STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
	)	
Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, Plaintiff,	)	
	)	**PLAINTIFF'S MOTION *IN LIMINE* NO. 1 TO EXCLUDE DEFENDANTS' EMPTY-CHAIR DEFENSE AND EVIDENCE OF THIRD-PARTY FAULT OF PLAINTIFF'S EMPLOYER**
vs.	)	
	)	
South Carolina Electric & Gas Company; PENSCO Trust Company LLC; and Edisto Sales & Rentals Realty, LLC, Defendants.	)	

Plaintiff Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios ("Plaintiff"), respectfully submits this motion *in limine* to prohibit Defendants from introducing at trial any testimony or other evidence of fault on the part of Stevens Irrigation & Landscaping and/or its principal, William Stevens (collectively "Stevens"), who was the employer of the decedent plaintiff Jose Refugio Licona Larios ("Larios"). Under the facts of this case, neither SCE&G, PENSCO, nor Edisto Realty has any basis on which to argue either the traditional "empty chair" defense or the limited "empty chair employer" defense recently recognized in *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017). Without a basis for either defense, evidence of the alleged negligence of Stevens is irrelevant and inadmissible pursuant to Rule 402, SCRE. In the alternative, any probative value would be substantially outweighed by the dangers of unfair prejudice to Plaintiff, confusion of the issues, and misleading the jury, requiring exclusion of such evidence pursuant to Rule 403, SCRE.

POSTURE

A more complete synopsis of the case is set forth in Plaintiff's pre-trial brief. For purposes of this motion *in limine*, the relevant facts relate to the absence of a nexus between Stevens and

the named Defendants that would support Defendants' use of the "empty chair employer" defense recognized in *Machin*.

Defendants SCE&G and Edisto Realty want to introduce evidence that Stevens negligently trained and supervised its employee, Larios, and failed to provide him with a safe working environment. Such evidence will include alleged OSHA violations committed by Stevens with respect to the tree trimming at issue. SCE&G wants to tell the jury that such evidence supports a finding that the independent negligence of Stevens constituted an intervening or superseding cause that prohibits a finding that SCE&G's own negligence was a proximate, legal cause of Larios's accident. SCE&G Memo in Support of MSJ at 10–11; Edisto Realty MSJ at 6–7.

PENSCO wants to tell the jury that Stevens new or should have known of the dangerous condition of the untrimmed trees and SCE&G's power lines, and that such constructive knowledge was imputed to Stevens' employee, Larios. PENSCO Memo in Support of MSJ at 16–17. In doing so, PENSCO wants to argue not only Larios's comparative negligence, but also that the alleged third-party negligence of Stevens was the proximate cause of Larios's accident.

Defendants assert that evidence of OSHA violations by Stevens is relevant to show that Stevens negligently supervised and trained Larios, and that Stevens' negligence was a proximate (legal) cause of Larios's accident. Yet, because Stevens is immune from liability pursuant to the Workers' Compensation Act, acts and omissions by Stevens *cannot*, as a matter of law, be found a proximate, legal cause of the accident.[1]

[1] Plaintiff also craves reference to Plaintiff's Motion *in Limine* No. 2, section III, where Plaintiff explains that Defendants' theory of liability against Stevens—negligent supervision and training—fails because critical elements of such a claim are missing in this case.

Even if the jury were to believe the proposed evidence about Stevens, that would not prevent the jury from finding that SCE&G, PENSCO, Edisto Realty, or all of them also committed negligence, or that their respective negligence was at least *a* proximate cause of the accident. Since the evidence would not provide such a factual barrier to a finding of fault on the part of any Defendant, the evidence is unlike that found in *Machin* to support an empty-chair-employer defense.

LAW AND ARGUMENT

As the employer of Larios, Stevens is protected from civil liability pursuant to the Workers' Compensation Act, and is therefore not a potential joint tortfeasor of the named Defendants. Consequently, Defendants are unable to present a traditional "empty chair" defense…that regardless whether Defendants committed negligence, the negligence of non-party Stevens was the sole proximate, legal cause of Plaintiff's injuries.

