

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

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SC Court of Appeals

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

v.

CNA Holdings, LLC..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

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

Respondents incorrectly contend that the Supreme Court's decisions in *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) represented a major change in South Carolina's statutory employee jurisprudence. Respondents argue that *Olmstead* changed the law such that the worker must be "laboring in" the putative employer's trade or business to meet the definition of a statutory employee. In other words, they assert that the proper inquiry for determining whether a worker is a statutory employee is to narrowly define the company's "trade or business," and then determine whether the worker's activities match that trade or business. They define the trade or business of Celanese as manufacturing, and contend that since Seay was a maintenance worker and not a manufacturing worker, he is not a statutory employee. In other words, Respondents assert that Celanese would have to be *in the maintenance business* for Seay to have been a statutory employee, even though his work activities were crucial to the operation of the manufacturing lines on which he worked. This argument is a distortion of long established South Carolina jurisprudence and is unsupported by any case law, including *Abbott* or *Olmstead*.

1. *Abbott* and *Olmstead* did not change the tests for determining whether a worker's activities are part of the putative statutory employer's trade, business, or occupation under South Carolina law.

As an initial note, despite citing this proposition in their brief, Respondents ignore the Supreme Court's recognition that "no easily applied formula can be laid down for the determination of whether . . . work in a given case is a part of the general trade, business or occupation of the principal employer." *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 244, 371 S.E.2d 796, 798 (1988). Rather, "[e]ach case must be determined on its own facts." *Id.* Despite

this framework, Respondents contend that the Supreme Court fundamentally changed the statutory employee doctrine in *Abbott* and *Olmstead* for all types of workers and work activities. As *Ost* acknowledged, however, a one-size-fits-all approach to the statutory employee doctrine is not possible. *Olmstead* even recognized as much, noting that the three tests established to interpret the statute “do not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged.” *Olmstead v. Shakespeare*, 354 S.C. at 426, 581 S.E.2d at 486.¹

In any event, *Abbott* and *Olmstead* did not modify South Carolina statutory employment law aside from determining that a narrow category of activities, under the facts of those respective cases, would not result in a worker being classified as a statutory employee. It is critical to note that both *Abbott* and *Olmstead* involved employees of common carriers engaged in the activity of transportation. *Abbott* held that “the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier’s employee,” and specifically overruled two other cases involving the activities of employees of common carriers to the extent they could be read to hold otherwise. See *Abbott v. The Limited, Inc.*, 338 S.C. 161, 164 & n.1, 526 S.E.2d 513, 514 & n.1 (2000).

In *Olmstead*, the trial court found that a transportation worker/delivery driver was a statutory employee, noting that the Supreme Court could have expanded *Abbott* to ***all transportation cases*** but chose not to, limiting its holding to receipt of goods delivered by common carrier. See *Olmstead v. Shakespeare*, 348 S.C. 436, 439, 559 S.E.2d 370, 372 (Ct.

¹ The three factor test for determining whether a worker is engaged in activities that are part of the company’s “trade, business, or occupation,” looks to whether the activities are: “(1) are an important part of the trade or business of the employer, (2) are a necessary, essential, and integral part of the business of the employer, or (3) have been previously performed by employees of the employer.” *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997).

App. 2002), *aff'd as modified*, 354 S.C. 421, 581 S.E.2d 483 (2003). The Court of Appeals did not agree with this “overly narrow reading of *Abbott*,” and found that its holding was not limited to situations involving a retailer’s receipt of goods. *Id.* As the Court explained, however, *Abbott* “***focused on the transportation aspect*** to determine if the individual is a statutory employee,” not whether the purported statutory employer “was a shipper or recipient of goods.” *Id.* (emphasis added). Thus, the Court concluded that the injured worker, “as an employee of a common carrier involved only in the transportation of goods, was not part of the general trade, business, or occupation of Shakespeare.” *Id.* at 441, 559 S.E.2d at 373.

