THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2016-000227
Case No. 2013-CP-42-3915

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

v.

CNA Holdings, LLC..... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err by finding that Dennis Seay was not a statutory employee of Celanese and that the Workers' Compensation Act was not his exclusive remedy?**

II. **Did the trial court err by denying Celanese's motion for a mistrial where the jury engaged in premature deliberations and considered outside influences?**

III. **Did the trial court err by refusing to exclude an unauthorized, inflammatory, and highly prejudicial video of Seay crying out to Jesus for help and by failing to grant Celanese's motion for a mistrial on this basis?**

IV. **Did the trial court err by failing to grant a new trial where the damages awarded were grossly excessive?**

STATEMENT OF THE CASE

Respondents/Plaintiffs Angie Keene, individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay (hereinafter "Respondents") initiated this action on September 26, 2013. (Compl.; R. __.) The Complaint asserted various causes of action against numerous defendants, alleging that they negligently exposed Dennis Seay ("Seay") to various asbestos containing materials in connection with his work as a millwright at Daniel Construction Company ("Daniel"), resulting in Seay contracting mesothelioma. (*Id.*; R. __.) Appellant CNA Holdings, LLC, successor in interest to Hoechst Celanese Corporation ("Celanese") answered the Complaint and denied any liability to Respondents.[1] (Ans.; R. __.) Respondents amended their Complaint three additional times during the course of the litigation. (*See* Third Am. Compl.; R. __.) Celanese answered each of these Amended Complaints by continuing to deny any liability to Respondents. (*See* Ans. to Third Am. Compl.; R. __.)

On September 11, 2014, Celanese filed a Motion to Dismiss for Failure to State a Claim, or in the alternative, Motion for Summary Judgment, along with a Memorandum in Support. (Mot. to Dismiss; Memo. in Supp. of Mot. to Dismiss; R. __.) In this motion, Celanese contended that Seay was its "statutory employee" and the South Carolina Workers' Compensation Act provided the exclusive remedy for his claims. (Memo. in Supp. of Motion to Dismiss; R. __.) Celanese cited to various cases supporting the proposition that maintenance workers like Seay—employed by an outside contractor but working at a facility owned by a company like Celanese—are typically found to be statutory employees of the facility owner. (*See id.*) Celanese later filed an Amended Motion on May 26, 2015, along with a Memorandum

[1] In their Complaint, Respondents sued numerous defendants, contending they were all liable in some way for the harm to Seay. However, at the time of trial only John Crane, Inc. ("John Crane") and Celanese remained as defendants. Because Celanese is the only appellant, the Statement of the Case and Statement of Facts focus on the background and facts relevant to this appeal.

in Support of the Amended Motion. (Am. Mot. to Dismiss; Memo. in Supp. of Am. Mot. to Dismiss; R. __.)

After the motion was fully briefed, (*see* Memo. in Opp'n to Am. Mot. to Dismiss; Reply in Supp. of Am. Mot. to Dismiss; R. __.), the trial court issued a fully reasoned Order dated July 28, 2015 denying Celanese's motion. (Order Denying Am. Mot. to Dismiss; R. __.) In denying the motion the court looked to cases involving transportation and construction workers to support its finding that Seay was not a statutory employee of Celanese. (*See id.*; R. __.) The court declined to follow the more factually analogous case law cited by Celanese from the maintenance worker context. (*See id.*; R. __.) Instead, the court concluded that several relatively new decisions from South Carolina appellate courts involving transportation workers employed by common carriers were controlling on the issue, and represented a break from prior controlling law. (*Id.*; R. __.) Celanese continued to raise the statutory employee argument throughout the litigation without success. (*See* Trial Transcript ("Tr.") pp. 1327:5-1332:6; R. __ (directed verdict and renewed directed verdict motions).)

Accordingly, the matter proceeded to trial. At the time of trial, the only remaining Defendants were John Crane and Celanese, and the only issue before the Court was whether they were liable to Respondents for negligence. (*See* Verdict Form; R. __.) The court held an eight day trial between September 28, 2015 and October 8, 2015. (*See* Tr. pp. 1, 444, 762, 1267; R. __.)

During the course of the trial, two significant matters of law arose. First, in the middle of the trial Juror #16 came forward and expressed concerns about a conflict of interest. (Tr. p. 514:13-15; R. __.) The juror explained that he worked at the same facility as Seay doing essentially the same job as Seay and that he disclosed this information to the other jurors. (*See*

Tr. pp. 515:6-16, 518:4-6, 573:12-574:3; R. __.) He also acknowledged that another member of the jury asked about asbestos, but stated that the jury refrained from discussing it any further. (Tr. p. 574:4-14; R. __.) After receiving this information, the trial court dismissed this juror. (Tr. p. 575:6-8; R. __.) Defendants moved for a mistrial. However, the trial court found that no premature deliberations had occurred and that the Defendants were not prejudiced. (Tr. p. 570:9-573:3, 578:24-579:25; R. __.) Thus, the trial court denied Defendants' motion for a mistrial. (Tr. p. 570:9-573:3, 579:10-20; R. __.)

The other critical matter of law that arose was the introduction of a short video clip of Dennis Seay while he was in hospice care crying out in pain for Jesus to help him. (Video of Dennis Seay; Rough Transcript from Oct. 8, 2015 p. 874:17-18, included as exhibits to post-trial motions; R. __.) Defendants objected on the basis that the clip was inflammatory and highly prejudicial, and requested that the court strike the video from evidence and/or grant a mistrial. (Tr. pp. 766:6-772:18; R __.) The trial court, however, denied the motion. (Tr. p. 772:16-18; R. __.)

On October 8, 2015, the jury rendered a defense verdict for John Crane and a verdict finding Celanese liable to Respondents. The jury awarded $2,000,000 in actual damages for the survival action, $5,000,000 in actual damages for the wrongful death action, $5,000,000 in actual damages for the loss of consortium claim, and $2,000,000 in punitive damages. (Verdict Form; Judgment; R. __.)

Celanese filed several post-trial motions—for judgment notwithstanding the verdict ("JNOV"), for a new trial absolute, and for a new trial nisi remittitur. (Mot. for JNOV; Mot. for New Trial; Motion for New Trial Nisi Remittitur; R. __.) In the motions, Celanese reasserted the statutory employee issue, along with the premature jury deliberation and prejudicial video issues.

(Mot. for JNOV; Mot. for New Trial; Motion for New Trial Nisi Remittitur; R. __.) Moreover, also relevant to this appeal, Celanese asserted that the verdict was grossly excessive when compared to other mesothelioma verdicts and was improperly based on the jury's premature deliberations and the prejudicial video. (Mot. for New Trial; Motion for New Trial Nisi Remittitur; R. __.) The court denied the post-trial motions in their entirety. (Order on Post-Trial Motions; R. __.) Celanese timely filed a notice of appeal.

STATEMENT OF THE FACTS

Dennis Seay worked as an employee of Daniel Construction Company ("Daniel") from 1969 to 1978. (D. Seay, Tr. pp. 359:8-24; R. __.) During this time, Daniel was the exclusive maintenance provider at the Celanese facility where Seay worked, which facility manufactured synthetic resins and fibers. (*See* Court's Ex. 1, D. Seay Video Dep. p. 67:2-7; D. Seay, Tr. p. 362:12-24; R. pp. __.) This facility did **not** produce any asbestos containing products. (*See* D. Seay, Tr. p. 360:16-21; R. __.) Seay was assigned exclusively to the Celanese facility, working initially as a millwright helper for a few months and later as a millwright for the remainder of his tenure. (*See id.* pp. 359:8-360:3; R __.) Celanese relied on Daniel to handle the maintenance and repair work at the facility. (*See* Court's Ex. 1, D. Seay Video Dep. p. 67:2-7; D. Seay, Tr. p. 362:12-24; R. pp. __.) All maintenance, including maintenance of critical manufacturing equipment, was done by Daniel employees. (*See* Court's Ex. 1, D. Seay Video Dep. p. 67:2-7; D. Seay, Tr. p. 362:12-24; R. pp. __.) Seay worked on various elements of the equipment such as pumps, valves, and gear boxes, all of which were key components of the process lines used in the facility's manufacturing operations. (*See* D. Seay, Tr. pp. 382:20-383:23, 416:19-21, 418:3-11, 419:2-420:10; R. __.)

During the time he worked for Daniel, Seay used products containing asbestos—and was exposed to asbestos dust—in connection with the repair work he performed. (*Id.* at 393:7-11, 408:17-409:12; Court's Ex. 1, D. Seay Video Dep. pp. 27:12-28:5; R. __.) One of the Daniel millwrights' key job duties, for example, involved replacing gaskets made of asbestos on steam condensers. (*See* D. Seay, Tr. pp. 406:19-409:18; Court's Ex. 2, R. Thompson Video Dep. pp. 52:14-17, 54:4-21, 56:14-24; R. __.) According to Seay, on occasion the old gaskets could be easily removed. (D. Seay pp. 407:12-408:16, 436:13-437:7; R. __.) However, most of the time, the gaskets would degrade over time and become difficult to remove. (*See* Court's Ex. 1, D. Seay Video Dep. p. 41:6-21; D. Seay, Tr. pp. 399:17-400:15, 407:12-409:18, 439:1-440:9; R. __.) The removal of these gaskets would sometimes create dust. (*See* Court's Ex. 1, D. Seay Video Dep. at 47:10-48:10, D. Seay, Tr. pp. 380:23-381:6, 408:17-18, 437:4-7; R. pp. __.)

