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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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.

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly found Dennis Seay was not Hoechst Celanese's statutory employee when Mr. Seay worked for a construction company and when construction maintenance was not part of Hoechst's manufacturing business.

II. Whether the trial court abused its discretion when it found the jury followed the court's instructions and did not engage in premature deliberations.

III. Whether the trial court abused its discretion when it denied Hoechst Celanese's motion for a mistrial after there was no timely objection to the evidence in question and when a mistrial was not necessary.

IV. Whether the trial court abused its discretion when it held the jury's verdict appropriately reflected the devastating injuries Mr. Seay and his family suffered.

STATEMENT OF THE CASE

This tragic case has a huge record, but the four appellate issues are straightforward and the trial court handled them capably.

A. Abbreviated background.

This case arises from occupational exposure to asbestos. Dennis Seay was diagnosed with mesothelioma—"asbestos cancer"—in August of 2013. (Pl's Master Exhibits p.432, line 12:07-12:08). He and his wife filed this lawsuit the next month. (Compl. p.1).

Mr. Seay died in December of 2014. (4/24/15 Or.p.1). He was 70 years old. (Trial Tr.p.213, ll. 11-12). The suit was amended to state wrongful death and survival claims. (4/24/15 Or.). These were in addition to Mrs. Seay's claim for loss of consortium.

The case was tried over eight days in the Fall of 2015. The two defendants were CNA Holdings and John Crane Inc. CNA is the corporate successor of Hoechst Celanese.

The jury returned a defense verdict acquitting John Crane. (Trial Tr.pp.1472-1473).

The jury returned plaintiffs' verdicts against CNA of $2 million on the survival claim, $5 million for wrongful death, $5 million for loss of consortium, and—after a separate hearing—$2 million in punitive damages for wrongful death. (Trial Tr.pp.1472-1473; p.1494). The verdict's date was October 8, 2015.

CNA filed timely motions for judgment notwithstanding the verdict, for a new trial absolute, and for a new trial nisi remittitur. Plaintiffs filed responses opposing each motion.

The trial court heard the motions two months later, in December of 2015. (12/3/15 Tr.p.1). The court denied the motions in an order filed the next month. (1/13/16 Or.pp.1-46). The order is 46 pages long and analyzes every issue, in detail.

B. Plaintiffs' theory of CNA's (Hoechst Celanese's) liability.

Mr. Seay was exposed to asbestos while working for a construction company—Daniels Construction—more than 40 years before he was diagnosed with cancer. He worked for Daniels for about 10 years during the 1960s and 1970s. (Trial Tr.p.359, lines 10-23). Multiple experts explained Mr. Seay's on-the-job exposure caused his cancer. (Id.p.466, lines 14-21); (Pl's Master Exhibits p.499, lines 15:21-15:24). This was Mr. Seay's only job working around asbestos. (Pl's Master Exhibits p.436, lines 23:13-23:25).

Daniels assigned Mr. Seay to work at a polyester plant in Spartanburg owned by Hoechst Celanese. (Id.p.436, lines 24:14-25:02). Mr. Seay was a millwright. (Id.p.437, ll. 25:03-25:23). He summarized his job, and Daniels Construction's job at this plant, as maintaining the equipment and keeping it running. *Id.* Daniels did this work at plants across the United States. (Trial Tr. p.1300, lines 2-5). A Hoechst witness explained Daniels was

hired because it was a qualified contractor that could do the "expert work" Hoechst needed "both in construction and maintenance." (Trial Tr.p.1072, ll. 9-13).

Mr. Seay was exposed to asbestos in two principal ways. He worked with insulation and he worked with gaskets. (Pl's Master Exhibits p.437, l. 27:12 - p.438, l. 27:22). He repaired and maintained equipment like pumps, valves, and other components of the plant's pipelines, bringing him into constant contact with the gaskets and insulation used in those pipelines. (Id.p.438, ll. 28:08-28:18); (Trial Tr.p.371, ll.12-13). The record contains multiple references to the significant dust Mr. Seay's work produced. (Trial Tr.p.371, l. 12 - p.372, l. 24; p.437, l. 4-7); (Pl's Master Exhibits p.449, l. 58:25 - p.450, l. 61:07). This was an extremely dirty job, and Mr. Seay did it.

