South Carolina Law Review

Volume 66
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 8

Summer 2015

Toxic Torts and Workers' Compensation at the Savannah River Site: The Disparate Remedies Available to Those Who Work for Cancer and Those Who Get It for Free

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TOXIC TORTS AND WORKERS' COMPENSATION AT THE SAVANNAH RIVER SITE: THE DISPARATE REMEDIES AVAILABLE TO THOSE WHO WORK FOR CANCER AND THOSE WHO GET IT FOR FREE

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I. INTRODUCTION

As a father sits with his family around the kitchen table quietly enjoying breakfast, a few miles upwind, a pipefitter and his coworkers head into work at a nuclear processing plant. As the father begins to cough heavily, the pipefitter collapses with a tightness in his chest that causes him to cough as well. Both have suffered injuries from exposure to constant low doses of nuclear radiation.

Both are rushed to the same hospital and treated for the same injuries. Both will be diagnosed with the same form of cancer and struggle equally with its symptoms. The only difference between the two is how South Carolina law will value and compensate them for their radiation-related injuries.

Current workers' compensation laws in South Carolina provide remedies to similar classes of injured workers that are far inferior to common law remedies available to nonemployee citizens with similar injuries from similar causes.[1] While workers' compensation laws provide the sole remedy for injured workers,[2] nonemployees are free to exercise several different avenues of compensation provided under common law.[3]

A nuclear facility, such as the Savannah River Site (SRS), provides the perfect example of an environment where different classes of individuals can experience the same types of injuries. According to several sources, including the Centers for Disease Control and the National Institute for Occupational Safety and Health, the SRS produces radiation that can be linked to many negative effects on its workers, neighboring residents, and even the surrounding wildlife.[4] While neighboring residents have a host of remedies to combat injuries resulting from these toxic torts, the South Carolina Workers' Compensation Act (the Act) substantially limits remedies available to SRS employees who suffer similar injuries.[5] These employees should not be treated differently under South Carolina laws.

The purpose of this Note is to analyze the different remedies afforded to employees and nonemployees with similar injuries under South Carolina law and to suggest appropriate changes to equalize their treatment. Part II of this Note will discuss the history of the SRS and analyze the science of radiation and radiation-related injuries. Part III will discuss possible remedies available to SRS employees under the Act, including limited exceptions, and will illustrate the application of those remedies through a hypothetical case analysis of an injured SRS employee. Part IV will discuss the various remedies available to nonemployee citizens who suffer similar types of radiation injuries and will illustrate the benefits afforded under these remedies through a hypothetical case

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1. *See* GRADY L. BEARD ET AL., THE LAW OF WORKERS' COMPENSATION INSURANCE IN SOUTH CAROLINA 515 (6th ed. 2012) (citing S.C. CODE ANN. § 42-1-540 (2015)).

2. *See* S.C. CODE ANN. § 42-1-540 (2015).

3. BEARD ET AL., *supra* note 1, at 515.

4. *Savannah River Site Mortality Study*, CTR. FOR DISEASE CONTROL, http://www.cdc.gov/niosh/oerp/savannah-mortality (last updated March 31, 2011) (reporting that SRS workers have a higher chance of dying from leukemia and pleural cancer); *SRS Dose Reconstruction Project, Phase III*, CTR. FOR DISEASE CONTROL AND PREVENTION 3 (2003), *available at* http://www.cdc.gov/nceh/radiation/Savannah/docs/Fact%20Sheet_083006.pdf (reporting increased levels of radiation exposure from contaminated fish and livestock around the SRS); 1 WILSON B. RIGGAN ET AL., U.S. ENVTL. PROT. AGENCY, U.S. CANCER MORTALITY RATES AND TRENDS, 1950–1979 390 (Nat'l Cancer Inst. 1983) (indicating that Aiken county had "significantly more deaths than expected" from certain types of cancer).

5. *See* S.C. CODE ANN. §§ 42-1-540, -13-70 (2015).

analysis of an injured nonemployee living near the SRS. Part V will highlight some of the major disparities in available remedies between injured SRS employees and similarly situated classes of nonemployee citizens and call upon the South Carolina legislature to reform its South Carolina workers' compensation laws.

II. FACTUAL BACKGROUND

A. History of the Savannah River Site

The SRS is a 310 square mile complex located on the edge of the Savannah River, approximately 12 miles south of Aiken, South Carolina.[6] It is located in parts of Aiken, Barnwell, and Allendale Counties.[7] The Savannah River itself serves not only as the dividing line between Georgia and South Carolina, but also as a source of drinking water and a popular water venue for fishing, boating, and other recreational activities.[8]

Ei Dupont de Numours (Dupont) created the SRS in the early 1950s at the request of President Truman, and the Department of Energy (DOE) controlled operations of the then-named Savannah River Plant.[9] The SRS originally produced material for nuclear weapons, including tritium and plutonim-239.[10] To facilitate the production process, Dupont constructed five reactors, two chemical separation plants, a heavy water extraction plant, a nuclear fuel and target fabrication facility, and waste management facilities.[11] SRS manufactured approximately thirty-six metric tons of plutonium between 1953 and 1988.[12]

Westinghouse Savannah River Company (Westinghouse) took control of the SRS in 1989 and changed the official name to the Savannah River Site.[13] That same year, the Environmental Protection Agency (EPA) placed the SRS on the National Priorities List of Contaminated Sites after investigations revealed that disposal practices of nuclear waste at the SRS caused significant site contamination.[14] The SRS stopped producing nuclear materials for weapons in

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6. *Savannah River Site*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region4/superfund/sites/fedfacs/savrivsc.html (last updated Jan. 3, 2012) [hereinafter U.S. ENVTL. PROT. AGENCY].

7. MARY BETH REED ET AL., SAVANNAH RIVER SITE AT FIFTY 148 (Barbara Smith Strack ed., 2000); *Savannah River Site*, ENERGY.GOV, http://energy.gov/em/savannah-river-site (last visited Apr. 2, 2015) [hereinafter ENERGY.GOV].

8. U.S. ENVTL. PROT. AGENCY, *supra* note 6.

9. REED ET AL., *supra* note 7, at 552; *SRS History Highlights*, ENTERPRISE SRS, http://www.srs.gov/general/about/history1.htm (last updated Feb. 13, 2013) [hereinafter *SRS History Highlights*].

10. REED ET AL., *supra* note 7, at 336–37, 385; ENERGY.GOV, *supra* note 7.

11. U.S. ENVTL. PROT. AGENCY, *supra* note 6.

12. REED ET AL., *supra* note 7, at 513 (citing *Plutonium the First 50 Years*, U.S. DEP'T OF ENERGY 32 fig.7, 18 & fig.14 (Feb. 1996), http://fissilematerials.org/library/doe96.pdf).

13. REED ET AL., *supra* note 7, at 513; *SRS History Highlights*, *supra* note 9.

14. U.S. ENVTL. PROT. AGENCY, *supra* note 6; *SRS History Highlights*, *supra* note 9.

1991.[15] Since the late 1980s, the SRS has devoted significant time and resources to environmental cleanup and restoration and hopes to complete site cleanup operations by 2030.[16]

In 2008, Savannah River Nuclear Solutions (SRNS)[17] took over the contract for maintenance and operations at the SRS, but the DOE continued to regulate site operations.[18] Today, the SRS employs approximately 12,000 people, with 55% of that total comprised of SRNS' direct employees and major subcontractors.[19] About 3.7% of the SRS workforce are DOE employees.[20] Currently, although much attention is directed towards site restoration and environmental cleanup, the SRS also focuses on maintaining national security needs, such as participating in the Stockpile Stewardship Program and constructing a mixed oxide fuel fabrication (MOX) facility.[21] As part of the Stockpile Stewardship Program, which is a program that focuses on assessing and sustaining the nation's nuclear stockpile without using active nuclear tests, the SRS aids in storing and repurposing used nuclear devices that contain tritium from other countries.[22] The SRS also serves as a storage area for large amounts of weapons-grade plutonium and highly enriched uranium.[23] The DOE plans to construct a MOX facility at the SRS to transform stored plutonium into mixed oxide fuel for use in industrial applications.[24] Currently, the MOX facility is fourteen years behind schedule and over $6.5 billion over budget, with the completion date continually delayed and costs rising.[25] The National Nuclear Security Administration has slowed progress on the MOX facility construction and its completion is questionable.[26] If the MOX facility is not completed, the large and increasing stockpiles of plutonium present at the SRS will sit in storage indefinitely.[27] The increased presence of plutonium increases the risk of

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15. *SRS History Highlights*, *supra* note 9.

16. REED ET AL., *supra* note 7, at 512; *Savannah River Site*, UNION OF CONCERNED SCIENTISTS 2 (Oct. 2013), http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nwgs/nuclear-weapons-complex/savannah-river-site-fact-sheet.pdf [hereinafter UNION OF CONCERNED SCIENTISTS]; U.S. ENVTL. PROT. AGENCY, *supra* note 6.

17. All owners and operators, both past and present—including DuPont, Westinghouse, and the SRNS—will be referred to as Operators, collectively.

18. *SRS History Highlights*, *supra* note 9.