The first step of the gasket replacement process sometimes involved stripping back the asbestos insulation covering the piping on the machinery. (Court's Ex. 1, D. Seay Video Dep. pp. 65:18-66:04; D. Seay, Tr. pp. 371:7-372:10, 378:5-379:4, 439:1-440:9; Court's Ex. 2, R. Thompson Video Dep. pp. 65:18-66:01, 108:21-109:14; R. __.) This allowed the millwright to access the flanges where the gaskets were located. (Court's Ex. 1, D. Seay Video Dep. pp. 65:18-66:04; D. Seay, Tr. pp. 371:7-372:10, 378:5-379:4, 439:1-440:9; Court's Ex. 2, R. Thompson Video Dep. pp. 65:18-66:01, 108:21-109:14; R. __.) Approximately 25 to 30% of the time, Seay had to scrape off excess insulation from the flange with a screwdriver or putty knife. (D. Seay, Tr. pp. 439:1-440:9; R. __.) For particularly difficult repairs, Seay used a wire brush or a brush powered by a drill motor. (*Id.*) He then removed the old gasket and installed a new one, which he cut from a sheet to ensure a correct fit. (D. Seay, Tr. pp. 399:17-400:20, 406:19-407:25; R. __.) Seay testified that 95 to 98% of the time the old gaskets would be degraded and

did not immediately pop out of place. (D. Seay, Tr. p. 408:19-23; R. __.) Therefore, he typically had to remove the old gaskets with a scraper, putty knife, or wire brush. (*See* Court's Ex. 1, D. Seay Video Dep. pp. 39:25-42:24, 43:14-44:22; D. Seay, Tr. pp. 399:17-400:20, 406:19-409:3; R. pp. __.) John Crane was one manufacturer of the asbestos-containing gaskets that Daniel millwrights used in completing such work. (D. Seay, Tr. p. 383:24-384:9.) Seay testified that he probably worked with John Crane products the most often. (*See* D. Seay, Tr. p. 384:7-19; R. __.)

Seay contracted mesothelioma. (Court's Ex. 1, D. Seay Video Dep. p. 11:21-12:10; R. __.) Whether Seay contracted mesothelioma, however, is not at issue in this appeal. Rather, the critical issues at trial involved whether Celanese and/or John Crane were negligent and should be held liable for that harm.[2] (Verdict Form; Tr. pp. 1443:16-1459:14; R. __.) For mesothelioma, the calculus involves determining whether either of these entities was a "substantial factor" in Seay's exposure to asbestos. (Jury Charges, Tr. p. 1457:21-1458:5; R. __.) Seay brought suit against numerous Defendants, many of whom were dismissed prior to trial, alleging that they all had some role in causing the harm. The jury ultimately rendered a verdict finding that Celanese was negligent and should be held liable to Seay for the harm that he suffered. (Verdict Form; Tr. 1472:10-1473:16; R. __.)

Much of the trial record consisted of evidence and testimony detailing the dangers of asbestos, the properties and characteristics of mesothelioma (*i.e.*, how someone could contract the disease and the symptoms they would experience as a result); what was generally known about asbestos at the time Seay was employed with Daniel; and what Daniel and Celanese allegedly knew about the dangers of asbestos. Respondents also introduced testimony from Seay

[2] Plaintiffs pursued a products liability theory against John Crane and a premises liability theory for Celanese, both claims sounding in negligence. (Jury Charges, Tr. p. 1443:16-1459:14; R. __.)

and his family regarding his experience with mesothelioma and how it impacted his life to support their claims for damages.

The issues raised by Celanese concern four critical errors of law that occurred in this action. The essential facts related to each issue are set forth in greater detail below.

ARGUMENT

The trial court's judgment should be reversed for several reasons. First, the trial court erred in determining that Seay was not Celanese's statutory employee and by denying Celanese's motions on that basis. The trial court improperly relied on inapposite case law, and it misinterpreted modern precedent to support its erroneous conclusion. Second, the trial court erred by denying Celanese's motion for a mistrial and motion for a new trial in light of the jury's premature deliberations. Third, the trial court erred by permitting admission of a highly prejudicial video recording of Seay in hospice crying out in pain for Jesus to help him. Finally and fourth, the trial court erred by failing to grant Celanese's motion for a new trial in light of the jury's grossly excessive verdict, which was out of line with other mesothelioma verdicts from that time period and was improperly based on the jury's premature deliberations and the prejudicial video.

I. SEAY WAS CELANESE'S STATUTORY EMPLOYEE UNDER SOUTH CAROLINA LAW.

Celanese contended that Seay was its statutory employee, and thus the Workers' Compensation Act provided the exclusive remedy. The trial court incorrectly rejected this argument with distinguishable facts and legal conclusions—relying on cases involving transportation workers and construction workers—and asserting that such cases controlled the result here. Furthermore, in reaching this decision, the trial court ignored several analogous South Carolina cases in which the courts concluded that a maintenance worker was a statutory

employee. This constitutes error, and thus this Court should reverse and instruct that judgment be entered in favor of Celanese.

A. South Carolina law on statutory employees is to be construed liberally.

The Workers' Compensation Act is the ***exclusive remedy*** against an employer for an employee's work-related accident or injury. *Fuller v. Blanchard*, 358 S.C. 536, 595 S.E.2d 831, 833 (2004); *see also Strickland v. Galloway*, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer."). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Edens v. Bellini*, 359 S.C. 433, 441-42, 597 S.E.2d 863, 867 (Ct. App. 2004).

"Coverage under the Workers' Compensation Act depends on the existence of an employment relationship." *Id.* at 439, 597 S.E.2d 863, 866. Whether or not an employer-employee relationship exists is a jurisdictional question. *Id.* at 440, 597 S.E.2d at 866 (quoting *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 594, 564 S.E.2d 110, 113 (2002); *S.C. Workers' Compensation Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995)).[3] Because the determination of whether a worker is a statutory employee is jurisdictional "the question on appeal is one of law." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523

[3] In *Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002), the Supreme Court stated that the "exclusivity" provision of the workers' compensation code "does not involve subject matter jurisdiction." *Id.* As the court explained, a tort action is "clearly a part of the general class of cases which the court of common pleas has subject matter jurisdiction to hear," and thus the trial court had subject matter jurisdiction over the plaintiff's claims. *Id.* Despite the court of common pleas having subject matter jurisdiction, however, the court explained that "certain cases may be taken from the trial court's original jurisdiction by the General Assembly." *Id.* at 423, 567 S.E.2d at 234. For workers' compensation, the court noted that the "General Assembly has vested the Commission with exclusive original jurisdiction over the types of claims made by [plaintiff]," such that the trial court was "divested" of original jurisdiction. *Id.* As a subsequent Court of Appeals decision explained, cases since *Sabb* have still used Rule 12(b)(1), SCRCP to dismiss workers compensation cases. *See Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 402 (Ct. App. 2008).

S.E.2d 766, 769 (1999). "As a result, this court has the ***power and duty*** to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Harrell*, 337 S.C. at 320, 523 S.E.2d at 769 (emphasis added); *see also Glass v. Dow Chem. Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997). Further, "[i]t is South Carolina's policy to resolve jurisdictional doubts in favor of the **inclusion** of employers and employees under the Workers' Compensation Act." *Edens*, 359 S.C. at 440, 597 S.E.2d at 867 (emphasis added).

The Workers Compensation Code expands this inclusion to workers of subcontractors and states:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-10-40. As the Court of Appeals has explained, this means that, "depending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer." *Voss v. Ramco, Inc.*, 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997).

The key question in determining whether a worker is a statutory employee is whether the activity of the subcontractor's employee "is a part of [the owner's] trade, business or occupation." *See Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). In determining whether an employee is engaged in such an activity, the Supreme Court has applied three tests. *Id.* The activity is considered "part of [the owner's] trade, business, or occupation"

for purposes of the statute if it "(1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; ***or*** (3) has previously been performed by the owner's employees." *Olmstead*, 354 S.C. at 424, 581 S.E.2d at 485 (quoting *Glass v. Dow Chemical*, 325 S.C. 198, 482 S.E.2d 49 (1997)). "If the activity at issue meets even *one* of these three criteria [i.e., tests], the injured employee qualifies as the statutory employee of 'the owner.'" *Id.* Finally, it bears repeating that "'***[a]ny doubts*** as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013) (quoting *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218–19, 661 S.E.2d 395, 400 (Ct. App. 2008)) (emphasis added). Hence, the Court has before it a legal question subject to this Court's *de novo* review, and, as set forth below, the undisputed relevant facts require reversal when the proper precedent is applied.