Plaintiffs' theory against Hoechst was premises liability: Plaintiffs alleged Hoechst knew its factory had asbestos, Hoechst knew asbestos was hazardous, and Hoechst failed to warn Mr. Seay in spite of Hoechst's superior knowledge. (Trial Tr.p.1359, lines 12-18). Plaintiffs claimed Hoechst had sophisticated knowledge of the danger—Hoechst was a large manufacturer that knew of over 40 "red flags" about the hazards of asbestos before Mr. Seay set foot at its plant. (Id.p.1361, l. 2 - p.1364, l. 18). Yet Mr. Seay never received training on asbestos and never saw any warnings the plant contained asbestos. (Id.p.428, ll. 5-12).

Daniels had more knowledge than Mr. Seay, but not much. A Daniels employee explained he had never heard OSHA standards were *not* designed to protect against cancer. (Id.p.1306, line 10 - 1311, line 20). Plaintiffs presented evidence Hoechst *knew* these standards were insufficient and that cancer could occur with only slight asbestos exposure. (Id.p.1164, line 2 - p.1166, line 10).

Plaintiffs' argument for punitive damages focused on three alleged acts of Hoechst's conscious disregard for Mr. Seay's well-being.

First, Plaintiffs argued Hoechst made a calculated decision to use asbestos because it was cheaper. (Id.p.1488, lines 5-7). An internal document from 1949 demonstrated Teflon gaskets performed best, but because Teflon was more expensive, Hoechst concluded it should only be used when "economically justified." (Id.p.1146, line 10 - p.1147, line 23).

Second, Plaintiffs said Hoechst ignored its promises. (Id.p.1488, lines 7-8). Hoechst promised to audit contractors like Daniels to ensure compliance with safety procedures. (Id.p.1185, line 6-17). Hoechst did not have any documents showing these audits happened, (Id.p.1185, line 24 - p.1186, line 3), and the evidence showed a complete breakdown of this pledge. Workers like Mr. Seay were not educated about asbestos and protective equipment like masks and respirators were not required or available. (Id.p.375, lines 10-22). An expert explained why these shortcomings were critical. (Id.p.483, line 12 - p.484, line 21).

Plaintiffs' final argument for punitive damages relied on evidence Plaintiffs believed showed a culture of concealment. Hoechst's internal memos from the 1960s instructed employees to avoid creating written reports of hazardous material test results because such reports were a "serious legal hazard." (Id.p.1197, line 2 - p.1199, line 12); see also (Pl's Master Exhibits pp.545-555). In the event something *was* written, it was to omit interpretative opinions. *Id.* A "confidential" document from 1979 advised the proper way to answer an employee's question about hazardous materials was with a prepared statement emphasizing the data was "inconclusive," exposures were being monitored, and exposures were controlled below appropriate limits. (Trial Tr.p.1177, line 21 - p.1178, line 23).

C. Summary of defense arguments and court rulings relevant to the appeal.

John Crane's chief defense was to point at the insulation. This company sold gaskets and gasket material and consistently argued Mr. Seay's work with gaskets did not expose him to enough asbestos to cause mesothelioma. (Id.p.219, line 6 - p.220, line 10; p.817, line 19 - p.819, line 5; p.1399, lines 1-23). The verdict for John Crane indicates this defense worked.

John Crane also disputed when it learned asbestos was hazardous but had to explain past testimony about the company's knowledge and actions in the 1940s. (Id.p.899-900).

Hoechst's principal defense is its first issue on appeal: Hoechst argued Mr. Seay was its "statutory" employee. The court denied Hoechst's motion to dismiss, issuing a written order after a hearing. (7/28/15 Or.p.1-8). The court renewed this ruling at the directed verdict stage, (Trial Tr.p.1330, ll. 14-24), and in its post-trial order. (1/13/16 Or.pp.21-26).

Statutory employment is determined by whether the injured worker performed work that was part of the putative employer's "trade or business." If this question is answered affirmatively, an injured worker may not bring a civil suit for damages because a workers' compensation claim is the worker's exclusive remedy. At each juncture in this case, the trial court concluded that while Mr. Seay's work was obviously important to Hoechst, it was not part of Hoechst's *business*. As the court observed at the directed verdict stage, "they [Hoechst] weren't in the maintenance business." (Trial Tr.p.1330, lines 19-20).

Hoechst's second appellate issue is an allegation of juror misconduct. During the fourth day of trial, one of the jurors notified the court of a potential conflict of interest. (Id.p.514, line 13 - p.515, line 4). This juror then disclosed to the court he worked at the same plant, now owned by a different company, and did the same job as Mr. Seay. (Id.p.515,

lines 5-16). The juror disclosed this fact to other jurors after he was asked where he worked, and when another juror inquired whether the plant contained asbestos, a third juror reminded the jury they were not to discuss the case. (Id.p.518, lines 2-6; p.573, line 6 - p.574, line 14).

