Appendix 10

(Chapter 10-Third Party Claims & Carriers Liens)

1. Motion for Approval of Settlement, Agreed Reduction of Lien; Proposed Order.
2. Motion for Approval of Settlement & Reduction of Lien.
3. Sample Lien Reduction Calculations, Future Medical Involved.
4. Single Catastrophic Hazard Opinions.
5. Sample Form 4 – Judgement in a Civil Case
6. Sample Order – Motion For Summary Judgment
7. Notice or Third Party Action – Form

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

John Q. Public, Employee/Claimant,

vs.

Southeast Frozen Foods, Employer,

and

Wausau Insurance Co., Carrier.

MOTION FOR APPROVAL OF THIRD PARTY SETTLEMENT
W.C.C. File No. 9427558

IN RE:

John Q. Public, Tort Plaintiff,

vs.

Calvin Snow, Tort Defendant,

and

Allstate Insurance Company,
Liability Carrier.

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1. On August 12, 1994 claimant, John Q. Public, while in the course and scope of his employment with Southeastern Frozen Foods, was involved in an automobile accident with a vehicle driven by Calvin Snow and owned by Poneace M. Gosnell.

2. The accident occurred when Snow crossed the center line and struck the vehicle claimant was driving.

3. As a result of the accident, claimant sustained injuries to his left hand. He also lost time from work.

4. Pursuant to the Workers' Compensation Act, medical treatment was provided and paid for by claimant's employer and carrier. Claimant was also paid temporary total compensation. The workers' compensation claim was previously settled on a clincher.

5. As a result of payments made, Wausau, the workers' compensation carrier, asserts a subrogation lien on the proposed settlement of the third party claim.

6. An agreement has now been reached to settle the third party liability claim. On behalf of the third party defendants, the liability carrier, Allstate, will pay its full liability limit of Fifteen Thousand Dollars ($15,000) in full and final settlement of any and all claims which claimant may have as a result of the accident. Claimant also has a claim under his personal underinsured motorist coverage. This claim is being settled concurrently with the liability claim. By law, the underinsured motorist coverage is not subject to the workers' compensation carrier's lien.

7. The workers' compensation carrier, Wausau, has agreed to accept the sum of Five Thousand Dollars ($5000) from the proceeds of the liability settlement in full satisfaction of its subrogation lien. The remaining funds will be distributed pursuant to the written contract between the claimant and his attorney.

8. Claimant understands that upon approval of this settlement he will have no further claim of any kind or nature against the third party defendants, the liability carrier, the employer, the workers' compensation carrier, or any other person or entity.

9. Upon approval of this settlement the employer and carrier will be entitled to close their files with the South Carolina Workers' Compensation Commission.

10. Claimant believes that this settlement is in his best interest and respectfully asks that the Workers' Compensation Commission approve the same, thereby allowing the parties to execute all appropriate releases and documents necessary to consummate the proposed agreement.

11. All parties expressly waive the right to any appearances, inquiry, viewing, hearing, or proceedings before the commission with regard to the settlement.

WHEREFORE, claimant and the other parties hereto respectfully request that the settlement be approved as outlined above.

Respectfully Submitted:

Date: ______________________

____
M. Terry Haselden, Attorney for Claimant

We hereby certify that we have read the Motion for Approval of Third Party Settlement. We are in full agreement with the motion and ask that the commission promptly approve the same.

____
Employee/Claimant

Date:_______________

____
For the Employer and Workers' Compensation Carrier

Date:_______________

____
For the Liability Carrier and Third Party Defendant

Date:_______________

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

John Q. Public, Employee/Claimant,	)	
	)	
vs.	)	
	)	
Southeast Frozen Foods, Employer,	)	**ORDER APPROVING**
	)	**THIRD PARTY SETTLEMENT**
and	)	**W.C.C. File No. 9427588**
	)	
Wausau Insurance Co., Carrier.	)	

IN RE:

John Q. Public, Tort Plaintiff,	)
	)
vs.	)
	)
Calvin Snow, Tort Defendant,	)
	)
and	)
	)
Allstate Insurance Company,	)
Liability Carrier.	)

Based upon the motion filed by the claimant, and consented to by all necessary parties, I hereby approve the proposed third party settlement as outlined in the motion.

Upon payment of $15,000 by the liability carrier, the carrier and third party defendant are released and discharged from any and all claims and liabilities arising out of the August 12, 1994 accident. Claimant is hereby authorized to execute all necessary releases or other documents necessary to consummate the settlement.

Upon receipt of the settlement proceeds, and execution of the necessary documents, claimant and his attorney are authorized to disburse funds as set forth in the motion.

Upon payment of the amount specified to the workers' compensation carrier, said carrier's lien shall be fully satisfied.

Upon completion of all of the terms of the settlement, the files of the employer, workers' compensation carrier, and Workers' Compensation Commission may be closed.

AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

____
Commissioner

Date: ____________________

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Mary E. Linder, Employee/Claimant,

vs.

The Charles Lea Center, Employer,

and

The State Accident Fund, Carrier.

MOTION FOR APPROVAL OF THIRD PARTY SETTLEMENT AND REDUCTION OF LIEN

IN RE: THE THIRD PARTY TORT ACTION

Mary E. Linder, Tort Plaintiff,

vs.

Scott E. Atkins, and
Goodway Trucking, Inc., Tort Defendants

PROPOSED THIRD PARTY SETTLEMENT

1. On August 5, 1993, claimant/employee, while in the course and scope of her employment with The Charles Lea Center, was involved in an automobile accident with a vehicle driven by Scott E. Atkins, an employee of Goodway Trucking, Inc. Atkins was within the course and scope of his employment with Goodway Trucking, Inc. at the time of the accident.