19. *Facts about the Savannah River Site*, SAVANNAH RIVER NUCLEAR SOLUTIONS 1 (Jan. 2011), http://www.srs.gov/general/news/factsheets/srs.pdf.

20. *Id.*

21. *Savannah River Site Strategic Plan*: S*haping the Business of SRS Success*, U.S. DEPT. OF ENERGY 8 fig.2 (Sept. 2011), http://www.srs.gov/general/pubs/srs_2011strategic_plan.pdf.

22. REED ET AL., *supra* note 7, at 512; UNION OF CONCERNED SCIENTISTS, *supra* note 16, at 2; *Stockpile Stewardship Program Quarterly Experiments*, NATIONAL NUCLEAR SECURITY ADMINISTRATION, http://nnsa.energy.gov/ourmission/managingthestockpile/sspquarterly (last visited Apr. 2, 2015).

23. UNION OF CONCERNED SCIENTISTS, *supra* note 16, at 2.

24. *Id.* at 2–3.

25. *Id.* at 3.

26. *Id.*

27. *Id.*

potential radiation exposure in the case of an accident.[28] Increased risk of radiation exposure would also increase the risk of radiation-related injuries.

B. Radiation and Radiation-Related Injuries

Radiation exposure causes two types of injuries: late radiation injury and acute radiation injury.[29] Acute radiation injury occurs when an individual is exposed to a single or several large doses of radiation in a short period of time.[30] These injuries include redness, hair loss, nausea, diarrhea, sterility, organ deterioration, fibrosis, and others.[31] Acute radiation injuries usually show up within a few months of the radiation exposure.[32] Late radiation injury occurs when an individual is exposed to low doses of radiation over a longer period of time.[33] These injuries include cancer, leukemia, and genetic changes.[34] Late radiation injuries usually take years to manifest symptoms.[35]

Injuries resulting from radiation begin at the cellular level when ionization causes physical and chemical changes in the cell.[36] Radiation-caused cell damage has four possible effects: (1) damaged cells will die; (2) damaged cells will be repaired without any injury to the organism; (3) damaged cells will function normally but lose the ability to reproduce; or (4) damaged cells may be unrepairable and have a modified code for reproduction.[37]

Linking radiation to a certain injury can be a steep hurdle to overcome when proving causation in litigation.[38] Humans are exposed to numerous forms and varying amounts of low-level radiation that may contribute to radiation injuries in their everyday lives, such as fossil fuels, soil, and buildings.[39] Also, the extended time frame needed for late radiation injuries to manifest increases a potential plaintiff's hardship in proving causation.[40] Many courts, including

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28. *Id.*

29. COMM. FOR REV. AND EVAL. OF THE MED. USE PROGRAM OF THE NUCLEAR REG. COMM'N, INST. OF MED., RADIATION IN MEDICINE: A NEED FOR REGULATORY REFORM 113 (Kate-Louise D. Gottfried & Gary Penn eds., Nat'l Academy Press 1996) [hereinafter INST. OF MED.].

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. FRED A. METTLER, JR. & ARTHUR C. UPTON, MEDICAL EFFECTS OF IONIZING RADIATION 10 fig.1-6 (3d ed. 2008).

37. *Id.*; Craig A. Barr, *A Practical Guide to Proving and Disproving Causation in Radiation Exposure Cases: Hanford Nuclear Site and Radioactive Iodine*, 31 GONZ. L. REV. 1, 4 (1996) (citing David S. Gooden, *Radiation Injury and the Law*, 1989 B.Y.U. L. REV. 1155, 1163 (1989)).

38. *See* Barr, *supra* note 37, at 6 (citing Myra P. Mulcahy, Note, *Proving Causation in Toxic Torts Litigation*, 11 HOFSTRA L. REV. 1299, 1302, 1326 (1983)).

39. *Id.* at 7.

40. *Id.* at 6 (citing EDWARD GREER & WARREN FREEDMAN, TOXIC TORT LITIGATION ¶ 5.3[1] (1989)).

those in South Carolina, have recognized this problem and gradually expanded the scope of causation beyond traditional "but for" causation to include the "substantial factor test."[41] The adoption of the substantial factor test has allowed plaintiffs to prove that their injuries were caused by radiation by introducing various types of evidence, including epidemiological studies, retrospective risk assessment, experimental evidence, and expert testimony.[42]

III. REMEDIES AVAILABLE TO EMPLOYEES AT THE SAVANNAH RIVER SITE

A. Radiation Exposure Claims at the Savannah River Site

The pipefitter introduced earlier is a theoretical example of one of the many employees that are associated with the SRS.[43] Although the pipefitter is a theoretical character used to illustrate the effects of workers' compensation laws, he does represent a very real and very large population of employees who have documented injuries resulting from radiation exposure at the SRS.[44] The pipefitter is employed through a subcontractor and has worked in and around the nuclear reactors and other facilities at the SRS for many years. He has contracted leukemia as a result of radiation exposure from the SRS, and he will pursue remedies via South Carolina's workers' compensation laws because that is his sole remedy as a result of the exclusivity provision within the laws.[45]

Like the pipefitter, workers at the SRS have been exposed to radiation through various hazardous working conditions and multiple incidents of accidental radiation leaks and exposure.[46] For instance, the EPA reported that

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41. *Id.* at 9 (citing Cipollone v. Liggett Grp., Inc., 893 F.2d 541, 561 (1990), *modified*, 505 U.S. 504 (1992); Allen v. United States, 588 F. Supp. 247, 418 (1984); Elam v. Alcolac, Inc., 765 S.W.2d 42, 174 (Mo. Ct. App. 1988)); *see also* Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) (citing Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977)) (explaining the substantial factor test by stating that defendant's negligence need not be the sole cause of the injury, but must be at least one of the causes).

42. Barr, *supra* note 37, at 11.

43. *See supra* Part I.

44. *See* Samantha Ehlinger, *Feds Paid $800 Million to Ill Workers at Nuclear Site in S.C.*, THE STATE, Nov. 30, 2014, at A3 (stating that over 8,000 past and present workers at the SRS received compensation for work related injuries including cancer); Rob Pavey, *Savannah River Site Cancer Compensation Briefing Draws Hopeful Crowd*, AUGUSTA CHRONICLE, Apr. 17, 2012, http://chronicle.augusta.com/latest-news/2012-04-17/savannah-river-site-cancer-compensation-briefing-draws-hopeful-crowd (stating that over 3,800 SRS workers have been diagnosed with one or more of 22 cancers related to radiation exposure).

45. *See* S.C. CODE ANN. § 42-1-540 (2015); *infra* Part II.C.

46. *See* SPECIAL COMM'N OF INT'L PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR AND THE INST. FOR ENERGY AND ENVTL. RESEARCH, NUCLEAR WASTELANDS: A GLOBAL GUIDE TO NUCLEAR WEAPONS PRODUCTION AND ITS HEALTH AND ENVIRONMENTAL EFFECTS 249 (Arjun Makhijani et al. eds., 1995) [hereinafter NUCLEAR WASTELANDS] (stating that multiple storage tanks of radioactive material have leaked and contaminated parts of the SRS); Peter Applebome, *Anger Lingers After Leak at Atomic Site*, N.Y. TIMES, Jan. 13, 1992, http://www.nytimes.com/1992/01/13/us/anger-lingers-after-leak-at-atomic-site.html?src=pm&

investigations at the SRS revealed "contamination in ground water, sediments, soils, sludge, solid waste, debris, and surface water that could potentially harm people in the area."[47] The EPA report also found that "[m]ultiple buildings and facilities at SRS have been contaminated with radioactive contaminants of concern, including . . . plutonium, tritium, and uranium."[48] Also, accidental leakage of radioactive material may have been more common than previously realized because early in the programs history, the SRS failed to report leaks that it did not consider significant.[49] Although some leaks were not reported, numerous other reports did state that at least nine of sixteen high-level waste storage tanks have leaked into the surrounding area, contaminating soil and ground water.[50]

Although it appears that every SRS employee has been exposed equally to the radioactive hazards, there have been reports that certain groups or subsets of workers have been intentionally exposed to hazards more often than other subsets.[51] For example, African-American workers have filed claims against the SRS, contending that they were exposed to radiation more often than their white counterparts and that they were intentionally placed into employment positions with more dangerous conditions than those of their coworkers.[52] If those race-based allegations are confirmed in the actions of employers—either the Operators or their sub-contractors—different remedies could be created for those employees intentionally exposed to higher levels of radiation.[53]

B. Linking Radiation Exposure and Causation

Overall, most of the radiation-related injuries in SRS employees would be classified as late radiation exposure because they are cancerous and take many years to surface.[54] Because most injuries would be classified as late radiation

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pagewanted=2 (describing an accidental leak of 150 gallons of radioactive water); *see also* U.S. ENVTL. PROT. AGENCY, *supra* note 6 (stating that multiple buildings and facilities at the SRS have been contaminated).