The Supreme Court agreed that the Court of Appeals “correctly interpreted . . . *Abbott*.” *Olmstead*, 354 S.C. at 425, 581 S.E.2d at 485 (2003). The Supreme Court explained that *Abbott* did not change the need for a case by case analysis of statutory employment, but “merely establishes that ***transportation of goods*** is important to nearly all businesses, and, that ***transportation of goods*** by a common carrier alone, without something more, does not qualify as ‘part of [the owner’s] trade, business, or occupation’ under any of the three established tests for statutory employment.” *Id.* at 426, 581 S.E.2d at 486 (emphasis added). It was with this in mind that the Court stated that *Abbott* represented “a change in this state’s jurisprudence on what activity constitutes ‘part of [the owner’s] trade, business, or occupation.’” *Id.* Thus, the *Olmstead* Court noted that because *Abbott* “likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the *Abbott* opinion . . . we now overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case.” *Id.*

In the proper context, it is evident that the “change in jurisprudence” referenced by the *Olmstead* Court was related to the activity of transportation of goods by common carriers. Neither the *Abbott* nor the *Olmstead* Court intended a fundamental change in the general tests for

determining whether an employee's activities render him or her a statutory employee. As the *Olmstead* Court explained, the "change in South Carolina jurisprudence" was the imposition of a new requirement for workers engaged in the transportation of goods, namely: something in addition to the fact that transportation is "important" must be shown to warrant classification of the worker's activities as part of the owner's trade, business or occupation.² Respondents selectively isolate and highlight excerpts from the opinions in an effort to have *Abbott* and *Olmstead* stand for a major change to the tests with respect to all workers, not just those engaged in the transportation of goods. These decisions do not support the notion that the Court intended to abrogate South Carolina case law examining whether other types of workers or work activities—such as maintenance at a factory or plant—meet the tests for statutory employment. As Celanese discussed in detail in its opening brief, prior case law examining maintenance workers confirms that Seay was Celanese's statutory employee.

The appellate briefing in *Abbott* and *Olmstead* further support that these decisions were meant to be limited to transportation workers. In the injured worker's petition for rehearing of the Court of Appeals' decision in *Abbott*, for example, he contended that the activity of

² As the Court of Appeals explained in *Olmstead*, this is in line with the *Abbott* Court explicitly overruling two transportation cases, while declining to overrule another transportation case: *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990). As the Court explained, the *Revels* Court found that the worker in question, who worked for a common carrier transporting liquid organic chemicals, was a statutory employee because "checking the levels of the chemicals being loaded into the tanker[] was a part of Celanese'[s] general business." *Olmstead*, 348 S.C. at 372-73, 559 S.E.2d at 440 (quoting *Revels*, 301 S.C. at 318, 391 S.E.2d at 731). The Court noted that "unlike" the employees in *Abbott* and the cases it overruled, who were merely transporting goods, the worker in *Revels* was "more involved in the business process since he monitored the levels of chemicals being pumped into the tanker." *Id.* at 373, 559 S.E.2d at 440. Additionally, the *Revels* Court found that "distribution, and therefore transportation, was an integral part of Celanese's business." *Id.* Therefore, *Revels* involved "more than transportation alone" and was "easily distinguished on its facts." *Id.* The Supreme Court presumably agreed with this analysis, as it did not modify this portion of the Court of Appeals' opinion in *Olmstead*.

transportation “should be exempt from the strict application of the three prong test,” and that common carriers should also be exempt. Pet. for Reh’g at 1-3, *Abbott v. The Limited*, No. 94-CP-21-1430 (S.C. Ct. App. July 7, 1998).³ Likewise, in his brief of petitioner, the worker argued that the work of common carriers falls into a unique category, and that they should not be considered statutory employees absent the owner’s control over the common carrier’s work or an exclusive relationship. See Br. of Pet’r at 2-3, *Abbott v. The Limited*, No. 94-CP-21-1430 (S.C. S. Ct. Apr. 15, 1999). The worker argued that the work of common carriers is “important” to every business and thus the traditional three factor test is inadequate. See *id.* at 2-6.