Likewise, Defendants are unable to present the more limited empty-chair defense with respect to the alleged fault of a plaintiff's employer, as recognized in *Machin*. *Machin* involved a failure-to-warn products claim against a chemical manufacturer for exposure to toxic chemicals. The plaintiff worked for the Town of Lexington, which purchased the chemical to deodorize its sewer systems. *Id.* at 531–32, 799 S.E.2d at 470. The manufacturer defended the plaintiff's claim, in part, by arguing that it had, in fact, provided numerous warnings instructing users to wear protective equipment when handling the chemical. That is, the manufacturer was not negligent for failing to warn, and nothing it had done was the cause in fact ("but for" cause) of the plaintiff's accident. Instead, the manufacturer claimed, the town had failed to share the manufacturer's warnings with the town's employees, including the plaintiff, and that such failure by the town was the reason that the plaintiff had been injured. *Id.* at 532–33, 799 S.E.2d at 471. The legal question

arose as to whether and to what extent the manufacturer should have been able to raise the empty-chair defense as to the fault of the plaintiff's employer, the town. *Id.* at 536–37, 799 S.E.2d at 472–73.

There, the Supreme Court held that while defendants are unable to assert a traditional empty-chair defense as to a plaintiff's employer, defendants may be able to raise the issue of the employer's fault *if* the jury could find that the employer's conduct, in the course of events leading up to the plaintiff's accident, serves as a factual barrier to a finding that the named defendants were negligent. *Machin*, 419 S.C. at 543–44, 799 S.E.2d at 476–77 (holding that a jury may consider an employer's fault "only insofar as [the jurors] assess and determine whether the plaintiff has met his burden of proving" negligence against the named defendant). An example is a product-liability case against a manufacturer where the plaintiff's employer had altered a perfectly safe product and thereby converted the product into a dangerous product. The jury's finding employer fault in that case may preclude a finding of fault by the manufacturer, and the manufacturer is therefore allowed to present evidence of the employer's alteration of the product in order to present the full factual context of the manufacturer's defense that the product was safe when it left the manufacturer's hands.

The case at bar presents no factual basis for such an argument by Defendants about the conduct of Plaintiff's employer, Stevens. The most Defendants could ever prove here was that acts or omissions by Stevens constituted a cause of Plaintiff's injuries *concurrent with* the negligence of the named Defendants. A finding that Stevens was negligent would in no way prove that SCE&G, Edisto Realty, or PENSCO were not also negligent. Consequently, the limited "empty-chair-employer" defense from *Machin* is unavailable to these Defendants.

Since neither the traditional empty-chair defense nor the empty-chair-employer defense is available to Defendants, all evidence of Stevens' alleged fault should be excluded pursuant to Rules 402 and 403, SCRE.

I. DEFENDANTS MAY NOT RAISE THE TRADITIONAL EMPTY-CHAIR DEFENSE.

Pursuant to the Contribution Among Joint Tortfeasors Act, the jury is to apportion damages only among the plaintiff and those defendants sued by the plaintiff. Potential tortfeasors whom the plaintiff could have sued, but chose not to, are thus not included on the verdict form. *Machin*, 419 S.C. at 544–46, 799 S.E.2d at 477–78; *Smith v. Tiffany*, 419 S.C. 544–45, 555–60, 799 S.E.2d 479, 483–86 (2017).

While a third-party tortfeasor whom the plaintiff has not sued is not included on the verdict form or apportioned fault by the jury, a named defendant may raise the "empty chair" defense and argue that the negligence of the third-party tortfeasor was the sole proximate cause of the plaintiff's injuries. In other words, the defendant may argue that it was not negligent, but even if it were, its negligence was not a proximate cause of the plaintiff's injuries. The "empty chair" tortfeasor's negligence was the *sole proximate cause*, the argument goes, and the jury should deliver a defense verdict in favor of the named defendant. *Machin*, 419 S.C. at 532, 799 S.E.2d at 470 (noting that the empty-chair defense is an argument that the non-party's "negligence was the *sole* proximate cause of Plaintiff's injuries") (emphasis added); *Smith*, 419 S.C. at 557, 799 S.E.2d at 484 n. 2 (discussing how the empty-chair defense operates with respect to the negligence of both the named defendant and the unnamed tortfeasor and whether either was the proximate cause of the plaintiff's injuries).