B. The trial court incorrectly held that the maintenance work done by Seay was not an important and essential part of Celanese's business.

The trial court held that Seay's maintenance work was not part of Celanese's "trade, business or occupation." (Order Denying Mot. for Summ. J. p. 7; R. p. __.) This holding is contrary to established South Carolina precedent. The trial court's determination that Seay was not a statutory employee should be reversed.

The uncontested evidence clearly demonstrates that the repair work Seay did for Daniel was an important and essential part of Celanese's business. Seay was employed as a millwright with Daniel essentially the entire time he worked at the Celanese facility.[4] (*See* Court's Ex. 1, D. Seay Video Dep. pp. 24:20-25:23; R. pp. __.) As a millwright, he was responsible for repairs and preventative maintenance work on Celanese's manufacturing equipment. (*See id.* at 26:25-

[4] When he first started with Daniel, Seay was a millwright helper for a few months before being promoted to millwright. (D. Seay, Tr. p. 359:8-360:3.)

27:6, 61:9-62:19, 67:17-21; D. Seay, Tr. pp. 427:22-428:9; R. pp. __.) A Celanese employee, referred to as the "lead man," would provide instructions to Seay's supervisor at Daniel, who would then give Seay his daily job duties. (*See* Court's Ex. 1, D. Seay Video Dep. at 66:1-67:1; D. Seay, Tr. pp. 374:23-375:9; Dep. of D. Seay (Nov. 20, 2013), Ex. B to Amended Mot. for Summ. J. at 42:19-43:2; R. pp. __.) Daniel was the exclusive maintenance provider at the Celanese facility, and all maintenance work at the facility was performed by Daniel employees. (*See* Court's Ex. 1, D. Seay Video Dep. at 67:2-7; D. Seay, Tr. p. 362:12-24; R. pp. __.) Although Celanese did not have its own maintenance division at this facility at the time Seay worked there, it did provide all supplies for the maintenance work. (*See* D. Seay, Tr. p. 366:3-10; R. p. __.)

The Celanese facility where Seay worked manufactured synthetic fibers. (Court's Ex. 1, D. Seay Video Dep. at 25:3-8; D. Seay, Tr. p. 360:16-21; R. pp. __.) As Seay himself testified, his work on steam lines was vital to the operation of Celanese's business, because all of the equipment he maintained, such as pumps, valves, and gear boxes, was critical to the successful operation of the manufacturing process lines at the facility. (*See* D. Seay, Tr. pp. 382:20-383:23, 416:19-21, 418:3-11; 419:2-420:10; R. __.) Seay testified as follows:

> Q: So it sounds like the lines were fairly important to the operation of the business, is that fair?
> A: Very important. If they didn't operate, they wouldn't run.

(*See* D. Seay, Tr. 416: 22-25; R. __.). Further, Seay testified:

> Q: So you would – so would you agree that these lines were important to the operation of Hoechst Celanese?
> A: Very important.
> Q: If a line went down and there was a failure, was it important for you to repair the line quickly?
> A: Yes.
> Q: And that would be the case no matter where the repair was made in the facility; right?

A: Yes.
Q: You, also, mentioned repairing some equipment last time during your deposition. When you made a repair, was it because there was something wrong with the equipment?
A: Right.

(D. Seay, Tr. 418: 3-15; R. __.).

Seay testified that each piece of equipment in the facility was essential to the manufacturing operation. (D. Seay Video Dep. at 76:20-77:1; D. Seay, Tr. pp. 416:19-25, 423:24-424:1; Dep. of D. Seay (Jan. 16, 2014), Ex. C to Am. Mot. for Summ. J. at 179:6-8; R. __.) The repairs and preventative maintenance Seay performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility. (*See* D. Seay Video Dep. at 76:23-77:6; D. Seay, Tr. p. 420:5-10; R. __.)

Ronnie Thompson, another Daniel contractor who worked with Seay at the Celanese facility, testified similarly. (Court's Ex. 2, R. Thompson Video Dep. at 17:4-24; R. __.) Thompson worked at Daniel with Seay from 1973 to 1975, and confirmed that Daniel employees performed all of the maintenance work in the facility. (*Id.* at 17:4-24, 98:5-12; R. __.) Thompson also stated that the purpose of Daniel's work was to ensure Celanese's production lines remained operational. (*Id.* at 97:6-9; R. __.) As he explained, keeping the production lines operating was important to Celanese's manufacturing business, as production could not proceed if the valves, pumps, and other equipment were not working properly. (*Id.* at 97:10-25; R. __.)

Finally, Celanese's corporate representative Bruce Bowyer echoed this testimony, stating that the maintenance work performed by Daniel was a necessary, essential, and integral part of Celanese's business. (Ex. G. to Celanese's Am. Mot. for Summ. J., Aff. of B. Bowyer at ¶ 7; B. Bowyer, Tr. p. 1262:15-20; R. __.) It was essential for Celanese to have maintenance workers on site to maintain, repair, and replace equipment. (Ex. G. to Celanese's Am. Mot. for Summ. J.,

Aff. of B. Bowyer at ¶¶ 5, 7; Ex. H to Celanese's Am. Mot. for Summ. J., Dep. of B. Bowyer at 314:18-315:17; R. __.) Furthermore, the maintenance of equipment and upkeep of production lines was a regular, ongoing part of Celanese's operations. (*See* Ex. G. to Celanese's Am. Mot. for Summ. J., Aff. of B. Bowyer at ¶ 7; R. __.) Without the ongoing maintenance provided by Daniel workers like Seay, the Celanese facility would not have been able to properly function and consistently produce product for sale. (*Id.* at ¶ 7; Ex. H to Celanese's Am. Mot. for Summ. J., Dep. of B. Bowyer at 314:18-315:17; B. Bowyer, Tr. p. 1262:15-20; R. __.) The maintenance work provided by the Daniel employees was so valuable to Celanese that in later years Celanese directly hired the Daniel maintenance workers as employees. (Ex. G. to Celanese's Am. Mot. for Summ. J., Aff. of B. Bowyer at ¶ 10; R. __.)

The testimony and evidence overwhelmingly supports that Seay's activities were both an important part of Celanese's business or trade and a necessary, essential, and integral part of its trade or business. Respondents presented no evidence to the contrary. Instead, they focused on the fact that Celanese did not have a dedicated maintenance division, and that direct Celanese employees did not handle the type of maintenance work performed by Seay prior to his time there. (*See* Pls.' Resp. in Opp'n to Mot. for JNOV pp. 9-10; R. __.) Although these issues may have a bearing on ***one*** of the three relevant tests (*viz.*, whether the work had previously been performed by direct Celanese workers), they do not affect the overwhelming evidence showing that Seay's activities played an important, necessary, integral and essential part in Celanese's manufacturing operations.

C. Analogous case law supports finding that Seay was a statutory employee of Celanese.

1. Prior decisions from South Carolina courts have held that a worker was a statutory employee under similar facts.

Several South Carolina cases have found a maintenance worker to be a statutory employee. The testimony and evidence presented here is analogous to those cases. For example, the Supreme Court analyzed the classification of a worker hired to make repairs in *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991). In *Smith*, the worker in question was a self-employed welder and sole proprietor of a contracting company. *Id.* at 290, 411 S.E.2d at 439. The defendant manufacturer hired his company "to repair a metal shearing machine used in the [company's] business operations." *Id.* at 290, 411 S.E.2d at 440. The trial court granted summary judgment in the defendant's favor, finding that the worker was engaging in "work which was an essential part of the trade, business or occupation of the respondent" and that the nature of the work "was an integral part of the [defendant's] operations, ***without which respondent's operation could not function***." *Id.* at 291, 411 S.E.2d at 440. The worker's estate appealed, but the Supreme Court affirmed the trial court, agreeing that the worker was the defendant's statutory employee and that summary judgment was proper. *See id.* at 292, 411 S.E.2d at 442.

Likewise, in *Wheeler v. Morrison Machinery Co.*, 313 S.C. 441, 438 S.E.2d 264 (Ct. App. 1993), the court determined that a worker hired to remove asbestos insulation was a statutory employee of a textile manufacturer. The worker in *Wheeler* was injured when he fell into a piece of textile equipment at the defendant's facility while working to remove asbestos. *Id.* at 440, 438 S.E.2d at 265. The Supreme Court looked to the applicable tests for determining whether he was a statutory employee. As the court explained, the "evidence reveal[ed] that as

part of an ongoing maintenance program, it was necessary for [the worker] to remove and dispose of asbestos." *Id.* at 443, 438 S.E.2d at 266. The asbestos insulated the machinery and its connecting pipes, and "had to be removed to allow workers to replace rollers, bearings, valves, and other worn components of this equipment." *Id.* at 443, 438 S.E.2d at 266. As the Court explained, "[p]reventive maintenance, including the removal and reinstallation of insulation, has always been and always will be an ongoing process." *Id.* This, coupled with the fact that some of the manufacturer's employees previously worked in removing asbestos, could "only lead to the conclusion that [the worker] was engaged in work which was part of the 'trade, business, or occupation' of the [manufacturer]." *Id.* Therefore, the worker was the defendant's statutory employee.