The appellate briefing in *Olmstead* was equally limited in scope. The *Olmstead* trial court drew a distinction between the activities of common carrier workers engaged in delivering inventory and those engaged in delivering finished product. See Order at 2-3, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. C.P. Mar. 1, 2000).⁴ In the injured worker’s opening brief to the Court of Appeals, he contended that after *Abbott* “South Carolina law is now clear that the delivery of products by truck to a company or place of business does not render the truck-driver delivering the products a statutory employee of the company or business.” Br. of Appellant at 4, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 28, 2001). Therefore, even the appellant—who was arguing for a broader application of *Abbott*—recognized that the holding was limited to a specific subset of workers and work activities. The worker’s argument for expanding *Abbott* was solely limited to asserting that “[t]here should be no distinction between the receipt of products or goods and the delivery of them” for determining

³ It is well established that a court may “take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.” *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); see also *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (same).

⁴ This Order is found in pages 33-36 of the *Olmstead* Record on Appeal.

whether the transportation worker is a statutory employee. *Id.* at 5. As the worker noted in his reply brief to the Court of Appeals, *Olmstead* presented “the logical solution to a two part situation,” and the same principles should apply whether the worker “delivers raw materials or finished products to a business or manufacturer” or “takes away finished products or raw materials” from the same business or manufacturer. Reply Br. of Appellant at 2, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 28, 2001). In no way did the worker advocate for an abrogation of all prior South Carolina law governing statutory employees.

Additionally, the defendant company’s appellate briefing in *Olmstead* explains the Court’s discussion about overruling any prior cases to the extent they contradict *Abbott* or *Olmstead*. In its briefs, the company argued that there must be some meaning behind *Abbott* only explicitly overruling two prior decisions involving employees of common carriers, while declining to overrule other cases involving the activities of common carrier workers. See Br. of Resp’t at 9-12, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 22, 2001); Pet. for Writ of Cert. p. 6-8, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. S. Ct. Mar. 21, 2002); Br. of Pet’r at 6-10, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. S. Ct. July 1, 2002). The company cited to other statutory employee cases which were not overruled to support its position that *Abbott* was limited to cases involving receipt of goods delivered by a common carrier. See Br. of Resp’t at 11-12, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 22, 2001); Pet. for Writ of Cert. at 7-8, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. S. Ct. Mar. 21, 2002); Br. of Pet’r at 9-10, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. S. Ct. July 1, 2002). Therefore, the *Olmstead* Court’s statement overruling any other prior cases inconsistent with the *Abbott* and *Olmstead* decisions appears to be directly tied to this argument by the defendant company.

Therefore, it is evident no one in *Abbott* or *Olmstead* was advocating or even arguing about a major change of the statutory employer tests with respect to all workers. *Abbott* and *Olmstead* do not support the expansive position advanced by Respondents.

2. Subsequent cases addressing statutory employment contradict Respondents' argument.

Cases decided after *Abbott* and *Olmstead* also support that those holdings were limited and were not the sweeping change in South Carolina law that Respondents suggest. For example, in *Edens v. Bellini*, 359 S.C. 433, 444, 597 S.E.2d 863, 869 (Ct. App. 2004), the Court of Appeals noted that pursuant to *each* of the three tests, the worker in question was a statutory employee of the defendant manufacturer. In *Edens*, the worker was a subcontractor working at the defendant manufacturer's (Milliken's) dye package plant. The Court did not apply the evidence to each insular test, but referenced testimony and evidence supporting the following in reaching its conclusion: (1) maintaining the operations equipment and machinery in the dye package plant was "an important and necessary part of Milliken's business at the Abbeville Plant," as this was an integral aspect of plant operations and it made the equipment and machinery "more productive"; (2) the work assigned to the injured worker was not specialized or unique; and (3) Milliken's workers also assisted in the same activities. *Id.*

Similarly, in a decision issued after *Abbott* and the Court of Appeal's decision in *Olmstead*, the Court of Appeals also applied the same traditional three factor test. *See Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003). In *Hancock*, the injured worker was an employee of a Wal-Mart vendor. The vendor's employees would go into Wal-Mart and assist with assembling and setting up merchandise. *Id.* at 170, 584 S.E.2d at 399. The injured vendor's worker exclusively did this for Wal-Mart. *Id.* The Court found that the worker's relationship with Wal-Mart satisfied all three tests, and thus rendered him a statutory

employee of Wal-Mart. *Id.* at 174, 584 S.E.2d at 401. Under the first test, the worker's duties were a "vital and important part of Wal-Mart's business in that items always display and sell better once they have been assembled." *Id.* As for the second test, the worker's duties were also "a vital and integral part of [Wal-Mart's] regular operations." *Id.* The worker assembled merchandise exclusively for Wal-Mart at the store, reported to a Wal-Mart manager who identified the merchandise that was to be assembled, and upon completion informed the manager and turned in his itemized work order. *Id.* Finally, the third test was satisfied because Wal-Mart employees often performed the same assembly duties. *Id.*