Importantly, this traditional empty-chair defense is available only with respect to potential third-party *tortfeasors*…third-parties whose negligence may be found to be the sole proximate, or

legal, cause of the plaintiff's injuries. Since a plaintiff's unnamed employer is immune from a liability pursuant to the Workers' Compensation Act, any negligence by the employer cannot, as a matter of law, be found a proximate, legal cause of the plaintiff's injuries. *Machin*, 419 S.C. at 537–44, 799 S.E.2d at 473–77; *accord Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406–07, 608 S.E.2d 425, 426–27 (2005) (holding prior to *Machin* that a plaintiff's employer is not a potential joint tortfeasor); *Indemnity Ins. Co. v. Odom*, 237 S.C. 167, 176, 116 S.E.2d 22, 27 (1960) (same). Consequently, pursuant to *Machin*, Stevens is not a potential third-party tortfeasor in this case, and the named defendants may not raise the traditional empty-chair defense at trial. The Court should exclude them from trying to do so in opening or closing, or through the presentation of evidence.

II. DEFENDANTS MAY NOT RAISE *MACHIN'S* LIMITED EMPTY-CHAIR-EMPLOYER DEFENSE.

The only way for a defendant to raise an empty-chair defense as to a plaintiff's employer is if the facts of the case justify the limited version of the empty-chair defense provided for in *Machin*. The rule from *Machin* is that a defendant may introduce evidence of the conduct of the plaintiff's employer, a non-party, in the course of events leading up to the plaintiff's accident and injury, only if that conduct is relevant to disprove a key element of the plaintiff's cause of action against a named defendant. That is, the evidence of the employer's conduct must serve to demonstrate that the conduct of the named defendant was not a cause *in fact* of the plaintiff's accident. *Machin*, 419 S.C. at 543–44, 799 S.E.2d at 476–77 (holding that a jury may consider an employer's actions "only insofar as [the jurors] assess and determine whether the plaintiff has met his burden of proving" actionable negligence against the named defendant).

Machin includes an in-depth discussion of *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252 (Tenn. 1997), a Tennessee Supreme Court opinion on which the *Machin* Court heavily relied. *Snyder* involved a product-liability case against a manufacturer that had sold a cotton

compress to the plaintiff's employer. The plaintiff's arm was injured when it became stuck in the machine, and the plaintiff claimed that the machine was defective. The manufacturer defended that the machine was perfectly safe when it left the manufacturer's control, and that any danger was the result of the employer's post-purchase alteration of the machine. *Machin*, 419 S.C. at 539, 799 S.E.2d at 474 (providing a synopsis of the facts from *Snyder*, 955 S.W.2d at 253–54). In other words, the manufacturer defended that nothing it had done constituted a cause in fact of the plaintiff's accident.

In evaluating the extent to which the manufacturer could raise the empty-chair defense, the *Snyder* Court focused heavily on the difference between the legal concepts of cause in fact and proximate cause, and "held that the defendants were permitted to introduce evidence at trial that the plaintiff's employer's alteration, change, improper maintenance, or abnormal use of the defendants' product was a cause in fact of the plaintiff's injuries, but the jury would not be permitted to assess fault against the non-party employer." *Machin*, 419 S.C. at 540, 799 S.E.2d at 474. Assessing fault would require a finding of proximate, legal cause against the non-party employer, which is impossible due to employer immunity.

The *Snyder* Court's reasoning was that to disallow evidence of the employer's conduct under those facts would effectively deprive the manufacturer of the defense that the machine was safe when it left the manufacturer's hands and that the manufacturer's conduct was not a cause in fact of the plaintiff's accident. *Machin*, 419 S.C. at 540–41, 799 S.E.2d at 474 (quoting and summarizing *Snyder*, 955 S.W.2d at 253–57). That is, the manufacturer would be prevented from introducing evidence from which the jury could determine that the manufacturer was not at all at fault. Rather, the employer's conduct is what caused the machine to become unsafe.

Importantly, whether the employer was negligent in altering the machine was not the focus of the manufacturer's defense. The manufacturer's defense was that regardless whether the employer had been negligent, in a legal sense, in altering the machine, the plaintiff could not prove that "but for" anything the manufacturer had done the plaintiff's accident would not have happened. The evidence of the employer's conduct was relevant to the plaintiff's ability to prove this key element of his claim against the manufacturer. The *Snyder* Court's analysis was focused solely on the manufacturer's ability to present a full factual defense of its own conduct, not on any effort by the manufacturer to point fingers and argue that the non-party employer had been the one who had committed negligence.