2. The accident occurred when claimant was stopped to board passengers. Atkins, approaching from the rear, and driving too fast for conditions, swerved to avoid claimant's vehicle but nonetheless struck the left side of her vehicle.

3. As a result of the accident, claimant sustained injuries to her back, neck, and shoulders. Diagnoses made by the doctors include: neck strain, right CAT-1 radiculopathy, probable nerve root stretch injury, and chronic C-8 and T-1 root lesion. She was given an impairment rating of 35% to the arm by the neurologist. She also lost time from work.

4. Pursuant to the Workers' Compensation Act, medical treatment and compensation were provided and paid for by the claimant's employer and carrier. The carrier paid $________ for medical treatment, $__________ in temporary total, and $__________ for a clincher.

5. As a result of payments made, The State Fund, the workers' compensation carrier, asserts a subrogation lien of approximately $____________.

6. An agreement has now been reached between the claimant and third party defendant to settle the third party liability claim. Subject to the approval of the commission, the third party defendant, Goodway Trucking, Inc, will pay the sum of $___________ in full and final settlement of any and all claims which claimant may have against the third party defendants as a result of the accident.

7. Claimant understands that upon approval of this settlement she will have no further claim of any kind or nature against the third party defendants, the liability carrier, the employer, or the workers' compensation carrier.

8. Claimant believes that this settlement is in her best interest, and the best interests of all parties involved, and respectfully asks that the Workers' Compensation Commission approve the same, thereby allowing the parties to execute all appropriate releases and documents necessary to consummate the proposed settlement.

WORKERS' COMPENSATION LIEN

9. The workers' compensation carrier, The State Fund, has refused to agree to any reduction of its lien.

10. Though she believes that the proposed settlement is the proper thing to do under the circumstances of this case, claimant also believes that her "cognizable damages at law" are far in excess of the amount of the proposed settlement.

11. Claimant therefore requests, pursuant to S.C. Code Ann. § 42-1-560(f), that the commission reduce the carrier's lien in the proportion that the proposed settlement bears to the commission's evaluation of the claimant's total cognizable damages at law.

12. Claimant's attorney also asks that the carrier be required to pay its prorata share of the attorney's fee and costs.

WHEREFORE, claimant requests that a hearing be convened and that the commission issue an order:

A. Approving the proposed third party settlement and authorizing claimant to sign the proper documents to release the third party defendants,

B. Providing for the disposition of the proceeds of said settlement, to include a reduction of the carrier's lien.

Respectfully Submitted:

________________________________ Date: ____________________
M. Terry Haselden, Attorney for Claimant

We hereby join in the Motion for Approval of the Third Party Settlement. We are in full agreement with the motion and ask that the commission promptly approve the same.

________________________________ Date: ____________________
For the Third Party Defendants

By Kathryn Williams
4/24/98

EXAMPLE

Hardee

AMOUNT WC PAID TO DATE:	$ 300,000.00
PRESENT VALUE OF FUTURE PROBABLE COSTS:	600,000.00
TOTAL LIEN:	$ 900,000.00
	=========
COGNIZABLE DAMAGES AT LAW:	$6,000,000.00
NON-ECONOMIC LOSS:	5,100,000.00
SETTLEMENT:	500,000.00
EXPENSES:	60,000.00

RATIO OF RECOVERY TO DAMAGES:
$500,000.00 : $6,000.000.00 = .083

CARRIER'S LIEN = $900,000.00 x .083 =	74,700.00
MINUS ATTORNEY FEE (1/3)	24,900.00
	49,800.00
MINUS .083 x 60,000.00 (EXPENSES)	4,980.00
CARRIER'S NET LIEN:	44,820.00
	======

Kirkland, J

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191 F.3d 448 (Table)
Unpublished Disposition

(Cite as: **191 F.3d 448, 1999 WL 694444 (4th Cir.(S.C.))**)

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Courts's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the publication and citation of unpublished opinions.)

Robert H. SIMPSON, Plaintiff-Appellant,
v.
DUKE ENERGY CORPORATION, formerly known as Duke Power Company, Defendant-Appellee.
William R. CHASTAIN, Plaintiff-Appellant,
v.
DUKE ENERGY CORPORATION, formerly known as Duke Power Company, Defendant-Appellee.

Nos. 98-1906, 98-1950.

United States Court of Appeals,
Fourth Circuit.
Argued June 8, 1999.

Decided Sept. 8, 1999.

Appeals from the United States District Court for the District of South Carolina, at Anderson. William B. Traxler, Jr., District Judge. (CA-98-471-8- 21, CA-98-430-8-21)

Douglas Franklin Patrick, Sr., Covington, Patrick, Hagins, Stern & Lewis, Greenville, South Carolina; Donald Roscoe Moorhead, Donald R. Moorhead, P.A., Greenville, South Carolina, for Appellants.

Ellis Murray Johnston, II, Haynsworth, Marion, McKay & Guerard, Greenville, South Carolina, for Appellee.

Before MURNAGHAN, LUTTIG, and MOTZ, Circuit Judges.

OPINION

PER CURIAM:

**1 Plaintiffs-Appellants William Chastain and Robert Simpson filed actions against Duke Energy Corporation in the United States District Court for the District of South Carolina as a result of burn injuries they sustained in a steam pipe explosion at the Oconee Nuclear Station in Oconee County, South Carolina. The district court granted Defendant's motion for summary judgment, determining that Plaintiffs' exclusive remedy is under the South Carolina Workers' Compensation Law, S.C.Code Ann. § 42-1-10 et seq. (Law.Co-op.1985). On appeal, Plaintiffs challenge the court's determination, arguing primarily that the court should have certified certain questions to the state supreme court for resolution. Finding no error, we affirm the district court's decision.

