the construction work cannot fairly be characterized as part of the defendant's business, courts will not find the construction worker to be a statutory employee. *See Glass*, 325 S.C. at 202; *Raines v. Gould, Inc.*, 288 S.C. 541, 547, 343 S.E.2d 655, 659 (1986). For example, in *Raines* the court noted that "the nature of [the defendant's] business, according to its application to transact business in South Carolina, is the 'manufacturing and selling [of] batteries of all kinds and related products.'" 288 S.C. at 547, 343 S.E.2d at 659. Further, "the record does not indicate that [the defendant] had a construction division or that any construction work was performed by its regular employees." *Id.* Therefore, the plaintiff's construction work was not part of the defendant's trade or business and he was not a statutory employee. *Id.*

As a whole, the construction cases demonstrate that a determination that work is part of an owner's trade or business depends heavily on the company's stated business purpose. *See MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Raines*, 288 S.C. at 547; *Ewing*, at p. 5. Where the corporate documents, partnership agreements, state business

filings, or plain language of the company name showed construction as a business activity, the business was found to be in the construction business. *MacMullen*, 312 F.2d at 663; *Parker*, 275 S.C. at 73; *Fortner*, 402 S.C. at 431; *Ewing*, at p. 5. Employees of construction contractors or subcontractors were therefore found to be statutory employees. *Parker*, 275 S.C. at 74; *Fortner*, 402 S.C. at 432; *MacMullen*, 312 F.2d at 671-72; and *Ewing* at 6. On the other hand, in *Raines* where the stated business purpose was to manufacture batteries, the court could not find that construction was part of the company's business. *Raines*, 288 S.C. at 547.

Here, the stated purpose of Resolute was to manufacture paper and pulp. While Mr. Sizemore's work as a millwright and pipefitter may have been important to that operation, that does not answer the question of whether boiler and pipe maintenance was a part of Bowater's paper manufacturing business. All of the record evidence shows that such maintenance was not a part of Bowater's business and Bowater has failed to present any evidence that its corporate purpose included equipment maintenance. In fact, Mr. Sizemore testified that Bowater did not have workers doing the type of work he was doing. [Ex. A. to MTD Opp. at 142:1-4.] Bowater employees were neither trained nor certified to perform boiler repairs. [*Id.* at 142:1-143:6.]

None of the cases cited by Resolute involve facts similar to those presented here. Rather, Resolute cites cases in which the owner's workers also did the same type of work as the contractor found to be a statutory employee. In *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939), the plaintiff conceded that his work painting power transmission poles was necessary to the defendant's electricity business and the trial court found that "it is not disputed that such maintenance work was ordinarily performed by defendant's regular employees." *Id.* at 342, 2 S.E.2d at 831. Other cases cited by Resolute have found a statutory employment relationship existed where, unlike here, the plaintiff was performing the same work as the

owner's own employees. In *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 222, 661 S.E.2d 395, 402 (Ct. App. 2008), the employer's employees "routinely" did the type of work that the contractor was hired to do. In *Edens v. Bellini*, 359 S.C. 433, 444, 597 S.E.2d 863, 869 (Ct. App. 2004), also cited by Resolute, the work assigned to Mr. Edens on the day of the accident "was neither special nor unique," and he was merely "assisting" the defendant's employees, who were also performing the same work that the decedent was doing that morning. Similarly, in *Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 264, 437 S.E.2d 156, 158 (Ct. App. 1993), the defendant's employees performed the same cleanup work that the plaintiff performed. There is no comparable evidence in this case that Resolute's employees were performing the same specialized work that Mr. Sizemore was doing.

Another example of a case cited by Resolute in which the employer's workers also did the same type of work as the contractor found to be a statutory employee is *Matthews v. E. I. du Pont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111, at *2 (D.S.C. Nov. 13, 2018). In *Matthews*, the court found that an insulator was a statutory employee of DuPont, where employees of DuPont performed the same craftwork that was performed by contractors, including mechanics who performed insulation and pipefitting. For example, DuPont's Florence Plant employed 65 mechanics to perform "part-time" insulation work, while its Camden Plant employed 188 such employees. *Id.* Employees at the Florence plant spent approximately 10% of their time doing part-time insulation work, while employees at the Camden plant spent up to 25% of their time doing insulation work. *Id.* There is no evidence that Resolute's employees performed the same specialized work and to the same extent performed by Mr. Sizemore.