Both defendants moved for a mistrial. (Id.p.566, line 17 - p.568, line 8). The court excused the juror but denied a mistrial, explaining there did not appear to be any premature deliberations. (Id.p.570, line 9 - p.572, line 7). In fact, this juror had informed *everyone* he worked at a plant formerly owned by Hoechst *before* jury selection. (Id.p.568, line 10 - p.569, line 9). The court believed the issue was benign and said so in ruling after questioning the juror a second time, at Hoechst's request. (Id.p.578, line 24 - p.579, line 20).

Hoechst's third appellate issue is a challenge to a piece of evidence. During Mr. Seay's daughter Angie's testimony, Plaintiffs introduced a five to ten second video of Mr. Seay while he was in hospice. (Id.p.740, line 14 - p.741, line 5). This was immediately before Angie was asked about her father's suffering and before she explained her father suffered "worse than I can imagine anybody suffering." (Id.p.741, lines 6-8).

The next court day (4 days later due to the weekend), Hoechst objected to the video, seeking a mistrial or that the video be stricken. (Id.p.766, line 7 - p.767, line 4). Plaintiffs' counsel agreed not to use the video again. (Id.p.771, line 6 - p.772, line 15). The post-trial order held the objection was waived and there was no prejudice. (1/13/16 Or.pp.28-29).

Hoechst's final appellate issue relates to the amount of the verdicts. Hoechst argued the verdicts were grossly excessive. (CNA's Mot. for NTA pp.1-2). The trial court rejected this argument noting the unrelenting pain Mr. Seay experienced before his premature death and the overwhelming loss his family has suffered. (1/13/16 Or.pp.31, 38, 40).

ARGUMENT

First, Hoechst Celanese was not Mr. Seay's statutory employer. Precedent says each case is governed by its own facts, and the facts here illustrate Hoechst's business was manufacturing, not construction or maintenance. Mr. Seay's work was undoubtedly important, but it was not an important part of Hoechst's "business."

This result fulfills the purpose of the statutory employee doctrine. The doctrine is designed to protect injured workers: statutory employees may not sue in tort because their remedy is found in a workers' compensation claim. But a workers' compensation claim was never available to Mr. Seay. Hoechst's argument thwarts this doctrine's purpose.

Second, the trial court correctly found the jury did not engage in premature deliberations. This issue is reviewed under the abuse of discretion standard. The record contains ample facts supporting the court's decision.

Third, the trial court did not err in refusing to grant a mistrial based on the video showing Mr. Seay in agonizing pain. There was no timely objection to the video, this issue is reviewed under the abuse of discretion standard, and the video was cumulative to other evidence. Plaintiffs' counsel even agreed not to reference the video for the remainder of trial. Hoechst's argument is barred, and even if it was not, any error was harmless.

Finally, the verdicts are not excessive. Dennis Seay died an excruciatingly painful death. He suffered for many years and his family has endured profound harm. The court charged the jury—consistent with precedent—that there is no yardstick for measuring pain and suffering and that nobody is competent to measure the value of a parent or spouse. The awards reflect the severity of this family's injuries. This Court should affirm.

I. The trial court correctly found Dennis Seay was not Hoechst Celanese's statutory employee. Hoechst's "trade or business" was manufacturing, not construction or maintenance.

Hoechst Celanese was not Mr. Seay's statutory employer. Precedent says each case is governed by its own facts, and the facts here illustrate Hoechst's business was manufacturing; not construction or maintenance. This result furthers the purpose of the statutory employee doctrine, which is to extend coverage for workplace injuries, not leave an injured worker without any avenue for compensation. This Court should affirm.

a. This is a case-specific analysis controlled by whether the injured worker was laboring "in" the putative employer's "trade or business."

The statutory employee doctrine is a creature of statute. Section 42-1-400 of the Code (____) is part of the Workers' Compensation Act. The statute explains when a business owner uses a subcontractor "to perform or execute any work which is a part of his trade, business, or occupation," the business owner is liable to pay workers' compensation benefits as if the injured subcontractor had been the business' own employee.

This doctrine's purpose is to protect workers. In *Harrell v. Pineland Plantation*, the Supreme Court explained the statute exists in the event someone's direct employer (an intermediate subcontractor) is financially irresponsible. By making the upstream business owner liable for workers' compensation benefits, workers who labor in the business receive "double protection." 337 S.C. 313, 328, 523 S.E.2d 766, 773-774 (1999). Other cases use similar language. *Glover v. United States*, 337 S.C. 307, 311, 523 S.E.2d 763, 764 (1999).

