

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

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

RECEIVED
MAR 15 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.

RETURN

This return is filed pursuant to the Court's request. Respectfully, the petition for rehearing should be denied.

- A. There is no confusion about the test for statutory employment. Multiple precedents explain there is no easily applied formula and that each case turns on its own facts.**

Even though there is a three factor "test" for statutory employment the precedents say "no easily applied formula can be laid down" and "[e]ach case must be determined on its own facts." *Ost v. Integrated Prods.*, 296 S.C. 241, 244, 371 S.E.2d 796, 798 (1988); see also *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003); and *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997). This is because the parts of the three-factor "test" are means to an end. They are not ends themselves.

The goal of statutory employment is to sweep inside the protection of the Workers' Compensation Act everyone who is engaged in work that is truly a part of the owner's business. The end game, according to precedent, is to avoid the situation where an employer passes off core components of the business to small contractors and uses that out-sourcing to avoid insuring the workforce against the cost of industrial accidents.

Professor Larson's treatise explains:

From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction, or transportation service. The test ... is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.

Dickerson v. Eastman Kodak Co., 569 F. Supp. 1221, 1224 (D.S.C. 1983) (quoting the treatise). Professor Larson specifically mentions that almost any repair and construction work could be characterized as "useful, necessary, or even absolutely indispensable." Successful businesses do not typically hire outside contractors to do *unimportant* work. The key feature is whether the work is normally done through employees. The opinion in this case properly recognizes and acknowledges these principles.

The same recognition drove the circuit court's decision. In the pre-trial hearing on statutory employment, the circuit court noted a Fourth Circuit case explaining:

Practically all of the cases of general interest interpreting this type of statute are addressed to one question: When is the subcontracted work part of the regular business of the statutory employer? The statutory language lying behind this question varies somewhat; . . . But, with a surprising degree of harmony, the cases applying these assorted phrases agree upon the general rule-of-thumb that the statute covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees.

Corollo v. S. S. Kresge Co., 456 F.2d 306, 312 (4th Cir. 1972) (cited at R.p.1708). Every manufacturing plant requires maintenance. That is not remarkable. The key question is whether maintenance and construction is the sort of work Hoechst Celanese ordinarily did through employees or that similar businesses would ordinarily do through employees. The circuit court and this Court correctly found, on this record, the answer was “no.”

Rather than acknowledge precedent’s command that each case is decided on its own facts, Appellant’s premise appears to be that transportation cases are a category of their own and that maintenance workers are always statutory employees of manufacturers. No precedent supports this categorizing of statutory employment by job type.

Also, as noted during the oral argument, Appellant’s approach of determining statutory employment by profession directly conflicts with modern precedent on employment status. The law allows parties to define the nature of their relationship as one of “independent contract” when the independent contractor procures workers’ compensation coverage. *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 301, 676 S.E.2d 700, 703 (2009). Daniels Construction had workers’ compensation coverage. Daniels also had a maintenance and millwright division. Daniels had that division because Daniels was in the maintenance and millwright business. Hoechst Celanese was not in the maintenance and millwright business. That is why Hoechst hired Daniels.

B. The opinion properly recognizes that the record lacks the most useful evidence one would see if construction or maintenance was legitimately part of Hoechst’s business.

The record in this case does not contain the most useful evidence one would expect to see if construction or maintenance was legitimately *a part of* Hoechst’s business. There

are no articles of incorporation or statements of corporate purpose describing Hoechst's business as including construction or industrial maintenance. Those sorts of things have been featured in some of these sorts of cases. See *Cooke v. Palmetto Health All.*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005); *Raines v. Gould, Inc.*, 288 S.C. 541, 545-546, 343 S.E.2d 655, 658 (Ct. App. 1986).

Here, there is nothing beyond the predictable witness testimony that maintenance and repairs were necessary for this manufacturing plant to operate. Of course that work was necessary. Maintenance is almost always necessary. The thing that matters, however, is that the record does not show Hoechst ordinarily did maintenance work through employees or that employers in a similar business would ordinarily do that work through employees.

C. The repeated encouragements to read the Workers' Compensation Act broadly are inconsistent with the fact that Appellant seeks to deny protection and compensation.

