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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Judge

Appellate Case No. 2019-000816
Case No. 2013-CP-42-3915

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

v.

CNA Holdings, LLC..... Petitioner.

APPENDIX
VOLUME VII

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**APPENDIX
INDEX**

VOLUME ONE

Record on Appeal Vol 1	1
------------------------------	---

VOLUME II

Record on Appeal Vol 2	435
------------------------------	-----

VOLUME III

Record on Appeal Vol 3	924
------------------------------	-----

VOLUME IV

Record on Appeal Vol 4	1418
------------------------------	------

VOLUME V

Record on Appeal Vol 5	1913
------------------------------	------

VOLUME VI

Record on Appeal Vol 6	2272
------------------------------	------

VOLUME VII

Final Brief of Appellant.....	2744
-------------------------------	------

Final Brief of Respondent	2798
---------------------------------	------

Final Reply Brief of Appellant.....	2826
-------------------------------------	------

Court of Appeals Opinion, February 13, 2019	2854
---	------

Appellant CNA Holding, LLC's Petition for Rehearing and Suggestion for Rehearing En Banc, February 28, 2019.....	2878
---	------

Respondent Keene's Return to Petition for Rehearing and Suggestion for Rehearing En Banc, March 15, 2019.....	2909
--	------

Appellant CNA Holding, LLC's Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc, March 22, 2019	2917
---	------

Order Denying Petition for Rehearing, May 13, 2019	2929
--	------

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In The Court of Appeals

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APR 26 2017

SC Court of Appeals

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

Respondents,

v.

CNA Holdings, LLC

Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	Error! Bookmark not defined.
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
ARGUMENT	8
I. SEAY WAS CELANESE'S STATUTORY EMPLOYEE UNDER SOUTH CAROLINA LAW	9
A. South Carolina Law on statutory employees is to be construed liberally	9
B. The trial court incorrectly held that the maintenance work done by Seay was not an important and essential part of Celanese's business	12
C. Analogous case law supports finding that Seay was a statutory employee of Celanese	15
1. Prior decisions from South Carolina courts have held that a worker was a statutory employee under similar facts	15
2. Other authorities support a finding that Seay was a statutory employee of Celanese	18
D. The trial court incorrectly interpreted the cases it relied on in finding that Seay was not a statutory employee of Celanese	21
1. <i>Olmstead</i> and <i>Abbott</i> do not support a finding that Seay was not a statutory employee of Celanese	21
2. The trial court's reliance on cases involving construction workers, such as <i>Raines v. Gould</i> , was also misplaced	25
II. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL AFTER LEARNING THAT THE JURY PREMATURELY DELIBERATED AND CONSIDERED OUTSIDE INFLUENCES	28
A. South Carolina law supports finding that the trial court should have declared a mistrial	30
III. THE TRIAL COURT ERRED BY REFUSING TO EXCLUDE UNAUTHORIZED VIDEO OF SEAY CRYING OUT FOR JESUS TO HELP HIM AND BY FAILING TO GRANT CELANESE'S MOTION FOR A MISTRIAL	34
A. This Court is not precluded from reversal on this ground by the lack of contemporaneous objection, under the circumstances here	35
B. The Trial Court erred by refusing to exclude the video and by refusing to grant Celanese's motion for a mistrial	36

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT A NEW TRIAL DESPITE A GROSSLY EXCESSIVE VERDICT	40
CONCLUSION	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abbott v. The Limited, Inc.</i> , 338 S.C. 161, 526 S.E.2d 513 (2000).....	21, 22
<i>ACandS, Inc v. Redd</i> , 703 So.2d 492 (Fla. Ct. App. 1997).....	42
<i>Bannister v. Town of Noble</i> , 812 F.2d 1265 (10th Cir. 1987).....	38
<i>Bart v. Union Oil Co. of Cal.</i> , 540 N.E.2d 770 (Ill. Ct. App. 1989).....	42
<i>Brandes v. Brand Insulations, Inc.</i> , No. 14-2-21662-9SEA, 2015 WL 4741479 (Wash. Super. Ct. Apr. 6, 2015)	43
<i>Bratcher v. Conopco, Inc.</i> , No. 2003-CA-002153, 2008 WL 2065202, at *2 (Ky. Ct. App. 2008).....	18
<i>Burroughs v. Westlake Vinyls, Inc.</i> , No. 5:07-CV-89-R, 2008 WL 5192237, at *5 (W.D. Ky. Dec. 11, 2008).....	18
<i>Burroughs v. Worsham</i> , 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002)	41
<i>Caldwell v. K-Mart Corp.</i> , 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991)	40
<i>Clemmer v. John Crane, Inc.</i> , No. 434434, 2006 WL 7070932 (Cal. Super. Ct. Mar. 28, 2006).....	42
<i>Domino v. Folger Coffee Co.</i> , 32 So.3d 955 (La. Ct. App. 2010)	24
<i>Eades v. United States</i> , 168 F.3d 481, 1999 WL 25549 (4th Cir. 1999)	19, 20
<i>Eckman v. Moore</i> , 876 So. 2d 975 (Miss. 2004).....	38, 39
<i>Edens v. Bellini</i> , 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004)	9, 10
<i>Estate of Serven v. John Crane, Inc.</i> , No. 101202978, 2012 WL 8751702 (Pa. Com. Pl. Dec. 4, 2012).....	43
<i>Fayette Janitorial Servs. v. Kellogg USA, Inc.</i> , No. W2011-01759-COA-R3-EV, 2013 WL 428647 (Tenn. Ct. App. 2013).....	19
<i>Fields v. J. Haynes Waters Builders, Inc.</i> , 376 S.C. 545, 658 S.E.2d 80 (2008).....	36
<i>Fuller v. Blanchard</i> , 358 S.C. 536, 595 S.E.2d 831 (2004).....	9
<i>Glass v. Dow Chem. Co.</i> , 325 S.C. 198, 482 S.E.2d 49 (1997).....	10, 11, 20, 27