Finally, in an opinion that was subsequently vacated on other grounds, this Court examined the operations of a paper manufacturer to determine the types of activities that would be considered part of the business. *See Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), *vacated and dismissed by* 319 S.C. 240, 460 S.E.2d 392 (1995).[5] The worker at issue drove tanker trucks full of chemicals to the manufacturer's facility, and was injured when a hose disengaged and sprayed him with hot liquid. *Id.* at 331, 433 S.E.2d at 891. Although transportation workers are sometimes found to not be statutory employees,[6] in this situation the court determined that the truck driver was a statutory employee. The court explained that it was "undisputed that recovery, storage, and reprocessing" of the chemical was an "ordinary and necessary part of Westvaco's paper manufacturing business." *Id.* at 338, 433 S.E.2d at 895. Importantly, the court also stated that "[t]he ***maintenance and repair of***

[5] The Supreme Court vacated this opinion on procedural grounds. 319 S.C. at 242-43, 460 S.E.2d at 393-94.
[6] This distinction between maintenance workers and transportation workers is discussed *infra*.

manufacturing equipment is also a necessary part of Westvaco's business." *Id.* (emphasis added).

Seay's activities resembled the activities of the maintenance workers in *Smith* and *Wheeler*, both of whom were found to be statutory employees. Likewise, the *Woodard* opinion further supports that maintenance and repair of manufacturing equipment is an essential part of a manufacturer's business. These decisions establish that the trial court erred in holding that Seay was not a statutory employee of Celanese.

2. Other authorities support a finding that Seay was a statutory employee of Celanese.

Several other courts have examined whether a maintenance worker constituted a statutory employee. One case from the District of South Carolina examined whether a repair worker was a statutory employee. *See Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 893 (D.S.C. 1982), *aff'd*, 726 F.2d 1011 (4th Cir. 1984). In *Singleton*, the worker was an employee of an electric company which was hired to repair an electrical line owned by a textile mill. *Id.* at 888. The court explained that, without the repairs to the electrical lines, the plant could not operate and thus the lines were essential to the operation. *Id.* at 891. It did not matter that the mill's employees did not engage in this work previously, as the "continued maintenance and repair of the[] electrical lines w[as] absolutely essential to the continued operation of the textile plant." *Id.*; *see also Smith v. FCX, Inc.*, 744 F.2d 1378 (4th Cir. 1984) (contractor hired to engage in ongoing repairs of a dryer and electrical system at a grain market was a statutory employee of the market under South Carolina law).

Other jurisdictions have also recognized that contractors engaged in ongoing maintenance are statutory employees. *See, e.g., Burroughs v. Westlake Vinyls, Inc.*, No. 5:07-CV-89-R, 2008 WL 5192237, at *5 (W.D. Ky. Dec. 11, 2008) (noting that "[u]nder Kentucky law, routine

maintenance projects are a regular or routine part of a defendant's business" and that "'[e]mployees of contractors hired to perform routine repairs or maintenance are generally viewed as being statutory employees under the Act'" (quoting *Bratcher v. Conopco, Inc.*, No. 2003-CA-002153, 2008 WL 2065202, at *2 (Ky. App. 2008))); *Jones v. Lily Tulip Cup Corp.*, 158 F. Supp. 944, 945 (W.D. Mo. 1958) (finding that employee of contractor hired by manufacturer to perform routine electrical maintenance on manufacturing equipment was a statutory employee, as the work he performed was a "necessary part of the manufacturing operation of the company"); *Sisk v. Ins. Co. of N. Am.*, 356 So.2d 1109, 1110 (La. Ct. App. 1978) (holding that paper manufacturer was the statutory employer of a contractor's worker where the contractor had "a continuous maintenance program at defendant Olinkraft's paper plant."); *Fayette Janitorial Servs. v. Kellogg USA, Inc.*, No. W2011-01759-COA-R3-EV, 2013 WL 428647, at *9-10 (Tenn. Ct. App. 2013) ("[T]he cleaning and sanitation work performed by Fayette for Kellogg was a part of Kellogg's regular business, as it was an integral part of Kellogg's business that was performed on a continual and recurring basis. This was a routine maintenance program that was part of Kellogg's ongoing business operation, not an irregular specialized project . . . . The regular cleaning work previously completed by Kellogg's own employees, and now performed by Fayette, was precisely the type of 'regular business' activity that the statutory employer rule was meant to encompass.").

These cases further bolster the conclusion that Seay was a statutory employee of Celanese. Daniel provided a dedicated maintenance division that Celanese tasked with keeping its manufacturing equipment running in good condition. Celanese could not have ensured continued successful operation of its production lines without the work of Daniel and its

employees like Seay. Therefore, as these courts further establish, the work Seay performed was necessary and essential to Celanese's manufacturing business.

Contrasted with the above, but also supporting the position of Celanese, is the Fourth Circuit's decision in *Eades v. United States*, 168 F.3d 481, 1999 WL 25549 (4th Cir. 1999) (unpublished table decision). *Eades*, applying South Carolina law, examined whether an employee of an electrical testing contractor constituted a statutory employee of the Veterans Administration hospital where he was injured. The *Eades* court explained that "intermittent repairs" to a physical plant are generally not part of the "business of the employer" but "***regular and frequent maintenance*** is." *Id.* at *5 (emphasis added). For repair and maintenance work, "[t]he scope or nature of the repairs affects the question: a 'major' repair or a repair requiring 'technical knowledge that was highly specialized' is less likely to be the 'business of the employer.'" *Id.* (quoting *Glass v. Dow Chemical Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997)). However, "if the 'basic operation' of the business 'is dependent on' the work at issue, or the work is 'related to the basic operation of' the business, that work is more like regular maintenance and thus more important to the business of the employer." *Id.* Whether the business could perform or ever does perform the work with its own employees is relevant to whether the work is part of its business. *Id.* However, the work "may still be integral to a company's basic operations even if the company's own employees do not perform it, where the company 'cannot function' without that work." *Id.* (quoting *Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986)). Ultimately, the *Eades* court determined that the injured worker was not a statutory employee because his electrical testing activities simply had no bearing on the "day-to-day operations of the hospital." *Id.* at *6.[7] This ruling is in contrast to

[7] As the *Eades* court explained, the injured worker's electrical testing activities were a highly specialized and narrow category of maintenance, and a lightning bolt would have a better chance of interrupting the hospital's operations

the facts here, where Seay's work was routine and regular and part of the day-to-day maintenance—and thus operation—of the plant.

D. The trial court incorrectly interpreted the cases it relied on in finding that Seay was not a statutory employee of Celanese.

The trial court primarily relied on two veins of cases in rejecting Celanese's argument that Seay was a statutory employee—cases involving transportation workers and cases involving construction workers. The cases the trial court relied on, however, are distinguishable from the present matter and thus inapposite.

1. *Olmstead* and *Abbott* do not support a finding that Seay was not a statutory employee of Celanese

The trial court first relied on *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000) and *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003) in ruling that Celanese was not a statutory employer of Seay. (Order Denying Summ. J.; Order Denying Post-Trial Motions; R. __.) The trial court reasoned that *Abbott* constituted a change in the law on what activity constitutes part of the owner's trade, business, or occupation. *Abbott* and *Olmstead* however, involved transportation workers, and any change in legal analysis was solely related to that category of workers. Both cases presented very different facts from those involved here, and it is not surprising that the courts in those cases found that neither of the employees there were statutory employees. The trial court's reliance on these cases, therefore, was misplaced.

Abbott addressed whether a delivery driver for a common carrier was the statutory employee of a retailer. 338 S.C. at 162, 526 S.E2d at 514. The driver was injured when he slipped and fell at the retailer's premises. *Id.* The court applied the three aforementioned tests for determining if Abbott was a statutory employee, and determined he was not. The court

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than failure to conduct electrical testing. 1999 WL 25549, at *6. Moreover, if the worker's company had "not performed the electrical testing, the hospital's operations would not have faced any immediate interruption, or any likely interruption in the foreseeable future." *Id.*

reasoned that although it was important for the retailer to receive goods, such did not render the delivery of goods an important part of the retailer's business. *Id.* at 163, 526 S.E.2d at 514. Thus, the court held that "***the mere recipient of goods*** delivered by a common carrier is not the statutory employer of the common carrier's employee," and overruled two prior cases to the extent they suggested otherwise. *See id.* at 163 n.1, 526 S.E.2d at 514 n.1 (emphasis added). Both of those prior cases also concerned situations where an employee of a common carrier was injured on a business's premises. *See Neese v. Michelin Tire Corp.*, 324 S.C. 465, 469, 478 S.E.2d 91, 93 (Ct. App. 1996) (finding truck driver for trucking company injured as he unloaded his truck at a tire manufacturer's facility was a statutory employee); *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 495, 334 S.E.2d 825, 825 (Ct. App. 1985) (holding that a truck driver for trucking company injured when unloading a car at a car dealership was statutory employee).