Even transportation cases issued subsequent to *Abbott* and *Olmstead* have upheld the long-standing principles for determining whether a worker is a statutory employee under South Carolina law. For example, in *Johnson v. Jackson*, 401 S.C. 152, 163, 735 S.E.2d 664, 669-70 (Ct. App. 2012), the Court of Appeals found that a worker hired to load computers onto a truck was the statutory employee of a transportation company under all three tests. "First, packaging and loading technology equipment were an important part of [the transportation company's] business." *Id.* Second, an integral part of the company's transportation business "[wa]s agreeing to package and load goods," because "without these services, [the company's] financial profitability and customer base would undoubtedly diminish." *Id.* Finally, the worker performed the same tasks that an employee of the defendant company performed. *See id.* at 163-64, 735 S.E.2d at 670. Importantly, the *Johnson* Court rejected a similar argument to the one asserted by Respondents in this case. As the Court explained, the injured worker argued that an activity must be the "'main function and basic operation' of the business" and not "merely essential or necessary" for statutory employment to exist. *Id.* at 164, 735 S.E.2d at 670. The Court noted that the cases the worker cited for this proposition, including *Abbott*, were distinguishable

because in those cases: (1) the “basic operation of the putative employer *differed greatly* from the activity in which the plaintiff was engaged at the time of injury” and (2) “transportation was not a main and integral part of the defendant’s business for purposes of the Act.” *Id.* (emphasis added). In *Johnson*, transportation was the company’s business, and “packaging, loading, and unloading” equipment was an important part of that business. *See id.*

Similarly, in *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005), the Court determined that a helicopter pilot was not a hospital’s statutory employee. The *Cooke* Court noted that none of the three tests were met. First, the hospital’s business was providing health care, not transportation. *Id.* Although air lifting patients helped facilitate the hospital’s treatment of patients, this alone did not make transportation an important or essential part of the hospital’s general business. *Id.* Second, helicopter service was not “necessary, essential, or integral” to the hospital’s operation, as “less than one percent of the hospital’s patients use[d] the service and the Hospital’s emergency room services d[id] not cease when the helicopter cannot fly.” *Id.* at 175, 624 S.E.2d at 44. Lastly, the hospital never directly employed helicopter pilots. *Id.* Therefore, the *Cooke* Court concluded, after looking at the same three traditional tests pre-dating *Abbott* and *Olmstead*, that the pilot was not the hospital’s statutory employee.

Finally, in *Posey v. Proper Mold & Engr., Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008), the Court of Appeals explicitly acknowledged the limited application of *Abbott* and *Olmstead*. *Posey* involved a truck driver working for a trucking contractor who was injured while making a delivery of plastic injection molds to a manufacturer. 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 there.

Therefore, cases issued subsequent to *Abbott* and *Olmstead* support that the traditional tests for determining whether a worker is a statutory employee continue to apply in South Carolina. *Abbott*, *Olmstead*, and their progeny do not support Respondents' argument that these tests have been fundamentally altered or significantly restricted.

3. Respondents' argument is overly restrictive and contrary to South Carolina precedent.

Due to the highly fact-driven nature of statutory employee cases, whether an employee's activities meet one or more of the statutory employee tests must be viewed on a case by case basis. *Abbott* and *Olmstead* concerned delivery drivers whose involvement with the purported statutory employer was limited to making deliveries or pickups and then moving on to the next delivery or pickup. As the appellant in *Abbott* noted in his brief to the Court of Appeals, the driver in that case was essentially no different from the mail carrier. If the courts were to find that such delivery drivers were statutory employees, it would open the door for essentially any person who does the smallest amount of work for a company to become its statutory employee. If the courts were to find that the mail carrier and FedEx driver are statutory employees despite only spending a few minutes per day at the employer's property, it would be very easy to show that practically every other type of worker meets at least one of the applicable tests.