This doctrine is an exception—it extends workers' compensation coverage even though there is no employment relationship between the injured worker and the upstream

business. *Collins v. Seko*, 412 S.C. 283, 289, 772 S.E.2d 510, 514 (2015). The statute's operative language—that the work be "part of the owner's trade, business, or occupation"—differentiates the situation where a business is unfairly avoiding its obligation to cover people who are working "in" the business from the situation where a business hires outside contractors to do "outside" work. *Harrell*, 337 S.C. at 323, 523 S.E.2d at 771.

There is no formula for judging whether an injured worker was laboring "in" a putative employer's "trade or business." The best starting point is *Ost v. Integrated Products*, which gleaned three tests from precedent: is the work *an important part* of the putative employer's trade or business; is the work *necessary, or essential to, or an integral part* of the putative employer's operation; or is the work *customarily performed by* the putative employer's regular employees? 296 S.C. 241, 244-245, 371 S.E.2d 796, 798-799 (1988). These tests are constantly repeated in precedent, and many precedents also repeat a conspicuous warning—*Ost* explains "no easily applied formula can be laid down" and "[e]ach case must be determined on its own facts." 296 S.C. at 244, 371 S.E.2d at 798; see also *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003); *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997).

b. Mr. Seay was not working in Hoechst's trade or business. Hoechst manufactured polyester fiber; it was not a construction or maintenance company.

Mr. Seay was not working in Hoechst's business. Hoechst made polyester fiber. It was not a construction maintenance company. That is why Hoechst contracted with Daniels.

A former Hoechst employee explained Hoechst is a large chemical company; at one time perhaps the second largest chemical company in the world. (Trial Tr.p.792, lines 22-

24). He said Hoechst has "many different businesses" including fibers, chemicals, pharmaceuticals, and agrochemicals. (Id.p.793, lines 5-7). Hoechst has "many" different manufacturing plants. (Id.p.1129, lines 8-9). In fact, in the 1970s Hoechst manufactured a product containing asbestos. (Id.p.1129, lines 14-17). Hoechst's plant in Spartanburg made polyester fiber. (Id.p.1072, line 23 - p.1073, line 1; p.1129, lines 7-13).

Hoechst's employees worked in the manufacturing process. The same Hoechst witness explained Hoechst employees "were responsible for making polyester and the related products." (Id.p.1079, lines 13-19). This was consistent with other testimony. Mr. Seay said Hoechst employees were "production workers" doing work that was significantly different than his work. (Pl's Master Exhibits p.453, lines 67:12-68:11). Hoechst emphasized this in closing argument, telling the jury Hoechst did not have a maintenance department when Mr. Seay worked there. (Trial Tr.p.1408, lines 14-22). Hoechst focused on making fiber. *Id.* Hoechst workers and Daniels employees "did not work near each other." *Id.*

Daniels is a construction company. (Id.p.1310, lines 18-24). As of 1964, it had built about 400 manufacturing plants in twelve states, more or less. (Id.p.1298, lines 1-4).

In fact, Daniels built this plant; the same plant where Mr. Seay was exposed to asbestos. (Id.p.1298, lines 14-15). Daniels also provided maintenance services to plants across the country. (Id.p.1300, lines 2-8). Daniels performed all maintenance work at this plant until sometime in the 1980s or 1990s. (Id.p.1207, lines 9-12).

Hoechst's argument focused on the fact that Mr. Seay's work was important. Hoechst said it could not keep making polyester unless it maintained its system. (7/27/15 Tr.p.3, line 24 - p.5, line 7); (Trial Tr.p.1329, lines 12-15); (12/3/15 Tr.p.4, lines 1-5).

The trial court noted this argument's shortcomings: every business needs preventative maintenance and Mr. Seay's work was obviously important because businesses do not hire people to do unnecessary and wasteful work. (7/27/15 Tr.p.5, line 18 - p.6, line 6); (12/3/15 Tr.p.7, lines 14-23). The court correctly observed statutory employment does not hinge on whether the work is important, but whether the work is an important "part of" Hoechst's trade or business.

The court used the correct test in articulating its ruling. It noted there was no evidence Hoechst had a maintenance division or had used employees to perform work like Mr. Seay performed. (7/28/15 Or.pp.6-7); (1/8/16 Or.p.26). The court rejected the defense because although maintenance was undoubtedly important, maintenance was not a part of Hoechst's trade or business. (7/27/15 Tr.p.26, lines 16-18); (Trial Tr.p.1330, lines 14-24).