<i>Golik v. Georgia Pacific</i> , No. 1308-11192, 2014 WL 7525708 (Or. Cir. Ct. Dec. 18, 2014)	42
<i>Hairston v. Re: Leasing, Inc.</i> , 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985)	22
<i>Harrell v. Pineland Plantation, Ltd.</i> , 337 S.C. 313, 523 S.E.2d 766 (1999)	10
<i>Haselden v. Davis</i> , 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000)	37
<i>Heller v. Aldi, Inc.</i> , 851 S.W.2d 82 (Mo. Ct. App. 1993)	25
<i>Johnson v. Horry Cnty. Solid Waste Auth.</i> , 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010)	36, 37
<i>Jones v. Lily Tulip Cup Corp.</i> , 158 F. Supp. 944 (W.D. Mo. 1958)	18
<i>LaFarge, ex rel. Blizzard v. Kyker</i> , No. 1:08CV185-SA-JAD, 2011 WL 1742002 (N.D. Miss. May 5, 2011)	37
<i>Neese v. Michelin Tire Corp.</i> , 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996)	22
<i>Nelson v. Yellow Cab Co.</i> , 349 S.C. 589, 564 S.E.2d 110 (2002)	10
<i>Olmstead v. Shakespeare</i> , 354 S.C. 421, 581 S.E.2d 483 (2003)	11, 21, 22, 23
<i>Peace v. Special Elec. Co.</i> , No. 802680/2013, 2014 WL 7671986 (N.Y. Sup. Ct. Oct. 22, 2014)	42
<i>Penn v. Amchem Prods.</i> , 85 A.3d 475 (N.Y. S. Ct. App. Div. 2011)	43
<i>Poch v. Bayshore Concrete Products/S.C., Inc.</i> , 405 S.C. 359, 747 S.E.2d 757 (2013)	11, 23
<i>Posey v. Proper Mold & Eng'g, Inc.</i> , 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008)	10, 11, 23, 24
<i>Raines v. Gould, Inc.</i> , 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986)	20, 25, 26
<i>Rice v. VVP Am., Inc.</i> , 137 F. Supp. 2d 658 (E.D. Va. 2001)	24
<i>S.C. Workers' Compensation Comm'n v. Ray Covington Realtors, Inc.</i> , 318 S.C. 546, 459 S.E.2d 302 (1995)	10
<i>Sabb v. S.C. State Univ.</i> , 350 S.C. 416, 567 S.E.2d 231 (2002)	10
<i>Singleton v. J. P. Stevens & Co.</i> , 533 F. Supp. 887 (D.S.C. 1982)	18
<i>Sisk v. Ins. Co. of N. Am.</i> , 356 So.2d 1109 (La. Ct. App. 1978)	19

<i>Smith v. FCX, Inc.</i> , 744 F.2d 1378 (4th Cir. 1984).....	18
<i>Smith v. T.H. Snipes & Sons, Inc.</i> , 306 S.C. 289, 411 S.E.2d 439 (1991)	16
<i>Smith v. Wells</i> , 258 S.C. 316, 188 S.E.2d 470 (1972).....	40
<i>Smothers v. Tractor Supply Co.</i> , 104 F. Supp. 2d 715 (W.D. Ky. 2000)	24
<i>State v. Aldret</i> , 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999)	30, 31
<i>State v. Byers</i> , 392 S.C. 438, 710 S.E.2d 55 (2011)	36
<i>State v. Harris</i> , 340 S.C. 59, 530 S.E.2d 626 (2000).....	31
<i>State v. McDonald</i> , 343 S.C. 319, 540 S.E.2d 464 (2001)	36
<i>State v. Williams</i> , 386 S.C. 503, 690 S.E.2d 62 (2010)	36
<i>Stewart v. State Farm Mut. Auto. Ins. Co.</i> , 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000)	41
<i>Strickland v. Galloway</i> , 348 S.C. 644, 560 S.E.2d 448 (Ct. App. 2002).....	9
<i>Thompson v. TRW Auto. U.S., LLC</i> , No. 2:09-CV-1375-JAD-PAL, 2014 WL 2612271 (D. Nev. June 11, 2014)	39
<i>Toyota of Florence, Inc. v. Lynch</i> , 314 S.C. 257, 442 S.E.2d 611 (1994).....	36
<i>Voss v. Ramco, Inc.</i> , 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997)	11
<i>Welch v. Epstein</i> , 342 S.C. 279, 546 S.E.2d 408 (2000).....	40, 41
<i>Wheeler v. Morrison Machinery Co.</i> , 313 S.C. 441, 438 S.E.2d 264 (Ct. App. 1993)	16, 17
<i>Woodard v. Westvaco Corp.</i> , 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993)	17

Rules

Rule 12(b)(1), SCRPC	10
Rule 401, SCRE	36
Rule 402, SCRE	36
Rule 403, SCRE	36

Statutes

S.C. Code Ann. § 15-75-20.....	41
S.C. Code Ann. § 42-5-10.....	27
S.C. Code Ann. § 42-10-40.....	11

Other Authorities

4 <i>Larson's Workers Compensation Law</i> § 70.06[8] (2009)	24
--	----

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by finding that Dennis Seay was not a statutory employee of Celanese and that the Workers' Compensation Act was not his exclusive remedy?
- II. Did the trial court err by denying Celanese's motion for a mistrial where the jury engaged in premature deliberations and considered outside influences?
- III. Did the trial court err by refusing to exclude an unauthorized, inflammatory, and highly prejudicial video of Seay crying out to Jesus for help and by failing to grant Celanese's motion for a mistrial on this basis?
- IV. Did the trial court err by failing to grant a new trial where the damages awarded were grossly excessive?

STATEMENT OF THE CASE

Respondents/Plaintiffs Angie Keene, individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay (hereinafter “Respondents”) initiated this action on September 26, 2013. (Compl.; R. pp. 70-88.) The Complaint asserted various causes of action against numerous defendants, alleging that they negligently exposed Dennis Seay (“Seay”) to various asbestos containing materials in connection with his work as a millwright at Daniel Construction Company (“Daniel”), resulting in Seay contracting mesothelioma. (*See generally id.*; R. pp. 70-88.) Appellant CNA Holdings, LLC, successor in interest to Hoechst Celanese Corporation (“Celanese”) answered the Complaint and denied any liability to Respondents.¹ (Ans.; R. pp. 89-107.) Respondents amended their Complaint three additional times during the course of the litigation. (*See* Third Am. Compl.; R. pp. 108-17.) Celanese answered each of these Amended Complaints by continuing to deny any liability to Respondents. (*See* Ans. to Third Am. Compl.; R. pp. 118-133.)