I.

Plaintiffs-Appellants William Chastain ("Chastain") and Robert Simpson ("Simpson"), along with five other

workers, were injured on September 24, 1996 when a steam pipe exploded at the Oconee Nuclear Station in Oconee County, South Carolina. At the time of the accident, both Chastain and Simpson were employees of Duke Energy Corporation ("Duke Energy") and were acting within the course of their employment.

Three days after the accident, Duke Energy filed a report regarding the injuries with the South Carolina Workers' Compensation Commission ("Commission"), as is required under S.C.Code Ann. § 42-19-10. Thereafter, both Chastain and Simpson began to receive benefits under the South Carolina Workers' Compensation Law (the "Act"). Chastain received temporary benefits totaling $17,648.45. On October 24, 1997, his case was heard by the Commission, and he was awarded an additional $71,055.16 for a total compensation benefit of $80,073.61. Duke Energy also paid medical benefits of $319,557.68 on his behalf. Simpson received temporary benefits totaling $17,136.32. Duke Energy also paid medical benefits of $551,808.86 on his behalf. Simpson has not yet sought a final hearing before the Commission.

Both Chastain and Simpson filed diversity actions against Duke Energy in the United States District Court for the District of South Carolina as a result of the burn injuries they sustained in the accident. They maintain that Duke Energy was negligent in failing to design, fabricate, operate, and inspect the Nuclear Station's piping and associated systems and components properly.

Duke Energy filed answers to both actions on March 9, 1998 and later moved for summary judgment with respect to both suits. The district court held a hearing on the motions, where Chastain and Simpson argued that § 42-5-250 of the South Carolina Code of Laws [FN1] provides them with a common law right of action against Duke Energy. Chastain and Simpson also urged the district court to certify certain issues regarding the interpretation of § 42-5-250 to the South Carolina Supreme Court. The district court granted Duke Energy's motions and dismissed both cases.

> FN1. Section 42-5-250 provides as follows: "This Title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe." S.C.Code Ann. § 42-5-250 (Law.Co-op.1985).

Both Simpson and Chastain filed timely Notices of Appeal. This Court, on August 14, 1998, consolidated both appeals for purposes of briefing and oral argument. Because we find no error in the district court's decision, we affirm.

II.

**2 Appellants requested that the district court certify the following issues to the South Carolina Supreme Court under the certification procedure authorized by Rule 228 [FN2] of the South Carolina Appellate Court Rules:

> FN2. Rule 228 permits federal courts to certify an unsettled question of state law to the South Carolina Supreme Court for resolution. The rule states that "[t]he Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." S.C.A.C.R. 228(a).

1. Does § 42-5-250 of the South Carolina Code of Laws (1976) permit an employee to sue his employer under a general negligence theory if his injury was caused by a "single catastrophic hazard" as defined under the statute?
2. If § 42-5-250 of the South Carolina Code of Laws (1976) removes injuries occasioned by "single catastrophic hazards" from the South Carolina Workers' Compensation Act, can an employer claim election of remedies if workers' compensation benefits have been paid to the employee?
3. Can an employer force its employee to proceed under the doctrine of election of remedies if the employer

files for workers' compensation benefits on behalf of an employee who wasinjured in a "single catastrophic hazard" as defined under § 42-5-250 of the South Carolina Code of Laws?

Even though § 42-5-250 has not been interpreted by the South Carolina courts, the district court found it unnecessary to certify any of the issues outlined above to the state supreme court. Appellants argue that the lack of state precedent directly interpreting § 42-5-250 should have prompted the court to certify the issues, so the court's decision was in error. We review a district court's refusal to certify a question to the state's highest court for abuse of discretion. See Lehman Brothers v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974) (determining that use of certification procedure "rests in the sound discretion of the federal court"); Boyter v. Commissioner of Internal Revenue Service, 668 F.2d 1382, 1385 (4th Cir.1981).

Appellants insist that, while the decision to certify is within the court's discretion, the case law suggests there are broad guidelines that the court must follow. For example, in Langley v. Pierce, 993 F.2d 36 (4th Cir.1993), the Fourth Circuit pointed out that "[b]ecause the resolution of the contentions of the parties is a matter of South Carolina law, and it appears to us that there is no controlling precedent on point in the decisions of the Supreme Court of South Carolina, we believe [it] proper to certify to the Supreme Court of South Carolina for decision the question in this case." Id. at 37-38. Similarly, in Grattan v. Board of School Commissioners of Baltimore City, 805 F.2d 1160 (4th Cir.1986), we stated that certification "is appropriate when the federal tribunal is required to address a novel issue of local law which is determinative in the case before it." Id. at 1164 (denying appellant's certification request). Since there is no controlling precedent interpreting § 42-5-250, Appellants urge, certification to the state supreme court would be appropriate.

**3 To the contrary, there is no need for certification where the answer to the question sought to be certified is reasonably clear. The Fourth Circuit has emphasized that "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court." Roe v. Doe, 28 F.3d 404, 407 (4th Cir.1994); see also Smith v. FCX, Inc., 744 F.2d 1378, 1379 (4th Cir.1984) (determining certification was unnecessary since there was ample state precedent to guide the federal court as to the answer the state court would provide), cert. denied, 471 U.S. 1103 (1985). Even "[w]here there is no case law from the forum state which is directly on point, the district court [must] attempt[ ] to do as the state court would do if confronted with the same fact pattern." Roe, 28 F.3d at 407.