Olmstead directly applied *Abbott* to similar facts. *Olmstead* concerned a truck driver for a delivery company who was injured while unloading his truck at a manufacturing plant which made fishing rods. *See* 354 S.C. at 422, 581 S.E.2d at 484. The *Olmstead* court stated that "*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of [the owner's] trade, business, or occupation' under section 42-1-400." *Id.* at 426, 581 S.E.2d at 486.

Critically, however, the *Olmstead* court clarified this broad language, explaining that *Abbott* "merely establishes that ***transportation*** of goods ***is important to nearly all businesses***." *Id.* (emphasis added). In other words, *Abbott* recognized that transportation of goods by a common carrier, standing alone "without something more, does not qualify as 'part of the owner's trade, business or occupation' under any of the three tests for statutory employment." *Id.* at 425, 581 S.E.2d at 485. Moreover, the *Olmstead* court determined that this principle would apply "equally to delivery of goods cases" in addition to receipt of goods cases. *Id.* at 425, 581

S.E.2d at 485. Applying *Abbott*, the *Olmstead* court determined that the employee of the common carrier was not a statutory employee since, "[a]lthough delivery by common carrier was certainly important to [manufacturer's] operation, it does not follow that such delivery was 'part or process' of its manufacturing business." *Id.*

Therefore, although *Olmstead* stated that *Abbott* was a "change in this state's jurisprudence," and the court overruled "all prior cases to the extent they are in conflict," *id.* at 426-27, 581 S.E.2d at 468, these statements by the *Olmstead* court were intended to relate to situations involving employees of common carriers only, and in instances of transportation/delivery activity. Distilled down to their core principle, *Olmstead* and *Abbott* stand for the proposition that a common carrier transportation worker engaged in the transportation/delivery of goods either to or from a business is generally not a statutory employee of that business absent some additional facts that would support such a finding. Nothing in either decision can be read to suggest that the courts intended to abrogate South Carolina case law examining whether other types of workers—such as maintenance workers—are statutory employees. Indeed, under the trial court's improper expanded interpretation of *Olmstead* and *Abbott*, many, if not most, workers could not be statutory employees, an interpretation completely at odds with long-standing precedent that "'***[a]ny doubts*** as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013).

A subsequent case from this Court indicates as much. *Posey v. Proper Mold & Engr., Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008) also involved a truck driver working for a trucking contractor. The truck driver was injured while making a delivery of plastic injection molds to a company that manufactured them for the automotive industry. The court noted that

"[o]ur supreme court in *Abbott* . . . and *Olmstead* . . . addressed statutory employment ***in the common carrier context***." *Id.* at 219, 661 S.E.2d at 400 (emphasis added). However, despite acknowledging this general principle, the court ***affirmed*** the trial court's determination that the truck driver ***was*** a statutory employee of the manufacturer. The *Posey* court explained that the manufacturer's employees often made these same deliveries and that, unlike *Abbott* and *Olmstead*, the manufacturer was more than just a recipient or shipper of goods. *Id.* at 22, 661 S.E.2d at 401. Thus, the truck driver there was the manufacturer's statutory employee.

Indeed, cases from other jurisdictions also draw a distinction between employees of common carriers and other delivery workers. As a Louisiana court explained, the question of whether such an employee is a statutory employee "turn[s] largely on common-sense considerations of whether the delivery activity was routine or extraordinary for this type of business." *Domino v. Folger Coffee Co.*, 32 So.3d 955, 964 (La. Ct. App. 2010) (quoting 4 *Larson's Workers Compensation Law* § 70.06[8] (2009)). Typically for companies in the manufacturing business the ordinary rule is that the business "ceases with the manufacture of the good, that the trucker who picks up the finished good for delivery to one or more of the manufacturer's customers is not the statutory employee of the manufacturing firm." *Id.* (quoting Larson's, *supra*). The *Domino* court found that the transportation employee at issue in that case was in fact a statutory employee because the defendant company was in both the manufacturing and warehousing business. *Id.*

Other courts have also drawn similar conclusions. *See, e.g., Rice v. VVP Am., Inc.*, 137 F. Supp. 2d 658, 669 (E.D. Va. 2001) (transportation worker injured while engaged in "unpacking, sorting, and stocking of the delivery" would be classified as a statutory employee since this was an essential part of the defendant company's business selling and distributing

automobile glass, but would not have been a statutory employee had she merely "dropped the delivery off at the [defendant's] front desk"); *Smothers v. Tractor Supply Co.*, 104 F. Supp. 2d 715, 716, 718 (W.D. Ky. 2000) (truck driver for transportation contractor injured while delivering merchandise from retailer's warehouse to its store was a statutory employee, as this was a regular element of the retail business operations); *Heller v. Aldi, Inc.*, 851 S.W.2d 82, 83, 85 (Mo. Ct. App. 1993) (truck driver for produce contractor who was injured while unloading truck at a grocery store was a statutory employee, as the deliveries originated at the grocer's warehouses and ended at its stores, both the driver and the store's employees assisted with unloading, and the store previously owned its own trucking service).

Hence, *Abbott* and *Olmstead* should be read to apply only to transportation/delivery with regard to common carrier workers. In any event, the rulings in *Abbott* and *Olmstead* certainly should not have been extended, as the trial court here did, so far as to apply to maintenance workers like Seay, who worked at the Celanese site continuously and exclusively from 1969 to 1978, during which time his only duties were to work in maintenance to keep the Celanese manufacturing facility in operation.

2. The trial court's reliance on cases involving construction workers, such as *Raines v. Gould*, was also misplaced.

The other cases the trial court relied on in finding that Seay was not a statutory employee all involved construction workers. These cases, however, are factually distinguishable because construction activities require a completely different analysis. Therefore, the trial court's characterization of *Raines* as "acutely relevant authority" is incorrect.

The case primarily relied on by the trial court in ruling against Celanese with respect to construction workers was *Raines v. Gould*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986). That case involved an employee of a subcontractor hired to install an electrical system at a new plant

being constructed by the defendant. *See id.* at 542, 343 S.E.2d at 656. The court there examined whether the work he was performing was part of the defendant manufacturer's trade or business, which was the "manufacturing and selling of batteries of all kinds and related products." *Id.* at 547, 343 S.E.2d at 659. The court began its analysis by immediately noting that "[o]rdinarily ***construction work***, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer." *Id.* at 543, 343 S.E.2d at 657 (collecting cases from around the country reaching similar conclusions) (emphasis added). The court explained, however, that where a business "by its size and nature is accustomed to carrying on a more or less ***ongoing program of construction,*** perhaps having a construction division, or has handled its own construction in the past, ***construction work delegated to a contractor*** may be considered a part of its trade or business." *Id.* (collecting additional cases) (emphasis added). Ultimately, the court determined that the work activities of the worker which assisted in building the new plant did not constitute the trade or business of the manufacturer. The construction activities to build the new plant were not "an integral part of [manufacturer's] operations without which it cannot function," and to hold otherwise would make "employees of every contractor so engaged" a statutory employee of every such manufacturer. *Id.* at 547, 343 S.E.2d at 659.

It is clear that the holding in *Raines* related to construction workers engaged in new construction work or large-scale remodeling. That decision was not intended to apply to dedicated maintenance workers who maintain manufacturing equipment for a manufacturing company. The trial court wrongly concluded that *Raines* is "especially pertinent to, and dispositive of, Hoescht Celanese's claims." (Order at p. 7; R. __.) On the contrary, *Raines* has no bearing on whether Seay was a statutory employee and thus the trial court erred in relying on it. The proper analysis is set forth in the maintenance worker cases detailed above.

The other construction cases relied on by the trial court are also distinguishable. For example, *Glass v. Dow Chemical Co.*, 325 S.C. 198, 482 S.E.2d 49 (1997) clearly sets forth the distinction between cases involving construction and those involving maintenance or repairs. As the *Glass* court explained, "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Id.* at 202, 482 S.E.2d at 51. The "major task" at issue in *Glass*, for example, was "completely replacing façade panels requiring technical knowledge that was highly specialized." *Id.* Although the trial court read this to somehow weigh against classifying Seay as a statutory employee, the *Glass* court's analysis establishes the exact opposite. Large scale, major construction projects are not the business of a manufacturing entity unless it has its own construction division that would have typically performed such work. By contrast, regular, routine maintenance, such as that done by Seay, presents a completely different circumstance and is properly interpreted by reference to cases ***that involve maintenance or repair work*** rather than construction. Hence, the trial court erred in its decision to apply common carrier transportation case and construction worker cases to the maintenance worker circumstances here. The trial court should thus be reversed[8] and judgment entered for Celanese.