The record supports the court's ruling. Hoechst's core business did not involve construction and maintenance. Hoechst did not have employees doing this work and it had no maintenance division. Instead it contracted with Daniels, whose business *was* maintenance. Hoechst used the different nature of these businesses to its advantage, arguing it contracted with Daniels precisely *because* Daniels was in construction. (Id.p.1406, lines 4-14). Hoechst claimed Daniels was an asbestos abatement contractor, (Id.p.1181, lines 5-23), and argued Daniels' work required special skills. (Id.p.1078, line 23 - p.1079, line 1).

Daniels was not an asbestos abatement contractor, (Id.p.1315, lines 6-22), but Hoechst's point stands: these two companies had different businesses. Hoechst limited its business to manufacturing and it was Hoechst's prerogative to do so. Mr. Seay was not working in that business. For that reason, he is not a statutory employee.

c. This reasoning is faithful to precedent, which the trial court cited in its orders.

The trial court relied on the two precedents that are the most instructive: *Olmstead v. Shapekpeare* and *Raines v. Gould*. That reliance was correct. Precedent recognizes that while a business may not unfairly evade the Workers' Compensation Act by using outside workers to perform core operations, a business *does* have the freedom to craft its own identity and set boundaries for what its business is and what its business is not.

Olmstead v. Shakespeare contains the declarative acknowledgment that the Supreme Court has changed how it views activities constituting "part of" a trade or business. *Olmsetad* recites familiar language—the three tests and the fact that each case must rest on its facts—and then explains even though a task is important, it does not follow that such task is "part of" that business. 354 S.C. at 423-427, 581 S.E.2d at 484-486.

The *Olmstead* case is straightforward. Shakespeare designed and manufactured fiberglass products. The injured worker was a truck driver. The Court explained although delivering products was important to Shakespeare's business, it does not follow that delivery is *part of* Shapespeare's business. *Id.* at 426, 581 S.E.2d at 486. Shakespeare did not own any delivery trucks. None of its employees worked in delivery beyond loading cargo.

The same analysis applies here: maintenance was important to Hoechst, but Hoechst did not have a maintenance division and none of its employees did preventative maintenance. The trial court noted this prominently in its orders. (7/28/15 Or.p.5); (1/8/16 Or.p.26).

Olmstead's timing was significant. It came three years after the Court's decision in *Abbott v. The Limited*, also involving common carriers (delivery drivers). 338 S.C. 161, 526

S.E.2d 513 (2000). One of the arguments in *Olmstead* was that *Abbott* had been a limited decision: delivering goods to a retailer was supposedly different than delivering goods directly to a customer. Although both tasks were important, Shakespeare argued delivery to a retailer was not part of the manufacturing business but delivery to a customer *was* part of that business. *Olmstead*, 354 S.C. at 425, 581 S.E.2d at 485.

The Supreme Court rejected the argument, explaining "*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of [an owner's] trade business or occupation' under [the statutory employee statute]." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486. The Court explained *Abbott* "likely conflicts with cases other than the ones we explicitly overruled in [] the *Abbott* opinion" and that "all prior cases" were overruled to the extent they conflicted. *Olmstead*, 354 S.C. at 426-427, 581 S.E.2d at 486.

The trial court correctly perceived Hoechst was re-litigating precedent. At bottom, Hoechst argued Mr. Seay was a statutory employee because maintenance was important. If that analysis carried, *Olmstead* would have been written differently. It would have included explicit language limiting its analysis. It does not have limiting language.

Olmstead is written broadly. It speaks of a change in "*the state's* jurisprudence." 354 S.C. at 426, 581 S.E.2d at 486 (emphasis added). This applies to more than a single application: It modifies the full scope of the statute's effect. *Id.* The Court explained this change likely conflicted with other, unnamed cases. *Id.* Hoechst said the case was narrow, but the trial court correctly saw *Olmstead* as having wide impact. (12/3/15 Tr.pp.4-5).