Respondents, on the other hand, ask the Court to restrict the scope of the statutory employee doctrine to a narrow subset of workers. As an initial matter, this flies in the face of the

policy of this State, which is “to resolve jurisdictional doubts in favor of inclusion of employers and employees under the Workers’ Compensation Act.” *Edens*, 359 S.C. at 440, 597 S.E.2d at 867. Respondents’ overly restrictive “laboring in” the trade or business test would result in coverage of only a narrow category of workers. Maintenance workers like Seay, whose preventative maintenance and repair activities are critical to the continued operation of the manufacturing business, would not be statutory employees because they are not “manufacturing” workers, as such term appears defined by Respondents.

Additionally, Respondents’ proposed requirement that the purported statutory employer’s own employees must have also engaged in the same activity would lead to absurd results. For example, if Celanese had only used independent contractors at its facility and not utilized any of its own employees, no workers would be statutory employees under Respondents’ test. This is despite the courts’ acknowledgement that “even work which a business might never perform with its own employees may be considered a part of its trade or business if the work is an integral part of its operations without which it cannot function.” *Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986). Respondents’ assertion that the cases cited by Celanese involving maintenance workers like *Edens*, *Woodard v. Westvaco*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992) and *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939) are distinguishable because in those cases the manufacturers had regular employees working in maintenance is in opposition to both the language of the three factor test and the Court’s recognition in *Raines* that South Carolina law does not impose such a requirement.

South Carolina courts have endeavored to follow the statute and uphold South Carolina’s policy favoring inclusion under the Workers’ Compensation Act. Respondents contend that

Abbott and *Olmstead* fundamentally changed South Carolina’s statutory employee doctrine. This is incorrect. As Celanese detailed in its opening brief, courts applying South Carolina law have held for decades that maintenance is an important and essential part of a manufacturing business. Nothing in *Abbot*, *Olmstead*, or their progeny indicates that the Supreme Court intended to abrogate this long-standing precedent. Accordingly, Respondents argument is without merit.

4. Seay was Celanese’s statutory employee.

Abbott and *Olmstead* looked at a narrow type of work activity—transportation—and determined that it was simply too tangential of an activity to constitute part of a retailer or manufacturer’s trade or business without something more, such as control over the transportation worker or a history of the entity conducting the activity itself. Respondents grossly devalue the role that Seay and other Daniel workers played at Celanese in a misplaced effort to draw an analogy to these transportation cases. Even under Respondents’ more restrictive, “something more” test, Seay was Celanese’s statutory employee.

Seay was much more than just a “handy man” at Celanese. He was not tasked with washing windows, adding fresh coats of paint, or any other activities that were merely tangential to Celanese’s manufacturing business. On the contrary, Seay worked on the very production lines that were the lifeblood of Celanese’s manufacturing operations. Seay exclusively worked at the same Celanese facility maintaining the same machinery during his entire tenure with Daniel. Without his efforts, the Celanese plant could not properly function and Celanese would not be able to conduct its manufacturing business.

The record reflects that Seay worked as a millwright and was responsible for repairs and preventative maintenance work on Celanese’s manufacturing equipment. (D. Seay, Trial Transcript (“Tr.”) pp. 427:22-428:9; Court’s Ex. 1, D. Seay Video Dep. at 24:20-25:23, 26:25-

27:6, 61:9-62:19, 67:17-21; R. pp. 611-12, 1778-79, 1792-93, 1795.) 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 D. Seay, Tr. pp. 374:23-375:9; Court’s Ex. 1, D. Seay Video Dep. at 66:1-67:1; Dep. of D. Seay (Nov. 20, 2013), Ex. B to Mem. in Supp. of Am. Mot. to Dismiss at 42:19-43:2; R. pp. 558-59, 1794, 2267.) The Celanese facility where Seay worked manufactured synthetic fibers. (D. Seay, Tr. p. 360:16-21; Court’s Ex. 1, D. Seay Video Dep. at 25:3-8; R. pp. 544, 1779.) 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. pp. 566-67, 600, 602-04.) The repairs and preventative maintenance Seay performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility. (See D. Seay, Tr. p. 420:5-10; Court’s Ex. 1, D. Seay Video Dep. at 76:23-77:6; R. pp. 604, 1798.)