Resolute cites *Johnson v. Jackson*, 401 S.C. 152, 163, 735 S.E.2d 664, 669 (Ct. App. 2012) for the proposition that an activity is a necessary part of a business when the absence of

that activity would diminish the business's profitability and customer base. Appellant's Br. at 29 (citing *Johnson v. Jackson*, 401 S.C. 152, 163, 735 S.E.2d 664, 669 (Ct. App. 2012)). Resolute overstates the court's conclusion in *Johnson*. In that case, the court found that the packaging and loading technology equipment were an important part of Tantara's business as a transportation company, where an "integral part" of Tantara's transportation business was agreeing to package and load goods. Specialized maintenance of equipment such as boilers are not an "integral part" of paper manufacturing.

Again, "[t]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946). As held in *Abbott*, and reiterated in *Olmstead*, the importance of delivering a finished product does not make delivery a part of the manufacturing business for purposes of statutory employment. *Olmstead*, 354 S.C. at 425-26, 581 S.E.2d at 485-86. Similarly, the importance of maintenance does not make maintaining equipment part of the paper manufacturing business. Like the circuit court, this Court should find that because Mr. Sizemore was not engaged in any work that was part of Resolute's paper manufacturing business, Resolute was not his statutory employer.

IV. The circuit court properly denied Resolute's motion for summary judgment, as Resolute owed a duty to Mrs. Smith.

A. Standard of review

The standard for this Court's review of a denial of a motion for summary judgment is not determined because "an order denying a motion for summary judgment is not appealable." *Ballenger v. Bowen*, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994). As a general matter, summary judgment is proper only when there is no genuine issue as to any material fact and the

moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. The evidence and all factual inferences must be viewed in the light most favorable to the nonmoving party. *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. *Id.* “Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues.” *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Here, the circuit court correctly found that Resolute failed to meet its high burden of showing the absence of a genuine issue of material fact for trial.

B. Charlotte Smith was exposed to asbestos carried home by her husband from his work at Bowater.

From 1967 to 1991, Mrs. Smith lived with her husband, Lewis Childers. [Smith Compl.] From 1968 to 1979, Mr. Childers worked at Bowater, where he was exposed to asbestos dust and fibers from insulation during his career as an insulator. [Ex. 1 to MSJ Opp. at 16:25-17:6, 18:15-19, 26:1-4, 27:2-28:15, 40:3-7, 61:17-63:6.] Dust from the asbestos-containing products that Mr. Childers used remained on his clothing until it was laundered by Mrs. Smith. [*Id.* at 23:5-16, 32:15-33:6, 32:15-33:6, 35:18-36:25.] While shaking out her husband’s contaminated clothes, Mrs. Smith was exposed to and breathed respirable asbestos fibers. [Ex. 2 to MSJ Opp. at 169:7-16.]

C. It has long been known that take-home exposure to asbestos can cause mesothelioma among family members of those working with asbestos products.

According to the National Institute for Occupational Safety and Health, “families of asbestos-exposed workers have been at increased risk of pleural, pericardial or peritoneal mesothelioma” and other asbestos-related diseases. [Ex. 3 to MSJ Opp. (quoting NIOSH Report

to Congress on Workers' Home Contamination Study).] Many studies have shown that take-home asbestos exposure can cause mesothelioma among family members of those working with asbestos products. [Ex. 4 to MSJ Opp.]