The law of workers' compensation is construed liberally and in favor of coverage in order to serve its beneficent purpose. Several cases say this. *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015); *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015); *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

The Workers' Compensation Act was designed to protect the welfare of working people. *Phillips v. Dixie Stores*, 186 S.C. 374, 380, 195 S.E. 646, 648 (1938). Its provisions are construed "liberally in favor of employees and their dependents ... and to avoid incongruous or harsh results." *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 168, 14 S.E.2d 889, 894 (1941).

“[H]umane principles” should guide the Act’s interpretation and the Act is to be construed “to promote justice and the public welfare.” *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 75, 7 S.E.2d 712, 716 (1940). The Act’s purpose was to “assure the employee of redress for his injuries.” *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 363, 2 S.E.2d 825, 836 (1939).

Dennis Seay’s work at the plant owned by Hoechst Celanese killed him. There is no dispute about that. It is equally indisputable that there is no coverage or protection under the Workers’ Compensation Act for him.

This Court’s analysis on statutory employment stands on its own. There are no doubts to resolve one way or another. It is evident from this record that the reason Hoechst hired Daniels is because Daniels was in the construction and maintenance business; Hoechst was not.

Having said there are not doubts to resolve, the idea that a finding of statutory employment in this case would fit the Act’s beneficent purpose is a joke. It is every bit as laughable as Mr. Seay’s death is tragic.

D. The opinion correctly decides the remaining issues.

It would be difficult to square a contrary ruling on the alleged juror misconduct with the rule that an issue is barred from appeal unless the complaining party has first raised the same issue and argument to the circuit court. Appellant seems to fault the circuit judge for not taking the initiative to examine members of the jury. That has error preservation principles backwards. Appellant was obligated to ask the judge to do this before complaining about the procedure on appeal. Instead of asking the court to investigate the

matter or reconsider the court's statement that there did not appear to be premature deliberations, Appellant sought a mistrial with no proof one was necessary. (R.p.750); see also *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000) (mistrial should only be granted when absolutely necessary).

Also, Appellant's argument was not even based on premature deliberations. Appellant's chief objection to the circuit court was a variation on the rule about the failure to disclose information that would have been a material factor in the use of a party's peremptory strikes. (R.pp.750-751); see also *Thompson v. O'Rourke*, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986) (intentionally concealed information is disqualifying when it would have supported a challenge for cause or have been a material factor in the use of peremptory strikes). Appellant's other argument was that the panel somehow became "tainted" when they learned nothing other than the fact that the juror in question worked at the same manufacturing plant. *Id.*

Regarding the video that showed Mr. Seay in pain, it is difficult to see how Appellant's argument on the video's admission squares with the rule requiring a contemporaneous objection, the rule that cumulative evidence is generally harmless, and the rule about a curative instruction being sufficient to solve most evidentiary errors. Appellant did not contemporaneously object, the video was cumulative, and Appellant did not request a curative instruction. Instead, as with the alleged juror misconduct, Appellant sought a mistrial. (R.pp.950-956).

Finally, the damages awards are not excessive, much less grossly excessive. Dennis Seay experienced unrelenting pain before his premature death from mesothelioma. His

spouse and children watched him suffer and his family has suffered a tremendous loss. These things are not seriously disputed and cannot be seriously disputed.

The petition for rehearing expresses displeasure at the opinion's description of evidence Hoechst had a culture of concealment. That description was faithful to the record and is relevant to the jury's punitive verdict: Appellant argued the jury's verdict was not founded on the evidence and was driven by passion, caprice, and prejudice. It was only natural for the Court to describe why the evidence justifies the verdict.

It is also worth noting that an appellate court must view the facts in the light most favorable to the plaintiff in evaluating a challenge to a verdict's amount. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).


The petition for rehearing should be denied.

Respectfully Submitted,

March 15, 2019

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Appellant with a copy of the *Return to Petition for Rehearing* by mailing
copies of the same by United States Mail with first class postage prepaid to the following
address:

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March 15, 2019



Erin Bridges

March 15, 2019

VIA HAND DELIVERY

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

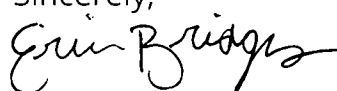
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RE: Angie Keene v. CNA Holdings
Case Tracking No.: 2016-000227

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Return to the Petition for Rehearing* in reference to this case. I have also enclosed a proof of service of this document upon counsel for Appellant. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,


Erin Bridges
Paralegal to Blake A. Hewitt
Bluestein Thompson Sullivan, LLC

/emb

Enclosures

cc: Theile B. McVey, Esquire
C. Mitchell Brown, Esquire
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