This Court's decision in *Raines v. Gould* predates *Olmstead* but follows the same sort of logic. *Raines* held an electrician installing an electrical system at a manufacturing plant

was not the statutory employee of the plant's owner. *Raines*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986). The plant's owner—Gould, Inc.—had been involved in the construction of several facilities, but it did not have a construction division and no construction work was performed by its regular employees. *Id.* at 547, 343 S.E.2d at 659. Instead, Gould prepared designs for the facilities or oversaw the design process, and in some instances Gould provided supervising personnel giving general assistance to contractors and subcontractors. *Id.* This Court reasoned "[e]very manufacturer must have a plant, but this fact alone does not make the work of constructing a plant part of [a manufacturer's] trade or business." *Id.*

Raines and *Olmstead* operate on a common principle: A business may not thwart the Workers' Compensation Act and its purpose by using outside workers to perform the business's core operation, but a business also has freedom to craft its own identity and decide what its business is and what its business is not.

Some manufacturers may choose to make transportation a part of their business. A case like *Posey v. Proper Mold & Engineering* is consistent with *Olmstead* because the manufacturer in *Posey* owned a tractor, a trailer, and had two drivers working in delivery. 378 S.C. 210, 220-221, 661 S.E.2d 395, 401 (Ct. App. 2008). That manufacturer's business included transportation. Shakespeare's business in *Olmstead* did not.

Some manufacturers will make construction and maintenance a part of their business. Mr. Seay's case easily reconciles with cases like *Edens v. Bellini* and *Wheeler v. Morrison Machine*, where maintenance workers were held to be statutory employees because those manufacturing plants had regular employees working in maintenance or had used regular employees in maintenance before. *Edens*, 359 S.C. 433, 443-444, 597 S.E.2d 863, 868-869

(Ct. App. 2004); *Wheeler*, 313 S.C. 440, 443, 438 S.E.2d 264, 266 (Ct. App. 1993). The trial court gave another example in the hearing below, differentiating between Hoechst and DuPont (the manufacturer in a prior case) by noting DuPont had a construction division, a history of construction activity, and was "pretty much" in the construction business. (7/27/15 Tr.p.4, lines 6-11). Hoechst's situation was "a far different situation." (Id.p.4, line 10).

d. The cases Hoechst cites are meaningfully different from this case and Hoechst seeks a ruling violating the statute's purpose instead of honoring it.

Smith v. T.H. Snipes & Sons contains no analysis and predates the *Olmstead* decision. *Smith*, 306 S.C. 289, 411 S.E.2d 439 (1991). *Boseman v. Pacific Mills* also predates *Olmstead* and is questionable because the injured worker used special equipment. Compare *Boseman*, 193 S.C. 479, 8 S.E.2d 878 (1940) with *Glass*, 325 S.C. at 202, 482 S.E.2d at 51 (explaining "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.").

The manufacturers in *Woodard v. Westvaco*, *Gentry v. Milliken*, and *Marchbanks v. Duke Power* had used regular employees for the same work they outsourced to subcontractors. *Woodard*, 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993); *Gentry v. Milliken & Co.*, 307 S.C. 235, 236, 414 S.E.2d 180, 181 (Ct. App. 1992); *Marchbanks*, 190 S.C. 336, __, 2 S.E.2d 825, 837 (1939). Hoechst did not use employees to do maintenance until years after Mr. Seay left, and although Hoechst was free to change its business at any time, there is no authority for applying that change to Mr. Seay after the fact.

Singleton v. J. P. Stevens & Co. is a Federal Case involving an electrician repairing an electrical system at a mill. 533 F. Supp. 887, 888 (D.S.C. 1982). It applies South

Carolina law, but it pre-dates *Olmstead* by 20 years and is inconsistent with this Court's decision involving electrical repair work—*Raines v. Gould.*

The same criticism applies to the Fourth Circuit's decision in *Smith v. FCX*, 744 F.2d 1378 (4th Cir. 1984). This case was decided 19 years before *Olmstead.*

Hoechst cites several foreign cases. The Supreme Court has explained few cases from other jurisdictions "afford any help" because "[t]he various Workmen's Compensation Acts are so different," *Marchbanks*, 190 S.C. at ___, 2 S.E.2d at 828, but it is not necessary to distinguish these based on any generality. Each one is distinguishable after examination.

Hoechst cites two Louisiana cases, but until 1997, Louisiana had broad statutory language that is inconsistent with South Carolina precedent. Louisiana's statute said specialized work, extraordinary work, and work usually done by an outside worker could still fall within the statute, regardless of whether the putative employer was capable of performing the work. *Dominio v. Folger Coffee Co.*, 32 So. 3d 955, 957 (La. Ct. App. 2010) (applying pre-1997 law). South Carolina law is not so broad. In letter or application.

