

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.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Introduction

Pursuant to Rule 221(a), SCACR, Appellant CNA Holdings, LLC, successor in interest to Hoechst Celanese Corporation (“Celanese”) respectfully petitions for a rehearing of Opinion No. 5625 (S.C. Ct. App. filed Feb. 13, 2019) (Shearouse Adv. Sh. No. 7 at 16) (“the Opinion”) and/or the issuance of a new opinion. The basis for the requested rehearing is that certain facts, points, and arguments were overlooked and misapprehended as discussed below. In addition, Celanese suggests and requests rehearing en banc.

Rehearing should be granted. The Court overlooked settled law holding that the legislative and judicial policy of South Carolina favors inclusion under the Workers’ Compensation Act (“the Act”), and therefore *any doubts* regarding whether a worker is a statutory employee should be resolved in favor of inclusion. The Court’s reformulated test ignored this policy and thus misapprehended prior law by limiting its analysis to consideration only of the “part or process” of the owner’s business as declared by the owner and whether the company’s employees previously engaged in the same activity as the plaintiff. In a similar vein, and given its over-narrow focus, the Court also misapprehended the scope of *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 finding that those cases changed the long-standing applicable test for determining statutory employee status. As a result, the Court erroneously found that these decisions changed the relevant analysis for statutory employment in all contexts—even though no other case has ever suggested that the three factor test of *Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 245, 371 S.E.2d 796, 799 (1988) has been so fundamentally altered. Finally, the Court misapprehended the utility of the contractual language between Celanese and Daniel Construction, Seay’s employer, and overlooked critical testimony and evidence regarding the important and essential nature of Seay’s work to Celanese’s chemical

manufacturing business. For these reasons, Celanese respectfully submits that the Court should grant rehearing and/or issue a new opinion.

Celanese further requests rehearing en banc, as permitted under Rule 219 of the Appellate Court Rules where: (1) “consideration by the full court¹ is necessary to secure or maintain uniformity of its decisions,” or (2) “the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR. Both criteria are satisfied here. First, the Court’s decision here conflicts with prior statutory employment precedent, including decisions of this Court. Second, it presents a question of exceptional importance—namely, what is the test for statutory employment under South Carolina law? Rehearing en banc, in short, is both appropriate and necessary to address such a fundamental change in policy and law.

Celanese’s Argument

I. The Court ignored legislative and judicial policy and precedent in misapprehending South Carolina’s long-standing statutory employment law.

A. The Court overlooked South Carolina’s governing legislative and judicial policy favoring inclusion under the Act.

First, the Court overlooked the critical policy underpinnings of the statutory employment test. As this Court has recognized, “[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 v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004); *see also Collins v. Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015) (same). This policy serves the legislative goal of providing broad protection to workers. *See Crosby v. Prysmian Commc’ns Cables & Sys.*

¹ Because Judge Hill was the trial judge in this matter and cannot participate in an en banc vote, Celanese requests that the Chief Judge designate a trial judge to perform this function in his place. The spirit of the en banc rule contemplates that the six members of the Court who did not sit on the panel could review the Opinion and vote in favor of rehearing. If Judge Hill is not replaced by another Judge, the purpose of this provision would not be met.

USA, LLC, 397 S.C. 101, 117, 723 S.E.2d 813, 821 (Ct. App. 2012) (“[T]he purpose of our workers’ compensation scheme is to protect workers who have suffered injuries arising out of and in the course of their employment.”); *see also Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) (explaining that “[t]he employee receives the right to swift and sure compensation” and “the employer receives immunity from tort actions by the employee,” and this “quid pro quo approach” has “worked to the advantage of society as well as the employee and employer”). As a result, in the context of a dispute over whether a worker is a statutory employee “[a]ny doubts as to a worker’s status should be resolved in favor of including him or her under the Workers’ Compensation Act.” *Id.*; *see also Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013). As the Supreme Court explained in *Olmstead*, the broad construction in favor of coverage applies equally where the Act is used as a shield to liability under another theory. *Olmstead v. Shakespeare*, 354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003).

Here, the Court ignores this governing policy consideration in its statutory employee analysis. *Any doubts* must be resolved in favor of inclusion, and thus the Court’s analysis should have begun with this overarching principle. Instead, it is devoid of any discussion of this point. The Court’s failure to consider this rule resulted in an erroneous framing of the Court’s analysis, and alone warrants rehearing.

Moreover, the application of this standard—resolving any doubt in favor of inclusion as a statutory employee—conflicts with the Court’s acknowledgement suggesting that this was not a clear-cut case. In this regard, the Court acknowledged the numerous South Carolina cases involving maintenance workers, but held that although Seay’s work was “important to the manufacturing process,” it was not “part of” that process and thus the facts here were “unique.” (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) Rather than resolving all doubts in favor of

inclusion, the Court reached its Opinion by doing just the opposite, mistakenly resolving its doubts in favor of *exclusion*. This warrants rehearing.

B. The standard articulated by the Court conflicts with prior South Carolina precedent.

The Court affirmed and adopted the trial court’s rationale that after the Supreme Court’s decisions in *Abbott* and *Olmstead*, the tests for determining whether a worker is a statutory employee are: (1) whether the activity was “part or process” of the business of the defendant company as declared, and (2) whether the company’s own workers ever conducted the activities completed by the worker. Not so, as this is a substantial departure from South Carolina law which for over three decades has consistently recognized the same three factor statutory employment test, which was not changed by *Abbott* or *Olmstead*.