Ronnie Thompson, another Daniel contractor who worked with Seay, confirmed that 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. (Court’s Ex. 2, R. Thompson Video Dep. at 17:4-24; R. p. 1801.)

Finally, Celanese’s corporate representative, Bruce Bowyer, echoed this testimony, stating that the maintenance work performed by Seay was a necessary, essential, and integral part of Celanese’s business. (B. Bowyer, Tr. p. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; R. pp. 1261, 2409.) It was essential for Celanese to have maintenance workers on site to maintain, repair, and replace equipment. (Aff. of B. Bowyer, Ex.

G to Mem. in Supp. of Am. Mot. to Dismiss at ¶¶ 5, 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 2409, 2519.) Furthermore, the maintenance of equipment and upkeep of production lines was a regular, ongoing part of Celanese's operations. (See Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; R. p. 2409.) 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. (B. Bowyer, Tr. p. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 1261, 2409, 2519.) 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 Celanese employees. (Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 10; R. p. 2410.)

Therefore, the testimony and evidence overwhelmingly supports that Seay's activities were both an important part of Celanese's trade or business and were a necessary, essential, and integral part of Celanese's trade or business.⁵ As Celanese explained in detail in its opening brief, case law from South Carolina and various other jurisdictions involving maintenance

⁵ The Supreme Court has indicated that the "important" factor is met for a manufacturer where the worker's activities are "related to the basic operation of the [company's] business." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997); see also *Fortner v. Thomas M. Evans Const. & Dev., LLC*, 402 S.C. 421, 432, 741 S.E.2d 538, 544 (Ct. App. 2013) (finding that the "important" factor was met where the worker was engaged in activity designed to "engender goodwill," since the testimony and evidence supported that "maintaining goodwill was crucial" to the defendant construction business). Likewise, the Supreme Court has suggested that the "necessary, essential, and integral" factor is met for a manufacturer where the "basic operation of manufacturing . . . is dependent" on the worker's activity. *Glass*, 325 S.C. at 202, 482 S.E.2d at 51. As detailed in Celanese's opening brief and herein, Seay's activities undoubtedly satisfied both factors.

workers supports that Seay was a statutory employee.⁶ However, even under the stricter standard articulated by Respondents, Seay would still be Celanese's statutory employee. Seay's work activities were directly tied to Celanese's manufacturing business, such that he was "laboring in" Celanese's manufacturing business.

5. Respondents' policy argument was rejected by the *Olmstead* Court.

The Supreme Court in *Olmstead* specifically modified the Court of Appeals' decision in that case, which held that the broad construction in favor of coverage under the Workers' Compensation Act is not "as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory." *Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486. The Supreme Court explained that it has "not previously adopted a different standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory, and *declines to do so now.*" *Id.* (emphasis added). Therefore, the Supreme Court has expressly rejected Respondents' argument that courts should approach the statutory employee issue differently where the doctrine is asserted as a shield.

Moreover, it is irrelevant to the present matter that the statute of repose has purportedly expired for filing a Workers' Compensation claim. This has no bearing on whether Seay was the statutory employee of Celanese and is a question properly reserved for the Workers' Compensation Commission, which has jurisdiction due to Seay's status as a statutory employee. Therefore, Respondents' policy argument is without merit.

⁶ Respondents attempt to distinguish the highly persuasive case law discussed by Celanese by contending that these cases either predated *Olmstead* and should be considered overruled or were from other jurisdictions which have broader rules governing statutory employees. For the reasons set forth herein, *Abbott* and *Olmstead* did not fundamentally change South Carolina law. Further, as previously stated, the policy of South Carolina favors broad inclusion of workers as statutory employees.