On September 11, 2014, Celanese filed a Motion to Dismiss for Failure to State a Claim, or in the alternative, Motion for Summary Judgment, along with a Memorandum in Support. (Mot. to Dismiss and Memo. in Supp. of Mot. to Dismiss; R. pp. 2606-20.) In this motion, Celanese contended that Seay was its “statutory employee” and the South Carolina Workers’ Compensation Act provided the exclusive remedy for his claims. (Memo. in Supp. of Mot. to Dismiss at 12-13; R. pp. 2619-20.) Celanese cited to various cases supporting the proposition that maintenance workers like Seay—employed by an outside contractor but working at a facility

¹ In their Complaint, Respondents sued numerous defendants, contending they were all liable in some way for the harm to Seay. However, at the time of trial only John Crane, Inc. (“John Crane”) and Celanese remained as defendants. Because Celanese is the only appellant, the Statement of the Case and Statement of Facts focus on the background and facts relevant to this appeal.

owned by a company like Celanese—are typically found to be statutory employees of the facility owner. (*See id.* at 7-12; R. pp. 2614-19.) Celanese later filed an Amended Motion on May 26, 2015, along with a Memorandum in Support of the Amended Motion. (Am. Mot. to Dismiss; Memo. in Supp. of Am. Mot. to Dismiss; R. pp. 2237-605.)

After the motion was fully briefed, (*see* Memo. in Opp'n to Am. Mot. to Dismiss; Reply in Supp. of Am. Mot. to Dismiss; R. pp. 2117-236), the trial court issued a fully reasoned Order dated July 28, 2015 denying Celanese's motion. (Order Denying Am. Mot. to Dismiss; R. pp. 55-62). In denying the motion the court looked to cases involving transportation and construction workers to support its finding that Seay was not a statutory employee of Celanese. (*See id.* at 2-7; R. pp. 56-61.) The court declined to follow the more factually analogous case law cited by Celanese from the maintenance worker context. (*See id.* at 5-7; R. pp. 51-53.) Instead, the court concluded that several relatively new decisions from South Carolina appellate courts involving transportation workers employed by common carriers were controlling on the issue, and represented a break from prior controlling law. (*Id.* at 3-6; R. pp. 49-52.) Celanese continued to raise the statutory employee argument throughout the litigation without success. (*See* Trial Transcript ("Tr.") pp. 1327:5-1332:6; R. pp. 1511-16 (directed verdict and renewed directed verdict motions).)

Accordingly, the matter proceeded to trial. At the time of trial, the only remaining Defendants were John Crane and Celanese, and the only issue before the trial court was whether they were liable to Respondents for negligence. (*See* Verdict Form; R. pp. 68-69.) The court held an eight day trial between September 28, 2015 and October 8, 2015. (*See* Tr. pp. 1, 444, 762, 1267; R. pp. 185, 628, 946, 1451.)

During the course of the trial, two significant matters of law arose. First, in the middle of the trial Juror #16 came forward and expressed concerns about a conflict of interest. (*Id.* at 514:13-15; R. pp. 698.) The juror explained that he worked at the same facility as Seay doing essentially the same job as Seay and that he disclosed this information to the other jurors. (*See id.* at 515:6-16, 518:4-6, 573:12-574:3; R. pp. 699, 702, 757-58.) He also acknowledged that another member of the jury asked about asbestos, but stated that the jury refrained from discussing it any further. (*Id.* at 574:4-14; R. p. 758.) After receiving this information, the trial court dismissed this juror. (*Id.* at 575:6-8; R. p. 759.) Defendants moved for a mistrial. However, the trial court found that no premature deliberations had occurred and that the Defendants were not prejudiced. (*Id.* at 570:9-573:3, 578:24-579:25; R. pp. 754, 762-63.) Thus, the trial court denied Defendants' motion for a mistrial. (*Id.* at 570:9-573:3, 579:10-20; R. pp. 754-57, 763.)

The other critical matter of law that arose was the introduction of a short video clip of Dennis Seay while he was in hospice care crying out in pain for Jesus to help him. (Video and Audio of Dennis Seay; Rough Transcript from Oct. 8, 2015 p. 874:17-18, Ex. F to Pls.' Resps. to Def.'s Post-Trial Motions; R. pp. 2689-91.) Defendants objected on the basis that the clip was inflammatory and highly prejudicial, and requested that the court strike the video from evidence and/or grant a mistrial. (Tr. pp. 766:6-772:18; R. pp. 950-56.) The trial court, however, denied the motion. (*Id.* at 772:16-18; R. p. 956.)

On October 8, 2015, the jury rendered a defense verdict for John Crane and a verdict finding Celanese liable to Respondents. The jury awarded \$2,000,000 in actual damages for the survival action, \$5,000,000 in actual damages for the wrongful death action, \$5,000,000 in actual

damages for the loss of consortium claim, and \$2,000,000 in punitive damages. (Verdict Form; Judgment; R. pp. 66-69.)

Celanese filed several post-trial motions—for judgment notwithstanding the verdict (“JNOV”), for a new trial absolute, and for a new trial nisi remittitur. (Mot. for JNOV; Mot. for New Trial; Mot. for New Trial Nisi Remittitur; R. pp. 2075-92.) In the motions, Celanese reasserted the statutory employee issue, along with the premature jury deliberation and prejudicial video issues. (See Mot. for JNOV at 3; Mot. for New Trial at 2-3; R. pp. 2083-84, 2090.) Moreover, also relevant to this appeal, Celanese asserted that the verdict was grossly excessive when compared to other mesothelioma verdicts and was improperly based on the jury’s premature deliberations and the prejudicial video. (See generally Mot. for New Trial; Mot. for New Trial Nisi Remittitur; R. pp. 2075-87.) The trial court denied the post-trial motions in their entirety. (Order on Post-Trial Motions; R. pp. 1-46.) Celanese timely filed a notice of appeal.