1. The “part of” language has been in the Act at issue for many years and the three factor test was developed to provide direction to lower courts as to how to apply this language.

Since its enactment, the Worker’s Compensation Act has contained essentially the same language regarding statutory employment. *See* 1936 S.C. Act No. 610, § 19 (explaining that the doctrine applies where a person “undertakes to perform or execute any work which is *part of his trade, business or occupation*” by contracting with another for execution of that work (emphasis added)). Over the years, the courts developed a three factor test to make this statutory employment determination. As the Supreme Court explained in *Olmstead*: “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 v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) (emphasis in original).

The most recent Supreme Court case to address a statutory employment question was *Collins v. Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015).² The *Collins* court reaffirmed the three factor test, stating that the statutory employee relationship depends on the “**nature of the work** performed by the subcontractor.” *Id.* (quoting *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997)) (emphasis in original). The court thus quoted the three factor test, highlighting the words “important,” “necessary, essential, and integral,” and “identical activity.” Quoted verbatim, the court said:

To determine whether the work performed by a subcontractor is a part of the owner’s business, this Court must consider whether (1) the activity of the subcontractor is an *important* part of the owner’s trade or business; (2) the activity performed by the subcontractor is a *necessary, essential, and integral* part of the owner’s business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner.

Id. (emphasis in original). *Collins* is the law—as it has been for decades—and confirms that these three factors remain the key components to examine when reviewing the nature of the work.

The Court here, however, departed from the settled tripartite formulation. Instead it, agreed with the trial court’s myopic analysis that begins and ends with a simplistic, cabined analysis of whether the work activity met the narrow confines of the defendant company’s declared trade or business, but without any regard to the important or essential nature of the work and whether the defendant company had in the past used its own employees for the activity at issue. Under this new standard, which fundamentally differs from the Supreme Court’s controlling three factor test, the degree of importance of the work to the business involved is irrelevant as long as the worker’s activities meet the declared trade or business. This ruling ignores the governing policy of

² Notably, despite being a transportation case, the *Collins* court did not even mention *Abbott* or *Olmstead*, much less suggest that they overruled, or even modified, long-standing South Carolina law.

inclusion, and compounds that mistake by discarding the long established principle that the nature of the work—*i.e.*, how important or necessary it is—drives the inquiry as to whether that work was truly to be considered a “part of” the business involved.

The statutory employment doctrine developed in large measure because the courts sought to implement the policy of inclusion by avoiding an overly narrow, technical analysis of competing arguments about what the company’s trade or business is. The three factor test frames the analysis, and thus examines the work itself in an effort to avoid disputes over what the company’s declared business is by focusing on the tangible question of what the worker actually did for the company. In this manner, the three factor test ensures implementation of the inclusion policy; specifically, that any doubts should be resolved in favor of finding that the employee was a statutory employee.

Mr. Seay was a maintenance worker, but, critically, his work was central and important to Celanese’s manufacturing operations, as he maintained the very manufacturing machinery Celanese depended upon to produce its goods. While routine maintenance of, for example, office space might not be an integral or necessary part of selling a vehicle in a car dealership, for a manufacturing business, maintenance of the manufacturing equipment is essential to—indeed, part and parcel of—the business of producing goods. For a company like Celanese, if the machinery is not maintained, no goods ultimately are produced. Mr. Seay himself agreed with this straightforward proposition. *See* Part I.H *infra*.

Despite agreeing that Seay’s work was “important” to Celanese’s manufacturing operation, the Court nevertheless found his work was not “part of” the business because maintenance was not its corporate purpose. (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) The Court’s conclusion, if not reheard, will lead to undesirable, unworkable, and inconsistent judicial outcomes, contrary to the governing legislative and judicial policy of inclusion. In this regard, consider the following illustration of the problems and confusion created by the Opinion: Under the Court’s Opinion: 1)

if Celanese declared that maintenance was a part of its business, Seay would be a statutory employee; 2) if Celanese never declared maintenance to be part of its business but Celanese employees sometimes did maintenance, Seay would be a statutory employee; yet 3) if Celanese did not declare maintenance to be part of its business and its workers did not do maintenance, Seay would not be a statutory employee. The facts about the work he did never changed, yet his status would vary. This is precisely the type of result the Supreme Court sought to preclude when it articulated the three factor test that centered the analysis on an examination of the nature of the work.

2. The type of work engaged in by Celanese employees is only relevant to the third factor of the *Ost* test.

As the Court acknowledges, the three factor test is an “or” test. The activity thus need only satisfy “one of” the “three criteria” to qualify as a statutory employee. *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003); *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 368, 747 S.E.2d 757, 762 (2013). Nevertheless, the Court’s Opinion finds that Seay’s work was not “part of” Celanese’s manufacturing process because only Daniel employees performed maintenance and repair on the manufacturing equipment. (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) The opinion repeats the trial court’s finding that Seay’s maintenance work was “significantly different” from the work performed by Celanese employees. (*Id.*) But this factor *only* relates to the third factor of the test. See *Collins v. Charlotte*, 412 S.C. 283, 289, 772 S.E.2d 510, 514 (2015) (noting that the third factor is whether “the identical activity performed by the subcontractor has been performed by employees of the owner”). Moreover, it misses the point that the subcontractor’s work is precisely the type of work that Celanese would do (and have to do) in order to manufacture its products had Celanese not subcontracted it out. See n.3 *infra*.