[8] The trial court did not address whether Celanese adequately demonstrated that it "secured the payment of compensation" to its employees in the manner provided by the Workers' Compensation Code during the time that Seay worked at the Celanese facility (1969 to 1978). *See* S.C. Code Ann. § 42-5-10. Respondents did not provide any evidence that Celanese lacked the requisite coverage. The Record demonstrates this is a non-issue, and again, the trial court did not address it. (*See* Ex. A to Reply in Supp. of Mot. for Summ. J, Insurance Policies; Ex. B. to Reply in Supp. of Am. Mot. for Summ. J., Aff. of Garry Allen; Exs. I & J to Am. Mot. for Summ. J., Contracts between Celanese and Daniel; R. _). The Court may also take judicial notice of the Workers' Compensation Commission's Carrier History Records, which establish that Celanese maintained proper coverage. The Commission's website notes that the Insurance and Medical Services Department's Coverage Division "maintains a historical record of insurance coverage and uses it to confirm the responsible insurance carrier in the event of a work-related accident or injury." Coverage Division, S.C. Workers' Compensation Commission (last visited Oct. 18, 2016), http://www.wcc.sc.gov/insurance/Pages/CoverageDivision.aspx.

II. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL AFTER LEARNING THAT THE JURY PREMATURELY DELIBERATED AND CONSIDERED OUTSIDE INFLUENCES.

If this Court determines Celanese is not entitled to have judgment entered in its favor, a new trial should be ordered nonetheless. The trial court erred when it failed to grant Celanese's motion for mistrial or motion for a new trial based on the premature deliberations of the jury. During the initial *voir dire* of the jury, Juror #16 stated that he worked at the "Auriga Polymers that used to be called Celanese" and that he knew some people who worked for Hoescht Celanese. (Tr. p. 52:24-53:3; R. __.) He stated that he never worked for Celanese though, and that he did not have any bias towards Celanese. (*Id.* at 104:5-106:8; R. __.) However, during the middle of trial, on the morning of the fourth day,[9] the bailiff reported to the trial judge that "one of the young men here feels it's a conflict of interest in him on this." (*Id.* at 514:13-15; R. __.) The resulting examination of Juror #16 made it apparent that the jury had engaged in premature deliberations. As a result, the trial court should have declared a mistrial.

After receiving the above information from the bailiff on day four of trial, the trial judge sent the jury out of the court room and questioned the individual juror. Juror #16 explained that he realized during the trial that he worked at the same facility as Dennis Seay doing "the very same job he does – working on the stretch lines." (*Id.* at 515:10-11; R. __.) He explained that it was "hard to say" whether this would impact his judgment, and that this was "something that is very close to my life." (*Id.* at 516:15-22; R. __.) He said he was not sure of anything specifically that would cause him to not be fair and impartial, but wanted to bring it to the Judge's attention. (*Id.* at 516:23-518:1; R. __.) Importantly, the trial judge asked him if he had discussed it with anyone else and he stated that he told the other jurors that he worked at the

[9] At this point the jury had already heard a considerable amount of the Respondents' case, including the video deposition testimony from Seay himself.

same plant. (*Id.* at 518:4-6; R. __.) He also said that he "***asked to talk to you [Judge Hill] about it yesterday***, but I guess it didn't get through." (*Id.* at 518:8-11; R. __.) The trial judge sent Juror #16 back to the jury room and told him not to discuss the case. (Tr. p. 523:16-525:13; R. __.) Celanese and John Crane reserved the right to object while they contemplated what happened and spoke with their clients.[10] (Tr. p. 519:7-520:20; R. __.) Seay's counsel candidly admitted that this new information from the juror "was a wild card issue" and agreed there would be no waiver of any objection if the trial proceeded for a little longer so defense counsel could have the opportunity to consult with their clients on what to do. (Tr. p. 521: 3-16; R. __.).

After hearing more of the Respondents' case and breaking for lunch, both Celanese and John Crane moved for a mistrial. (Tr. pp. 566:7-570:8; R. __.) The trial judge denied the motion, finding that there was no evidence of premature deliberations and that the questions to Juror #16 from the other jurors were limited to where he worked. (Tr. p. 570:9-573:3; R. __.) Finally, he reiterated that the juror did not give any appearance of bias. (Tr. p. 571:13-16; R. __.)

After denying the motion, and only at the Defendants' request, the trial judge brought Juror #16 back in to ask exactly what was discussed in the jury room. The Juror explained at this second questioning that he told the other jurors "where I work, **and** I work on the same stretch lines, section 14, and I do pretty much [the] same job." (Trial Tr. p. 573:12-574:3; R. __.) He also acknowledged that "**one of them asked something about asbestos,**" but another juror said they should not be talking about that and they stopped discussing it. (*Id.* at 574:4-14; R. __.) All of this information was much more than the juror previously stated was discussed the first time

[10] Although both parties objected here, at the beginning of trial, the parties stipulated that any objection by one Defendant would constitute an objection for both Defendants unless the other specifically opted out of the issue. (Tr. p. 237:24-238:19; R. __.)

the trial judge questioned him. In the first questioning, the juror stated only that he told the other jurors that he had worked at the same plant.

The juror also admitted that the other jurors **"all" asked him what happened when he spoke to the judge alone** and that he "said that [the judge] asked me question [sic] if it's going to affect my judgment and all that. And that's pretty much it." (*Id.* at 574:16-575:5; R. __.)

In light of these answers to this second inquiry, the trial judge excused Juror #16. (*Id.* at 575:6-8; R. __.) The Defendants renewed their motions for a mistrial, noting that there was clear evidence of premature deliberations. (*Id.* at 576:12-578:23; R. __.) As John Crane's counsel argued, there was evidence that jury had begun discussing the case and "from the jury's perspective, they asked him if there was asbestos in the plant, and the next thing we know, we sent him home." (Tr. p. 578:7-11; R. __.) The trial court, however, found that the jury was presumed to be following his instructions and disagreed that there was evidence of premature deliberations. (Tr. p. 578:24-579:25; R. __.) Thus, the trial court denied the motion. This was error.

A. South Carolina law supports finding that the trial court should have declared a mistrial.

State v. Aldret is the seminal case on premature deliberations in South Carolina. 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). As the *Aldret* court reasoned, "premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." *Id.* The *Aldret* court explained that premature deliberation standing alone does not warrant automatic reversal. Rather, prejudice must also be demonstrated. *Id.* at 313-14, 509 S.E.2d at 814. If the issue of premature deliberation arises during the middle of a trial, the Supreme Court stated that a trial court should:

> conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may voir dire the jurors and, if practicable, "tailor a cautionary instruction to correct the ascertained damage." If the trial court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered.

Id. at 315, 509 S.E.2d at 815.

The Supreme Court has also recognized "outside influences" as another category of juror misconduct. *See, e.g., State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) ("The juror's action in conducting independent legal research was unquestionably misconduct."). When analyzing "whether outside influences have affected the jury, relevant factors include (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice." *Id.* "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Id.*

Several procedural errors occurred during the trial court's handling of Juror #16. First, the court failed to initially conduct a proper hearing and question jurors to ascertain if prejudice had occurred. Although the court initially brought in Juror #16 to ask him about his own possible conflict, the court made little inquiry about what Juror #16 discussed with the other jurors. The trial court made no inquiry of the remaining jurors on the topic.

After ruling on the first mistrial motion, on defense counsel's request, the trial court brought Juror #16 back in to ask him about what he discussed with the other jurors. (*Id.* at 572:1-573:11; R. __.) New information not previously disclosed was revealed. The trial court still did not make inquiry of the remaining jurors.

When the trial court did in fact make the follow up inquiry of Juror #16 with respect to his interactions with other jurors, that additional inquiry prompted new information and new

mistrial motions. These motions were also denied, and the only action the trial court took ultimately as a result of Juror #16's circumstances and various discussions with the other jurors was to dismiss Juror #16. Again, the court did not question the other jurors.

The trial court erred in finding that Celanese did not suffer any prejudice. The record demonstrates that the other jurors asked Juror #16 where he worked, and that he told them he worked at the same facility doing essentially the same job as Seay. (*Id.* at 518:4-6, 573:12-574:3; R. __.) One juror specifically asked him a question about asbestos at the facility. (*Id.* at 574:4-14; R. __.) At least one other juror heard this, and stated that the jury "shouldn't be talking about it." (Tr. p. 574:7-9; R. __.). This indicates the jury knew it was having improper discussions and "shouldn't be." Soon after, the jury saw Juror #16 called into court by himself during the middle of the Respondents' presentation of their case. The Respondents had already played Seay's video deposition testimony talking about the debilitating nature of his mesothelioma and his suffering with the disease. The other jurors then had Juror #16 rejoin them, whereupon they "all" asked him what had happened in his discussions before the judge. He told them "all" that "[the judge] asked me question [sic] if it's going to affect my judgment and all that." Later that afternoon, Juror #16 was **again** told to leave the jury room to see the judge alone. He was thereafter excused and the other jurors never saw him again.

The circumstances of Juror #16's dismissal could have only been interpreted one way by the jury. Juror #16's personal circumstances were strikingly similar to Seay's, and not long after another juror asked him about asbestos at the Celanese facility, he was not permitted to be back on the jury. He was dismissed shortly after Seay's testimony.