STATEMENT OF THE FACTS

Dennis Seay worked as an employee of Daniel Construction Company (“Daniel”) from 1969 to 1978. (D. Seay, Tr. p. 359:8-24; R. p. 540.) During this time, Daniel was the exclusive maintenance provider at the Celanese facility where Seay worked, which facility manufactured synthetic resins and fibers. (See D. Seay, Tr. p. 362:12-24; Court’s Ex. 1, D. Seay Video Dep. at 67:2-7; R. pp. 547, 1794-95.) This facility did *not* produce any asbestos containing products. (See D. Seay, Tr. p. 360:16-21; R. p. 544.) Seay was assigned exclusively to the Celanese facility, working initially as a millwright helper for a few months and later as a millwright for the remainder of his tenure. (See *id.* pp. 359:8-360:3; R. pp. 543-44.) Celanese relied on Daniel to handle the maintenance and repair work at the facility. (See D. Seay, Tr. p. 362:12-24; Court’s

Ex. 1, D. Seay Video Dep. at 67:2-7; R. pp. 546, 1794-95.) All maintenance, including maintenance of critical manufacturing equipment, was done by Daniel employees. (*See* D. Seay, Tr. p. 362:12-24; Court's Ex. 1, D. Seay Video Dep. at 67:2-7; R. pp. 546, 1794-95.) Seay worked on various elements of the equipment such as pumps, valves, and gear boxes, all of which were key components of the process lines used in the facility's manufacturing operations. (*See* D. Seay, Tr. pp. 382:20-383:23, 416:19-21, 418:3-11, 419:2-420:10; R. pp. 566, 600, 602-04.)

During the time he worked for Daniel, Seay used products containing asbestos—and was exposed to asbestos dust—in connection with the repair work he performed. (*Id.* at 393:7-11, 408:17-409:12; Court's Ex. 1, D. Seay Video Dep. at 27:12-28:5; R. pp. 577, 592-93, 1779-80.) One of the Daniel millwrights' key job duties, for example, involved replacing gaskets made of asbestos on steam condensers. (*See* D. Seay, Tr. pp. 406:19-409:18; Court's Ex. 2, R. Thompson Video Dep. at 52:14-17, 54:4-21, 56:14-24; R. pp. 590-93, 1812-14.) According to Seay, on occasion the old gaskets could be easily removed. (D. Seay pp. 407:12-408:16, 436:13-437:7; R. pp. 591-92, 620-21.) However, most of the time the gaskets would degrade over time and become difficult to remove. (*See* D. Seay, Tr. pp. 399:17-400:15, 407:12-409:18, 439:1-440:9; Court's Ex. 1, D. Seay Video Dep. at 41:6-21; R. pp. 583-84, 591-93, 623-24, 1785.) The removal of these gaskets would sometimes create dust. (*See* D. Seay, Tr. pp. 380:23-381:6, 408:17-18, 437:4-7; Court's Ex. 1, D. Seay Video Dep. at 47:10-48:10; R. pp. 564-65, 592, 621, 1787-88.)

The first step of the gasket replacement process sometimes involved stripping back the asbestos insulation covering the piping on the machinery. (D. Seay, Tr. pp. 371:7-372:10, 378:5-379:4, 439:1-440:9; Court's Ex. 1, D. Seay Video Dep. at 39:25-44:22; Court's Ex. 2, R.

Thompson Video Dep. at 65:18-66:01, 108:21-109:14; R. pp. 555-56, 562-63, 623-24, 1784-86, 1817, 1826.) This allowed the millwright to access the flanges where the gaskets were located. (D. Seay, Tr. pp. 371:7-372:10, 378:5-379:4, 439:1-440:9; Court's Ex. 1, D. Seay Video Dep. at 39:25-44:22; Court's Ex. 2, R. Thompson Video Dep. at 65:18-66:01, 108:21-109:14; R. pp. 555-56, 562-63, 623-24, 1784-86, 1817, 1826.) Approximately 25 to 30% of the time, Seay had to scrape off excess insulation from the flange with a screwdriver or putty knife. (D. Seay, Tr. pp. 439:1-440:9; R. pp. 623-24.) For particularly difficult repairs, Seay used a wire brush or a brush powered by a drill motor. (*Id.*) He then removed the old gasket and installed a new one, which he cut from a sheet to ensure a correct fit. (*Id.* at 399:17-400:20, 406:19-407:25; R. pp. 583-84, 590-91.) Seay testified that 95 to 98% of the time the old gaskets would be degraded and not immediately pop out of place. (*Id.* at 408:19-23; R. p. 592.) Therefore, he typically had to remove the old gaskets with a scraper, putty knife, or wire brush. (*See id.* at 399:17-400:20, 406:19-409:3; Court's Ex. 1, D. Seay Video Dep. at 39:25-42:24, 43:14-44:22; R. pp. 583-84, 590-93, 1784-86.) John Crane was one manufacturer of the asbestos-containing gaskets that Daniel millwrights used in completing such work. (D. Seay, Tr. p. 383:24-384:9; R. pp. 567-68.) Seay testified that he probably worked with John Crane products the most often. (*See id.* at 384:7-19; R. p. 568.)

Seay contracted mesothelioma. (Court's Ex. 1, D. Seay Video Dep. at 11:21-12:10; R. pp. 1773-74.) Whether Seay contracted mesothelioma, however, is not at issue in this appeal. Rather, the critical issues at trial involved whether Celanese and/or John Crane were negligent and should be held liable for that harm.² (Verdict Form; Tr. pp. 1443:16-1459:14; R. pp. 68-69,

² Plaintiffs pursued a products liability theory against John Crane and a premises liability theory for Celanese, both claims sounding in negligence. (Jury Charges, Tr. p. 1443:16-1459:14; R. pp. 1627-43.)

1627-43.) For mesothelioma, the calculus involved determining whether the actions of either of these entities was a “substantial factor” in Seay’s exposure to asbestos. (Jury Charges, Tr. p. 1457:21-1458:5; R. pp. 1641-42.) Seay brought suit against numerous Defendants, many of whom were dismissed prior to trial, alleging that they all had some role in causing the harm. The jury ultimately rendered a verdict finding that Celanese was negligent and should be held liable to Seay for the harm that he suffered. (Verdict Form; Tr. 1472:10-1473:16; R. pp. 68-69, 1656-57.)

Much of the trial record consisted of evidence and testimony detailing the dangers of asbestos, the properties and characteristics of mesothelioma (*i.e.*, how someone could contract the disease and the symptoms they would experience as a result); what was generally known about asbestos at the time Seay was employed with Daniel; and what Daniel and Celanese allegedly knew about the dangers of asbestos. Respondents also introduced testimony from Seay and his family regarding his experience with mesothelioma and how it impacted his life to support their claims for damages.