Jones v. Lily Tulip Cup Corp., reasoned an electrician continuously servicing a plant's electrical system qualified as a statutory employee. 158 F. Supp. 944, 945 (W.D. Mo. 1958). This conflicts with *Olmstead* and *Glass*. This electrician's work was regular, but that does not establish it as "part of" the manufacturing business. That analysis would capture delivery drivers with exclusive contracts or specialized workers on any multi-year job.

The manufacturer in the case Hoechst cites from Kentucky employed 90 full-time maintenance staff, hiring outside workers for supplemental support. *Burroughs v. Westlake Vinyls, Inc.*, No. 5:07-CV-89-R, 2008 WL 5192237, at *1 (W.D. Ky. Dec. 11, 2008).

Finally, it bears mentioning that Hoechst seeks a result perverting the statutory employee doctrine's purpose. The doctrine extends the reach of the Workers' Compensation Act, granting statutory employees access to the Act's guarantee of "swift and sure" compensation for workplace injuries. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980). This is why precedent explains the statutory employee doctrine is construed liberally. Close cases are to lean in favor of statutory employment because the Workers' Compensation Act favors protecting injured workers.

There is no protection in the Workers' Compensation Act for Mr. Seay. The Act's statute of repose bars him from making a workers' compensation claim because his disease was not contracted within two years year of his last exposure to asbestos. S.C. Code Ann. § 42-11-70 (Supp. _____). The discovery rule applies to the Act's statute of limitations, see *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 123, 127 S.E.2d 288, 292 (1962), but that says nothing of the repose deadline, which would plainly apply to Mr. Seay who contracted cancer decades after leaving Daniels. A statutory employee would get access to "swift and sure" compensation. The idea that Mr. Seay would get "swift and sure" anything in the workers' compensation system is a joke.

II. The trial court acted within its discretion in finding the jury followed instructions and did not engage in premature deliberations.

Precedent explains the trial court has broad discretion in dealing with allegations of juror misconduct because the trial court is in the best position to determine credibility. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). Precedent also instructs a mistrial should only be granted when absolutely necessary, that the decision to grant a

mistrial lies in the trial court's discretion, and that a party must show error and prejudice to be entitled to a mistrial. *Id.* at 63, 530 S.E.2d at 627-628.

Hoechst cannot demonstrate an abuse of discretion. The trial court examined this juror twice. (Trial Tr.p.514, line 13 - p.525, line 14) and (Id.p.572, line 21 - p.575, line 25). Those examinations led the court to believe the episode was an example of the jury following its instructions, saying it sounded like one juror asked whether the plant contained asbestos and another juror said "we're not supposed to be talking about the case." (Id.p.578, line 24 - p.579, line 4). The juror in question explained this was the end of the discussion; he did not answer the question. (Id.p.574, lines 4-14). The trial court believed this was a harmless encounter. (1/8/16 Or.pp.26-27). That view of the facts has evidentiary support.

Hoechst also cannot show necessity. The burden lies on the moving party, not the court. A party alleging misconduct may ask the court to voir dire the jurors. *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). If there has been misconduct, a cautionary instruction is available to correct the damage. *Id.* at 307, 315, 509 S.E.2d at 815.

Hoechst never asked to question other jurors or for a curative instruction. (Trial Tr.p.519, line 7 - p.523, line 2; p.566, line 17 - p.579, line 25). Hoechst insisted on a mistrial; a request the court properly denied. There is no evidence a mistrial was necessary.

III. The trial court acted within its discretion in denying Hoechst a mistrial based on the video. There was no proper objection to this cumulative evidence and no reason a mistrial would be necessary.

Hoechst's argument about the 10-second video of Mr. Seay in hospice is barred because there was no timely objection. The video was played on the fifth day of trial during

the fourth of that day's six segments of witness testimony. (Id.p.740, line 14 - p.741, line 5). There was no objection to the video while it was played. There was no objection immediately after it was played. There was no objection during the remainder of that day's proceedings. Instead, the objection came at the beginning of the next day in court, which was four calendar days later because of the weekend. (Id.p.766, line 6 - p.767, line 4).

Plaintiffs could not find any authority allowing a party to make an evidentiary challenge under similar circumstances.

Hoechst relies on *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), but in *Dial v. Niggel Associates*, the Supreme Court insisted *Lynch* recognizes "a narrow exception" applicable to "flagrant cases where a vicious inflammatory argument results in clear prejudice." *Dial*, 333 S.C. 253, 256-257, 509 S.E.2d 269, 271 (1998). This applies to arguments—not evidence—and a video of a man in pain is neither vicious nor inflammatory.