Juror #16 was brought out, questioned by the trial court, and then sent back to the jury room whereupon he told "all" of the other jurors he was questioned about impartiality. After

this, he was brought back out separately from the other jurors, and subsequently excused. These circumstances create the strong inference for the remaining jurors that Juror #16 must have been dismissed because he had information damaging to Celanese. This was only amplified by the trial judge's closing instructions, which suggest that the reason Juror #16 was dismissed was because he could not have been fair and impartial. In his final instructions, the trial judge stated that:

> Neither John Crane or Celanese or Mrs. Seay picked y'all because they want you to be a partisan or advocate for them. They picked you ***because they believed you could be fair and you could decide this case without any kind of bias or prejudice.***

(Tr. p. 1463:7-12; R. __.) The inverse of this statement implies that a juror who was not picked, or worse was dismissed, is not someone that could decide the case without bias or prejudice. The highly unusual circumstances here show prejudice, premature deliberations, and considerations by the jurors of outside influences. Lastly, the juror's late-disclosed information (after the jury was empaneled) adversely affected Celanese with respect to its jury selection rights, which separately demonstrates prejudice.

For all of these reasons, the trial court erred in failing to grant Celanese's motions for a mistrial and/or motion for a new trial. Therefore, reversal is warranted and a new trial should be ordered.

III. THE TRIAL COURT ERRED BY REFUSING TO EXCLUDE UNAUTHORIZED VIDEO OF SEAY CRYING OUT FOR JESUS TO HELP HIM AND BY FAILING TO GRANT CELANESE'S MOTION FOR A MISTRIAL.

During Angie Keene's testimony, on the Friday afternoon of the fifth day of trial, Respondents played a video clip of Dennis Seay in hospice care. (Tr. p. 740:22-741:5; R. __.) The clip was between five and ten seconds and consisted entirely of video and audio of Seay calling out: "Help me, Jesus. Lord, help me, Jesus. Oh, help me, Jesus." (Video of Dennis

Seay; Rough Transcript from Oct. 8, 2015 at 874:17-18, included as exhibits to post-trial motions ; R. __.) Prior to playing the video, Respondents' counsel gave no indication what it would involve and stated that he did "not have it plugged into any audio," and that the jury "may not be able to hear it." (Tr. p. 740:22-741:5; R. __.)

Admittedly, no objection to the clip was made at the time it was played. However, the next morning of trial (after a long weekend), defense counsel immediately raised an objection. Counsel for Celanese stated that Respondents' counsel came over to him and said that they were going to "show 5 seconds of a video"—without specifying the content—and asked if that was OK. (Tr. p. 766:2-767:4; R. __.) Counsel contended that Respondents' counsel did not say anything about audio and certainly did not explain that the video contained audio of Seay calling to Jesus for help. (*Id.*) Counsel averred that he assumed it had been cleared with someone else on the defense, but learned during the weekend that no one had approved it. (*Id.*) Counsel for Celanese adamantly denied that Respondents' counsel ever told him that Seay discussed Jesus in the video clip and that there was audio. (*Id.* at 770:6-23; R. __.) He stated that he had never had an issue like that come up at any trial and thus he was sure he would have objected if counsel had told him about the audio. (*Id.*)[11] The trial court, however, overruled this objection. This Court should grant a new trial based on the introduction of this unduly prejudicial video clip into evidence.

[11] Seay's counsel stated that he went over during the trial to lead defense trial counsel, Mr. Young, who "was busy doing something else." (Tr. p. 767; R. __.) Seay's counsel then stated, "I said, Hey Lane, I'm going to show these pictures. And I'm going to play this video, five seconds at the end, where he says 'Jesus' over and over. And I said that to Mr. Elliott too." *Id.* Defense counsel denied having been told of the possible use of the video as an exhibit in advance of the trial and denied they were told the video contained audio with Mr. Seay saying "Jesus." (Tr. p. 769, 770; R. __.).

A. This Court is not precluded from reversal on this ground by the lack of contemporaneous objection, under the circumstances here.

In the order denying Celanese's post-trial motions, the trial court found that Celanese waived this objection by failing to assert it contemporaneously. However, the video was inherently prejudicial and inflammatory, and under the circumstances here, a contemporaneous objection was not necessary.

As detailed above, there was considerable confusion regarding the video. Counsel for Celanese vehemently maintained that he was not made aware of the contents of the video or informed that it would contain audio. Additionally, lead trial counsel for Celanese explained that he did not immediately object because he thought use of the video, without audio, had been cleared by another member of the joint defense team. When the Defendants realized that no one had consented, they both immediately raised their objection. The video was played on a Friday afternoon and Defendants objected and moved for a mistrial the very next morning of trial. Therefore, Defendants should not be penalized for not contemporaneously objecting.

Moreover, even if the Court agrees with the trial court that the objection was untimely, any failure to timely object was excused by the inherently inflammatory nature of the video. Angie Keene and Linda Seay both testified extensively about Dennis Seay's pain and suffering. Therefore, this video clip had the sole impact of stirring the jury's sympathy and appealing to the jury's passion. The Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a ***vicious***, ***inflammatory*** argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (emphasis added).

B. The Trial Court erred by refusing to exclude the video and by refusing to grant Celanese's motion for a mistrial.

While the admission of evidence is left to the sound discretion of the trial judge, his decision will be reversed where that discretion has been abused. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "'An abuse of discretion occurs when the trial court's ruling is based on an error of law.'" *Id.* (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2001)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 and 402, SCRE). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotation marks omitted).

The probative value of the Seay video clip here was substantially outweighed by the danger of unfair prejudice. The video clip served no useful purpose other than to play to the jury's sympathy and passion. Linda Seay and Angie Keene both testified extensively about Seay's demeanor and condition, as well as his suffering with mesothelioma. Moreover, Seay

also testified via deposition about how his life changed for the worse after being diagnosed with mesothelioma. Therefore, the jury had plenty of testimony by which to determine the amount of damages. The video was simply a narrowly prejudicial snapshot of a particularly unfortunate moment towards the end of Seay's life. The video was designed to stir the jury's passion rather than accurately portray Seay's daily life with mesothelioma.

This Court has held that a particular "day-in-the-life" video was not unduly prejudicial. *See Haselden v. Davis*, 341 S.C. 486, 498, 534 S.E.2d 295, 302 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d 293 (2003). The video in *Haselden*, however, was markedly different from the video at issue in this case. The video in that matter presented a literal view of the plaintiff's daily activities near the end of her life and was a "realistic depiction of her condition and quality of life." *Id.* The video showed, among other things, her medications and how a lift was used to move her from her bed to her wheelchair. *Id.* Critically, the audio was turned off while the jury viewed it and her son answered questions via live testimony while it played. *Id.* The court found that, although it was emotional, the video was "neither graphic, gruesome, nor grotesque." *Id.* Other courts have admitted videos in similar circumstances. *See, e.g.*, *LaFarge, ex rel. Blizzard v. Kyker*, No. 1:08CV185-SA-JAD, 2011 WL 1742002, at *8 (N.D. Miss. May 5, 2011) (admitting video that was "basic in its making, not exaggerated, and portray[ed] scenes of ordinary activities (i.e., bathing sleeping)," but ordering that "the entire audio portion of the video" be deleted).

As a case from the Tenth Circuit cautioned, however, "day in the life" videos must "fairly represent [ ] the facts with respect to the impact of the injuries on the plaintiff's day-to-day activities." *Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987). These videos should be designed to show how an injury or illness impacted the plaintiff's daily routine and

typical films "show the victim in a variety of everyday situations, including getting around the home, eating meals, and interacting with family members." *Id.* Day in the life videos introduced during trial raise "obvious dangers of prejudice to the opposing party." *Id.* Thus, a fair portrayal in a day-in-the-life video would not depict "the victim in unlikely circumstances or performing improbable tasks." *Id.* "The probative value of a film is greatest, and the possibility of prejudice lowest, when the conduct portrayed is limited to ordinary, day-to-day situations." *Id.* As the *Bannister* court explained, another important consideration is the fact that film evidence is "dominant," and the jury is more likely to "better remember" and "give greater weight to" film evidence as opposed to conventional testimony. *Id.* Finally, the court cautioned that day-in-the-life evidence could distract the jury because the benefit of effective cross-examination is lost. *Id.*

Eckman v. Moore, 876 So. 2d 975, 984 (Miss. 2004) is instructive. In that matter, two prejudicial videos were introduced at trial, neither of which accurately portrayed the victim's routine activities. The first video included pictures of the victim's stepson at his wedding, a ballgame, and a graduation ceremony, all of which the court found should not have been included. *Id.* at 985. The remainder of the video did show the victim's routine activities, and the court concluded that portion was admissible. The second video, however, was entirely inappropriate, as it consisted of a short clip of the victim's mother crying over him sobbing "Momma loves you, Momma loves you." *Id.* at 985. The *Eckman* court, collecting cases, explained that where day in the life videos are admitted, the films in question must "truly depict" a day in the life of the victim. *Id.* The court determined that the questionable portions of these videos were not consistent with that requirement. Accordingly, the court reversed and remanded. *See id.*; *see also Thompson v. TRW Auto. U.S., LLC*, No. 2:09-CV-1375-JAD-PAL, 2014 WL 2612271, at *2 (D. Nev. June 11, 2014) (excluding a day in the life video that was an overly

dramatized, inaccurate depiction of plaintiff's daily activities and was designed to gain jury's sympathy).