The issues raised by Celanese concern four critical errors of law that occurred in this action. The essential facts related to each issue are set forth in greater detail below.

ARGUMENT

The trial court’s judgment should be reversed for several reasons. First, the trial court erred in determining that Seay was not Celanese’s statutory employee and by denying Celanese’s motions on that basis. The trial court improperly relied on inapposite case law, and it misinterpreted modern precedent to support its erroneous conclusion. Second, the trial court erred by denying Celanese’s motion for a mistrial and motion for a new trial in light of the jury’s premature deliberations. Third, the trial court erred by permitting admission of a highly

prejudicial video recording of Seay in hospice crying out in pain for Jesus to help him. Finally and fourth, the trial court erred by failing to grant Celanese's motion for a new trial in light of the jury's grossly excessive verdict, which was out of line with other mesothelioma verdicts from that time period and was improperly based on the jury's premature deliberations and the prejudicial video.

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

Celanese contended that Seay was its statutory employee, and thus the Workers' Compensation Act provided the exclusive remedy. The trial court incorrectly rejected this argument with distinguishable facts and legal conclusions—relying on cases involving transportation workers and construction workers—and asserting that such cases controlled the result here. Furthermore, in reaching this decision, the trial court ignored several analogous South Carolina cases in which the courts concluded that a maintenance worker was a statutory employee. This constitutes error, and thus this Court should reverse and instruct that judgment be entered in favor of Celanese.

A. South Carolina law on statutory employees is to be construed liberally.

The Workers' Compensation Act is the *exclusive remedy* against an employer for an employee's work-related accident or injury. *Fuller v. Blanchard*, 358 S.C. 536, 595 S.E.2d 831, 833 (2004); *see also Strickland v. Galloway*, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer."). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Edens v. Bellini*, 359 S.C. 433, 441-42, 597 S.E.2d 863, 867 (Ct. App. 2004).

“Coverage under the Workers’ Compensation Act depends on the existence of an employment relationship.” *Id.* at 439, 597 S.E.2d 863, 866. Whether or not an employer-employee relationship exists is a jurisdictional question. *Id.* at 440, 597 S.E.2d at 866 (quoting *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 594, 564 S.E.2d 110, 113 (2002); *S.C. Workers’ Compensation Comm’n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995)).³ Because the determination of whether a worker is a statutory employee is jurisdictional “the question on appeal is one of law.” *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999). “As a result, this court has the **power and duty** to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence.” *Harrell*, 337 S.C. at 320, 523 S.E.2d at 769 (emphasis added); *see also Glass v. Dow Chem. Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997). Further, “[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*, 359 S.C. at 440, 597 S.E.2d at 867 (emphasis added).

The Workers Compensation Code expands this inclusion to workers of subcontractors and states:

³ In *Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002), the Supreme Court stated that the “exclusivity” provision of the workers’ compensation code “does not involve subject matter jurisdiction.” *Id.* As the Court explained, a tort action is “clearly a part of the general class of cases which the court of common pleas has subject matter jurisdiction to hear,” and thus the trial court had subject matter jurisdiction over the plaintiff’s claims. *Id.* Despite the court of common pleas having subject matter jurisdiction, however, the Court explained that “certain cases may be taken from the trial court’s original jurisdiction by the General Assembly.” *Id.* at 423, 567 S.E.2d at 234. For workers’ compensation, the Court noted that the “General Assembly has vested the Commission with exclusive original jurisdiction over the types of claims made by [plaintiff],” such that the trial court was “divested” of original jurisdiction. *Id.* As a subsequent Court of Appeals decision explained, cases since *Sabb* have still used Rule 12(b)(1), SCRCP to dismiss workers compensation cases. *See Posey v. Proper Mold & Eng’g, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 402 (Ct. App. 2008).

When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as “owner,” undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-10-40. As the Court of Appeals has explained, this means that, “depending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer.” *Voss v. Ramco, Inc.*, 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997).

The key question in determining whether a worker is a statutory employee is whether the activity of the subcontractor’s employee “is a part of [the owner’s] trade, business or occupation.” *See Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). In determining whether an employee is engaged in such an activity, the Supreme Court has applied three tests. *Id.* The 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*, 354 S.C. at 424, 581 S.E.2d at 485 (quoting *Glass*, 325 S.C. 198, 482 S.E.2d 49). “If the activity at issue meets even *one* of these three criteria [i.e., tests], the injured employee qualifies as the statutory employee of ‘the owner.’” *Id.* Finally, it bears repeating that “‘[a]ny doubts as to a worker’s status should be resolved in favor of including him or her under the Worker’s Compensation Act.”’ *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013) (quoting *Posey v. Proper Mold & Eng’g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008)) (emphasis

added). Hence, the Court has before it a legal question subject to this Court's *de novo* review, and, as set forth below, the undisputed relevant facts require reversal when the proper precedent is applied.

B. The trial court incorrectly held that the maintenance work done by Seay was not an important and essential part of Celanese's business.

The trial court held that Seay's maintenance work was not part of Celanese's "trade, business or occupation." (Order Denying Mot. to Dismiss p. 7; R. p. 61.) This holding is contrary to established South Carolina precedent. The trial court's determination that Seay was not a statutory employee should be reversed.

The uncontested evidence clearly demonstrates that the repair work Seay did for Daniel was an important and essential part of Celanese's business. Seay was employed as a millwright with Daniel essentially the entire time he worked at the Celanese facility.⁴ (See Court's Ex. 1, D. Seay Video Dep. at 24:20-25:23; R. pp. 1778-79.) As a millwright, he was responsible for repairs and preventative maintenance work on Celanese's manufacturing equipment. (See D. Seay, Tr. pp. 427:22-428:9; Court's Ex. 1, D. Seay Video Dep. at 26:25-27:6, 61:9-62:19, 67:17-21; R. pp. 1779, 1792-93, 1795.) A Celanese employee, referred to as the "lead man," would provide instructions to Seay's supervisor at Daniel, who would then give Seay his daily job duties. (See D. Seay, Tr. pp. 374:23-375:9; Court's Ex. 1, D. Seay Video Dep. at 66:1-67:1; Dep. of D. Seay (Nov. 20, 2013), Ex. B to Mem. in Supp. of Am. Mot. to Dismiss at 42:19-43:2; R. pp. 558-59, 1794-95, 2267.) Daniel was the exclusive maintenance provider at the Celanese facility, and all maintenance work at the facility was performed by Daniel employees. (See D. Seay, Tr. p. 362:12-24; Court's Ex. 1, D. Seay Video Dep. at 67:2-7; R. pp. 546, 1794-95.)