We are especially hesitant to overrule the district court's decision denying certification where the party seeking certification is the same party that sought federal jurisdiction in the first place and, by extension, federal interpretation of state law. See Smith, 744 F.2d at 1379 (suggesting that it was inappropriate for party to request certification of issue to state supreme court where that party "sought and received a federal court's interpretation of state law"). Chastain and Simpson initiated their suits against Duke Energy in federal district court based on diversity jurisdiction. They chose the forum and, in so doing, opted for federal interpretation of the relevant provisions of the state Workers' Compensation Law. We are reluctant to find an abuse of discretion under such circumstances.

Because there exists sufficient sources of South Carolina law for us to render a reasoned and principled conclusion (see discussion below), certification is unnecessary. We, therefore, find no error in the district court's decision.

III.

Concluding that the state Workers' Compensation Law provided the exclusive remedy for injuries arising from "a single catastrophe hazard," the district court granted Duke Energy's motion for summary judgment against Appellants' common law negligence claims. Appellants challenge the judgment, arguing that their injuries are outside the scope of the Act and, thus, exempt from the exclusive remedy rule. We review the court's grant of summary judgment, as well as its interpretation of the state workers' compensation statute, de novo. See Roe, 28 F.3d at 406-407; see also Salve Regina College v. Russell, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (concluding that an appellate court should review de novo a district court's determination of state law).

The South Carolina Workers' Compensation Law provides the exclusive remedy against an employer for employees who are injured in the course of employment. The Act specifically provides:

> **4 The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S.C.Code Ann. § 42-1-540 (Law.Co-op.1985). In short, Section 42-1-540 bars all common law actions against an employer for accidental personal injury. S.C.Code Ann. § 42-1-540; see also Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E.2d 296, 298 (S.C.App.1986) (stating that the exclusivity provision of the Act "bars all actions against an employer where a personal injury to an employee comes within the Act ... [making] the Act the exclusive means of settling all such claims"), cert. denied, 292 S.C. 230, 355 S.E.2d 861 (S.C.1987).

The South Carolina courts have recognized narrowly-defined exceptions to the exclusive remedy provision of the Workers' Compensation Law. First, the statute itself expressly excludes claims for injuries that result from certain "acts of a subcontractor." S.C.Code Ann. § 42-1-540. In addition, since § 42-1-540 only bars actions arising out of "personal injury or death by accident," employees can maintain an action against their employer if the action is not based on a claim of personal injury. As such, it is beyond the scope of the Act. For example, in Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (S.C.1992), the South Carolina Supreme Court permitted an employee to maintain a common law action for negligent supervision against her employer for a co-employee's alleged slander. Id. at 540. The court determined that a slander action did not constitute a personal injury claim and, thus, was not barred by the Act's exclusivity provision "since the gravaman of a slander action is injury to one's reputation."

Id. Similarly, in Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (S.C.1993), the state Supreme Court noted that § 42-1-540, which by its express terms only applies to accidents, does not bar a common law action if the employer "acted with deliberate or specific intent to injure the employee." Id. at 65.

Appellants argue that, under § 42-5-250, their injuries are similarly outside the scope of the Act. Section 42-5-250 states:

> **5 This Title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

S.C.Code Ann. § 42-5-250. Appellants maintain that the provision effectively removes from the Act injuries caused by a single catastrophe hazard like the pipe explosion at issue here. Consequently, Appellants argue, if an employee's injury is caused by such a hazard, he can sue his employer under a general negligence theory.

With this argument in mind, Appellants urge us to adopt the holding of a recent decision of the South Carolina Court of Common Pleas for Colleton County, Pender v. Dogwood Hills Country Club, Inc., No. 98-CP-15-647 (May 11, 1999). In Pender, an employee was killed at work when an irrigation tank exploded. The wife and personal representative of the decedent brought a wrongful death action against her deceased husband's former employer, Dogwood Hills Country Club. The employer moved to dismiss the action on the ground that the plaintiff's claims were precluded by the exclusive remedy provision of the Workers' Compensation Law. Rejecting the motion, the court construed § 42-5- 250 to allow the plaintiff to maintain the negligence action against the employer. The court determined that the plaintiff could recover any available insurance proceeds but could not recover more than the insurance coverage. "By excluding only insurance policies from the Act," the court concluded, "the legislature intended to allow employees to recover benefits in addition to the benefits under the Workers' Compensation Act, but at the same time not expose the employer to liability unless an insurance policy covered the loss." [FN3]

Because the state trial court's decision is not an authoritative statement of state law and, as an unpublished decision, la... ny precedential value, we decline to follow the holding in Pender. Where neither a state's supreme co... r its intermediate appellate courts have ruled on an issue, a federal court is not bound by an unpublished trial court decision. See King v. Order of United Commercial Travelers of America, 333 U.S. 153, 160-61, 68 S.Ct. 488, 92 L.Ed. 608 (1948) (determining that decision of South Carolina Court of Common Pleas not binding on federal district court); see also Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (noting that "while the decrees of 'lower state courts' should be 'attributed some weight ... the decision [is] not controlling ...' where the highest court of the State has not spoken on the point"). In South Carolina, decisions of a common pleas court are accorded little weight. They are" 'binding solely upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina.' " King, 333 U.S. at 492. "[I]t would be incongruous ... to hold the federal court bound by a decision which would not be binding on any state court." Id. at 493. Instead, as a federal appellate court, we must attempt to predict how the state's highest court would rule if confronted with the issue. See id. at 492; see also Bosch, 387 U.S. at 465 ("If there be no decision by [the state's highest court] then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."). Having reviewed the statutory scheme and relevant case law, we believe the state supreme court, if faced with interpreting § 42-5-250, would decide contrary to the trial court's ruling in Pender.