Respectfully, this is an incorrect application of statutory employee precedent recognizing the three factor test. The Court's Opinion supports its conclusion by citing to a statement in a 1999 Supreme Court case that: "[e]mployees who work for the subcontractor but are not employed to do the work that the owner would normally do would not have a statutory employment relationship with the owner." (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 22.) (quoting *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999)). But this statement has no supporting citation in the *Harrell* opinion; nor does it appear to have been repeated or followed in any subsequent decisions absent this one. Moreover, the *Harrell* court never stated, much less suggested, that it was changing the analysis or converting the three factor test into one.

Furthermore, the *Harrell* court's actual holding does not support the Court's characterization of this isolated statement. In evaluating whether the worker's activity satisfied any of the test's three factors, the *Harrell* court, "**focusing on the responsibilities**" that the worker had, found that the work was both "important" and "necessary, essential, and integral." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325, 523 S.E.2d 766, 772 (1999) (emphasis added). The court explained further that without the work of the subject worker, the company "would have had to hire direct employees to complete those duties" and that this "relationship **is exactly the type** that the statutory employer theory is meant to cover." *Id.* (emphasis added).³ The court cited *Carter v. Florentine Corp.* to support this point, which held that "an **absentee landlord** that hired a management company to run its only property was a statutory employer." *Id.* (emphasis added) (citing *Carter v. Florentine Corp.*, 310 S.C. 228, 230, 423 S.E.2d 112, 113 (1992), *overruled on other grounds by Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995)). Applied to

³ This is precisely the situation here—if Celanese had not subcontracted the work out, it would have had to have other employees do the same job, which was necessary for it to manufacture any products at all.

this case, Celanese must maintain its manufacturing machinery in order to produce its goods, and it would have had to hire direct employees to perform that maintenance absent the retention of subcontractor Daniel employees like Mr. Seay.

Celanese's position is well supported, as this Court previously has held that a company need not have had its own employees engage in the same activity in order for that activity to meet the statutory employer test. *See Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986) (“[E]ven 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.”). Moreover, *Harrell* and *Carter* support this point as well. Contrary to these decisions, however, the Court's Opinion here makes employee engagement in the same activity a requirement in order to find inclusion as a statutory employee—a holding that cannot be squared with the decisions in *Raines* and other precedent. Rehearing is both appropriate and necessary under these circumstances in order to correct this misapprehension as well as to clarify the governing law.

C. The Court overlooked that the decisions in *Abbott* and *Olmstead* were not of broad application, but instead, of narrow scope.

1. The questions raised in the appellate briefing in those matters were of limited and narrow scope.

Citing to *Abbott* and *Olmstead*, the Court found these decisions “brought new clarity” to the statutory employment case law and their logic was “binding in the present case.” (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) A careful examination of both decisions, however, reveals that the appellate briefing in each case makes clear the decisions were confined to the transportation worker context and not intended to have the broad scope or reading that the Court gives them here. In finding that these cases changed the three factor test for all types of workers, the Court overlooked this point, as discussed in detail in Celanese's Reply Brief at § I.1.

Significantly, in the worker’s Brief of Petitioner to the Supreme Court in *Abbott*, the worker argued that the work of common carriers falls into a unique category, and thus 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).⁴ Likewise, in *Olmstead*, the appellant argued 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). 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 whether the transportation worker is a statutory employee. *Id.* at 5.

The questions presented in those cases did not seek nor brief a sweeping change in the statutory employment analysis under South Carolina law—a point overlooked by the Court here.

2. The limited context of the “overruling” discussion in the *Abbott* and *Olmstead* decisions did not announce a broad change in the three factor test.

The Court also fails to account for the *Olmstead* court’s analysis of precisely what cases were overruled by *Abbott* and *Olmstead*. The Supreme Court’s discussion is telling, and has significance to the outcome of the case.

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

⁴ 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).

otherwise. *Abbott v. The Limited, Inc.*, 338 S.C. 161, 164 & n.1, 526 S.E.2d 513, 514 & n.1 (2000) (emphasis added). The court went no further than that, and nowhere overruled or suggested it was modifying the three factor test.

In the appellate briefing in *Olmstead*, the defendant company raised the meaning of the “overruling” provision of *Abbott* to the court. In its briefs, the company argued that because *Abbott* only explicitly overruled two prior decisions involving *receipt of goods* from a common carrier, while declining to overrule cases involving other types of activities of common carrier workers, it meant that *Abbott* was limited to cases involving *receipt of goods* by a common carrier. The company cited to statutory employee cases from outside the receipt of goods context which were not explicitly overruled by *Abbott* to support its position. 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).

The *Olmstead* court responded by clarifying that *Abbott* was not limited to the mere receipt of goods, but rather stood for the proposition 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.” 354 S.C. at 425, 581 S.E.2d at 485 (emphasis added). In light of this holding and the company’s argument discussing transportation cases not explicitly overruled by the *Abbott* court, the *Olmstead* court overruled all prior cases “*to the extent they conflicted*” with *Abbott* and *Olmstead*. *Id.* at 426, 581 S.E.2d at 486 (emphasis added). But, again, nothing suggested that the *Olmstead* court was overruling or modifying the three part statutory employee test.