The video of Seay calling out for Jesus to help is not an appropriate depiction of a day in his life. It is undisputed that Seay suffered from mesothelioma and that it is a debilitating disease. However, this short video clip—only a few seconds long—was a select portrayal of him at one of the lowest points of his life—in hospice on his deathbed apparently in severe pain. The sole image presented to the jury was of Seay in a particularly difficult moment crying out in agony to Jesus[12] for help. Hence, the video clip was not a proper basis for the jury's verdict due to its highly prejudicial and inflammatory nature.

Therefore, the mistrial motion should have been granted. As detailed below in Part IV, the improper video was no doubt a factor, along with the juror issue discussed above, behind the jury's grossly excessive verdict.

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT A NEW TRIAL DESPITE A GROSSLY EXCESSIVE VERDICT.

The jury's verdict in this matter was grossly excessive and disproportionate compared to other similar asbestos verdicts. The jury's considerations were motivated by passion, caprice, prejudice, or other considerations not founded on the evidence, particularly the jury's premature deliberations and considerations of outside influences, and the improper video.

Although an appellate court will not set aside a verdict for undue liberality, "if a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence then it is the

[12] In *voir dire*, three of the four venire men who mentioned in their questionnaires that they would follow their religious beliefs if those conflicted with the Court's instructions ended up seated as jurors (Juror #187, Juror # 189, and Juror #215). (Tr. pp. 56-59, 119-23, 128-30, 156-58, 167-68; R. __.) While each ultimately stated that they could take an oath and follow the court's instructions, these statements in their questionnaires demonstrate that these jurors were very religious individuals.

duty of the trial court and the appellate court to set aside the verdict absolutely." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 33, 410 S.E.2d 21, 24-25 (Ct. App. 1991). Here, the verdict should have been set aside and a new trial ordered.

"Actual damages in a survival action are awarded for the benefit of the decedent's estate. *Welch v. Epstein*, 342 S.C. 279, 546 S.E.2d 408 (2000). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Id.* "In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Id.* The following damages are recoverable in a wrongful death action:

> (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries.

Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972).

Although the wrongful death factors include loss of consortium, it is an independent, rather than derivative, action. *Burroughs v. Worsham*, 352 S.C. 382, 405-06, 574 S.E.2d 215, 227 (Ct. App. 2002). Loss of consortium "arises out of the special relationship between a husband and wife," *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000), and the damages recoverable are the actual damages arising from "an intentional and or tortious violation of the right of companionship, aid, society and services" of the injured spouse, S.C. Code Ann. § 15-75-20.

In this matter, the jury awarded $2,000,000 for the survival action, $5,000,000 for the wrongful death action, $5,000,000 for the loss of consortium action, and $2,000,000 in punitive

damages, for a total of $14,000,000. This verdict is grossly excessive and shockingly disproportionate. Compare the verdict here, for example, with the verdict in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). In that case, a verdict of $3,000,000 was affirmed on appeal where pecuniary loss in the amount of $630,690 was established by the evidence, the decedent was only 37 years of age at the time of his death and his widow was only 28 years old, and his children were 8 and 6. This is in stark contrast to this case, where there was no evidence of pecuniary loss as a result of Seay's death, Seay was 70 years old, his wife was approximately four years younger, and his children were all emancipated adults. (Court's Ex. 1, Video Dep. of D. Seay p. 7:2-7, 8:9-18; L. Seay, Tr. 752:14-16, 752:25-753:2, 754:1-8; Court's Ex. 5, R. Kradin Video Dep. p. 42:1-3; R. __.) At the time of his death, Seay had a remaining life expectancy of 13.8 years. (Court's Ex. 5, R. Kradin Video Dep. p. 44:05-19; R. __.) Moreover, Seay was a cigarette smoker and suffered from diseases unrelated to his asbestos exposure, such as coronary heart disease and angina. (A. Brody, Tr. p. 240:5-14; D. Seay, Tr. p. 441:8-12; Court's Ex. 5, R. Kradin Video Dep. pp. 105:9-22, 107:16-108:8; R. __.) Finally, the amount of medical expenses incurred as a result of his condition was stipulated to be $280,457.91.[13] (Tr. p. 721:16-21; R. __.) Despite this, the verdict was over 4.5 times the verdict in *Welch*.

The wrongful death and loss of consortium verdicts are excessive. Courts from other jurisdictions have granted new trials for verdicts similar to or less than the amounts awarded in this case. For example, in *Bart v. Union Oil Co. of California*, 540 N.E.2d 770 (Ill. Ct. App. 1989), the court found that a $2.2 million wrongful death claim, which the trial court had remitted to $1 million, was excessive and remanded for a new trial. *Id.* at 772. In that case, the

[13] As Celanese noted in its motion for a new trial nisi remittitur, the amount of compensatory damages the jury awarded was over 42 times this figure. (Mot. for New Trial Nisi Remittitur; R. __.)

wife was 66 years old at the time of her husband's death at 63, and the court found that "considering the decedent's age and the emancipation of his children," the award was "beyond the flexible limits of fair and reasonable compensation." *Id.* Similarly, the Florida Court of appeals reversed a $7.2 million award for loss of consortium, finding that it was so excessive as to require a new trial. *See ACandS, Inc. v. Redd*, 703 So.2d 492 (Fla. Ct. App. 1997).

Moreover, as Celanese detailed in its motion for a new trial nisi remittitur, this verdict far exceeded similar mesothelioma verdicts from the same time frame. *See, e.g., Clemmer v. John Crane, Inc.*, No. 434434, 2006 WL 7070932 (Cal. Super. Ct. Mar. 28, 2006) ($1,900,000 verdict consisting of $1,100,000 in non-economic damages, $550,000 in economic damages, and $250,000 in loss of consortium); *Peace v. Special Elec. Co.*, No. 802680/2013, 2014 WL 7671986 (N.Y. Sup. Ct. Oct. 22, 2014) (total award of $1,612,000, including past and future pain and suffering of victim and past and future loss of society and services for spouse); *Golik v. Georgia Pacific*, No. 1308-11192, 2014 WL 7525708 (Or. Cir. Ct. Dec. 18, 2014) (total verdict of $3,957,6723 total verdict, including $1,286,111 damages to surviving spouse and $830,555 for each of the decedent's three children); *Estate of Serven v. John Crane, Inc.*, No. 101202978, 2012 WL 8751702 (Pa. Com. Pl. Dec. 4, 2012) (total verdict of $650,000 for wrongful death claim by survivors of 67 year old man); *Brandes v. Brand Insulations, Inc.*, No. 14-2-21662-9SEA, 2015 WL 4741479 (Wash. Super. Ct. Apr. 6, 2015) (total verdict of $3,500,000 remitted by trial court to $2,500,000). Finally, in a 2011 mesothelioma case, the New York Supreme Court Appellate Division reduced an award for past pain and suffering from $3,650,000 to $1,500,000 and an award for loss of consortium from $1,670,000 to $260,000. *Penn v. Amchem Prods.*, 85 A.3d 475, 477 (N.Y. S. Ct. App. Div. 2011).

In light of the foregoing, the verdict was excessive and shockingly disproportionate, particularly in light of the amount Seay's stipulated medical expenses. The verdict was also not in line with verdicts in similar mesothelioma cases. This indicates that the jury's verdict was motivated by passion, caprice, prejudice, or other considerations not founded on the evidence. Instead of focusing on the evidence and testimony properly introduced at trial, the jury based its verdict on improper conclusions drawn from the issues surrounding Juror #16 and the highly prejudicial video. Therefore, because the jury's verdict was not founded on the evidence, the verdict should be set aside in its entirety.

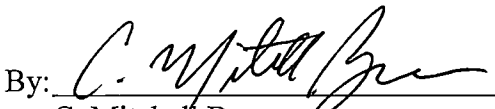
CONCLUSION

Based on the forgoing, the Court should reverse the judgment of the trial court and enter judgment in favor of Celanese. Failing this, the Court should reverse and remand for a new trial absolute.

Signature on Following Page

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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December 8, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Case No. 2013-CP-42-03915
Appellate Case No. 2016-000227

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

v.

CNA Holdings, LLC, ... Appellant.

PROOF OF SERVICE

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

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December 8, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
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RE: Angie Keene, as Personal Representative of the Estate of Dennis Seay and Linda Seay, Individually v. 3M Company, et al.
Appellate Case No. 2016-000227
Our File No. 46697/01501

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of the brief and designation.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: Theile B. McVey, Esquire
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