6. Respondents' reliance on *Raines v. Gould* is also misplaced.

Finally, as Celanese detailed in its opening brief, *Raines v. Gould*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986) is inapposite. *Raines* involved the 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 *Raines* Court 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 *Raines* Court held that construction of the *new plant* was generally outside the manufacturer's trade or business. The *Raines* Court noted that an exception may arise, however, where the 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." *Id.* (collecting additional cases). In other words, *Raines* simply recognized that the construction of the manufacturing plant itself, under the facts of that case, was not part of the defendant company's business of manufacturing and selling batteries. Once construction finished, the construction workers' task in *Raines* was complete and they would not be involved in the actual manufacturing activity. This is in stark contrast to workers like Seay, whose activities were essential to the continued operation of Celanese's manufacturing plant.

7. Because Seay was a statutory employee of Celanese, this Court should reverse.

For the reasons stated herein and in Celanese's opening brief, Seay was Celanese's statutory employee. Accordingly, this Court should reverse and enter judgment in favor of Celanese.

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

The trial court abused its discretion by failing to grant a mistrial despite evidence of premature deliberations by the jury. The trial court's handling of Juror #16 created the implication that he was dismissed because he had knowledge harmful to Celanese. Therefore, this Court should reverse.

After a considerable amount of testimony and evidence had already been presented, Juror #16 voiced his concern about a potential conflict. The court excused the rest of the jury and questioned him individually.⁷ Once the court finished its questioning, it asked juror to step outside. (*See* Tr. p. 518:23-519:4; R. pp. 702-03.) The court then asked if "any party wish[ed] to *state anything for the record.*" (*Id.* at 519:5-6; R. p. 703.) Defendants raised concerns with what Juror #16 had divulged and preserved the right to object after the next break in the trial, which was the lunch break. The trial court then brought Juror #16 back into the courtroom, and noted that he would "stay on the jury right now," but cautioned him to not "talk about the case or anything related to it with anyone, even your fellow jurors at this time." (*Id.* at 523:22-524:1; R. pp. 707-08.) The trial court then brought the rest of the jury back to hear more testimony and evidence. Juror #16 remained with them until after the lunch break.

⁷ The trial court asked Juror #16 what he felt the conflict was, and he explained that he realized during the course of the trial that he not only worked at a facility that used to be owned by Celanese, but that he worked at the exact same plant as Seay doing essentially the same job. (Tr. pp. 515:5-9; R. p. 699.) The trial court asked whether he discussed "it" with the other jurors. (*Id.* at 518:2-3; R. p. 702.) The court's question was ambiguous. "It" could either be interpreted narrowly as asking the juror whether he discussed working at the same plant doing the same job or more broadly as asking whether he discussed his perceived conflict and its implications. Juror #16's response indicates that he understood the trial court to only be asking about whether he discussed working at the same facility. (*See id.* at 518:4-6; R. p. 702.)

After the break, the trial court asked if there was “[a]nything else” before the jury was brought back in, and Defendants made their motion for a mistrial at that time. (*Id.* at 565:19-566:19; R. pp. 749-50.) They had no choice but to move for a mistrial at that juncture to preserve their objection. The trial court denied the motion for a mistrial, finding that there was no evidence of premature deliberations, but also finding that Juror #16 should be excused. (*Id.* at 570:9-572:7; R. pp. 574-76.)

To clarify the ruling, Defendants asked that the court question Juror #16 again about what transpired in the jury room. (*Id.* at 572:8-20; R. p. 756.) It was only then that Juror #16 disclosed that another juror had asked him about asbestos and a third juror said they should not be discussing it. (*Id.* at 573:17-574:14; R. pp. 757-58.) The juror also admitted that the other jurors asked what happened when he spoke with the judge alone, and that he told them the judge asked questions about whether “it’s going to affect my judgment.” (*Id.* at 574:16-575:5; R. pp. 758-59.) In light of this, Defendants renewed their motion for a mistrial, which the trial court again denied.

Respondents contend that the trial court properly determined that any of the jury’s premature discussions were harmless. However, this ignores the Celanese’s critical point. It was not only what was said, but also what was *implied*. Juror #16 admitted to the other jurors he worked at the same plant as Seay, doing essentially the same job. One of them asked about asbestos, but another juror said they should not discuss it. Juror #16 was then singled out and brought before the trial judge. Once he returned to the jury room, the other jurors asked him what happened and he told them the judge asked him if working at the same plant as Seay in the same job would affect his judgment. This was despite the trial court’s clear directive not to “talk about the case *or anything related to it* with anyone.” (*Id.* at 523:22-524:1; R. pp. 707-08.)