The context of the briefing, arguments, and opinions in both cases thus supports the conclusion that the “overruling” language in these decisions was limited to prior common carrier

cases—not to entirely discard, alter, or modify the three factor test under South Carolina law. In this regard, first, the Supreme Court did not reference changing the three factor test or overrule prior precedent applying it generally. Moreover, second, the *Abbott* court’s explicit focus upon and reference to common carrier cases has to mean something, and the *Olmstead* court’s clarification that *Abbott* concerned “transportation” has meaning. If the Supreme Court intended to change the three factor test for all types of workers to what the Court’s Opinion articulates here, it would have overruled or abrogated *Ost*—the prior Supreme Court decision that was the genesis of the three factor test.⁵

D. No South Carolina cases issued after *Abbott* and *Olmstead* have held, as the Court did here, that the statutory employee test has been changed in the maintenance worker context.

Aside from the present case, two Supreme Court cases and ten Court of Appeals cases have issued since *Abbott* and *Olmstead*; *none* reached the sweeping conclusion that the trial court and this Court did here. In fact, most of these decisions hardly mention *Abbott* or *Olmstead*, much less suggest that they represented a broad, much less revolutionary, change in the law. In fact, when these post-*Abbott* and *Olmstead* cases are cited, it is typically for very general propositions such as *Olmstead*’s repeating of the same three factor test from *Ost*.

The Supreme Court cases are:

1. *Collins v. Charlotte*, 412 S.C. 283, 772 S.E.2d 510 (2015) (transportation worker case that does not cite either *Abbott* or *Olmstead*)
2. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (cites *Olmstead* only for the broad proposition that the court applies the three factor test in examining whether a worker is a statutory employee)

⁵ Both *Abbott* and *Olmstead* cite to the three factor test first formulated in *Ost*. Although the cases cite to *Glass v. Dow Chemical*, 325 S.C. 198, 482 S.E.2d 49 (1997) in reciting the factors, substantively *Glass* sets forth the same standard as *Ost*.

The decisions from this Court without any substantive analysis of *Abbott* or *Olmstead* are:

1. *Ferguson v. New Hampshire Ins. Co.*, 412 S.C. 203, 771 S.E.2d 851 (Ct. App. 2015) (cites *Olmstead* solely for its recitation of the three factors)
2. *Fortner v. Thomas M. Evans Const. & Dev., LLC*, 402 S.C. 421, 741 S.E.2d 538, (Ct. App. 2013) (does not cite to either *Abbott* or *Olmstead*)
3. *Collins v. Charlotte*, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012), *aff'd*, 412 S.C. 283, 772 S.E.2d 510 (2015) (transportation worker case that only cites *Olmstead* for the recitation of the three factor test)
4. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009), *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013) (cites *Olmstead* solely to support the proposition that if the activity at issue satisfies even one of the three factors, the injured worker qualifies as a statutory employee)
5. *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007) (extensively discussing the origin of the statutory employee three factor test and the *Ost* court's analysis, but citing *Olmstead* solely for the proposition that each case must be decided on its own facts)
6. *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004) (cites to the Court of Appeals' opinion in *Abbott* only for the proposition that if a worker is a statutory employer he may not maintain a direct negligence cause of action against the employer and *Olmstead* only for the proposition that the activity need only meet one of the three tests)
7. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 172, 584 S.E.2d 398, 400 (Ct. App. 2003) (same as *Edens* regarding *Abbott*)⁶

Three Court of Appeals cases examined *Abbott* and *Olmstead* in greater detail, but none are helpful to Plaintiff's position here. First, none of the cases suggested that the applicable three factor test was fundamentally altered by these decisions. Moreover, all of the cases involved the question of whether transportation was an important part of the defendant company's trade or business. None involved a maintenance worker, much less a maintenance worker who worked on

⁶ It's noteworthy that the first three decisions following *Abbott* and *Olmstead* barely discussed those decisions.

production lines, and none suggested that the principles from *Abbott* and *Olmstead* were intended to apply beyond the common carrier transportation context.

The first case was *Johnson v. Jackson*, 401 S.C. 152, 156, 735 S.E.2d 664, 665 (Ct. App. 2012). Celanese discussed this case in its briefing. (See Reply Br. at pp. 8-9.) *Jackson* involved a transportation worker engaged in the delivery of goods. The Court cited to *Abbott*, explaining that in it and other transportation cases “**transportation** was not a main and integral part of the defendant’s business.” *Id.* at 164, 735 S.E.2d 664, 670 (Ct. App. 2012) (emphasis added). However, in the case before it, the defendant’s business was transportation of equipment which would include the related tasks of “packing, loading, and unloading, that equipment.” *Id.* Thus, *Johnson* was a transportation case and merely reaffirmed *Abbott* and *Olmstead*’s applicability in that context; it has no general applicability to cases like this one, and most certainly does not supplant the settled three factor test.

Next was *Posey v. Proper Mold & Eng’g, Inc.*, 378 S.C. 210, 219, 661 S.E.2d 395, 400 (Ct. App. 2008), which Celanese also discussed in the briefing. (See Br. of Appellant at pp. 23-24; Reply Br. at pp. 9-10.) This case is instructive and supports Celanese’s position. *Posey* extensively discusses *Abbott* and *Olmstead* but does not find that either decision modified the general statutory employment test. Rather, the Court recognized that the Supreme Court only “addressed statutory employment **in the common carrier context**” in these decisions. *Id.* at 219, 661 S.E.2d at 400 (emphasis added). The *Posey* Court’s analysis thus solely focused on whether the third factor of the test was met, and determined that despite *Abbott* and *Olmstead*, the transportation worker in question was a statutory employee because the owner’s employees previously had conducted similar activities. *Id.* at 221-22, 661 S.E.2d at 401.

