

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.

**REPLY IN SUPPORT OF PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

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Introduction

Respondents' Return fails to address fundamental errors, and misconstrues Celanese's arguments. The Court should grant rehearing because, respectfully, it overlooked and/or misapprehended: (1) the proper and controlling three factor test for examining the statutory employment question in South Carolina and the evidence showing that Seay's work activity was an important and necessary part of Celanese's manufacturing business; (2) the significant taint of outside influence on the jury arising from the circumstances surrounding Juror #16's dismissal; (3) the highly prejudicial nature of the purported "day in the life" video of Seay crying out in pain to Jesus; and (4) the excessiveness of the verdict, which resulted from these extraneous and improper issues impacting the jury.

Furthermore, the Court should grant Celanese's request for rehearing *en banc* due to the conflict between the Court's decision and prior statutory employment precedent and the exceptional importance of the questions raised. Respondents do not contest the suggestion for *en banc* consideration.

Summary

Respondents' position in their Return confirms that Respondents maintain we no longer have the three factor test set forth in *Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 371 S.E.2d 796 (1988). First, Respondents argue that *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) changed the *Ost* test. This cannot be true given that *Abbott* and *Olmsted* continued to apply the three factor test, which is why other cases following those decisions also continue to apply the three factor test. Second, Respondents would have the Court rule that unless the business has stated the activity involved is part of its business or unless the business used its own employees to perform the

activity involved, then there is no statutory employment for one engaged in such activity. This too is an attempt to overrule and reject the *Ost* test—as well as the many cases admonishing courts to liberally construe the statutes to find inclusion of workers as statutory employees.

Under the test the Respondents posit, and contrary to the State’s established liberal policy of inclusion, a company could start a new business, narrowly describe the type of business, and then principally use independent contractors. In this situation, workers’ compensation coverage would be largely, if not entirely, avoided. The business would be new and thus never have had any employees performing any work. Moreover, the narrow definition of the business would exclude everyone not engaged in that narrow activity. For example, assume Celanese was a new business and labeled its business “sale and distribution of fibers.” Further assume Celanese used independent contractors to manufacture all of the fibers it sold and distributed, and used independent contractors to maintain and repair the manufacturing equipment. Under Respondents’ position, no independent contractor who manufactures the fibers, maintains the manufacturing equipment, or repairs the manufacturing equipment could be a statutory employee because: 1) those persons are not in sales or distribution; and 2) Celanese had no former employees doing the manufacturing, maintenance, or repair jobs. This cannot be the correct result in light of the *Ost* test, which implements the statute’s policy favoring inclusion of workers as statutory employees and the resolution of all doubts in favor of such inclusion. The application of the *Ost* three factor test would mean that such manufacturing, maintenance, and repair workers would be covered.

I. The Court’s decision misapprehended and/or overlooked long-standing principles of South Carolina law—as Respondents’ Return confirms.

A. The Court misapprehended the proper standard.

South Carolina courts *consistently* apply *Ost*’s three factor test to determine whether a worker is a statutory employee.¹ Although Respondents’ truism that each case must be determined on its own facts is obvious, the three factor test applies in *every* statutory employment case in South Carolina to guide and direct the court into how to make the statutory employment determination. As the Supreme Court explained in *Collins*, the Court “*must*” consider the three factor test. 412 S.C. at 289, 772 S.E.2d at 514 (emphasis in original).

To support their position, Respondents rely on 36 year old federal district court case (1983), which quoted a general treatise analyzing nationwide workers’ compensation law. *See Dickerson v. Eastman Kodak Co.*, 569 F. Supp. 1221, 1224 (D.S.C. 1983) (quoting *Larson’s Workmen’s Compensation Law* § 49.12 at 9-53 (1982)). But with respect, what does that general, decades-old decision have to do with this case or the current law of this State? In this regard, *first*, the *Dickerson* case predated *Ost*, which first distilled South Carolina’s statutory employee law down into the three factor test. *See Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 371 S.E.2d 796 (1988). *Second*, *Dickerson* is a transportation case, along the lines of *Abbott* and *Olmstead*. *Third*, the quoted portion from the Larson’s treatise stating that the relevant inquiry is whether a worker’s indispensable activity is “in that business, normally carried on through employees rather than independent contractors” directly conflicts with both the three factor test and South Carolina

¹ *See, e.g., Collins v. Charlotte*, 412 S.C. 283, 289, 772 S.E.2d 510, 514 (2015); *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 368, 747 S.E.2d 757, 762 (2013); *Ferguson v. New Hampshire Ins. Co.*, 412 S.C. 203, 210, 771 S.E.2d 851, 855 (Ct. App. 2015); *Fortner v. Thomas M. Evans Const. & Dev., LLC*, 402 S.C. 421, 431-32, 741 S.E.2d 538, 544 (Ct. App. 2013) (these are the two most recent Supreme Court and Court of Appeals cases examining a statutory employee question, all of which applied the three part test).

authority.² 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.”). Whether the work has been done by the owner’s employees is only one prong of South Carolina’s test, which instead focuses on the “**nature of the work.**” See *Collins*, 412 S.C. at 289, 772 S.E.2d at 514 (emphasis in original).