**6 First, as Duke Energy correctly points out, all other exceptions to the exclusive remedy rule existing under South Carolina law are anchored in the plain language of § 42-1-540. As explained above, the provision expressly excludes claims for injuries resulting from certain "acts of a subcontractor," S.C.Code Ann. § 42-1-540, and, by definition, any action not based on an accidental personal injury. In contrast, Appellants attempt to force an unrelated provision from a separate chapter of the Act governing workers' compensation insurance into the discussion of employees' rights and remedies outlined in § 42-1-540. State rules of statutory interpretation simply will not allow an expansion of the statute's operation based on such a random and forced construction of law. See Adams v. Clarendon County School District No. 2, 270 S.C. 266, 241 S.E.2d 897, 900 (S.C.1978) (determining that statutory section cannot be read in isolation or interpreted so as to ignore or conflict with other provisions of the statute).

Second, a plain reading of the statute, see Brooks v. Northwood Little League, 327 S.C. 400, 489 S.E.2d 647, 650 (S.C.App.1997) (noting that South Carolina courts must "give statutes their plain and ordinary meaning where the statute's language is unambiguous"), makes clear that § 42-5-250 applies only to "policies of insurance." Indeed, the provision says so expressly and, additionally, it falls within the chapter entitled "Insurance and Self-Insurance." S.C.Code Ann. § 42-5-10 through 42-5-250 (Law.Co-op.1985); see also T.W. Morton Builders, Inc. v. Buedingen, 316 S.C. 388, 450 S.E.2d 87, 95 (S.C.App.1994) (noting that, when interpreting statute, court may use statute's title to show legislative intent). As an insurance provision, section 42-5-250 merely relieves employers of their obligation to carry insurance and comply with other insurance-related requirements where the injuries for which compensation is required are caused by single catastrophe hazards. It does not lessen or discharge employers from liability under the Act.

See § 42-5-250 (stating that "nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe."). Nor does it provide an employee with a common law right of action for such injuries.

Appellants maintain that the effect of removing insurance policies for single catastrophe hazards from the Act is to remove injuries resulting from those hazards from the Act. They reason that insurers could refuse payment for such injuries, and, unless the employer had a special policy or rider covering single catastrophe hazards, the employer would be left with the loss. The picture Appellants paint is surely possible but not inconsistent with the plain meaning and legislative intentof the statute, by which we are bound. See Adams, 241 S.E.2d at 900 (commenting that in interpreting statutes, the court "must be mindful of the principle that the intention of the legislature is the primary guideline"). Under the Act, an employer who accepts the compensation provisions of the statute is liable to its employees for personal injury. To secure the payment of compensation to his employees, the

employer must insure his liability through an insurance carrier or by self-insuring. S.C.Code Ann. §§ 42-5-10, 42-5-20 (Law.Co-op.1985). If the employer decides not to secure the payment through a carrier, he must furnish to the Commission "satisfactory proof of his financial ability to pay directly the compensation." S.C.Code Ann. § 42-5-20. So, employer liability exists under the Act independent of insurance coverage. Where "a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts." Cook, 352 S.E.2d at 299.

**7 Our holding is consistent with the broad principles that informed the state's adoption of its workers' compensation system. As the South Carolina Court of Appeals has noted, the Workers' Compensation Law "was founded upon a recognition that it is desirable to discard the common law doctrines of tort liability in the employer-employee relationship and substitute a duty of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of his employment." Id. at 298; see also Peay, 437 S.E.2d at 65 (noting that "[w]orkers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault"). In exchange for the employer's assumption of any risk of work- related injuries, the employee is required "to surrender his right to sue at common law." Cook, 352 S.E.2d at 298. The workers' compensation system becomes the "exclusive means of settling all claims for personal injuries arising out of and in the course of an employment relationship." Id. at 299. Given the essential role exclusivity plays in the state's effort to compensate workplace injuries, see id. at 299-300 ("Exclusivity is not incidental to the system of workers' compensation; it is an essential feature of a comprehensive legislative plan for compensating workplace injuries."), we will not lightly read exceptions into that carefully crafted scheme. See Peay, 437 S.E.2d at 65 (determining that any exception to the exclusive remedy rule of § 42-1-540 must be narrowly construed). Rather, as is dictated by South Carolina law, we construe the statute liberally in favor of coverage. See id. (noting that "workers' compensation statutes are construed liberally in favor of coverage").

Since injuries arising from a "single catastrophe hazard" are not exempted from the Act's coverage, Appellants' sole remedy for such injuries is through the workers' compensation system. The district court was, therefore, correct in granting summary judgment against Appellants' negligence claims. Accordingly, the district court's decision is

AFFIRMED.

FN3. The trial court's reading of § 42-5-250 to imply a legislative intent to allow employees to recover benefits under the workers' compensation system and at common law is contrary to state law on the issue. It is well-established that an employee cannot obtain both workers' compensation benefits and common law damages. In Boulware v. Mills, 294 S.C. 24, 362 S.E.2d 184 (S.C.App.1987), for example, an employee was assaulted by a co-worker, filed a workers' compensation claim, and recovered benefits pursuant to the claim. The injured employee then filed a civil action for assault and battery against the co-worker and employer. Id. at 185. The South Carolina Court of Appeals dismissed the action, stating: "We do not interpret the law to mean the employee may recover workers' compensation and then proceed to file a suit against the employer under common law. Rather, ... in such a case the employee has the option to claim workers' compensation or sue his employer under the common law." Id. Similarly, in McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (S.C.1991), the South Carolina Supreme Court cautioned that "an employee may not recover under workers' compensation and at common law." Id. at 893.