The last case was *Cooke v. Palmetto Health All.*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), which Celanese also examined. (See Reply Br. at p. 9.) This was another transportation

case which examined whether airlifting patients met the statutory employment three factor test as part of a hospital's trade or business. In examining *Abbott* and *Olmstead*, the Court did not suggest that the two decisions changed the long-standing three factor test. Rather, the Court cited to *Olmstead* solely for its articulation of the three factor test. *Id.* at 174-75, 624 S.E.2d at 442. Moreover, it cited *Abbott* to support the narrow point that although transportation helped facilitate the hospital's treatment of patients, that fact alone did not make "*transportation* an important or essential part of the hospital's general business." *Id.* (emphasis added).

In short, none of the other cases issued after *Abbott* and *Olmstead* support the Court's formulation of the standard here.

E. In addition to the maintenance worker cases Celanese has cited, other South Carolina appellate decisions support the conclusion that maintenance workers are statutory employees of manufacturers.

The Court dismissed as factually distinguishable the maintenance worker cases Celanese cited in its briefing. Contrary to the Court's suggestion, however, Celanese did not argue that these were binding on the Court, as Celanese acknowledged that each case is fact-intensive. The reason Celanese referenced these decisions is that because they involved similar maintenance work activities, they serve as reliable guideposts for determining whether Seay's maintenance and repair activity satisfy the three factor statutory employee test. There is a longstanding line of South Carolina decisions supporting the conclusion that maintenance can be an important part of a manufacturing business. Those decisions—while not controlling—should not have been disregarded and overlooked in the Opinion.

In addition, there are other maintenance worker cases which found a contractor to be a statutory employer dating back nearly eight decades. The first such case appears to have been *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939). In *Marchbanks*, the Supreme Court held that a contractor "hired to paint telephone poles on behalf of Duke Power was a

statutory employee” because he was “engaged in part of the defendant’s business, because the maintenance of utility poles was necessary to the distribution of electricity.” *Singleton v. J.P. Stevens & Co.*, 533 F. Supp. 887, 888 (D.S.C. 1982), *aff’d*, 726 F.2d 1011 (4th Cir. 1984) (citing *Marchbanks*, 190 S.C. at 365-66, 2 S.E.2d at 837).

Next, in *Boseman v. Pac. Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940), the Supreme Court ruled that the maintenance of the water tank was an integral part of the defendant mill’s business for fire prevention purposes. *See id.* at 483, 8 S.E.2d at 880. As the court explained, testimony showed that the mill desired to have the work done on the inside of the tank as soon as possible “so that its every day, ordinary service, that of fire protection, could be resumed,” as “the mill depended upon this tank for such protection.” *Id.* The “very nature” of the mill’s work, manufacturing “cotton into cloth, especially required the best of protection against fire.” *Id.* Thus, the tank in question “was particularly necessary and essential in the operation and carrying on of the business of the mill.” *Id.* Given these facts, the court concluded that it necessarily followed that painting of the tank was “part of the trade, business or occupation” of the mill, and accordingly, the worker was a statutory employer. *Id.*

Bell v. S.C. Elec. & Gas Co., 234 S.C. 577, 579, 109 S.E.2d 441, 441 (1959) applied *Marchbanks* under similar facts. In *Bell*, the injured worker was employed by a construction company to repair power and transmission lines belonging to the defendant power company. *See id.* The court found that the power company was a “public utility engaged in the manufacture and transmission of electricity,” which “uses poles and wires in its business.” *Id.* at 580, 109 S.E.2d at 442. “[R]epair and maintenance of such poles and wires or the transferring of such from one set of poles to another” was thus “part of its business, trade and occupation.” *Id.* at 580-81, 109 S.E.2d at 442. As a result, the power company was the statutory employer of the worker who performed this work. *See id.* at 581, 109 S.E.2d at 442.

In *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 132 S.E.2d 18 (1963), the Supreme Court again found that maintenance was part of the trade, business, or occupation of the defendant company. In *Bridges*, the defendant manufactured woolen goods. *See id.* at 23. Its machinery was operated by electricity derived in part from its own hydro-electric plant and in part through power purchased from Duke Power. *See id.* The plaintiff's job was to repair and/or replace the electrical transmission line owned by the defendant company, and this power was "necessary for the operation of [the] business." *See id.* The replacement was necessary due to an overload on the system created by the addition of machinery in the mill. *See id.* The *Bridges* court also found that the test's third factor was satisfied because the defendant's employees customarily completed such maintenance work. *See id.*

Next, in *Bailey v. Owen Elec. Steel Co. of S.C.*, 298 S.C. 36, 37, 378 S.E.2d 63, 64 (Ct. App. 1989), *rev'd on other grounds*, 301 S.C. 399, 392 S.E.2d 186 (1990), the Court reached the same conclusion regarding a maintenance worker. In *Bailey*, the defendant company was "in the business of manufacturing steel" by acquiring scrap metal to fabricate it. *Id.* The contractor performed various jobs at the facility, and was injured while connecting an exhaust system to a furnace at the plant. *See id.* at 38, 378 S.E.2d at 64. The Court nevertheless found that all three factors of the *Ost* test were met. Significantly here, the Court explained that the worker was assigned to replace a part of duct work that was beyond repair and, although the furnace could operate without it, law and regulation required the duct system for ventilation. *See id.* at 39, 378 S.E.2d at 64. Therefore, the important and necessary/essential tests were met. *See id.* Moreover, the third prong also was satisfied because the company's employees previously engaged in this activity. *See id.*

Finally, in *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992), the contractor was injured while installing scouring machinery at a Milliken plant. *Id.* at 236, 414

S.E.2d at 181. This Court found that the machinery was “essential to the plant’s manufacture of certain materials,” *id.* at 237, 414 S.E.2d at 181, and therefore the “integral” factor of the test was met, *see id.* Additionally, the test’s third factor was met because Milliken’s workers previously engaged in the activity. *See id.* For both ***independent*** reasons, the worker was held to be a statutory employee.