⁴ When he first started with Daniel, Seay was a millwright helper for a few months before being promoted to millwright. (D. Seay, Tr. p. 359:8-360:3; R. pp. 543-44.)

Although Celanese did not have its own maintenance division at this facility at the time Seay worked there, it did provide all supplies for the maintenance work. (*See* D. Seay, Tr. p. 366:3-10; R. p. 550.)

The Celanese facility where Seay worked manufactured synthetic fibers. (D. Seay, Tr. p. 360:16-21; Court's Ex. 1, D. Seay Video Dep. at 25:3-8; R. pp. 544, 1779.) As Seay himself testified, his work on steam lines was vital to the operation of Celanese's business, because all of the equipment he maintained, such as pumps, valves, and gear boxes, was critical to the successful operation of the manufacturing process lines at the facility. (*See* D. Seay, Tr. pp. 382:20-383:23, 416:19-21, 418:3-11; 419:2-420:10; R. pp. 566-67, 600, 602-04.) Seay 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 testified:

- 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.

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

Seay testified that each piece of equipment in the facility was essential to the manufacturing operation. (D. Seay, Tr. pp. 416:19-25, 423:24-424:1; Court's Ex. 1, D. Seay

Video Dep. at 76:20-77:1; Dep. of D. Seay (Jan. 16, 2014), Ex. C to Mem. in Supp. of Am. Mot. to Dismiss at 179:6-16; R. pp. 600, 607-08, 1798, 2302.) The repairs and preventative maintenance Seay performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility. (See D. Seay, Tr. p. 420:5-10; Court's Ex. 1, D. Seay Video Dep. at 76:23-77:6; R. pp. 604, 1798.)

Ronnie Thompson, another Daniel contractor who worked with Seay at the Celanese facility, testified similarly. (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 confirmed that Daniel employees performed all of the maintenance work in the facility. (*Id.* at 17:4-24, 98:5-12; R. pp. 1801, 1822.) Thompson also stated 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 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.)

Finally, Celanese's corporate representative Bruce Bowyer echoed this testimony, stating that the maintenance work performed by Daniel was a necessary, essential, and integral part of Celanese's business. (B. Bowyer, Tr. p. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; R. pp. 1261, 2409.) It was essential for Celanese to have maintenance workers on site to maintain, repair, and replace equipment. (Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶¶ 5, 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 2409-10, 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.) Without the ongoing maintenance provided by Daniel workers like Seay, the Celanese facility would not have been able to properly function and consistently produce product for sale. (B. Bowyer, Tr. p. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 1261, 2409, 2519.) The maintenance work provided by the Daniel employees was so valuable to Celanese that in later years Celanese directly hired the Daniel maintenance workers as employees. (Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 10; R. p. 2410.)

The testimony and evidence overwhelmingly supports that Seay's activities were both an important part of Celanese's business or trade and a necessary, essential, and integral part of its trade or business. Respondents presented no evidence to the contrary. Instead, they focused on the fact that Celanese did not have a dedicated maintenance division, and that direct Celanese employees did not handle the type of maintenance work performed by Seay prior to his time there. (*See* Pls.' Resp. in Opp'n to Mot. for JNOV pp. 9-10; R. pp. 1953-54.) Although these issues may have a bearing on *one* of the three relevant tests (*viz.*, whether the work had previously been performed by direct Celanese workers), they do not affect the overwhelming evidence showing that Seay's activities played an important, necessary, integral, and essential part in Celanese's manufacturing operations.

C. Analogous case law supports finding that Seay was a statutory employee of Celanese.

1. Prior decisions from South Carolina courts have held that a worker was a statutory employee under similar facts.

Several South Carolina cases have found a maintenance worker to be a statutory employee. The testimony and evidence presented here is analogous to those cases. For example,

the Supreme Court analyzed the classification of a worker hired to make repairs in *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991). In *Smith*, the worker in question was a self-employed welder and sole proprietor of a contracting company. *Id.* at 290, 411 S.E.2d at 439. The defendant manufacturer hired his company “to repair a metal shearing machine used in the [company’s] business operations.” *Id.* at 290, 411 S.E.2d at 440. The trial court granted summary judgment in the defendant’s favor, finding that the worker was engaging in “work which was an essential part of the trade, business or occupation of the respondent” and that the nature of the work “was an integral part of the [defendant’s] operations, *without which respondent’s operation could not function.*” *Id.* at 291, 411 S.E.2d at 440 (emphasis added). The worker’s estate appealed, but the Supreme Court affirmed the trial court, agreeing that the worker was the defendant’s statutory employee and that summary judgment was proper. *See id.* at 292, 411 S.E.2d at 442.

Likewise, in *Wheeler v. Morrison Machinery Co.*, 313 S.C. 441, 438 S.E.2d 264 (Ct. App. 1993), the Court determined that a worker hired to remove asbestos insulation was a statutory employee of a textile manufacturer. The worker in *Wheeler* was injured when he fell into a piece of textile equipment at the defendant’s facility while working to remove asbestos. *Id.* at 440, 438 S.E.2d at 265. The Supreme Court looked to the applicable tests for determining whether he was a statutory employee. As the Court explained, the “evidence reveal[ed] that as part of an ongoing maintenance program, it was necessary for [the worker] to remove and dispose of asbestos.” *Id.* at 443, 438 S.E.2d at 266. The asbestos insulated the machinery and its connecting pipes, and “had to be removed to allow workers to replace rollers, bearings, valves, and other worn components of this equipment.” *Id.* at 443, 438 S.E.2d at 266. As the Court explained, “[p]reventive maintenance, including the removal and reinstallation of insulation, has

always been and always will be an ongoing process.” *Id.* This, coupled with the fact that some of the manufacturer’s employees previously worked in removing asbestos, could “only lead to the conclusion that [the worker] was engaged in work which was part of the ‘trade, business, or occupation’ of the [manufacturer].” *Id.* Therefore, the worker was the defendant’s statutory employee.