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STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 98-CP-15-647

Cynthia Pender, Personal Representative of the Estate of Zan C. Pender,

Plaintiff,

-v-

Dogwood Hills Country Club, Inc.

Defendant.

ORDER

99 MAY 26 AM 11:58

This matter came before the court on defendant Dogwood Hills Country Club's ("Dogwood Hills") motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) SCRCP. Dogwood Hills bases its request for dismissal on grounds that plaintiff's claims are barred by the South Carolina Workers Compensation Act, S.C. Code Ann § 42-1-10 et seq. which provides the exclusive remedy for injuries to employees covered by the Act.[1]

This is a wrongful death action filed by the wife and personal representative of Zan Pender who was killed in an explosion at Dogwood Hills on June 14, 1998. The complaint filed in this action alleges that Mr. Pender was an employee of Dogwood Hills and was killed when a tank that was part of the irrigation system exploded. At the hearing on this matter counsel for both parties submitted photographs of the scene which unquestionably show that an explosion occurred at the time of Mr. Pender's death.

The plaintiff maintains that this action is exempted from the Act by § 42-5-250 which provides:

[1]The court was presented with no evidence that the parties hereto were covered by the Act and was asked by counsel to assume that the Act applied for purposes of this motion.

> This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

The plaintiff introduced into evidence an insurance policy that provides coverage for the explosion that killed decedent. She argues that because Dogwood Hills maintained a policy of insurance that covered the loss that § 42-5-~~240~~ 250 allows her to pursue this coverage and that she is not limited to an award under the Act.

Dogwood Hills contends that the tank that exploded was not a boiler and, the provision is inapplicable for this reason. The court finds that the tank that exploded was a boiler tank based upon the affidavit of Madison Walling, a former employee of Dogwood Hills, and the OSHA material presented to the court, but this finding is not necessary because the event is clearly a single catastrophe hazard as contemplated by the section. The court further finds that the explosion that killed decedent was an event of the type contemplated by § 42-5-240.

Dogwood Hills next contends that because the employer and employee accepted the provisions of the Workers Compensation Act that § 42-5-~~240~~ 250 is inapplicable and that therefore the plaintiff is restricted to recovery under the Act. This argument is contrary to a plain reading of the statute. Section 42-5-250 is a part of the Workers Compensation Act and by its language clearly provides an exception to the Act. The question presented to the court is what is excepted from the Act, and more importantly does this provision allow plaintiff to maintain the present action.

Section 42-5-250 has not been interpreted by any South Carolina court nor have the appellate courts of other states with similar provisions in their Workers Compensation Acts

addressed the language of this provision.[2] It thus becomes the court's duty to interpret the statute at issue to ascertain its meaning and application to the present case. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Walton v. Canal Ins.*, 485 S.E.2d 103 (Ct. App. 1997). Statutory provisions should be given a reasonable construction, consistent with the policy and purpose of the Act. *Jackson v. Charleston County School Dist.*, 447 S.E.2d 859 (1994).

The first sentence of the statutes provides: "This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards." The heading of the section reads: "Title not applicable to insurance for single catastrophe hazards." It is clear that the focus of this section is on insurance policies that provide coverage for catastrophe hazards such as explosions. The provision does not say that all claims involving such hazards are excluded from the Act but is directed toward insurance policies.

The only logical interpretation of this language is that the Act was not intended to prevent claims for injury caused by an explosion if there is an insurance policy that provides coverage for the event. The Act is not available to the insurance carrier as a defense to bar claims made under the policy. Because the statute only excludes insurance policies, it does not allow for a claim against the employer over and above any loss covered by an insurance policy. If a policy of insurance does not exist covering the event, then § 42-5-250 has no application. There must exist both a catastrophic event such as an explosion and a policy of insurance that provides coverage before the section is applicable. If these criteria are met, this action is not barred.

---

[2]North Carolina, Tennessee and Virginia have almost identical provisions in their Workers Compensation Acts. NC. St. § 97-99 (1944-1997); TN. St. § 50-6-405; VA. St. § 65.2-816.

Both of these criteria are present in this case. There was an explosion which killed Mr. Pender and there is insurance coverage for the loss occasioned by the explosion. The court has reviewed the policy of insurance provided by Companion Property and Casualty Group. The policy provides Employer Liability Insurance. The coverage provides that the insurance company will pay all sums which employer must pay because of bodily injury including death by accident to any employee arising out of the employee's employment. This policy clearly provides coverage for the loss occasioned by Mr. Pender's death. Because the requirements of Section 42-5-250 have been met, the plaintiff can maintain this action to recover any available insurance proceeds but cannot recover from the employer in a tort suit more than the insurance coverage. The employer is, however, still liable for benefits payable under the Act by virtue of the second sentence contained in § 42-5-250.

> But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

By this sentence the legislature sought to prevent an employer from escaping his responsibility under the Act because of the existence of an insurance policy that provided coverage pursuant to the first sentence. There can be no other purpose for this language.

In essence § 42-5-250 allows an avenue for additional compensation when an employee is injured or killed in an explosion and separate insurance coverage is available. This interpretation is consistent with the purpose of the Act which was enacted to ensure compensation for the employee for injuries arising out of and in the course and scope of employment and at the same time protect the employer from unlimited tort liability. By excluding only insurance policies from the Act, the legislature intended to allow employees to recover benefits in addition to the benefits under the Workers Compensation Act, but at the same

time not expose the employer to liability unless an insurance policy covered the loss.

A review of the history of the Workers Compensation act supports the above interpretation. Section 42-5-250 was included in the original Act which was adopted in 1936. 1936 Act No. 1231. A review of the legislative history reveals no recorded discussion of § 42-5-250. However, what is clear from the history is that at least some legislators felt the benefits provided were too low.