In rendering its Opinion here, the Court overlooked both of these cases, which further supports Celanese’s position that Seay’s maintenance work was an important, necessary, integral, and essential part of its manufacturing business—a conclusion consistent with (as well as compelled by) the other cases Celanese cited in its briefing.⁷

G. The Court’s reliance on the contractual language between Celanese and Daniel is misplaced.

The Opinion also misapprehended the degree of import to give to the contractual language between Celanese and Seay’s direct employer, Daniel. As this Court and the Supreme Court have previously explained, “[w]hatever the parties contract to call their relationship is not controlling in a statutory employment analysis.” *Fortner v. Thomas M. Evans Const. & Dev., LLC*, 402 S.C. 421, 430, 741 S.E.2d 538, 543 (Ct. App. 2013) (quoting *Harrell*, 337 S.C. at 322, 523 S.E.2d at 770); *see also Wilson v. Daniel Intern. Corp.*, 260 S.C. 548, 197 S.E.2d 686 (1973) (stating that the terminology used by the parties is not controlling of their relationship); *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 174, 584 S.E.2d 398, 401 (Ct. App. 2003) (“Although Hancock characterized the relationship as vendor/vendee, that alone is not controlling in the statutory

⁷ *See Smith v. FCX, Inc.*, 744 F.2d 1378 (4th Cir. 1984); *Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 893 (D.S.C. 1982), *aff’d*, 726 F.2d 1011 (4th Cir. 1984); *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991); *Wheeler v. Morrison Machinery Co.*, 313 S.C. 441, 438 S.E.2d 264 (Ct. App. 1993); and *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).

employment analysis.”). Consistent with this clear direction, the Workers’ Compensation Act makes this statutorily explicit: “No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this Title except as otherwise expressly provided in this Title.” S.C. Code Ann. § 42-1-610.

Focusing as the Opinion does on the contractual language between Celanese and Daniel, therefore, was neither the touchstone much less the most reliable source for determining whether Seay was a statutory employee. This is especially true where, like here, there was testimony and evidence from both Celanese personnel and Seay himself, *see infra*, agreeing that Seay’s work was important and essential to Celanese’s manufacturing business. Moreover, the contractual language quoted in the Court’s Opinion contains no discussion about the precise work that millwrights like Seay performed and its relationship to Celanese’s business. Finally, the contractual language has no more than marginal relevance, at best, because it simply confirms that Daniel employees were not responsible for operating the manufacturing equipment. (*See Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27-28.*) But again, that over-narrow focus does not answer the question under the three factor test, and completely ignores the policy of inclusion.

H. The Court overlooked the testimony of Seay himself, as well as that of another millwright at the Celanese facility, regarding the essential nature of their work.

The Court’s Opinion does not address, much less consider, the testimony of Celanese personnel, Seay, and another Daniel millwright about the important and essential nature of Seay’s work. True, the Opinion notes that it will not automatically assign “probative value to any self-serving” evidence of the defendant company’s representatives.⁸ But in this case, there was much

⁸ Celanese’s corporate representative Bruce Bowyer stated that the maintenance work performed by Daniel was a necessary, essential, and integral part of Celanese’s business. (B. Bowyer, Tr. p.

more than that, as in addition to Celanese's own evidence about the nature of Seay's work, there was testimony of Seay and another millwright at the site—testimony confirming that the three factor test was satisfied. None of this testimony is considered in the Opinion.

As Celanese has explained, Seay testified that his work on the Celanese steam lines was vital (integral) 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.) Seay thus 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.

(*Id.* at 416: 22-25; R. p. 600.) Further, Seay stated:

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.

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. 2409-10, 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.) Finally, 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.)

(*Id.* at 418:3-15; R. p. 602.)

Seay also testified as to the importance of each piece of equipment at the facility in the following colloquy:

Q: Would you agree that each piece of equipment in the factory then was essential to the manufacturing operation?

A: Correct.

(*Id.* at 423:24-424:1; R. pp. 607-08.) Finally, Seay testified that the repairs and preventative maintenance Seay performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility. Seay stated:

Q: Okay. So the preventative maintenance was done to ensure the plant would continue operating?

A: Right.

Q: Would you say that preventative maintenance is essential to the operation of the plant?

A: Very important.

Q: And then in terms of the repairs, the repairs were done either – like some particular type of equipment. I know you talked a lot about the equipment last time. But when one of those pieces of equipment failed, then you would perform a repair; is that fair?

A: Yeah.

Q: Okay. And when there's – the repairs were made, basically, to get the machinery or equipment back up and running so the plant could continue operating; right?

A: Right.

Q: And then you made those repairs, the factory workers could keep doing their jobs; right?

A: Correct.

(*Id.* at 420:5-23; R. p. 604.) Likewise, Seay testified:

Q: And the repairs that you made, were those important to the continued operation of Hoechst?

A: Yes, it was.