Soon after, Juror #16 was singled out again and brought back before the trial court. He was then excused, never to be seen again by the jury. As Celanese noted, the clear implication was that Juror #16 must have some significant, harmful knowledge about Celanese and its use of asbestos in Seay's particular type of job such that he could not be fair and impartial. This fundamentally tainted the trial.⁸ The trial court abused its discretion by failing to grant a mistrial, and therefore this Court should reverse.

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

Respondents contend that this argument is barred because Defendants did not make a timely objection. Celanese described in detail the misunderstanding that resulted in the delayed objection in its opening brief. As Celanese explained, the delayed objection was a result of confusion between the co-defense team. After realizing that no member of the defense team consented to Respondents' counsel playing the video, Celanese's counsel immediately raised the objection at the next possible opportunity. Additionally, since the video was inherently

⁸ Respondents also contend that Celanese should have requested to *voir dire* the jurors or requested a limiting instruction. South Carolina law does not require either. As the Supreme Court explained in *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), if an allegation of premature deliberations arises during trial, "the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." *Id.* at 315, 509 S.E.2d at 815. The *Aldret* Court explained that "[i]f requested by the moving party, the court *may* voir dire the jurors and, *if practicable*, 'tailor a cautionary instruction to correct the ascertained damage.'" *Id.* (quoting *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993)) (emphasis added). The Court clearly stated that the moving party *may* request voir dire and/or a limiting instruction, but in no way suggested that the moving party is required to make such a request.

prejudicial and inflammatory, a contemporaneous objection was not necessary under the circumstances.⁹

Respondents' other argument is that the evidence was cumulative and thus a mistrial was unnecessary. However, this actually supports Celanese's point—there was simply no reason to play this video aside from a desire to stir the jury's passion or prejudice. Respondents presented considerable evidence and testimony regarding Seay's struggles with mesothelioma. This isolated—and admittedly cumulative—clip of Seay at one of the worst moments of his life was designed to stir the jury's passion rather than accurately portray Seay's daily struggles with mesothelioma. Thus, the trial court's failure to grant the motion for mistrial was thus an error.

The video clip was not a proper basis for the jury's verdict due to its highly prejudicial and inflammatory nature. Therefore, this Court should reverse.

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

Lastly, the jury's verdict in this matter was grossly excessive and disproportionate to other mesothelioma verdicts from the same time frame. In responding to this ground, Respondents simply point to evidence and testimony which they contend support the damage award. Respondents ignore Celanese's argument that the reason the verdict was grossly excessive was *because* the jury was motivated by passion, caprice, prejudice, and/or other considerations not founded on the evidence. The verdict was based, at least in part, on the jury's premature deliberations, the negative inference against Celanese created by Juror #16's dismissal, and the improper video.

⁹ Although *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) concerned contemporaneous objections to arguments rather than evidence, the *Lynch* Court's reasoning should equally apply to evidence.

As Celanese detailed in its opening brief, the verdict was excessive and shockingly disproportionate, particularly in light of the amount of Seay's stipulated medical expenses. The verdict was also not in line with verdicts in similar mesothelioma cases. Respondents contend that Celanese acknowledged at the post-trial motions stage that there have been higher damage awards in similar cases, but that those verdicts were outliers. Those verdicts were indeed outliers, particularly in comparison to the facts of this case. Celanese detailed numerous mesothelioma verdicts rendered around the time of the verdict in this case that were much lower. The verdict here was grossly excessive because it was motivated by improper factors. Therefore, this Court should reverse and order a new trial.

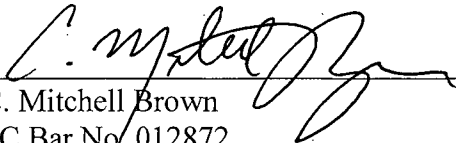
CONCLUSION

For the reasons stated herein and in Celanese's opening brief, 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,

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April 26, 2017

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

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SC Court of Appeals

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

Respondents,

v.

CNA Holdings, LLC,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

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