For example, then State Senator Strom Thurmond, spoke out against the Act because the compensation "brackets" were "entirely too low." 1935 Senate Journal p. 1515. Other comments included that the "low compensation for such severe and serious injuries is altogether unfair." (*id.*) Further, that "[t]he amounts provided in the brackets would hardly support the man and his family during his illness, much less allow him any compensation for the loss of an eye, foot, hand, or other injury that he might sustain." (*id.*) The low "brackets" complained of by Senator Thurmond and others were incorporated in the Act as signed by Governor Johnston in 1936.

It is entirely consistent with this legislative history that the legislature recognized that severe injury or death was the likely result when a boiler exploded or some other catastrophic event occurred. In this same light it is consistent that the legislature recognized that the compensation rates provided in the Act would be inadequate and intended to allow for additional compensation if there was a policy of insurance covering the loss.

Based on the foregoing discussion, the court interprets § 42-5-250 to allow the plaintiff to pursue the present action but only to the limits of any insurance policies which provide coverage for the explosion at issue.

The defendant's motion to dismiss is therefore denied.

IT IS SO ORDERED.

Diane Goodstein
Diane Goodstein
Presiding Judge

Summerville, SC
~~April ______, 1999~~
May 11, 1999

STATE OF SOUTH CAROLINA
COUNTY OF YORK

JUDGEMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 98CP46-559

STANLEY C. BIEDA AND SHEILA BIEDA

PLAINTIFF(S)

SANDERS BROTHERS INC AND INCHEM, INCORPORATED

DEFENDANT(S)

CHECK ONE:

( ) **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

( ) **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

( ) **ACTION DISMISSED** (*CHECK REASON*): ( ) Rule 12(b), SCRCP; ( ) Rule 41(a), SCRCP (Vol. Nonsuit); ( ) Rule 43(k), SCRCP (Settled); ( ) Other - ____

( ) **ACTION STRICKEN** (*CHECK REASON*): ( ) Rule 40(j) SCRCP; ( ) Bankruptcy; ( ) Other - ____

IT IS ORDERED AND ADJUDGED: ( ) See attached order; ( ) Statement of Judgment by the Court:

ORDER OF THE COURT REGARDING INCHEM'S
MOTION FOR SUMMARY JUDGMENT

Dated at YORK, South Carolina, this 21 day of SEPTEMBER, 19 99.

S/J. BUFORD GRIER
PRESIDING JUDGE

This judgment was entered on the 22 day of SEPTEMBER, 19 99, and a copy mailed first class this 22 day of SEPTEMBER, 19 99 to attorneys of record or to parties (when appearing pro se) as follows:

MARK CHAPPELL
ATTORNEY AT LAW
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COLUMBIA, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

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ATTORNEY AT LAW
PO DRAWER 2426
COLUMBIA, SC 29202
~~TIMOTHY D. ST CLAIR, ATTORNEY~~ AT LAW
PO BOX 2285
~~COLUMBIA, SC 29202~~

ATTORNEY(S) FOR THE DEFENDANT(S)

DAVID HAMILTON
CLERK OF COURT

98CP-46-559

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	CIVIL ACTION NO.: 98-CP-46-559
STANLEY C. BIEDA AND SHEILA BIEDA, as wife Plaintiffs, vs. SANDERS BROTHERS, INC. AND INCHEM, INCORPORATED, Defendants.	**ORDER OF THE COURT REGARDING INCHEM'S MOTION FOR SUMMARY JUDGMENT**

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Sep 22 4 46 PM '99
DAVID HAMILTON C.C.P. & G.S. YORK COUNTY, SC

This matter comes before me for a hearing on July 8, 1999 on Defendant Inchem's Motion for Summary Judgment. Present for the hearing were Timothy St. Clair, Esquire, attorney for Inchem, Russell Burke, Esquire, attorney for Sanders Brothers and Mark D. Chappell, Esquire attorney for the Plaintiffs.

Statement of Facts

The facts are undisputed that Stanley Bieda was burned when an explosion occurred while he was acting within the course and scope of his employment with the Defendant Inchem. The facts also show that Bieda settled his workers' compensation claim with the Defendant Inchem, but did with the agreement of Inchem, in his release, retain and not waive any rights he may have under § 42-5-250 of the South Carolina Code Annotated. Subsequent to settlement of the workers' compensation claim, the Plaintiff did file this action alleging negligence against Inchem and Sanders Brothers, an outside contractor doing work within the chemical plant, for the explosion and his injuries. All acts of negligence of the Defendants have been denied. Inchem then brought this motion for summary judgement arguing in essence that Plaintiff's

claims are barred by the exclusive remedy provisions of § 42-1-540 and the Plaintiff's election of remedies.

Discussion

The crux of the issue before this court is whether an employee injured in an explosion, can sue his employer in a negligence action. The applicable South Carolina Annotated section is § 42-5-250. The first sentence of the statute provides:

> This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards.

The heading of the section reads: "Title not applicable to insurance for single catastrophe hazards." It is clear that the focus of this section is on insurance policies that provide coverage for catastrophic hazards such as explosions. The provision does not say that all claims involving such hazards are excluded from the Act but is directed toward insurance policies.

The only logical interpretation of this language is that the Act was not intended to prevent claims for injury caused by an explosion if there is an insurance policy that provides coverage for the event. The Act is not available to the insurance carrier as a defense to bar claims made under the policy. Because the statute only excludes insurance policies, it does not allow for a claim against the employer over and above any loss covered by an insurance policy. If a policy of insurance does not exist covering the event, then § 42-5-250 has no application. There must exist both a catastrophic event such as an explosion and a policy of insurance that provides coverage before the section is applicable. If these criteria are met, this action is not barred.