Q: And you talked about some preventative maintenance. Was that preventative maintenance necessary to the continued operation of the plant?

A; Very much so.

(Court's Ex. 1, D. Seay Video Dep. at 76:23-77:6; R. p. 1798.)

Ronnie Thompson, another Daniel contractor who worked with Seay at the Celanese facility, further confirmed that Seay's work satisfies the three factor test. (Court's Ex. 2, R. Thompson Video Dep. at 17:4-24; R. p. 1801.) Thompson worked at Daniel with Seay from 1973 to 1975, and explained that Daniel employees performed all of the facility's maintenance work. (*Id.* at 17:4-24, 98:5-12; R. pp. 1801, 1822.) Thompson also testified that the purpose of Daniel's work was to ensure Celanese's production lines remained operational. (*Id.* at 97:6-9; R. p. 1822.) As he explained, keeping the production lines operating was important and integral 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. p. 1822.)

The Court overlooked all of this other testimony, which further supports Celanese's argument about the important and essential nature of Seay's work. The failure to consider this evidence in the Opinion, combined with the principal emphasis of the contractual language between Daniel and Celanese, reflect a misapprehension of the proper analysis under South Carolina statutory employee precedent. Under these circumstances, rehearing is warranted.

I. Rehearing is warranted on the statutory employee issue.

Undisputed evidence before the Court shows that Celanese satisfied the three factor test regarding the status of Mr. Seay. Only by departing from and misapprehending South Carolina statutory employment law, particularly the policy of inclusion and the three factor test, was the trial court as well as this Court's Opinion able to reach the contrary conclusion that Seay was not Celanese's statutory employee. Accordingly, we respectfully submit that the Court should grant rehearing and/or issue a new opinion holding that Seay was a statutory employee of Celanese.

II. The Court also misapprehended the degree of taint by outside influences on the jury.

The Opinion overlooked or misapprehended the serious issues relating to Juror #16. The trial record supports that the jurors: (1) discussed aspects of the case, and Juror #16's connection to Celanese, prior to the designated time, and (2) were aware of Juror #16's conflict of interest and his dismissal by the Court without any explanation. Given these facts, under either *State v. Aldret*'s standard for premature deliberations or *State v. Harris*'s standard for outside influences, a mistrial was warranted. *See Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (explaining that the Court may order a new trial if it determines the premature discussions were prejudicial); *Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (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").

In rejecting Celanese's appeal on the Jury #16 issue, the Court misapprehended the degree of prejudice to Celanese. True, the Court faults Celanese for not having direct evidence of any prejudice—but the existence of such direct evidence is almost always a truism—the prejudice has to be inferred from objective record facts. And here, there was a very large verdict, which is strongly indicative of prejudice.

In addition, the Court overlooked the negative implications for Celanese that Juror #16's dismissal created. Juror #16 admitted he told the other jurors he worked at the same plant doing the same job, and that somebody asked about asbestos. (Tr. 573:12-574:9.) When raising the issue to the Court, the bailiff stated *on the record in front of all of the other jurors* that one juror "feels it's a conflict of interest" for him.⁹ (Trial Tr. 514:13-5; R. 698.) After the court conducted the

⁹ Juror #16 said he tried to let the court know the previous day, but the message was not properly relayed. (Tr. at 518:8-11; R. p. 702.) This also resulted in additional prejudice to Celanese because the taint of Juror #16's presence remained for an entire day of trial longer than it should have.

first conversation with him, the trial judge *explicitly cautioned* him not to discuss *anything* from that conversation with the other jurors. (Tr. 524:4-7; R. 708.) When he went back in after the first conversation with the trial judge, the other jurors asked him what happened. (Tr. 574:16-21; R. 758.) Ignoring the Court's instruction, he proceeded to *tell them what happened*—that the judge asked a question about whether the conflict was going to affect his judgment. (Tr. 574:574:23-575:3; R. 758-59.) The trial judge then dismissed him. Despite the dismissal, the trial judge did not give *any explanation* to the jury or provide a curative instruction.

These objective facts constitute strong circumstantial evidence of outside influences. The jurors were aware that Juror #16 worked at the same place doing the same job as Seay, felt he had a conflict of interest, the trial court asked him about the conflict and its impact on his ability to be fair and impartial and despite warning him not to tell other jurors about this he told them anyway, and he then was dismissed without further explanation. The only reasonable conclusion the other jurors could reach was that the conflict and inability to be fair and impartial was the reason for his dismissal. This point was further bolstered by the trial court's final instruction that the jury was selected because the parties believed they could be fair and impartial and free from bias or prejudice—suggesting Juror #16 could not be in light of his dismissal. (See Tr. p. 1463:7-12; R. p. 1647.)

The Court also faults Celanese for not requesting voir dire of the other jurors, but this misapprehends the standard, and also ran the risk of making matters even worse. First, although Celanese could have requested that the trial court ask the jurors what was discussed, it could not have requested questioning about their opinions on Juror #16 and how his dismissal would impact their view of the case. Second, voir dire is not *required* by *Aldret* or *Harris*. As the *Aldret* court explained, “[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.’” 333 S.C. 307, 509 S.E.2d 811

(quoting *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993)) (emphasis added). *Harris* did not discuss voir dire of the other jurors. *See generally* 340 S.C. 59, 530 S.E.2d 626. Last, the Court also overlooked Celanese's discussion of the unique procedural circumstances here where the trial court denied the mistrial motion from the bench before engaging in further discussion with Juror #16. The Judge should have made the jury inquiry prior to ruling on the mistrial motion.