The foreseeable risk of injury to family members of workers exposed to toxic dust dates back to at least 1913. [Ex. 5 to MSJ Opp.] A 1913 treatise directly identified the danger of toxic dust on workers' clothing and specifically sought to reduce "needless deaths" caused by "dusty trades, industrial poisons and occupational disease." [*Id.* at xi.] The authors directly addressed the foreseeability of the danger to family members of workers exposed to toxic products, created by contaminated work clothing taken home, recommending "removing working-clothes. . . before leaving the factory" so the toxin is not carried "into the homes of the workers." [*Id.* at 248-249.] The following year, a published text recommended preventative measures specifically designed to mitigate "[t]he effect of the workman's taking dust and dirt and . . . often toxic materials *to his home* . . ." [Ex. 6 to MSJ Opp. at 92, 120-121 (emphasis added).]

In 1949, the National Institute of Health and National Cancer Institute published an article by Dr. Hueper entitled *Environmental and Occupational Cancer*. [Ex. 7 to MSJ Opp.] Discussing control of occupational cancers, Dr. Hueper noted that exposure to industrial carcinogens such as asbestos should be eliminated or reduced through containing dusts in the workplace and careful disposal of carcinogenic waste. [*Id.* at 54-55.] Dr. Hueper recommended precautions to prevent asbestos from being carried home on workers' clothing, including "washing and bathing facilities and separate lockers for street clothes and work attire." [*Id.* at 55.] Dr. Hueper's findings were reported in JAMA (the Journal of the American Medical Association), the most widely read medical journal in the world.

The risk of take-home exposure to asbestos was further illustrated in 1960 by a major report of mesothelioma by Wagner, who reported that “the [patients’] original histories . . . included housewives, domestic servants . . . none of whom were working on the asbestos mines at the time.” [Ex. 8 to MSJ Opp. at 260.] Among the mesothelioma cases were children of asbestos mine workers and individuals who lived in proximity to asbestos mines. The year before its publication, Wagner presented his paper at an international pneumoconiosis conference attended by leading American figures in the field of industrial hygiene and long-term consultants to industry. [Ex. 9 to MSJ Opp.] In 1959, this study was published in the Journal of the American Medical Association.

In 1965, Newhouse and Thompson published a study documenting mesothelioma among persons with a history of living with asbestos workers or near asbestos factories. [Ex. 3 to MSJ Opp. at 190.] These findings were discussed at the New York Academy of Sciences international conference on asbestos-related diseases chaired by Dr. Irving Selikoff. [*Id.*] The Selikoff conference was widely reported in the popular press, including by the New York Times:

Dr. Selikoff noted that the dangers of exposure to asbestos dust were not limited to those who work directly with this ubiquitous insulator and filler material. The dangers, he said, extend to workers in “contiguous trades” such as other construction workers *and their families*.

[Ex. 10 to MSJ Opp. (emphasis added)]

In 1972, OSHA established asbestos exposure regulations and informed employers that there were “undisputed grave consequences from exposures to asbestos fibers.” [Ex. 11 to MSJ Opp., at 11318.] OSHA regulations required employers to provide special work clothing, changing rooms, and two clothes lockers to separate work clothing from street clothing to employees whose exposures to asbestos exceeded exposure limits. [*Id.* at §1910.93a(d)(3) and

a(d)(4).] Asbestos-contaminated clothing was to be laundered to prevent fiber release and exposure, and asbestos waste, including asbestos-contaminated clothing, was to be “disposed of in sealed impermeable bags.” [*Id.* at §1910.93a(d)(4)(iii) and a(h).]

Bowater was aware that asbestos was dangerous to anyone who could come into contact with it. [Ex. 36 to MSJ Opp. at 64:1-65:14.] In fact, Bowater had documents that showed it how to remain in compliance with OSHA standards. [*Id.*] One document listed 12 methods of compliance; Method 7 states that Bowater must provide and use protective clothing, change rooms, and two lockers for employees’ street and work clothing. [*Id.* at 64:5-10; *see also* Ex. 37 to MSJ Opp.] Resolute’s corporate representative acknowledged that the intent was “[t]o make sure if there was asbestos fiber, that the clothes didn’t leave the facility.” [Ex. 36 to MSJ Opp. at 64:24-65:4.] Resolute’s corporate representative agreed that as of 1972, Bowater had actual knowledge of the OSHA regulation, and further presumed that the reasoning was that taking asbestos home on clothes can be hazardous to those at the house. [*Id.*]