The trial court’s analysis at the pretrial hearing suffers from the same deficiency. The trial court also cited to a federal case predating *Ost*, quoting this same language from Larson’s. (See Hearing Tr. at 26:19-27:12; R. pp. 1707-08 (quoting *Corollo v. S.S. Kresge Co.*, 456 F.2d 306 (1972).) Respondents’ reliance on this dated discussion is misplaced.³

Furthermore, contrary to Respondents’ suggestion, Celanese has not contended that *all* maintenance workers are statutory employees of manufacturers. Nor is such a broad question before the Court. However, the common carrier transportation worker cases *do* represent a separate fact pattern category with a specialized standard governed by *Abbott* and *Olmsted*, and thus do not apply here for the reasons discussed in Celanese’s Petition and merits briefing. Celanese’s position has consistently been that under the *facts of this case*, *Seay’s work* was an

² In a South Carolina centric treatise—the respected *The Law of Workers’ Compensation Insurance in South Carolina*, the author correctly notes that “South Carolina follows the rule in maintenance and repair cases that ‘a person is performing the trade, business or occupation of an owner if he is engaged in work that is essential to the function of the employer’s business, even if the employer never performed that particular work with its own employees.’” Grady L. Beard et al., *The Law of Workers’ Compensation Insurance in South Carolina*, (6th Edition 2012).

³ Additionally, the holding of *Corollo* supports Celanese’s position on this point. The plaintiff there worked in the millinery department in a K-Mart store. *Corollo*, 456 F.2d at 307-08. K-Mart “had never been engaged in the millinery business.” *Id.* at 312. The court explained, however, that the relevant inquiry “was not whether K-Mart as owner was engaged in the millinery business or had ever been, but whether [the] millinery business was a part of the business of K-Mart which was that of operating a department store.” *Id.* at 312.

important, necessary, essential, and integral part of Celanese’s manufacturing business since he maintained the very manufacturing lines that made the product. Those are indeed the only facts before the Court. The maintenance worker cases cited by Celanese, particularly those from the manufacturing context, bolster this conclusion. As Celanese explained in its Petition, all maintenance work may not always necessarily satisfy the three factor test. However, critical maintenance work on the production lines themselves in a manufacturing plant that enables the manufacturer to continue operating is an important and necessary part of a manufacturer’s business—as the evidence below showed.

Respondents next invite the court to improperly conflate statutory employment principles with the independent contractor/employee analysis. The Supreme Court examined this argument in *Collins*, and rejected it. *See* 412 S.C. at 288, 772 S.E.2d at 513 (affirming the Court of Appeals, which found that the Workers’ Compensation Commission “committed an error of law when it applied the employee/independent contractor test instead of the statutory employee test,” since “active control of the worker is not the focal point” of the statutory employee test). This conflation should be rejected here as well.

Finally, Respondents’ Return makes no attempt to respond to Celanese’s argument about the limited nature of *Abbott* and *Olmstead*. Likewise, it fails to address Celanese’s salient observation that *no other* South Carolina appellate decision following *Abbott* and *Olmstead*, aside from the Court’s decision at issue here, found that those cases represented a wholesale change in the statutory employee tests which control in South Carolina. *See* Pet. for Rehearing Part I.D (discussing the other twelve decisions following *Abbott* and *Olmstead*).

For all of these reasons, therefore, Respondents fail to justify the critical flaws with the Court's misapplication of the law, as Celanese's Petition explains. As a result, the Court should grant rehearing *en banc* or rehearing and revise its opinion accordingly.

B. The Court overlooked the record evidence showing that Seay's work satisfied the three factor test.

South Carolina courts have never suggested that articles of incorporation or statements of corporate purpose are the best evidence for examining statutory employment. If that were the case, then companies could draft articles and statements in a way designed to limit or eliminate altogether their statutory employment responsibility. Respondent's assertion to the contrary lacks merit, as it is contrary both to the statute's purpose as well as case law. Although courts may have looked to these documents on occasion, they have also relied on testimony and affidavits in making the determination. *See, e.g., Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 264, 437 S.E.2d 156, 158 (Ct. App. 1993) (affidavit); *Gentry v. Milliken & Co.*, 307 S.C. 235, 237, 414 S.E.2d 180, 181 (Ct. App. 1992) (testimony).