The objective record facts strongly support the conclusion that the jury's verdict was fundamentally tainted by the premature deliberations and the outside influence of Juror #16's conflict and dismissal without explanation or curative instruction. This problem should be addressed on rehearing.

III. The Court overlooked the prejudicial video's conflict with the purpose behind a day-in-the-life video and its highly unnecessary nature in this case.

The Opinion reflects a misapprehension about the issue preservation issue in light of how the video in question was used at trial. Celanese does not dispute that South Carolina law requires a "contemporaneous" objection. Rather, Celanese's argument is that it is appropriate (and necessary) to relax the requirement here due to the way the events unfolded in this case. There was a lack of clarity regarding the content of the video, and Defense counsel objected as soon as they became aware that the video was not one of the numerous exhibits that were previously agreed to by consent of the parties. The inflammatory nature of the video further supported an exception to the general rule in light of *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). Finally, the Court misapprehended the preservation rules by dismissing Celanese's objection that introduction of the video was "highly improper" as insufficiently specific. Although an objection must be sufficiently clear, an issue is also preserved where it is clear from the record that the trial court understood the nature of the objection. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013); *see also* Rule 103(a)(1), SCRE (stating for alleged errors in

evidentiary rulings to be preserved, “a timely objection or motion to strike” must appear in the record “stating the specific ground of objection, *if the specific ground was not apparent from the context*” (emphasis added). The record supports that the trial court understood the nature of Celanese’s objection, and that the grounds were apparent, as it did not ask for clarification and proceeded to rule on the issue. (See Tr. pp. 766:2-777:4, R. pp. 950-61.)

Additionally, the Court overlooked Celanese’s discussion of the purpose and acceptable uses of day-in-the-life videos. As this Court has explained, such a video is appropriate when it is a realistic depiction of the subject’s condition or quality of life. 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). Such 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). The video clip *solely* portraying Seay crying out repeatedly to Jesus in pain was not a realistic depiction of a day in his life or the impact of his condition on day-to-day activities. The Court overlooked this critical issue.

Finally, the Court failed to address or consider the degree of impropriety of the video. In fact, the Court in its Opinion supports the utter lack of necessity of the video. As the Court acknowledged, the trial court found that the jury heard other evidence that Seay “died an agonizingly painful death.” (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 31.) Likewise, as the Opinion notes, other evidence and testimony in the record supported that mesothelioma is a particularly bad cancer, requiring “a lot of pain medication,” and caused Seay to suffer “enormously.” (*Id.* at 34.) This reinforces that the video of Seay crying out in pain to Jesus was wholly unnecessary, cumulative, and completely designed to foment passion and inflame the jurors.

All of these issues support granting rehearing and/or issuing a new opinion reversing the trial court and ordering a new trial.

IV. The Court overlooked and misapprehended Celanese's excessive verdict argument.

The record establishes that the verdict in this matter is well out of line with other mesothelioma verdicts and South Carolina wrongful death cases. In rejecting this argument, the Court seized on a statement from trial counsel conceding in a reply brief that there may have been higher mesothelioma verdicts from other jurisdictions. But the possibility of aberrational verdicts is not the rule, as what has been overlooked are the numerous mesothelioma cases detailed by Celanese with substantially lower verdicts than the verdict here. The mere fact that there might be outlier verdicts in other jurisdictions has no bearing on whether the verdict is excessive under South Carolina law.

Finally, the Court should not have stated in its Opinion that the Respondent had made a "compelling case" of a "culture of concealment." There was no issue in the appeal relevant to such a statement. Celanese of course disputes that there was any "culture of concealment," but regardless, no issue in the appeal warrants any discussion of corporate culture. Therefore, this should be excised from the opinion as it was unnecessary, prejudicial to Celanese, and had no bearing on any issue before the Court.

Conclusion

For the reasons discussed above, as well as those set forth in Celanese's appellate briefs, which are incorporated herein, this Court should grant rehearing and rehearing en banc, and issue a new Opinion reversing the decision and judgment of the trial court.

Signature on Following Page

Respectfully submitted,

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February 28, 2019

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

RECEIVED
FEB 28 2019
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.

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):

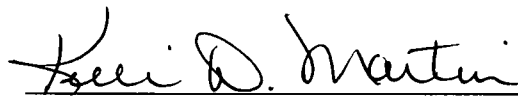
Pleadings: **Petition for Rehearing and Suggestion for Rehearing En Banc**

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A handwritten signature in cursive script, reading "Kelli D. Martin", written in black ink. The signature is positioned above a horizontal line.

Kelli Diamond Martin
Sr. Administrative Assistant

Dated: February 28, 2019.



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February 28, 2019

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia SC 29201

RECEIVED
FEB 28 2019
SC Court of Appeals

RE: Angie Keene, as Personal Representative of the Estate of Dennis Seay and Linda Seay, Individually v. 3M Company, et al.
Civil Action No. 2013-CP-42-03915
Appellate Case No. 2016-000227
Our File No. 046697/01501

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of a *Petition for Rehearing and Suggestion for Rehearing En Banc* in the above-referenced matter. We would appreciate it if you would file the original and return a clocked copy to us via our office's courier.

By copy of this letter to all counsel, we are hereby serving them with a copy of the above referenced pleading.

Very truly yours,

Blake T. Williams

BTW:kdm

Enclosures

cc: Theile B. McVey, Esquire
Blake A. Hewitt, Esquire
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