D. Resolute is not entitled to summary judgment on Plaintiff’s premises claims.

Resolute contends that, as a premises owner, it owed no duty to Charlotte Smith. South Carolina law imposes a common law duty not to injure reasonably foreseeable third parties. Resolute owed Mrs. Smith a general duty of due care under the common law. Resolute also owed a duty created by the OSHA regulations that required employers to take precautions to protect family members from asbestos exposure. Resolute further owed a duty to warn Mrs. Smith as a third party placed at risk by its own negligent conduct. The circuit court properly denied Resolute’s motion for summary judgment.

E. Resolute owed a duty not to harm reasonably foreseeable third parties.

Negligence requires “a duty on the part of the defendant to protect the plaintiff.” *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324, 325 (1986). Generally, duty requires “a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.” *Araujo v. Southern Bell Tel. & Teleg. Co.*, 291 S.C. 54, 58, 351 S.E. 2d 908, 910 (Ct. App. 1986). “There is no formula for determining duty.” *Id.* at 57. Rather, duty is “only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” *Hardee v. Bio-Med. Applications of S.C., Inc.*, 370 S.C. 511, 516, 636 S.E.2d 629, 632 (2006) (quoting William L. Prosser, *Handbook of The Law of Torts* § 53, 325–326 (4th ed. 1971)). Such considerations include whether the defendant’s own conduct created the risk of harm to the plaintiff, the moral culpability of the defendant, and the need to deter future acts of wrongdoing. *See Araujo*, 351 S.E.2d at 910.

The law does not require that there be a special relationship with the victim for the duty to arise. Instead, South Carolina law recognizes that a general duty of due care is owed at common law when a party engages in negligent conduct that harms a foreseeable victim. *See Hardee*, 370 S.C. 511, 636 S.E.2d at 631-32; *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12, 13 (2004). The South Carolina Supreme Court has reiterated as recently as 2006 that a defendant “owes a duty to prevent harm . . . to reasonably foreseeable third parties.” *Hardee*, 636 S.E.2d at 631-32.

In *Hardee*, on facts analogous to those in the instant case, the South Carolina Supreme Court held that a medical provider owed a duty to a third party that was injured after the provider negligently failed to warn its patient of the risks related to driving immediately following a medical procedure and the patient crashed into the third party. 636 S.E.2d at 630. The patient in

Hardee was an insulin-dependent diabetic required to undergo a four-hour hemodialysis treatment three times a week. The provider of the hemodialysis treatment negligently failed to warn the patient that the side effects accompanying dialysis often include insulin shock or low blood sugar and failed to conduct the standard post-treatment tests or monitoring before allowing the patient to leave the dialysis center. The plaintiffs' case arose when the patient was released to drive home after a treatment and he lost control of his vehicle and collided with the plaintiffs. The patient was killed, and the plaintiffs were badly injured. *Id.*

The plaintiffs filed suit against the medical provider, alleging that the center's negligence in failing to warn its patient concerning the treatment's side effects and the resulting dangers of driving had been a cause of their injuries. The South Carolina Supreme Court agreed, ruling that "the trial court erred in determining that a medical provider never owes a duty to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment." *Id.* at 632. Rather, "a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to *reasonably foreseeable third parties* by warning the patient of the attendant risks and effects before administering the treatment." *Id.* at 631-32 (emphasis added). In the case before it, "if [the medical provider] knew that Patient could experience ill effects following dialysis treatment, [the medical provider] owed [the plaintiffs] a duty to warn Patient of the risks of driving." *Id.* at 632.

Notably, the duty owed by the medical provider to the third party was no greater than the duty owed to the patient: "this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment." *Id.* This limitation ensures that there is not "limitless liability." Rather, the duty to the

third party only “mirrored” that was owed to the patient. *Oblachinski v. Reynolds*, 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011).