47. U.S. ENVTL. PROT. AGENCY, *supra* note 6.

48. *Id.*

49. NUCLEAR WASTELANDS, *supra* note 46, at 249 (citing Arjun Makhijani et al., *Deadly Crop in the Tank Farm: An Assessment of the Management of High-Level Radioactive Wastes in the Savannah River Plant Tank Farm, Based on Official Documents*, 1986 INST. FOR ENERGY & ENVTL. RESEARCH 20).

50. *Id.*

51. *See* Sherman v. Westinghouse Savannah River Co., 263 F. App'x 357, 359–60 (4th Cir. 2008) (describing a request for class certification based on race-based disparate treatment).

52. *See id.*

53. *See* Dickert v. Met. Life Ins. Co., 311 S.C. 218, 222, 428 S.E.2d 700, 702 (1993) (stating that injuries that result from intentional acts of the employer are exceptions to the exclusivity rule of workers' compensation).

54. *See* INST. OF MED., *supra* note 29, at 113; Pavey, *supra* note 44; *see also Savannah River Site Mortality Study*, *supra* note 4 (stating "15 years after exposure to radiation at [SRS], workers have a higher chance of dying from leukemia than if not exposed").

injuries, injured workers and nonemployee citizens alike may have a problem proving that radiation from the SRS actually caused their injuries.[55] To be awarded workers' compensation benefits in South Carolina, a worker must prove that his injuries arose out of employment.[56] South Carolina courts have held that for an injury to "arise" out of employment, the employment must be the proximate cause of the injury.[57] Therefore, a workers' injury is not compensable if it can be attributed to other factors.[58] Because SRS workers are potentially exposed to sources of radiation outside of work, it may be tough to show that radiation from the SRS proximately caused their injuries.[59]

Although showing causation may be a hindrance, it is not a complete bar as long as South Carolina continues to follow the general trend of using the substantial factor test in determining radiation-related illnesses.[60] Under the substantial factor test, workers with radiation related injuries will be able to introduce various types of evidence, including epidemiological studies, retrospective risk assessment, experimental evidence, and expert testimony, to show that radiation was a "substantial factor" in causing their illness.[61] Also, the link between radiation exposure and cancer should be an easier connection to make given the history of SRS' acknowledgement and payment for various types of cancers related to employment.[62] Recently, over 8,000 past and present employees at the SRS were paid over $800 million as compensation for work-related injuries such as pleural cancer and leukemia.[63] To facilitate compensation claims by federal SRS workers, the DOE has established the Energy Employees Occupational Illness Compensation Program Act

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55. *See generally* Barr, *supra* note 37, at 6 (citing EDWARD GREER & WARREN FREEDMAN, TOXIC TORT LITIGATION 5.3[1] (1989)) (discussing the difficulties of proving causation in radiation related injuries).

56. S.C. CODE ANN. § 42-1-160(A) (2015).

57. BEARD ET AL., *supra* note 1, at 98 (citing Nawa v. Wakenhut Corp., 288 S.C. 250, 252, 341 S.E.2d 800, 801 (1986)).

58. *Id.*

59. *See generally* Barr, *supra* note 37, at 11–12 (citing Elam v. Alcolac, Inc., 765 S.W.2d 42, 174, 178 (Mo. Ct. App. 1988)) (providing the test to prove causation).

60. *See id.* at 11 (quoting Elam v. Alcolac, Inc., 765 S.W.2d 42, 174 (Mo. Ct. App. 1988)); sources cited *supra* note 41. Recent case law has indicated that South Carolina's causation analysis for injuries such as cancer are equivalent with the substantial factor test. *See* BEARD ET AL., *supra* note 1, at 212–14 (quoting Glover v. Columbia Hospital, 236 S.C. 410, 416, 114 S.E.2d 565, 568 (1960); Hughes v. Easley Cotton Mill, 210 S.C. 193, 197, 42 S.E.2d 64, 66 (1947); Sigh v. Newberry Elec. Coop., 216 S.C. 401, 421, 58 S.E.2d 675, 684 (1950); Jeffers v. Manetta Mills, 190 S.C. 435, 438, 3 S.E.2d 489, 490 (1939)) (citing to recent South Carolina cases where courts have been willing to accept more circumstantial evidence and lay testimony due to uncertainty about cancer causation).

61. *See generally* Barr, *supra* note 37, at 11 (discussing ways to prove causation of radiation-related injuries).

62. *See* Pavey, *supra* note 44.

63. Ehlinger, *supra* note 44, at A3.

(EEOICPA) to investigate radiation related claims.[64] The EEOICPA only requires a 50% probability that injuries were caused by radiation exposure.[65] Although South Carolina workers' compensation claims are not regulated by the same DOE standards, the willingness of the federal government to only require a 50% probability of causation should presumably urge South Carolina courts to follow suit, thereby further alleviating problems of proving causation under South Carolina workers' compensation laws.

C. Exclusivity Under South Carolina Workers' Compensation Law

Some employees working at the SRS are federally regulated by DOE standards and are therefore not subject to the Act.[66] However, workers that are employed through non-federal agencies, contractors, and subcontractors are subject to South Carolina state law and subsequently bound by South Carolina workers' compensation statutes.[67] Therefore, employees of various subcontractors working at the SRS, like the theoretical pipefitter, are regulated under South Carolina workers' compensation laws as long as their employers maintain workers' compensation coverage, which they are mandated to do by law.[68] Furthermore, provisions within the Act specifically mandate that "[a]ll forms of ionizing radiation injury, disability or death shall be compensable under [the Act]," thereby ensuring that the pipefitter's radiation injuries are subject to the Act.[69]

Because subcontractor employees are subject to the Act, they are limited by the exclusivity provision found within the Act itself.[70] The exclusivity provision states that the employee's only remedy is the one provided by his employer

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64. *See* Young v. U.S. Dep't of Energy, No. CV 105-154, 2005 WL 3454767, at *1 (S.D. Ga. Nov. 22, 2005).

65. *See id.*

66. *Id.*

67. *Facts about the Savannah River Site*, *supra* note 19 (approximately 3.7% of the employees at the SRS are also employees of the U.S. Department of Energy). For the list of exempted occupations, which include *inter alia*, agricultural workers, railroad employees, state and county fair association employees, and federal employees, see S.C. CODE ANN. § 42-1-360 (2015).

68. *See generally* BEARD ET AL., *supra* note 1, at ch. 1 (citations omitted) (discussing persons covered under the South Carolina Worker's Compensation Act); *see also* Garner v. Morrison Knudsen Corp., 318 S.C. 223, 224, 456 S.E.2d 907, 908 (1995) (applying South Carolina law to a wrongful termination suit of a pipefitter employed by a subcontractor at SRS). Also, it should be noted that the theoretical pipefitter introduced earlier may have an argument as to whether one of the Operators is a statutory employer and thereby liable for his radiation-related injuries. However, for purposes of this Article it is assumed that the pipefitter's employer participates in the South Carolina workers' compensation regime. *See infra* notes 79–81 and accompanying text. Every employer in South Carolina having more than four employees and more than $3,000 in annual payroll is subject to the Workers' Compensation Act except for a few narrow exceptions, such as railroads and fair associations. BEARD ET AL., *supra* note 1, at 32–33.

69. S.C. CODE ANN. § 42-13-70 (2015).

70. *Id.* § 42-1-540.

under the Act.[71] This means that the employee is not allowed to pursue remedies traditionally available at common law.[72] The exclusivity provision was enacted to serve as a type of no-fault liability insurance for employers.[73] The provision was based on the balancing theory that an injured worker is allowed to receive compensation regardless of fault without having to establish common law liability of the employer, while an employer has to pay for injuries that may not have been his fault, but at a much lower cost than those remedies given at common law.[74] The provision allows an employer to escape tort liability and allows an employee fast, sure compensation for his work-related injuries.[75]

The exclusivity provision applies not only to the injured employee, but also to the employee's parents, dependents, and next-of-kin as well.[76] This limitation bars any dependent from asserting any common law claims for death or injury as a result of work-related accidents on behalf of the injured employee.[77] Here, the exclusivity provision is particularly relevant because the Act specifically addresses ionizing radiation injuries to ensure that workers injured as a result of radiation are encompassed under the Act's jurisdiction.[78] The exclusivity provision also limits an employee's remedies by providing immunity to his direct employer and to his "statutory employer" as well.[79] A statutory employer is an employer that may be responsible for injuries to an employee of a contractor or subcontractor even though he is not the direct employer of the injured employee.[80] Three tests are used to determine statutory employee status: (1) whether the contractor/subcontractor activities are part of the owner's business or trade; (2) whether the activity is a necessary, essential, and integral part of the owner's trade, business, or occupation; or (3) whether the owner's employees have previously performed an identical activity.[81]

Although the exclusivity provision was included in the workers' compensation laws with the best of intentions, it does have some negative side effects. One such side effect is that an employer will only have to pay the amount set by the workers' compensation statutes, regardless of how negligent

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71. *See id.*; BEARD ET AL., *supra* note 1, at 515 (citing Cook v. Mack's Transfer & Storage, 291 S.C. 84, 86, 352 S.E.2d 296, 298 (Ct. App. 1986)).

72. *See id.* at 516 (quoting *Cook*, 291 S.C. at 87, 352 S.E.2d at 298).