Both of these criteria are present in this case. There was an explosion, which injured Mr. Bieda, and there is insurance coverage for the loss occasioned by the explosion. The court has reviewed the policy of insurance provided by ITT Hartford. The policy provides Employer Liability Insurance. The coverage provides that the insurance company will pay all sums which

employer must pay because of bodily injury by accident to any employee arising out of the employee's employment. This policy clearly provides coverage for the loss occasioned by Mr. Bieda's injury. Because the requirements of § 42-5-250 have been met, the Plaintiff can maintain this action to recover any available insurance proceeds but cannot recover from the employer in a tort suit more than the insurance coverage. The employer is, however, still liable for benefits payable under the Act by virtue of the second sentence contained in § 42-4-250.

> But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

By this sentence the legislature sought to prevent an employer from escaping his responsibility under the Act because of the existence of an insurance policy that provided coverage pursuant to the first sentence. There can be no other purpose for this language.

In essence § 42-5-250 allows an avenue for additional compensation when an employee is injured or killed in an explosion and separate insurance coverage is available. This interpretation is consistent with the purpose of the Act which was enacted to ensure compensation for the employee for injuries arising out of and in the course and scope of employment and at the same time protects the employer from unlimited tort liability. By excluding only insurance policies from the Act, the legislature intended to allow employees to recover benefits in addition to the benefits under the Workers Compensation Act, but at the same time not expose the employer to liability unless an insurance policy covered the loss.

A review of the history of the Workers Compensation Act supports the above interpretation. § 42-5-250 was included in the original Act which was adopted in 1936. 1936 Act No. 1231. A review of the legislative history reveals no recorded discussion of § 42-5-250. However, what is clear from the history is that at least some legislators felt the benefits provided were too low.

For example, then State Senator Strom Thurmond spoke out against the Act because the compensation "brackets" were "entirely too low." 1935 Senate Journal p. 1515. Other comments included that the "[l]ow compensation for such severe and serious injuries is altogether unfair." (id.) Further, that "[t]he amounts provided in the brackets would hardly support the man and his family during his illness, much less allow him any compensation for the loss of an eye, foot, hand, or other injury that he might sustain." (id.) The low "brackets" complained of by Senator Thurmond and others were incorporated in the Act as signed by Governor Johnston in 1936.

It is entirely consistent with this legislative history that the legislature recognized that severe injury or death was the likely result when a boiler exploded or some other catastrophic event occurred. In this same light it is consistent that the legislature recognized that the compensation rates provided in the Act would be inadequate and intended to allow for additional compensation if there was a policy of insurance covering the loss.

Based on the foregoing discussion, the court interprets § 42-5-250 to allow the Plaintiff to pursue the present action but only to the limits of any insurance policies which provide coverage for the explosion at issue.

The Defendant also raises the issue that the Plaintiff is barred from recovery under this negligence action because he has elected his remedy in workers' compensation. This is incorrect for two reasons. First based on the foregoing analysis, it is clear that § 42-5-250 allows for an injured employee to collect both his workers' compensation benefits and his liability benefits if such insurance exists. Second, the language of the contract between Bieda and Inchem in the form of the release to the workers' compensation claim, specifically retained to the Plaintiff and

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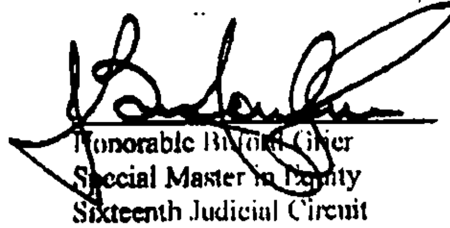
in no way waived any rights he may have to proceed under § 42-5-250.

The Defendant Inchem's Motion for Summary Judgement is therefore denied.

AND IT IS SO ORDERED.



Honorable Byron Gier
Special Master in Equity
Sixteenth Judicial Circuit

Dated at:
York, South Carolina

This 22d day of ~~July~~ Sept, 1999

#5

WCC File No.______

NOTICE
OF
THIRD PARTY ACTION
EMPLOYEE CARRIER

In the Workers' Compensation claim of

______________________________, Employee

______________________________, Claimant (s)

vs.

______________________________, Employer

______________________________, Carrier.

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above named Carrier or Self-Insured Employer:

PLEASE TAKE NOTICE that an action has been commenced against as defendant (s) in the Court of ___Common Pleas___________ ____________County of ____________ and State of____________

under date of ______________________, 1999.

In the event no recovery is made the undersigned assumes full responsibility for all expenses involved in the investigation preparation and trial of this case. In the event of recovery or settlement after suit is instituted attorney's fees are limited to one-third (1/3) of any amount recovered plus any necessary trial expenses.

____
Employee or Surviving Workers' Compensation Beneficiary

____
Attorney for Employee or Surviving Workers' Compensation Beneficiary

Dated:

____

A copy of this form must be served upon the South Carolina Workers' Compensation Commission, the Workers' Compensation carrier or self-insured employer by personal service, registered or certified mail within thirty (30) days after third party action commenced; and the third party action must be commenced within one (1) year after employer-carrier accepts liability for or makes payment of compensation as provided in the Workers' Compensation law.

COURT CERTIFICATE

________________________________,

________________________________, Plaintiff (s)

vs. Civil Action No:

________________________________,

________________________________, Defendant(s)

was filed in this Court under date of ______________________ 19________ with affidavit of service showing service of the Summons upon the defendant (s).

__________________________(SEAL)
Clerk of Court

Court__________________________

County__________________________

Dated:

____

State__________________________