The more appropriate cases for comparison are *Gibbs v. State* and *Lindsey v. City of Greenville*, both of which recognize a party's error in failing to make timely evidentiary objections. *Gibbs*, 403 S.C. 484, 493 n.10, 744 S.E.2d 170, 174 n.10 (2013); *Lindsey*, 247 S.C. 232, 241, 146 S.E.2d 863, 868 (1966). A timely objection is also required by Rule 103(a)(1) of the South Carolina Rules of Evidence. The trial court's order correctly held this argument was barred. (1/8/16 Or.p.28).

And even if this issue was not barred, it would not matter. *State v. Simpson* explains an instruction to disregard incompetent evidence will cure most errors. 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). A mistrial would not have been necessary. The video was also cumulative to other evidence, as the trial court noted in its ruling. (1/8/16 Or.pp.28-29).

IV. The trial court did not abuse its discretion when it held the jury's verdict appropriately reflected the devastating injuries Mr. Seay and his family suffered.

The trial court devoted 9 pages of its 46-page post-trial order to the damage awards in this case. As the court correctly held, the awards of $2 million on the survival claim, $5 million for wrongful death, $5 million for loss of consortium, and $2 million in punitive damages appropriately reflect the devastating injuries Mr. Seay and his family suffered.

A "grossly excessive" verdict is a verdict that is shockingly disproportionate to the plaintiff's injuries. *Bowers v. Charleston & W. C. Ry. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). Such a verdict is the product of a breakdown in the process—a new trial is ordered because the verdict is deemed to result from "a disregard of the facts, and of the instructions of the Court, and to be due to passion and prejudice rather than reason." *Gordon v. Rothberg*, 213 S.C. 492, 505, 50 S.E.2d 202, 208 (1948).

The court's order explains why these verdicts do not satisfy that standard.

The order recognized that damages in a survival action include recovery for the decedent's conscious pain and suffering. (1/8/16 Or.p.31). Mr. Seay suffered for 4 or 5 years before he was diagnosed with cancer. (Pl's Master Exhibits p.432, lines 12:07-13:02). He had fluid drained from his lungs 11 times, his lung collapsed, he had multiple surgeries, and he attended his deposition with two broken ribs that could not be repaired because his doctors did not want to cut into his side again. (Id.pp.432, line 13:07 - p.433, line 16:01). As he got sicker, he stayed in constant pain, had no appetite, and threw up whatever he ate. (Id.p.434, lines 19:04-19:14). He could not sleep. (Id.p.435). He had so much pain he prayed to die. (Id.p.456, lines 71:08-79:15). John Crane's expert admitted mesothelioma

is "a bad cancer" and "has a lot of pain." (Id.p.670, lines 145:09-146:02). Plaintiffs' counsel summarized this evidence in arguing for a substantial award. (Trial Tr.pp.1373-1376).

Precedent explains damages for pain and suffering cannot be determined with certainty and the monetary value placed upon them rests within the jury's sound judgment. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). Precedent also explains an appellate court must view the facts in the light most favorable to the plaintiff in evaluating a challenge to a verdict's amount. *Id.* at 224, 136 S.E.2d at 289.

Two million dollars is not excessive for a miserable death after a prolonged period of suffering. The trial court compared this to similar awards in its order. (1/8/16 Or.p.35).

The court also performed a detailed analysis for the wrongful death and loss of consortium awards. (Id.pp.35-40). The court recognized the damages components for each. Loss of consortium compensates for the loss of a spouse's companionship, aid, society, and services. (Id.p.36) (citation omitted). Wrongful death extends beyond pecuniary loss and covers mental shock and wounded feelings, grief, sorrow, loss of society, and loss of companionship. (Id.p.38) (citation omitted). As with the survival award, the trial court analyzed the evidence and compared these awards to other cases. (Id.pp.35-40).

No comparative analysis is required. Unliquidated damages are largely a matter of judgment based upon the facts of each case. *Watson*, 244 S.C. at 224, 136 S.E.2d at 289. Hoechst acknowledged during the post-trial hearing there have been "higher, even much higher damage awards," summarily claiming those verdicts were "outliers." (12/3/15 Tr.pp.17-18). The post-trial record contains no explanation at all of why these verdicts shock the conscience. (Mot. for New Trial, pp.1-6); (CNA Reply pp.1-5); (12/3/15 Tr.pp.1-52).

CONCLUSION

This is a tragic case, but the appellate issues are straightforward and the trial court handled them capably. The awards may be substantial, but so are the damages. This Court should affirm.

Respectfully submitted,

March 10, 2017

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