73. *See id.*

74. *See id.* at 516 (citing *Cook*, 291 S.C. at 86, 352 S.E.2d at 298).

75. *See id.*

76. S.C. CODE ANN. § 42-1-540 (2015).

77. *Id.*

78. *Id.* § 42-13-70.

79. *See id.* § 42-1-540; Edens v. Bellini, 359 S.C. 433, 442, 597 S.E.2d 863, 868 (Ct. App. 2004) (quoting S.C. CODE ANN. § 42-1-400 (1985)).

80. *See id.* § 42-1-400; *Edens*, 359 S.C. at 442, 597 S.E.2d at 868 (quoting S.C. CODE ANN. § 42-1-400 (1985)).

81. *See Edens*, at 442–43, 597 S.E.2d at 868 (citing Boone v. Huntington & Guerry Elec. Co., 311 S.C. 550, 553 n.1, 430 S.E.2d 507, 509 n.1 (1993); Riden v. Kemet Elec. Corp., 313 S.C. 261, 263, 437 S.E.2d 156, 157–58 (1993)).

he was in causing the injury.[82] This allows employers and statutory employers to escape common law liability for damages, even if they were grossly negligent in causing the employee's injury.[83] For example, in *Edens v. Bellini*, the employer, who was a subcontractor, and the statutory employer, who was a textile mill owner, obtained immunity from suits brought outside the Act by an employee's family after the employee was killed as a result of workplace negligence.[84] In that case, Christopher Edens was employed through a subcontractor at a factory that dyed textiles.[85] Edens was crushed by a piece of machinery after a factory supervisor intentionally disabled safety devices that would have prevented the accident.[86] There, the South Carolina Court of Appeals held that Edens performed tasks identical to the factory's employees and was therefore a statutory employee.[87] Therefore, the court prevented Edens' representatives from pursuing a wrongful death action or any other common law actions that would have entitled them to additional damages.[88] Based on these types of decisions, it is possible that the Act may incentivize employers to participate in the workers' compensation regime only to avoid common law damages that come with negligent actions.

Although the exclusivity provision limits an injured employee's remedies to those provided in the Act, a few limited exceptions are available.[89] An injured worker subject to the Act may be able to pursue some remedies available at common law if he falls into one of the following narrow workers' compensation exceptions: (1) where the injury results from a subcontractor's actions who is not the injured employee's direct employer; (2) where the injury is not accidental but the result of the employer's intentional actions; (3) where the injury is to the employee's reputation via slander; (4) where certain occupations are specifically excluded; or (5) where the dual persona doctrine applies.[90]

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82. Stanford E. Lacy, *The Workers' Compensation Lien Against Third-Party Proceeds: The Complex Has Become More Complexing*, S.C. LAW., Jan. 2006, at 18 (citing S.C. CODE ANN. § 42-1-540 (1985)).

83. *Id.*

84. *See Edens*, 359 S.C. at 445, 597 S.E.2d at 869 (citing Neese v. Michelin Tire Corp., 324 S.C. 465, 472, 478 S.E.2d 91, 94 (Ct. App. 1996), *overruled by*, Abbott v. The Limited, Inc. 338 S.C. 161, 526 S.E.2d 513 (2000)).

85. *Id.* at 437–38, 597 S.E.2d at 865.

86. *Id.* at 438, 597 S.E.2d at 866. The court reasoned that although the safety devices were intentionally disabled, Edens' death was not the intentional result of the employer's actions. *See id.* at 449, 597 S.E.2d at 871.

87. *Id.* at 444, 597 S.E.2d at 869.

88. *See id.* at 445, 597 S.E.2d at 869 (citing *Neese*, 324 S.C. at 472, 478 S.E.2d at 94).

89. *Id.* at 445, 597 S.E.2d at 869 (citing Cason v. Duke Energy Corp., 348 S.C. 544, 547, 560 S.E.2d 891, 893 (2002); Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993)).

90. *Id.* at 445–46, 597 S.E.2d at 869–70 (citing *Cason*, 348 S.C. at 547–48 n.2, 560 S.E.2d at 893 n.2). The dual persona doctrine is relatively new to South Carolina workers' compensation law and was only officially recognized by the South Carolina Supreme Court in 2013. The dual persona exception states that "[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—it possesses a second persona so completely independent from and

Absent a showing that one of these exceptions applies, the exclusivity provision within the Act severely limits an injured worker's possible claims against any employer.

D. Hypothetical Case Analysis: The Pipefitter

1. Limited Recovery Under The Act and Preclusion of Common Law Claims

The pipefitter has worked as a subcontractor's employee on various pipefitting jobs at the SRS for many years. Because he has been in and around many sources of contamination, such as soil, water, certain facilities, and radioactive waste storage tanks, he should have a relatively easy time showing that radiation from the SRS caused his injuries.[91] Because his symptoms took many years to surface, the SRS may have some strong arguments about the actual causation of the pipefitter's injuries, but because SRS employees have been readily able to prove causation from similar, if not identical, situations in the past, the pipefitter should be able to prevail on the causation issue based on established precedent.[92] Because the pipefitter can show that his injuries arose out of employment and his employer participates in the South Carolina workers' compensation regime, he is eligible for, but consequently limited to, a workers' compensation claim.[93] This fact is reinforced by the explicit provision within the Act that specifically identifies radiation injuries as compensable.[94] The Act specifically includes the pipefitter's injuries and will therefore limit his available remedies, via the exclusivity provision, from not only his direct employer, the subcontractor, but also from any possible statutory employer as well.[95]

If the Operators can show that the pipefitter satisfies one of the three tests used by the South Carolina courts, they will obtain statutory employer status, thereby gaining immunity from any common law claims.[96] Here, the Operators will most likely be able to show that pipefitting—the act of installing, assembling, fabricating, maintaining, or repairing mechanical piping systems—is

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unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person." Mendenall v. Anderson Hardwood Floors, LLC, 401 S.C. 558, 563, 738 S.E.2d 251, 253 (2013) (quoting 6 LARSON'S WORKERS' COMPENSATION LAW § 113.01[1] (Matthew Bender ed., 2012)). The dual persona exception is a narrow exception and is only applicable in the limited situation where a second set of obligations that form the basis of a tort suit is completely independent of the defendant's obligations as an employer. *See id.* at 563–64, 738 S.E.2d at 254 (citing 6 LARSON'S WORKERS' COMPENSATION LAW § 113.01[4] (Matthew Bender ed., 2012)).

91. *See supra* notes 47–50 and accompanying text.

92. *See supra* notes 63–64 and accompanying text.

93. *See* BEARD ET AL., *supra* note 1, at 98 (citing Nawa v. Wakenhut Corporation, 288 S.C. 250, 252, 341 S.E.2d 800, 801 (1986)).

94. S.C. CODE ANN. § 42-13-70 (2015).

95. *See supra* notes 80–81 and accompanying text.

96. *See supra* notes 81–82 and accompanying text.

an essential and integral part of nuclear manufacturing and storage.[97] Most, if not all, of the nuclear material that is processed and stored at the SRS is done so in a series of tanks, reactors, extraction plants, and other equipment all connected via various transport systems, including pipes.[98] Thus, the Operators are statutory employers and will acquire immunity from any common law claims.

Unless the pipefitter can fit his cause of action into one of the exceptions to the Act's exclusivity provision, he will be limited to only workers' compensation claims.[99] Here, slander was not the cause of the pipefitter's injuries, and his employers, both direct and statutory, only took on one persona.[100] Also, none of the explicit limitations in the Act apply here.[101] Moreover, because the SRS Operators obtained status as statutory employers, there is no argument that the pipefitter's injuries were caused by the actions of another subcontractor.[102] Therefore, the only exception that the pipefitter may be able to assert is the intentional tort exception.[103] This exception will apply only if the pipefitter can show that one of his employers intended to cause him harm.[104] This exception may be applicable if the pipefitter can show that his direct employer or statutory employer discriminated against him based on race or some other characteristic and that this discrimination intentionally placed him in danger or exposed him to greater risks.[105]

An intentional injury is not to be confused with intentional actions that may cause injury.[106] For instance, in *Edens,* the court held that disabling safety devices that would have prevented the employee's death was an intentional act; however, the act was not carried out with the intent to harm the employee.[107] The safety devices were disabled to speed up production and the employee was injured as an unexpected result.[108] For the intentional injury exception to be applicable in that case, the supervisor would have had to disable the safety

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97. *See Steamfitter-Pipefitter*, Description in *Trades & Occupations List*, ALBERTA, https://tradesecrets.alberta.ca/trades-occupations/profiles/0074/ (last visited Apr. 1, 2015).

98. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 6.

99. *See* supra notes 91–92 and accompanying text.

100. In this theoretical application, the SRS and the subcontractor only took on the persona of supervisor/employer; therefore, no other persona was used to make the dual persona exception applicable.

101. For the list of exempted occupations, which include *inter alia*, agricultural workers, railroad employees, state and county fair association employees, and federal employees, see S.C. CODE ANN. § 42-1-360 (2015).