Additionally, Respondents attempt to minimize the testimony elicited at trial as "predictable" ignores the inconvenient and undisputed fact that much of the testimony was from Seay himself and another Daniel millwright. Unlike the Court's characterization of the affidavit and testimony from Celanese's corporate representative as "self-serving," these witnesses had no ulterior motive to testify in a way that was favorable to Celanese's position. Yet they did.

Finally, Respondents *agree* that the evidence and testimony support that the second prong of the *Ost* test is satisfied here, as they acknowledge that Seay's work was necessary to Celanese's manufacturing operation. Nevertheless, they repeat their argument that the Court properly stated the test as whether Celanese ordinarily did maintenance work through its own employees or described its work as maintenance. But as Celanese has explained, this is an incorrect statement

of the law and warrants rehearing, particularly in light of the considerable evidence and testimony overlooked by the Court which establishes just how important and necessary Seay's work was to Celanese's manufacturing business.

C. The Court overlooked Celanese's policy arguments.

Celanese's Petition explained that the policy of the Workers' Compensation Act favors inclusion and any doubts should be resolved in favor of coverage. Respondents' argument that Celanese's position is a "joke" is a strange one because Respondents' argument is the same one rejected by *Olmsted*. There, the plaintiff argued that the broad construction in favor of coverage 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. Rejecting this argument, the *Olmstead* Court stated 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). Hence, while Respondents disagreed with Celanese's reliance on the holding in *Olmstead*, that holding is not a "joke," but is instead the law.

The Court overlooked these important principles underlying the statutory employee analysis, which warrants rehearing.

II. The Court also misapprehended and/or overlooked the premature jury deliberation, prejudicial video, and excessive verdict issues.

Respondents fail to address the strong circumstantial evidence of prejudice created by the events surrounding Juror #16. Moreover, contrary to Respondents' suggestion, *voir dire* of the other jurors was not required to preserve the issue. Finally, Celanese properly raised and preserved its objection to Juror #16's continued participation in the matter, and the trial record supports that

the conclusion that the Court understood the nature of the objection. *See* Rule 103(a)(1), SCRE; *State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013).

As to the video evidence, Respondents ignore key issues raised by Celanese. First, Celanese’s Petition explains why the preservation standard was met. Respondents’ return sets forth no substantive counterargument and merely asserts it was not. Second, the video evidence was *highly prejudicial*, and its cumulative nature amplified the prejudice due to its utter lack of value to the jury aside from inflaming its passions. Finally, Celanese noted that this was an improper “day in the life” video. Respondents do not address either of these points—confirmation that the evidence was far from harmless.

Regarding the excessive verdict, Respondents fail to rebut Celanese’s argument about this verdict being out of line with other mesothelioma verdicts rendered around this time, particularly regarding loss of consortium. Finally, Celanese did not raise any appellate issue specifically attacking the punitive damages award, and thus the “culture of concealment” discussion in the Opinion was unnecessary and irrelevant to any issue raised. The video and juror issues went to liability and actual damages generally, and the excessive verdict argument looked to other mesothelioma verdict amounts. At a minimum, then, this “culture and concealment” language should be excised from the Court’s opinion. Rehearing *en banc* and rehearing, in short, is warranted.

Conclusion

For the reasons discussed herein and as well as those in Celanese’s Petition for Rehearing, the Court should grant rehearing *en banc* and rehearing and issue a new Opinion reversing the decision and judgment of the trial court.

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Respectfully submitted,

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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: **Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc**

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A handwritten signature in cursive script, appearing to read "Eileen Hindman", written over a horizontal line.

Eileen Hindman
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Dated: March 22, 2019



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The Honorable Jenny Abbott Kitchings
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RE: Angie Keene, as Personal Representative of the Estate of Dennis Seay and Linda Seay, Individually v. 3M Company, et al.
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 **Reply in Support of a Petition for Rehearing and Suggestion for Rehearing En Banc** in the above-referenced matter. Also enclosed is our check in the amount of \$50.00 for the required filing fee. 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.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

by

Blake T. Wilkins w/ permission
C. Mitchell Brown

CMB:eh

Enclosures

cc: Theile B. McVey, Esquire
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The Honorable Jenny Abbott Kitchings
March 22, 2019
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