Although the court’s holding was made in the context of a medical provider’s duty to third parties, *Hardee* is equally applicable to the instant case. Given that “every valid claim” against an employer is not based on the employer-employee relationship, an employer that engages in practices “which it knows may have detrimental effects” on an employee’s capacity for safe keeping “owes a duty to prevent harm to [employees] and to reasonably foreseeable third parties by warning the [employee] of the attendant risks and effects before” engaging in such practices. *Hardee*, 636 S.E.2d at 631, 632. The duty Bowater owed to third parties, such as Mrs. Smith under this duty analysis, was “identical” to the duty Bowater owed to individuals present on its premises like her husband – to prevent his exposure to asbestos or to warn him so he could take precautions against the risk. As in *Hardee*, if steps had been taken to prevent exposure to Mrs. Smith’s husband, or if he had been warned of “the attendant risks and effects” of his work with asbestos, he would have been in a position to ensure that Mrs. Smith was not exposed. *Hardee* compels the recognition of a duty owed by Bowater to Mrs. Smith, who was a reasonably foreseeable third party likely to be injured by its negligence. The duty to warn Mr. Childers, and to prevent him from taking home asbestos on his work clothing, was the exact same duty owed to Mrs. Smith. No greater duty was owed to Mrs. Smith than Bowater already owed to her husband.

Other South Carolina cases are in accord with *Hardee* in recognizing a duty of care to foreseeable third parties. In *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12, 13 (2004), the plaintiff was injured in a one-car accident when a wind gust caused her car to veer off the road and down a twelve-inch drop from the road surface onto the shoulder. The

plaintiff sued the South Carolina Department of Transportation (SCDOT) and the paving contractor that, pursuant to a contract with SCDOT, had recently repaved the road and returned control of the highway to SCDOT. *Id.* In deciding whether the paving contractor owed a duty to the plaintiff above and beyond whatever duty it owed by virtue of the paving contract with SCDOT, the South Carolina Supreme Court held that “[t]he tortfeasor’s liability exists independently of the contract and rests upon the tortfeasor’s duty to exercise due care. . . . This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs.” *Id.* at 15 (citations omitted).

In 2015, Judge D. Garrison Hill found that a duty was owed to the family members of an asbestos-exposed worker in a take-home exposure case almost identical to this action. Judge Hill denied summary judgment in that case, *Donna Smith v. Armstrong International*, No. 2013-CP-40-02970, when the facts showed that the decedent was exposed to asbestos through laundering her brother’s asbestos-contaminated clothing. [Ex. 12 to MTD Opp. at 4-21, 30.] The defendants argued that there was no duty because the decedent did not enter the premises or have a direct relationship with the employer, and they relied on asbestos case law from other jurisdictions declining to impose a take-home duty. [*Id.* at 5, 8-9.] The plaintiff relied on *Hardee* and the evidence that the defendant knew or should have known that family members of asbestos workers were at risk of asbestos-related diseases from contact with contaminated work clothing. [*Id.* at 13-21.] Judge Hill rejected the argument that there must be privity to give rise to a duty and recognized that there is a common law duty to prevent persons from carrying home something that could cause disease to their family members. [*See id.* at 10-11.]

Resolute mistakenly relies on *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 49, 52–53, 644 S.E.2d 43, 47–49 (2007), for the proposition that foreseeability of

injury alone is not sufficient to support the imposition of a duty in tort. *See* Appellant's Br. at 33, 40-41 (citing). *McCullough* cited the duty owed to a foreseeable plaintiff as established in *Dorrell* with approval:

In the cases relied on by the Trustee, this Court held that a tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. Where there is such a contractual basis for a legal duty to a third party, this Court has determined that the tortfeasor's liability exists independently of the contract and *rests upon the common law duty to exercise due care to foreseeable plaintiffs*. *See, e.g., Dorrell*, 361 S.C. at 318, 605 S.E.2d at 15.

McCullough, 373 S.C. at 49, 644 S.E.2d at 46-47 (emphasis added).