102. *See* Edens v. Bellini, 359 S.C. 433, 445, 597 S.E.2d 863, 869 (Ct. App. 2004) (citing Neese v. Michelin Tire Corp., 324 S.C. 465, 472, 478 S.E.2d 91, 94 (Ct. App. 1996), *overruled by*, Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000)).

103. *Id.* (citing Cason v. Duke Energy Corp., 348 S.C. 544, 547, 560 S.E.2d 891, 893 (2002); Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 222, 428 S.E.2d 700, 702 (1993)).

104. *Id.* at 447, 597 S.E.2d at 870–71 (quoting Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65–66 (1993)).

105. *See id.* at 447, 597 S.E.2d at 870 (quoting *Peay*, 313 S.C. at 93–94, 437 S.E.2d at 65).

106. *See id.* at 449, 597 S.E.2d at 871–72.

107. *Id.*

108. *Id.* at 438, 597 S.E.2d at 866.

devices for the sole purpose of harming Edens.[109] Therefore, even if the pipefitter can show that he was intentionally placed in more hazardous working conditions, he will also have to show that his injuries were caused intentionally.[110] Although the pipefitter will have a strong argument that his injuries were intentionally inflicted if he can show that he was intentionally placed in certain situations based on discriminatory factors intended to cause him harm, South Carolina courts are reluctant to grant this exception; they customarily give "the intentional injury exception to [the exclusivity provision] its most narrow construction."[111] Because of this narrow construction and courts' willingness to uphold the exclusivity provision, the pipefitter will have a nearly insurmountable task of proving that the Operators discriminated against him based on race or some other characteristic, and also that the Operators discriminated to intentionally inflict injury upon him.

2. *Compensation Under South Carolina Workers' Compensation Act*

Although the pipefitter will not be able to pursue common law remedies, the Act will provide some benefits for his injuries.[112] In addition to the general provisions providing benefits for injuries arising out of the course of employment, the Act contains a specific chapter pertaining to ionizing radiation injuries.[113] In this chapter, the Act specifies that all forms of injuries resulting from ionizing radiation, including disability and death, are compensable.[114] Also, the time for filing a workers' compensation claim does not begin to run until the employee has sustained the injury and knows or should have known of a possible relationship between his employment and the injury.[115] Employees with an ionizing radiation injury are entitled to general workers' compensation benefits and other specific benefits, including medical services, appliances, and supplies needed to facilitate the restoration of health.[116] The injured employee is also entitled to vocational rehabilitation to train him for a more suitable position away from ionizing radiation if he does not have transferable skills.[117]

Because the entirety of the Act is applicable to ionizing radiation injuries, the pipefitter will also be entitled to the general benefits provided elsewhere.[118] The Act provides five categories of benefits available to injured workers: (1) temporary disabilities benefits; (2) permanent disability benefits; (3) death

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109. *See id.* at 449, 597 S.E.2d at 871.

110. *Id.* at 447, 597 S.E.2d at 870 (quoting *Peay*, 313 S.C. at 93–94, 437 S.E.2d at 65).

111. *Id.* (quoting *Peay*, 313 S.C. at 94, 437 S.E.2d at 65–65).

112. *See* BEARD ET AL., *supra* note 1, at 325.

113. *See generally* S.C. CODE ANN. § 42-13-10 to -130 (2015) (Chapter 13 focuses on ionizing radiation injury).

114. *Id.* § 42-13-70.

115. *Id.* § 42-13-60.

116. *Id.* § 42-13-80.

117. *Id.* § 42-13-90.

118. *Id.* § 42-13-120.

benefits; (4) disfigurement benefits; and (5) medical benefits.[119] Particularly relevant here are the benefits for medical treatment and temporary or permanent disability. In addition to the specific medical benefits provided for in the ionizing radiation chapter of the Act, an injured employee is entitled to reasonable medical expenses approved by the Workers' Compensation Commission, including, surgery, hospitalization, treatments, and even transportation.[120] The amount of compensation for employees with temporary or permanent disabilities equals sixty-six and two-thirds percent of the employee's average weekly wage, but no more than his average weekly wage in the preceding year.[121] The compensation methods change with the types of injuries.[122] For instance, if an employee is only partially disabled, he is required to return to work to receive compensation and his benefit is limited to sixty-six and two-thirds of the difference between his new lowered wage and his previous average wage.[123] These compensation payments have various statutory limitations depending on the type of injury, but the limitation most often cited, especially for permanent disabilities, is 500 weeks (9 years and 8 months).[124]

The pipefitter's specific radiation compensation and general compensation will be determined by the Workers' Compensation Commission and the Commission's evaluation of his medical situation. Because ionizing radiation caused his injuries, he will be entitled to medical treatment for as long as needed.[125] However, his general compensation, as set by the Commission, will be subject to statutory caps and limits.[126] Also, it is possible that the pipefitter may have to return to work to receive benefits or, alternatively, attend vocational rehabilitation and transfer to a completely different area of employment.[127]

Because the exclusivity provision limits the pipefitter from bringing any claims at common law and none of the exceptions are applicable, he will be barred from any common law remedies that may have been available to him outside of the workers' compensation regime.[128] Although the pipefitter will be compensated for his injuries and necessary medical expenses, because the Act serves as a form of no-fault liability insurance, both the pipefitter's direct and statutory employers will suffer no consequences for their actions, regardless of how negligent or grossly negligent they may have been.[129]

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119. *See* BEARD ET AL., *supra* note 1, at 325.

120. *See id.* at 372 (quoting S.C. CODE ANN. § 42-15-60).

121. *See id.* at 392 (quoting S.C. CODE ANN. § 42-9-10, -40).

122. For an in-depth discussion on benefits under the Workers' Compensation statutes in South Carolina, see generally *id.* at ch. 9.

123. *See id.* at 333–34 (quoting S.C. CODE ANN. § 42-9-20).

124. *See id.* at 355 (quoting S.C. CODE ANN. § 42-9-10).

125. *See supra* notes 113–17 and accompanying text.

126. *See supra* notes 122–24 and accompanying text.

127. *See supra* notes 117 & 123 and accompanying text.

128. *See* BEARD ET AL., *supra* note 1, at 515 (citing S.C. CODE ANN. § 42-1-540 (1976)).

129. *See* Lacy, *supra* note 82, at 18.

IV. REMEDIES AVAILABLE TO NONEMPLOYEES WITH SIMILAR INJURIES

A. Available Under Common Law

Nonemployee citizens have a greater number of options when asserting causes of action against the SRS because the Act, and its exclusivity provision, is inapplicable to their injuries.[130] Therefore, any nonemployees will be able to assert any relevant cause of action.[131] Here, the injuries resulted from the actions taken at the SRS but were not the result of actions undertaken to intentionally cause nonemployee harm. Because the injuries were not intentionally caused, the most relevant causes of actions are those based in negligence, such as simple negligence, gross negligence, and recklessness.[132]

1. Simple Negligence

One of the most common and basic common law causes of actions is an "ordinary" or "simple" negligence claim.[133] For a plaintiff to prevail on a negligence claim in South Carolina, he must prove three essential elements: (1) duty of care owed to the plaintiff; (2) breach of the duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.[134] The South Carolina Supreme Court has elaborated on these elements, noting that "[n]egligence is not actionable unless it is a proximate cause of the injury."[135] Also, "proximate cause requires proof of both causation in fact and legal

130. *See* S.C. CODE ANN. § 42-1-540 (2015).

131. For nonemployee citizens, all litigation will be filed pursuant to the Price-Anderson Act, which gives exclusive jurisdiction of all claims arising from a "nuclear incident" to federal courts. *See In re* Hanford Nuclear Reservation Litigation, 534 F.3d 986, 997 (9th Cir. 2007) (providing an application of the Price-Anderson Act, codified at 42 U.S.C. § 2210(n)(2) (2012)). The Price-Anderson Act was enacted to allow victims of nuclear incidents to sue private parties, such as DuPont and Westinghouse, to ensure that victims were able to receive compensation while also providing indemnity to the private parties to encourage participation in the nuclear industry. *Id.* Although federal courts have exclusive jurisdiction, the state in which the nuclear incident occurred provides the substantive rules of decision. *Id.* Therefore, all South Carolina statutes and common law doctrines are applicable to employees seeking damages for SRS radiation-induced injuries. *See id.*

132. *See generally* Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (citations omitted) (discussing negligence and recklessness claims in South Carolina); Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) (citing Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 300, 468 S.E.2d 292, 298 (1996)) (discussing the elements of a negligence claim in South Carolina); Clyburn v. Sumter Cnt'y Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (discussing government liability for grossly negligent actions).

133. Although here the term "simple negligence" is used to help differentiate between the increasing degrees of negligence, it is most commonly termed negligence. *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 (quoting Hart v. Doe, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)).

134. *Bishop*, 331 S.C. at 88, 502 S.E.2d at 82–83 (citing *Rickborn*, 321 S.C. at 300, 468 S.E.2d at 298).