Finally, in an opinion that was subsequently vacated on other grounds, this Court examined the operations of a paper manufacturer to determine the types of activities that would be considered part of the business. *See 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).⁵ The worker at issue drove tanker trucks full of chemicals to the manufacturer’s facility, and was injured when a hose disengaged and sprayed him with hot liquid. *Id.* at 331, 433 S.E.2d at 891. Although transportation workers are sometimes found to not be statutory employees,⁶ in this situation the Court determined that the truck driver was a statutory employee. The Court explained that it was “undisputed that recovery, storage, and reprocessing” of the chemical was an “ordinary and necessary part of Westvaco’s paper manufacturing business.” *Id.* at 338, 433 S.E.2d at 895. Importantly, the Court also stated that “[t]he *maintenance and repair of manufacturing equipment* is also a necessary part of Westvaco’s business.” *Id.* (emphasis added).

Seay’s activities resembled the activities of the maintenance workers in *Smith* and *Wheeler*, both of whom were found to be statutory employees. Likewise, the *Woodard* opinion further supports that maintenance and repair of manufacturing equipment is an essential part of a

⁵ The Supreme Court vacated this opinion on procedural grounds. *Woodard*, 319 S.C. at 242-43, 460 S.E.2d at 393-94.

⁶ This distinction between maintenance workers and transportation workers is discussed *infra*.

manufacturer's business. These decisions establish that the trial court erred in holding that Seay was not a statutory employee of Celanese.

2. Other authorities support a finding that Seay was a statutory employee of Celanese.

Several other courts have examined whether a maintenance worker constituted a statutory employee. One case from the District of South Carolina examined whether a repair worker was a statutory employee. *See Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 893 (D.S.C. 1982), *aff'd*, 726 F.2d 1011 (4th Cir. 1984). In *Singleton*, the worker was an employee of an electric company hired to repair an electrical line owned by a textile mill. *Id.* at 888. The court explained that, without the repairs to the electrical lines, the plant could not operate and thus the lines were essential to the operation. *Id.* at 891. It did not matter that the mill's employees did not engage in this work previously, as the "continued maintenance and repair of the[] electrical lines w[as] absolutely essential to the continued operation of the textile plant." *Id.*; *see also Smith v. FCX, Inc.*, 744 F.2d 1378 (4th Cir. 1984) (contractor hired to engage in ongoing repairs of a dryer and electrical system at a grain market was a statutory employee of the market under South Carolina law).

Other jurisdictions have also recognized that contractors engaged in ongoing maintenance are statutory employees. *See, e.g., Burroughs v. Westlake Vinyls, Inc.*, No. 5:07-CV-89-R, 2008 WL 5192237, at *5 (W.D. Ky. Dec. 11, 2008) (noting that "[u]nder Kentucky law, routine maintenance projects are a regular or routine part of a defendant's business" and that "[e]mployees of contractors hired to perform routine repairs or maintenance are generally viewed as being statutory employees under the Act" (quoting *Bratcher v. Conopco, Inc.*, No. 2003-CA-002153, 2008 WL 2065202, at *2 (Ky. Ct. App. 2008))); *Jones v. Lily Tulip Cup Corp.*, 158 F. Supp. 944, 945 (W.D. Mo. 1958) (finding that employee of contractor hired by

manufacturer to perform routine electrical maintenance on manufacturing equipment was a statutory employee, as the work he performed was a “necessary part of the manufacturing operation of the company”); *Sisk v. Ins. Co. of N. Am.*, 356 So.2d 1109, 1110 (La. Ct. App. 1978) (holding that paper manufacturer was the statutory employer of a contractor’s worker where the contractor had “a continuous maintenance program at defendant Olinkraft’s paper plant.”); *Fayette Janitorial Servs. v. Kellogg USA, Inc.*, No. W2011-01759-COA-R3-EV, 2013 WL 428647, at *9-10 (Tenn. Ct. App. 2013) (“[T]he cleaning and sanitation work performed by Fayette for Kellogg was a part of Kellogg’s regular business, as it was an integral part of Kellogg’s business that was performed on a continual and recurring basis. This was a routine maintenance program that was part of Kellogg’s ongoing business operation, not an irregular specialized project The regular cleaning work previously completed by Kellogg’s own employees, and now performed by Fayette, was precisely the type of ‘regular business’ activity that the statutory employer rule was meant to encompass.”).

These cases further bolster the conclusion that Seay was a statutory employee of Celanese. Daniel provided a dedicated maintenance division that Celanese tasked with keeping its manufacturing equipment running in good condition. Celanese could not have ensured continued successful operation of its production lines without the work of Daniel and its employees like Seay. Therefore, as these courts further establish, the work Seay performed was necessary and essential to Celanese’s manufacturing business.

Contrasted with the above, but also supporting the position of Celanese, is the Fourth Circuit’s decision in *Eades v. United States*, 168 F.3d 481, 1999 WL 25549 (4th Cir. 1999) (unpublished table decision). *Eades*, applying South Carolina law, examined whether an employee of an electrical testing contractor constituted a statutory employee of the Veterans

Administration hospital where he was injured. The *Eades* court explained that “intermittent repairs” to a physical plant are generally not part of the “business of the employer” but “**regular and frequent maintenance** is.” *Id.* at *5 (emphasis added). For repair and maintenance work, “[t]he scope or nature of the repairs affects the question: a ‘major’ repair or a repair requiring ‘technical knowledge that was highly specialized’ is less likely to be the ‘business of the employer.’” *Id.* (quoting *Glass v. Dow Chem. Co.*, 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997)). However, “if the ‘basic operation’ of the business ‘is dependent on’ the work at issue, or the work is ‘related to the basic operation of’ the business, that work is more like regular maintenance and thus more important to the business of the employer.” *Id.* Whether the business could perform or ever does perform the work with its own employees is relevant to whether the work is part of its business. *Id.* However, the work “may still be integral to a company’s basic operations even if the company’s own employees do not perform it, where the company ‘cannot function’ without that work.” *Id.* (quoting *Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986)). Ultimately, the *Eades* court determined that the injured worker was not a statutory employee because his electrical testing activities simply had no bearing on the “day-to-day operations of the hospital.” *Id.* at *6.⁷ This ruling is in contrast to the facts here, where Seay’s work was routine and regular and part of the day-to-day maintenance—and thus operation—of the plant.