The South Carolina Supreme Court adopted the Tennessee court's analysis *in toto*,[2] and held that the defendant in *Machin* could present evidence of the Town of Lexington's conduct in the course of events leading up to the plaintiff's chemical exposure. *Machin*, 419 S.C. at 542–44, 799 S.E.2d at 476–77. The Court held that in cases in which a defendant raises the empty-chair defense in relation to the plaintiff's liability-immune employer, "it is proper [for the jury to] consider the employer's actions, but only insofar as [the jurors] assess and determine whether the plaintiff has met his burden of proving the elements of the claim(s) necessary to recover against the defendant." *Id.* at 543–44, 799 S.E.2d at 477.

Pursuant to this holding, the chemical manufacturer could introduce evidence that it had indeed provided proper warnings about the need for protective gear to prevent chemical exposure, but the plaintiff's employer had failed to share those warnings with the plaintiff. Whether such evidence demonstrated third-party negligence on the part of the employer was not the issue.

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[2] *Snyder* may have been abrogated by statute in Tennessee. *See* 2013 Tenn. Code Ann. § 29-11-107(d). *Machin* has not been abrogated in South Carolina, and is controlling here.

Rather, the relevance of the evidence was to give the jury full context of the plaintiff's accident, and to demonstrate that the manufacturer had not failed to warn or otherwise committed negligence. Critically, the evidence supported the defense that the plaintiff could not prove "but for" the manufacturer's conduct, the accident would not have happened.

To be gleaned from *Machin* and *Snyder* is that to raise the empty-chair-employer defense, there must be evidence which would allow the jury to find that the employer's conduct factually defeats any finding that the named defendant was a cause in fact of the plaintiff's accident. A defendant cannot raise the defense by claiming that the plaintiff's employer was concurrently negligent along with the defendant; that the employer was more negligent than the defendant; or that the employer's negligence was a stronger proximate cause of the plaintiff's accident than the defendant's negligence. Unlike with the traditional empty-chair defense—where the named defendant argues that the unnamed third-party was the sole proximate, legal cause—with the empty-chair-employer defense the evidence must support a finding that the named defendant was not even a cause in fact.

Unlike the employer evidence proposed by the manufacturing defendants in *Machin* and *Snyder*, the proposed evidence of Stevens' conduct in the case at bar would not serve to demonstrate lack of negligence or cause in fact on the part of SCE&G, PENSCO, or Edisto Realty. At most, the evidence would suggest that Stevens may have committed negligence that ran concurrently with the negligence of these Defendants. That is not the type of employer evidence approved in *Machin*, and the Court should therefore exclude it pursuant to Rules 402 and 403, SCRE.

Even if Defendants are correct that Stevens was negligent and that it was a cause of the accident, the facts around Stevens' conduct would not prevent the jury from finding that "but for"

the omissions of SCE&G, Larios's accident would not have happened. Indeed, the whole case is predicated on the claim that SCE&G's power lines were not clear of vegetation, and that was the reason Larios was electrocuted. Defendants' argument that Stevens should have been aware of the presence of the power lines and warned or trained Larios to stay out of this palmetto tree cannot logically foreclose a finding of cause in fact against SCE&G, PENSCO, or Edisto Realty. Consequently, Defendants do not have a viable empty-chair-employer defense, and all evidence of the alleged negligence of Stevens is irrelevant and inadmissible. The Court should therefore exclude it.

CONCLUSION

Under the facts of this case, neither SCE&G, PENSCO, nor Edisto Realty has any basis on which to argue either the traditional "empty chair" defense or the limited "empty chair employer" defense recently recognized in *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017). Without a basis for either defense, evidence of the alleged negligence of Stevens is irrelevant and inadmissible pursuant to Rule 402, SCRE. In the alternative, any probative value would be substantially outweighed by the dangers of unfair prejudice to Plaintiff, confusion of the issues, and misleading the jury, requiring exclusion of such evidence pursuant to Rule 403, SCRE. Defendants should also be prohibited from arguing these invalid defenses to the jury.

SIGNATURE OF COUNSEL FOLLOWS ON PAGE 11

Respectfully submitted,

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