135. *Id.* at 88, 502 S.E.2d at 83 (citing Hanselmann v. McCardle, 257 S.C. 46, 48–49, 267 S.E.2d 531, 533 (1980)).

cause."[136] A plaintiff can establish causation in fact by showing that the harm would not have occurred "but for" the actions of the defendant.[137] Establishing foreseeability will prove legal causation.[138] Furthermore, a plaintiff can establish foreseeability by showing the natural and probable consequences of the asserted negligent act.[139] Another factor that aids in establishing a plaintiff's negligence claim is knowing that the defendant's actions do not have to be the sole cause of the injury to be deemed negligent.[140] The plaintiff only needs to show that the defendant's actions were at least one proximate cause of the plaintiff's injuries.[141]

2. *Gross Negligence*

Another applicable cause of action related to simple negligence is gross negligence. The Supreme Court of South Carolina differentiated gross negligence from simple negligence by defining gross negligence as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."[142] Furthermore, gross negligence differs from simple negligence in that "[simple] [n]egligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care."[143] A plaintiff must still prove the three basic elements of negligence to show a heightened form of negligence.[144] The main difference in proving the elements is that simple negligence only requires proof of a breach of the requisite care due to the plaintiff, whereas a gross negligence cause of action requires a plaintiff to prove that the defendant has failed to exercise slight care.[145] Therefore, gross negligence has a heightened requirement and mandates that the plaintiff show a greater lack of care than needed in a simple negligence claim.[146]

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136. *Id.* (citing Oliver v. S.C. Dep't of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)).

137. *Id.* (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130).

138. *Id.* at 88–89, 502 S.E.2d at 83 (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 131; Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

139. *Id.* at 89, 502 S.E.2d at 83 (citing *Koester*, 313 S.C. at 493, 443 S.E.2d at 394).

140. *Id.* (citing Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977)).

141. *Id.* (citing *Hughes*, 269 S.C. at 398, 237 S.E.2d at 757).

142. Clyburn v. Sumter Cnt'y Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (citing Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)).

143. *Id.*

144. *See supra* notes 121–27 and accompanying text; *see, e.g.*, Berberich v. Jack, 392 S.C. 278, 293–94, 709 S.E.2d 607, 615 (2011) (explaining that jury should be instructed on regular negligence elements even for heightened case of negligence).

145. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887.

146. *See id.*

3. Recklessness

Recklessness is a more severe degree of negligence and therefore has higher requirements for proof than simple negligence and gross negligence.[147] Recklessness is the "conscious failure to exercise due care" and it "implies the doing of a negligent act knowingly."[148] Multiple terms, such as willful or wanton, may be used in congruence with recklessness, but they all share the same legal significance; each denotes the conscious failure to exercise due care.[149] The test used to determine if an action is reckless is whether a reasonable, prudent person would have been conscious of the action as an invasion of the plaintiff's rights.[150] Recklessness has the highest degree of culpability and "assumes very much the nature of willfulness."[151] Recklessness is only distinguished from an intentional tort by inadvertence and is therefore the hardest to prove because the plaintiff must show that the defendant knew of the dangers and consciously chose not to exercise due care.[152]

4. Strict Liability

Strict liability is a special cause of action that significantly overlaps with negligence.[153] It is similar in that the plaintiff must still show that his injuries were proximately caused by the defendant's actions.[154] However, strict liability differs from negligence in that it imposes liability without fault under certain circumstances, such as when the injury is caused by "ultra-hazardous activities."[155] Therefore, the plaintiff does not need to show that the defendant breached a requisite duty of care because the defendant will be liable even if he exercised the highest degree of care.[156] However, the plaintiff will have to prove that his injuries were the result of an ultra-hazardous activity to prevail on a strict liability claim in South Carolina.[157] South Carolina applies the Restatement

147. 18 S.C. JUR. *Negligence* § 9 (1993).

148. *Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 (quoting Yaun v. Baldridge, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)).

149. *Id.* (citing *Yaun*, 243 S.C. at 419, 134 S.E.2d at 251).

150. *Id.* (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958)).

151. *Id.* (quoting Jeffers v. Hardeman, 231 S.C. 578, 582–83, 99 S.E.2d 402, 404 (1957)).

152. *Id.* (citing *Rogers*, 233 S.C. at 578, 106 S.E.2d at 264; *Jeffers*, 231 S.C. at 582–83, 99 S.E.2d at 404).

153. Chris Moore & Brady R. Thomas, *Ultrahazardous Activities—What Qualifies and Who Decides?*, S.C. LAW., Jan. 2006, at 30, 33.

154. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

155. Moore & Thomas, *supra* note 153, at 32–33 (quoting Shockley v. Hoechst Celanese Corp., 793 F. Supp. 670, 673 (D.S.C. 1992)); *see* RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

156. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

157. *See generally* Moore & Thomas, *supra* note 153, at 33 (determining whether an ultra-hazardous activity warrants strict liability is a question for the jury).

(Second) of Torts § 520 to determine if an activity is ultra-hazardous.[158] Currently, the only definitive ultra-hazardous activity in South Carolina is blasting.[159] Neither the South Carolina Supreme Court nor the legislature has addressed the issue of defining the storing, handling, and disposing of hazardous chemicals as an ultra-hazardous activity, and, therefore, lower courts have refused to extend the label of ultra-hazardous to such activities.[160] Some practitioners advise that plaintiffs assert a strict liability claim in addition to a negligence claim because there is significant overlap and negligence is easier to prove than the stringent multi-factor test required for strict liability.[161]

5. Damages in Negligence Actions

Although the burden of proof increases as the degree of negligence increases, the likelihood and amount of damages increase as well.[162] In every negligence claim, the plaintiff, if successful, is entitled to actual damages, both present and prospective.[163] These damages include compensation for lost wages, expenses, bodily pain, and mental anguish that result from the negligence.[164] The plaintiff can also recover for future discomfort or permanent disability.[165] Other compensable damages include medical expenses, past and future; loss of earning power; disfigurement; psychological trauma; and alteration of lifestyle.[166] The purpose of these damages is to restore, as closely as possible with money, the plaintiff to his original position prior to the negligent act that caused the plaintiff's injuries.[167]

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158. This test comprises of six factors to be considered by the factfinder with none being dispositive, but usually a finding of more than one is necessary for an activity to be deemed ultra-hazardous. *See id.* at 34 (quoting RESTATEMENT (SECOND) OF TORTS § 520 cmt. l (1977)) (claiming the determination should be a question of law for the court, not the factfinder).

159. *See id.* at 33 (quoting Shockley v. Hoechst Celanese Corp., 996 F.2d 1212, 1993 WL 241179, at *5 (4th Cir. 1993)).

160. *See id.* (quoting *Shockley*, 1993 WL 241179, at *5).

161. *See id.* at 34.

162. A successful claim of strict liability will result in damages similar to that of regular negligence. In South Carolina, a strict liability claim must be paired with a heightened degree of negligence to be eligible for punitive damages because punitive damages are not available to a strict liability claim alone. *See* Ravan v. Greenville Cnty., 315 S.C. 447, 462, 434 S.E.2d 296, 305 (Ct. App. 1993).

163. *See* Bussey v. Charleston & W. C. Ry. Co., 52 S.C. 438, 447–48, 30 S.E. 477, 481 (1898).

164. *Id.*

165. Long v. United States, 241 F. Supp. 286, 289 (W.D.S.C. 1965).

166. Watson v. Wilkinson Trucking Co., 244 S.C. 217, 228, 136 S.E.2d 286, 291 (1964); Gasque v. Heublein, Inc., 281 S.C. 278, 289, 315 S.E.2d 556, 562 (Ct. App. 1984).

167. Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (citing Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989); Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964); Carrigg v. Blue, 283 S.C. 494, 499, 323 S.E.2d 787, 790 (Ct. App. 1984); F.P. HUBBARD & R.L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 555–59 (2d ed. 1997)).

As the degree of negligence increases to willful, wanton, reckless, or malicious, punitive damages become available to the plaintiff.[168] Punitive damages are used to punish the defendant and deter similar actions from happening in the future.[169] Punitive damages are also used to vindicate the plaintiff's private right that was invaded by the reckless action of the defendant.[170] Although no formula exists for determining punitive damages, a jury may consider the character of the wrongdoing, the ability of the defendant to pay, and the appropriateness of the punishment to determine a proper amount.[171] The type and amount of damages will all depend on what the plaintiff is able to show to the jury.

B. Hypothetical Case Analysis: Nonemployee Citizen

Directly downwind and downstream of the SRS' southern boundary sits a parcel of land with a small house that the theoretical family introduced earlier calls home.[172] The father is approximately the same age and physical stature as the pipefitter, and both are similarly medically situated.[173] He has resided at this location approximately the same amount of time that the pipefitter has worked at the SRS. The father regularly fishes and boats in the Savannah River and its tributaries, obtains water from a well located on his property, and grows and consumes much of his own produce.

Many of the same sources of radiation that have contributed to the pipefitter's radiation-related injuries can also be attributed to the father's injuries. For instance, contamination of groundwater may have tainted the water that flows into the father's house.[174] Repeated leakage of large amounts of contaminated water into the Savannah River could lead to direct exposure as the father regularly fishes, swims in, and boats on the river with his family.[175] Additional sources of contamination can be identified as well. For instance,

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168. *See id.* (citing *Barnwell*, 301 S.C. at 537, 393 S.E.2d at 163).