The cases cited by Resolute stem from *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324, 325-26 (1986), which was concerned with an attenuated relationship between the parties. In *Booz-Allen*, a consulting firm was hired to conduct a comparative analysis of two ports; the firm was negligent in the way it collected information about one port, which lost business to the other port. *Id.* The supreme court held that the consulting firm owed a duty of care to the port damaged by the negligently prepared analysis but did not owe a duty to the businesses that lost revenue as a result of the reduced traffic in the port. *Id.* at 326.

The facts here are dramatically different than those in *Booz-Allen*. The class of reasonably foreseeable individuals likely to be harmed by Resolute's negligent conduct was well defined and limited to workers and family members of workers exposed to asbestos. The very grave risk to the defined class included terminal cancer. The risk was known, or knowable, to Resolute but not to the workers and family members at risk. And the ability to eliminate the risk lay solely in Resolute's control, as opposed to the workers or family members who were blamelessly unaware of the risk. In *Booz-Allen*, the class of individuals who might have suffered

from the reduced shipping traffic would have been uncertain; the harm suffered was strictly economic; knowledge of the risk of harm from reduced shipping traffic would have been known by all; and elimination of the risk of harm to one of the two ports would have been impossible – shipping traffic was likely to decrease in whichever port came out on bottom. In circumstances such as *Booz-Allen*, the “multiplicity of factors” may have pointed to a finding of no duty. Such a finding is not warranted under the facts of this case.

Citing nothing, Resolute claims that because Mrs. Smith was not an invitee on its premises, its duty could not be expanded to include “strangers” to the landowner-invitee relationship. Appellant’s Br. at 35. This assertion is contradicted by the foregoing authority, including *Hardee*, 636 S.E.2d at 631, 632, and *Dorrell*, 361 S.C. 312, 605 S.E.2d at 13.

As shown here, there is a common law duty of due care to avoid causing injury to foreseeable persons. *See Hardee, supra*, and *Dorrell, supra*. Such a duty existed here because Resolute knew, or certainly should have known, that the family members of individuals who worked with asbestos-containing products on its premises were at risk of being exposed to asbestos through contaminated work clothing. Resolute had a duty to avoid causing injury to workers’ family members who could foreseeably be injured by the failure to warn or failure to take precautions to prevent take-home exposures.

F. The 1971 OSHA asbestos regulations created an affirmative legal duty of care.

An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650, 656-57 (2006). State and federal regulations have the force of law and may give rise to a duty. *See Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994), *aff’d*, 319 S.C. 469, 462 S.E.2d 861 (1995).

To find that a statute imposes a duty sufficient to support a cause of action in negligence, it must be established that the essential purpose of the statute is to protect the plaintiff from the kind of harm suffered and that the plaintiff is a constituent of the class of persons the statute seeks to protect. *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189–90, 691 S.E.2d 170, 174 (Ct. App. 2010). These requirements are met here, as the purpose of the OSHA standards is to protect employees and their families. As explained by one OSHA representative:

To prevent spreading asbestos outside the workplace, OSHA’s standards require the employer to provide the employees protective clothing and ensure that the employees remove the contaminated clothing before leaving the workplace. To enhance the protection, employers must provide showers and separate clean change rooms for dressing into clean clothing.

[Ex. 13 to MTD Opp. at 49.]

The OSHA asbestos regulations regarding take-home exposures, effective in 1972, imposed a duty on Resolute to prevent workers’ family members from being exposed to asbestos. Those regulations, as set forth above, require employers to provide showers, changing rooms, separate lockers for street clothes and work clothes, and laundry services for the express purpose of preventing asbestos fibers from being taken home on work clothing and exposing family members. These regulations therefore created a duty to protect the family members of employees working with asbestos. As Mrs. Smith was unquestionably a member of the class of employee family members the regulations sought to protect, Resolute owed her a duty of care.

G. Resolute has a duty to warn third persons such as Charlotte Smith because its own conduct negligently created the risk of harm.