169. *See id.*

170. *See id.* at 379, 529 S.E.2d at 533 (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958)).

171. *See* Durham v. Clements, 295 S.C. 90, 93, 367 S.E.2d 174, 175 (Ct. App. 1988) (citing Mylin v. Allen-White Pontiac, Inc., 281 S.C. 174, 182, 314 S.E.2d 354, 358 (Ct. App. 1984)).

172. *See supra* Part I.

173. The father has been created very similar to the pipefitter to restrict any extraneous factors of causation or predisposition to radiation-related injuries. The focus here is on the difference between the available remedies of similarly situated classes of employees and nonemployees, so a comparison of almost identical individuals provides the best example possible.

174. *See Savannah River Site (USDOE)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region4/superfund/sites/fedfacs/savrivsc.html (last updated Jan. 3, 2012).

175. *See* Applebome, *supra* note 46 (quoting an SRS manager as saying that a 150 gallon leak of tritium contaminated water was "not the first time, nor even the largest dose of tritium released by [SRS]").

consuming fish caught in Lower Three Runs Creek[176] or the Savannah River has been determined to be an important radiation exposure pathway.[177] Similarly, consuming locally acquired meat and milk was reported as an important radiation pathway for those living around the SRS.[178] Once the father discovers that he has contracted a radiation-related illness, he will pursue remedies available at common law. The father is not employed by the SRS and he will not be limited by the Act and its exclusivity provision because his injuries did not arise out of the course of employment and there is no employer-employee relationship.[179]

The father will most likely assert a claim for reckless negligence in order to become eligible for compensatory as well as punitive damages.[180] To prove reckless negligence, the father will first have to fulfill all three elements required by South Carolina courts for negligence.[181] The father must show that (1) the SRS owed him a duty of care; (2) that the SRS then breached that duty by some act or omission; and (3) that the SRS' act or omission proximately caused damage to the father. The father will assert that the SRS had a duty to use reasonable care in maintaining its facilities, producing and refining nuclear materials, and storing radioactive waste to ensure the safety of its workers and others that may be affected by their actions, specifically those in close proximity to the SRS. The father must then prove that the SRS breached this standard by failing to maintain structures, equipment, or proper safety protocol and that the SRS' breach proximately caused his injuries. The father will, assuming that he can for purposes of the analysis, provide specific examples for failure to maintain a reasonable environment, such as repeated leaks of tritium into the Savannah River, groundwater, and surrounding soil.[182] He will also provide any evidence he has that will link negligent actions of the SRS to his radiation injuries, such as direct exposure to contaminated ground and river water and

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176. Lower Three Runs Creek is a tributary of the Savannah River that flows through the SRS before merging into the Savannah River.

177. *See SRS Dose Reconstruction Project*, *supra* note 4.

178. *Id.*

179. *See* S.C. CODE ANN. § 42-1-130 (2015) (defining employee).

180. *See* Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (citing Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989)). Also, the father could assert a claim for strict liability in addition to any negligence claim. The causation and damage elements will be the same as those in negligence, along with the additional task of proving that the actions undertaken at the SRS constitute an ultra-hazardous activity when applied to the multi-factor test. However, because negligence is easier to prove, a strict liability claim will not make him eligible for any more damages, and, because South Carolina courts have been reluctant to define activities surrounding hazardous chemicals as ultra-hazardous, it is unlikely that the father would be successful in asserting a strict liability cause of action. *See* Moore & Thomas, *supra* note 153, at 33 (quoting Shockley v. Hoechst Celanese Corp., 996 F.2d 1212, 1993 WL 241179, at *5 (4th Cir. 1993)).

181. *See supra* Part IV.A.1.

182. *See, e.g.*, NUCLEAR WASTELANDS, *supra* note 46, at 249 (stating that multiple storage tanks of radioactive material have leaked and contaminated soil and groundwater around the SRS); Applebome, *supra* note 46 (describing an accidental leak of 150 gallons of radioactive water).

other pathways, like fish from the Savannah River.[183] Once the father has established a duty and shown direct exposure to harmful conditions as a result of negligent Operator actions and omissions, he must then prove that the exposure proximately caused his injuries.[184]

Assuming that he can, the father's injuries, like the pipefitter's, will most likely be classified as late radiation injuries, which will hinder the showing of proximate cause.[185] However, the father will not have to show that his injuries were caused solely by the Operators' negligent acts; instead he must only show that the Operators' actions contributed to his injuries.[186] Keeping in line with the national trend, South Carolina courts have applied the "substantial factor" test in determining proximate cause.[187] Furthermore, South Carolina courts have explicitly allowed parties to introduce circumstantial evidence when proving proximate cause.[188] Therefore, the father will be able to introduce evidence such as epidemiological studies and expert testimony to aid in his causation analysis.[189] Although foreseeability is the touchstone of proximate cause,[190] the father does not have to show that the Operators foresaw his particular injuries. Instead, he has the lighter burden of showing only that the Operators should have foreseen that their negligence would probably cause injury to someone.[191] Because the father only has to show that the Operators' actions were a substantial factor in causing his radiation related injuries and can do so using circumstantial evidence, he should be able to introduce evidence that links his injuries to radioactive contamination resulting from the Operators' actions.

If the father prevails in his simple negligence suit, he will be entitled to compensable damages to restore him, as near as possible, to his original state before his injures.[192] Among others, these damages will include any medical bills, along with any compensation for disabilities that may result from his

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183. *See supra* note 176 and accompanying text.

184. *See supra* Part IV.A.1.

185. *See supra* note 38–40 and accompanying text.

186. *See supra* Part IV.A.1.

187. *See* Jeffords v. Lesesne, 343 S.C. 656, 664, 541 S.E.2d 847, 851 (Ct. App. 2000) (citing Daniel v. Days Inn of America, Inc., 292 S.C. 291, 301, 356 S.E.2d 129, 135 (Ct. App. 1987)) (stating that "if the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability"); *see supra* note 41 and accompanying text.

188. *See* Hurd v. Williamsburg Cnt'y, 353 S.C. 596, 613, 579 S.E.2d 136, 145 (Ct. App. 2003) (citing Mahaffey v. Ahi, 264 S.C. 241, 247, 214 S.E.2d 119, 122 (1975); Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997)).

189. *See supra* notes 41–42 and accompanying text.

190. *See* Gause v. Smithers, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (citing J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)).

191. *See* Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001) (citing Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546, 547–48 (1990)) ("It is not necessary for plaintiff to demonstrate that defendant should have foreseen the particular event which occurred, but, rather, merely that defendant should have foreseen his negligence would probably cause injury to someone.").

192. *See supra* notes 162–65 and accompanying text.

injuries.[193] He will also collect damages if he can show any loss in earning potential or alteration in lifestyle.[194] To receive punitive damages, the father will have to show a higher degree of culpability, including reckless, willful, or wanton actions. The father may be able to assert evidence of recklessness because he can assert evidence that the SRS failed to report certain leaks of high-level radioactive waste that contaminated the same groundwater that the father uses in his home.[195] He may also rely on statements that admit the repeated leakage of radioactive material into the Savannah River to prove that the SRS has an established pattern of reckless behavior.[196] If the jury finds the father's evidence persuasive, it could choose to grant punitive damages to prevent further wrongdoings or to punish the SRS for past actions.[197] However, as the SRS has slowed in production of radioactive material and focused more efforts on restoration and cleanup of its premises,[198] the jury may not feel that large monetary penalties are appropriate and therefore withhold any additional punitive damages. The amount of damages that the father receives will depend on what degree of negligence he can assert, how much the jury feels is enough to make the father whole, and whether the jury believes that the SRS needs to be punished for any of its negligent actions.

The father's hypothetical case against the Operators is extremely similar to an actual case recently decided against another nuclear facility in Washington.[199] In *In re Hanford Nuclear Reservation Litigation,* neighboring residents sued past and present owners of the Hanford Nuclear Site (Hanford) after investigations revealed that Hanford had released large amounts of harmful radiation from the site into surrounding areas beginning in the 1940s as a byproduct of the plants plutonium production.[200] In that case, thousands of plaintiffs, after court consolidation of all Hanford related cases, were able to assert causes of action to receive damages for radiation-linked injuries, such as lung cancer and hypothyroidism.[201] Because Washington state law adheres to the higher standard

193. *See supra* Part IV.A.5.

194. *See supra* Part IV.A.5.

195. *See* NUCLEAR WASTELANDS, *supra* note 46, at 249 (citing Arjun Makhijani et al., *Deadly Crop in the Tank Farm: An Assessment of the Management of High-Level Radioactive Wastes in the Savannah River Plant Tank Farm, Based on Official Documents*, INST. FOR ENERGY & ENVTL. RESEARCH 20 (1986), http://ieer.org/wp/wp-content/uploads/1986/07/deadlycropSRS1986.pdf).

196. *See, e.g.*, Applebome, *supra* note 46 (quoting an SRS manager as saying that a 150 gallon leak of tritium contaminated water was "not the first time, nor even the largest dose of tritium released by [SRS]").

197. *See supra* notes 166–69 and accompanying text.

198. *See* REED ET. AL., *supra* note 7, at 512; UNION OF CONCERNED SCIENTIST, *supra* note 16, at 2; U.S. ENVTL. PROT. AGENCY, *supra* note 6.

199. *See* In re Hanford Nuclear Reservation Litigation, 534 F.3d 986 (9th Cir. 2007). Note that pursuant to the Price-Anderson Act, this case was filed in federal court but applied Washington state law. *See id.* at 997; *supra* note 132 and accompanying text.

200. *In re Hanford*, 534 F.3d at 997.

201. *Id.* at 995, 998.

of "but for" causation but has also recognized radioactive production of nuclear material as ultra-hazardous, many plaintiffs successfully asserted a strict liability cause of action against Hanford.[202] The successful plaintiffs were able to use epidemiological studies and expert testimony to prove that radiation exposure caused their injuries and were awarded hundreds of thousands of dollars.[203] Other plaintiffs were unable to meet the strict requirements for the heightened causation element and were therefore unsuccessful in their tort claims.[204] It is possible that if Washington used the "substantial factor" requirement, as used in South Carolina, as opposed to the "but for" requirement for causation, more plaintiffs would have been successful not only in a strict liability claim, but also in a simple negligence claim because they would have had a much higher probability of proving liability.[205]

V. AVOIDING DISPARATE REMEDIES

Although the Act and common law have both provided remedies for the same injuries stemming from SRS contamination, these remedies are in no way equal.[206] Changes must be made to ensure that each member of society is treated with fairness and equality.

A. Remedies in Hypothetical Cases

As the pipefitter and the father both travel home from medical checkups, each contemplates how they were compensated for their injuries.[207] Both have dealt with the same symptoms and endured the same treatments. Both have had their lives permanently changed. The only difference is how that change was evaluated.

The pipefitter was limited by the Act and its statutory limitations.[208] Ironically, because the pipefitter's injuries were caused by ionizing radiation, his medical needs were provided for as long as he needed them beyond the statutory

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202. *Id.* at 996, 1003–05 (citations omitted) (discussing the various legal arguments presented to the court).

203. *Id.* at 998–99.

204. *Id.* at 999.

205. *See* Jeffords v. Lesesne, 343 S.C. 656, 664, 541 S.E.2d 847, 851 (Ct. App. 2000) (citing Daniel v. Days Inn of America, Inc., 292 S.C. 291, 301, 356 S.E.2d 129, 135 (Ct. App. 1987)) (stating that "if the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative [sic] his liability"); s*ee supra* Part IV.A.1 (discussing the requirements of simple negligence in South Carolina).

206. *See supra* Part I.

207. *See supra* Parts IV.A, IV.B.

208. *See supra* notes 122–24 and accompanying text.

limit.[209] After he recovered, he had to attend vocational rehabilitation and return to work in a different area to continue receiving benefits for the statutory limit.[210] After this time limit expired, he was no longer entitled to workers' compensation benefits.[211] Because of the exclusivity provision, the pipefitter, along with his dependents, were barred from bringing any common law actions against the Operators.[212] Furthermore, the Operators will not experience any negative recourse from their actions because the no-fault liability application of the Act allows the Operators to continue current operations with no incentive to change.[213]

The jury awarded the father compensable damages. His damages covered the cost of his past and future medical needs.[214] He was also awarded damages for pain, suffering, and lifestyle alteration.[215] Because the father and his dependents were not limited by the exclusivity provision, the father's wife was able to assert a claim for loss of consortium and was awarded damages for loss of services, society, and companionship as a result of the father's injuries.[216] Although the father was not able to show a heightened degree of negligence, such as recklessness, he still had the opportunity to be heard and present his case before the court.

The father's award for damages was significantly higher than the compensation offered to the pipefitter. Many factors contributed to this increase in award. The jury in the father's case was allowed to compensate him for alteration in lifestyle and emotional pain and suffering.[217] The Workers' Compensation Commission did not take those factors into account.[218] Also, the jury tried to award the father enough money to make him as close to whole as possible and was not restricted by statutory limitations, such as percentage caps or time limitations.[219] The father's family also benefited overall due to his wife's ability to assert a separate claim for loss of consortium.

The pipefitter was not allowed to present his case to a jury and was very limited by the Act's restrictions. Ironically, although the father was allowed to present a cause of action for recklessness, he was unable to prove such a

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209. *See* S.C. CODE ANN. § 42-13-80 (2015) (codifying that employees with an ionizing radiation injury are entitled to worker's compensation benefits and other benefits detailed in the statute).

210. *See id.* § 42-13-90.

211. *Id.*

212. *Id.* § 42-1-540. It should be noted that if the pipefitter had died from his ionizing radiation injuries, his dependents would be able to collect under the Act subject to certain statutory caps and limitations. BEARD ET AL., *supra* note 1, at 358–59 (quoting S.C. CODE ANN. § 42-9-290).

213. *See supra* note 128 and accompanying text.

214. *See supra* note 164 and accompanying text.

215. *See supra* note 164 and accompanying text.

216. *See* S.C. CODE ANN. § 15-75-20 (2005); *see generally* Davis v. Tripp, 338 S.C. 226, 239, 525 S.E.2d 528, 534–35 (Ct. App. 1999) (discussing reasons for a loss of consortium claim).

217. *See supra* notes 162–64 and accompanying text.

218. *See supra* notes 120–24 and accompanying text.

219. *See supra* notes 123–24 and accompanying text.

heightened degree of negligence.[220] However, if the pipefitter had not been barred from common law actions, he would have been able to present a much stronger case for recklessness because he could present evidence of discriminatory actions.[221] The actions of his employers at the SRS may not have been intentional enough to place him in the intentional tort exception to the exclusivity provision, but he would possibly have enough evidence to prevail on a charge of willful, wanton, or reckless action.[222] If the pipefitter could show that his radiation injuries were proximately caused by workplace discrimination, the jury would be allowed to award punitive damages to vindicate the violation of the pipefitter's private rights and prevent future reckless, willful or wanton actions.[223] In both of the hypothetical situations however, the Operators are presented with no reason to improve the current state of affairs because the jury in the father's case was not allowed to recommend punitive damages, and the pipefitter's compensation was a form of no-fault insurance, protecting the Operators from any common law actions.

B. Remedying Disparate Remedies

The Act must be reformed, not only to compensate injured workers after they are injured, but also to protect future workers from being injured by similar actions. An employer who is allowed to conform to the workers' compensation regime just to protect himself from common law actions and their higher compensable damages does a disservice to his employees and to society as a whole. Conversely, incentivizing employers to constantly improve working conditions and become aware of possible negligent actions will benefit society as a whole by reducing the amount of injuries and improve the functioning of working environments and their employee's quality of life.

From an ethical and legal standpoint, similarly situated individuals should not be treated differently. The pipefitter's injuries should be treated the same as the father's. Both sets of injuries were the result of the same negligent actions and both men require the same compensation to be made whole.[224] The legal system should not value the pipefitter any less because he worked to get his cancer while the father got his for free while enjoying his home and outdoor lifestyle. Because similar actions need similar reactions, it is time for the law to change in order to facilitate equality.

One specific change can be made to the South Carolina Workers' Compensation Act that would equalize the treatment of similarly situated injured workers and nonemployee citizens. If the legislature added another exception to the exclusivity provision that allowed workers to assert common law claims for

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220. *See supra* Part IV.A.
221. *See supra* Part IV.A.
222. *See supra* Parts III.D.1, IV.A.
223. *See supra* Part IV.A.5.
224. *See supra* Part I.

forms of heightened negligence, such as gross negligence and recklessness, many of the benefits of the Act would stay in place without some of the harsh consequences that result from the present inflexibility.

An exception to the exclusivity provision that allows heightened negligence claims would motivate all employers, both direct and statutory, to exercise at least slight care towards its employees without being reckless or intentionally disregarding required duties. The threat of common law claims, and their higher compensatory damages, would motive employers to take proactive steps in providing safe, efficient environments for their employees in order to prevent future injuries while also requiring them to rectify any current problems as they arise. Because heightened negligence claims also carry the possibility of punitive damages, employers could also be punished to deter similar future wrongs or vindicate violated rights.

This exception would also continue to provide the benefit of no-fault liability insurance to employers for simple negligence claims. Because the exception only allows injured workers to assert heightened forms of negligence, those with simple negligence claims will only be allowed to collect under the applicable provisions of the Act. This will allow employers to participate in the workers' compensation regime to protect themselves from one of the most common claims, simple negligence. Therefore, employers can continue to operate without the fear of numerous, costly common law actions, as long as they continue to exercise at least slight care.

A simple change implemented by the legislature could create a much needed resolution to the inequality found within the current workers' compensation regime.

VI. CONCLUSION

Although the current set of laws in South Carolina does favor certain classes of individuals over others, this problem can be easily rectified. The South Carolina Legislature can equalize the treatment of employees and nonemployees with the introduction of a short statutory exception to the current workers' compensation laws. Within a short legislative session, the father and the pipefitter can be treated as equals, all while maintaining the positive incentives of the workers' compensation regime. Implementing this change to protect employees, nonemployees, and society as whole is a positive step toward ensuring fair and just treatment for everyone.

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