South Carolina has long recognized in third party cases that a duty to warn a potential victim exists “where the defendant negligently or intentionally creates the risk.” *Faile v. South Carolina Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 546 (2002). “[A]t common

law, a person ordinarily has no duty to protect another from a harm inflicted by a third party.” *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 691 S.E.2d 170, 174 (Ct. App. 2010). If this were to be treated like a third-party case, it falls within one of five exceptions to the general rule that South Carolina common law imposes no general duty to control another’s conduct or “to warn a third person or potential victim of danger.” *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650, 656 (2006). The five long recognized exceptions are: “(1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) *where the defendant negligently or intentionally creates the risk*; and (5) *where a statute imposes a duty on the defendant*.” *Id.* (emphasis added); *see also Faile v. South Carolina Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 546 (2002); *Burnett*, 691 S.E.2d at 174 (“Usually, a person incurs no liability for failure to take steps to benefit others or protect them from harm *not created by his or her own wrongful conduct*.”) (emphasis added). This has been the law since at least 1938 when – in a case involving two truckers whose rigs were jack-knifed and stalled at night on an icy road at the bottom of a hill – the supreme court held the truckers owed a duty to warn other motorists of the danger the truckers had created. *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247, 251 (1938).

This is not an “ordinary” third party case, which would posit Mrs. Smith’s ex-husband as the third party who “inflicted harm” on his wife by exposing her to dangerous asbestos fibers. Rather, the risk of Mrs. Smith’s harm was created by Resolute’s negligent conduct in failing to warn her husband about asbestos hazards and in allowing carcinogenic asbestos material to escape from job sites Resolute controlled. Accordingly, this case falls within the South Carolina Supreme Court’s fourth enumerated exception to the general rule that the common law imposes

no general duty to control another's conduct or "to warn a third person or potential victim of danger." *Babcock Center, Inc.*, 638 S.E.2d at 656.

The fifth exception to third party liability is also applicable here because, as set forth above, a duty was imposed by the 1971 asbestos regulations that required Resolute to take precautions to prevent take-home exposures. *Madison*, 371 S.C. 123, 638 S.E.2d at 656. Thus, even under a third-party analysis, Resolute owed Charlotte Smith a duty.

H. Other courts have found that a duty is owed when it is reasonably foreseeable that family members are at risk of asbestos exposure and asbestos-related diseases.

Courts in numerous jurisdictions have utilized a foreseeability analysis to determine that there is a duty to warn spouses of the risk of take-home asbestos exposure. *See Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017); *Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018); *Kesner v. Superior Court*, 1 Cal. 5th 1132, 210 Cal.Rptr.3d 283, 384 P.3d 283 (2016); *Simpkins v. CSX Corp.*, 929 N.E. 2d 1257, 1263-64 (Ill. App. Ct. 2010); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008); *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at *2-3 (Wash. Ct. App. Aug. 13, 2007); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006); *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. App. 2007); *Zimko v. Am. Cyanamid*, 905 So. 2d 465, 483 (La. App. 2005); *Lunsford v. Saberhagen Holdings, Inc.*, 106 P.3d 808 (Wash. App. 2005); *cf. May v. Northrop Grumman Sys. Corp.*, 680 F. App'x 556, 559 (9th Cir. 2017) (allegations of take-home exposure sufficiently states a claim).

Even courts that premise their duty analysis on a relationship between the parties have found a duty not to expose household members to asbestos carried home by workers. *See Quisenberry v. Huntington Ingalls Inc.*, 818 S.E.2d 805, 810 (Va. 2018) (noting that "[t]he

existence of [a] duty does not depend on proving a particular relationship,” but “ ‘arises from that basic and necessary regulation of civilization which forbids any person because of his own convenience, to recklessly, heedlessly or carelessly injure another.’” (citation omitted)). *Quisenberry* also analyzed foreseeability, which is generally an important factor even among states that consider the relationship between the parties. *See id.* 814 (holding that as to those exposed to take-home asbestos, “a duty does indeed lie to such persons in the recognizable and foreseeable area of risk”).

As in numerous other states that have considered this issue, in South Carolina there is a general duty not to harm reasonably foreseeable third parties. *Hardee*, 636 S.E.2d at 630; *Dorrell*, 605 S.E.2d at 13. Put simply, the facts and the legal analysis are the same; Resolute owed a duty to Mrs. Smith to prevent carcinogenic asbestos fibers from escaping its job sites and finding their way into her home, where she was foreseeably exposed and injured.

I. The out-of-state authorities cited by Resolute hinge on state law that differs significantly from South Carolina law and are distinguishable on their facts.

Resolute directs this Court to foreign opinions that are in conflict with South Carolina law. For example, *In re N.Y. City Asbestos Litig. (Holdampf)*, 5 N.Y.3d 486 (2005), is the polar opposite of South Carolina law, as it found foreseeability irrelevant. *See also, e.g., Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1031 (Md. 2013) (distinguishing foreseeability jurisdictions); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) (declining to apply foreseeability).

It is not accurate, as Resolute claims, that courts that find a duty under a consideration of foreseeability do not consider other factors. Appellant’s Br. at 40. For example, in *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017), the Eleventh Circuit held that under Alabama law, that public policy concerns weighed in favor of imposing a duty. *Id.* at 1305. It

concluded that the defendant “was in the best position to protect people like [the decedent] from take-home asbestos exposure by complying with the relevant regulations or internal policies that were designed for that purpose, but it failed to do so. Recognizing [the defendant’s] duty in these circumstances is fully warranted by considerations of public policy.” *Id.* The court also noted that, contrary to the defendant’s argument, it was not imposing “limitless” liability. *Id.* at 1306.

The universe of potential plaintiffs is small. According to the Centers for Disease Control, the number of deaths from mesothelioma in South Carolina in 2007 (the last year for which statistics are available) was 34. [Ex. 14 to MSJ Opp.] In 1999, homemakers accounted for 6.8 percent of mesothelioma deaths in the U.S. [Ex. 15 to MSJ Opp. at 178]. Thus, the specter of liability is two South Carolina women each year, hardly a crushing number for anyone but the families affected. Indeed, for decades corporate defendants routinely settled the few household exposure cases filed without even raising the duty issue. *See, e.g., Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 590 S.E.2d 479 (2003) (where daughter developed mesothelioma caused by childhood exposure to asbestos on father’s clothing, defendant employer interposed door-closing statute as a defense).

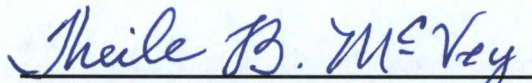
The recognition of duty in this case will not significantly increase the number of mesothelioma cases filed in South Carolina, and it will not extend Resolute’s liability with novel theories that break the bounds of traditional tort concepts. Rather, in accordance with traditional tort concepts, Resolute owes a duty for its negligent conduct to a limited class of foreseeable plaintiffs.

CONCLUSION

Respondents respectfully request that the Court deny the appeals and affirm the circuit court’s rulings.

Dated: February 11, 2019

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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FEB 11 2019

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefler Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2018-000618

James Coleman Sizemore, as Personal Representative of the Estate of
James Calvin Sizemore, Decedent,Respondent,

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley Power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc., Defendants,

Of which Resolute FP US, Inc. is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of
Charlotte Gaye, Smith,Respondent

v.

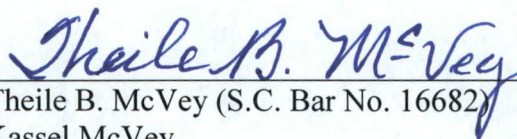
CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CNA

Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation, Defendants

Of which Resolute FP US, Inc. is the Appellant.

PROOF OF SERVICE

The undersigned, an attorney in this matter of the Respondent James Sizemore, certifies that I have this 11th day of February, 2019, served copies of the **Respondent's Initial Brief** and **Designation of Matter to be Included in the Record on Appeal** upon all counsel for Appellants (listed below) by causing them to be deposited in the United States mail with sufficient postage attached.



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