⁷ As the *Eades* court explained, the injured worker’s electrical testing activities were a highly specialized and narrow category of maintenance, and a lightning bolt would have a better chance of interrupting the hospital’s operations than failure to conduct electrical testing. 1999 WL 25549, at *6. Moreover, if the worker’s company had “not performed the electrical testing, the hospital’s operations would not have faced any immediate interruption, or any likely interruption in the foreseeable future.” *Id.*

D. The trial court incorrectly interpreted the cases it relied on in finding that Seay was not a statutory employee of Celanese.

The trial court primarily relied on two veins of cases in rejecting Celanese's argument that Seay was a statutory employee—cases involving transportation workers and cases involving construction workers. The cases the trial court relied on, however, are distinguishable from the present matter and thus inapposite.

1. *Olmstead* and *Abbott* do not support a finding that Seay was not a statutory employee of Celanese

The trial court first relied on *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 ruling that Celanese was not a statutory employer of Seay. (Order Denying Mot. to Dismiss at 2-6; Order Denying Post-Trial Motions at 23-24; R. pp. 23-24, 48-52.) The trial court reasoned that *Abbott* constituted a change in the law on what activity constitutes part of the owner's trade, business, or occupation. *Abbott* and *Olmstead* however, involved transportation workers, and any change in legal analysis was solely related to that category of workers. Both cases presented very different facts from those involved here, and it is not surprising that the courts in those cases found that neither of the employees there were statutory employees. The trial court's reliance on these cases, therefore, was misplaced.

Abbott addressed whether a delivery driver for a common carrier was the statutory employee of a retailer. 338 S.C. at 162, 526 S.E.2d at 514. The driver was injured when he slipped and fell at the retailer's premises. *Id.* The Court applied the three aforementioned tests for determining if *Abbott* was a statutory employee, and determined he was not. The Court reasoned that although it was important for the retailer to receive goods, such did not render the delivery of goods an important part of the retailer's business. *Id.* at 163, 526 S.E.2d at 514.

Thus, the Court held that “*the mere recipient of goods* delivered by a common carrier is not the statutory employer of the common carrier’s employee,” and overruled two prior cases to the extent they suggested otherwise. *Id.* at 163 & n.1, 526 S.E.2d at 514 & n.1 (emphasis added). Both of those prior cases also concerned situations where an employee of a common carrier was injured on a business’s premises. *See Neese v. Michelin Tire Corp.*, 324 S.C. 465, 469, 478 S.E.2d 91, 93 (Ct. App. 1996) (finding truck driver for trucking company injured as he unloaded his truck at a tire manufacturer’s facility was a statutory employee); *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 495, 334 S.E.2d 825, 825 (Ct. App. 1985) (holding that a truck driver for trucking company injured when unloading a car at a car dealership was statutory employee).

Olmstead directly applied *Abbott* to similar facts. *Olmstead* concerned a truck driver for a delivery company who was injured while loading his truck at a manufacturing plant which made fishing rods. *See* 354 S.C. at 422, 581 S.E.2d at 484. The *Olmstead* Court stated that “*Abbott* represents a change in this state’s jurisprudence on what activity constitutes ‘part of [the owner’s] trade, business, or occupation’ under section 42-1-400.” *Id.* at 426, 581 S.E.2d at 486.

Critically, however, the *Olmstead* Court clarified this broad language, explaining that *Abbott* “merely establishes that *transportation* of goods *is important to nearly all businesses.*” *Id.* (emphasis added). In other words, *Abbott* recognized that transportation of goods by a common carrier, standing alone “without something more, does not qualify as ‘part of the owner’s trade, business or occupation’ under any of the three tests for statutory employment.” *Id.* at 425, 581 S.E.2d at 485. Moreover, the *Olmstead* Court determined that this principle would apply “equally to delivery of goods cases” in addition to receipt of goods cases. *Id.* at 425, 581 S.E.2d at 485. Applying *Abbott*, the *Olmstead* Court determined that the employee of the common carrier was not a statutory employee since, “[a]lthough delivery by common carrier

was certainly important to [manufacturer's] operation, it does not follow that such delivery was 'part or process' of its manufacturing business." *Id.*

Therefore, although *Olmstead* stated that *Abbott* was a "change in this state's jurisprudence," and the Court overruled "all prior cases to the extent they are in conflict," *id.* at 426-27, 581 S.E.2d at 468, these statements by the *Olmstead* Court were intended to relate to situations involving employees of common carriers only, and in instances of transportation/delivery activity. Distilled down to their core principle, *Olmstead* and *Abbott* stand for the proposition that a common carrier transportation worker engaged in the transportation/delivery of goods either to or from a business is generally not a statutory employee of that business absent some additional facts that would support such a finding. Nothing in either decision can be read to suggest that the courts intended to abrogate South Carolina case law examining whether other types of workers—such as maintenance workers—are statutory employees. Indeed, under the trial court's improper expanded interpretation of *Olmstead* and *Abbott*, many, if not most, workers could not be statutory employees, an interpretation completely at odds with long-standing precedent that "[a]ny doubts as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Poch v. Bayshore Concrete Products/S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013).

A subsequent case from this Court indicates as much. *Posey v. Proper Mold & Engr., Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008) also involved a truck driver working for a trucking contractor. The truck driver was injured while making a delivery of plastic injection molds to a company that manufactured them for the automotive industry. The Court noted that "[o]ur supreme court in *Abbott* . . . and *Olmstead* . . . addressed statutory employment *in the common carrier context*." *Id.* at 219, 661 S.E.2d at 400 (emphasis added). However, despite

acknowledging this general principle, the Court *affirmed* the trial court's determination that the truck driver *was* a statutory employee of the manufacturer. The *Posey* Court explained that the manufacturer's employees often made these same deliveries and that, unlike *Abbott* and *Olmstead*, the manufacturer was more than just a recipient or shipper of goods. *Id.* at 22, 661 S.E.2d at 401. Thus, the truck driver there was the manufacturer's statutory employee.

Indeed, cases from other jurisdictions also draw a distinction between employees of common carriers and other delivery workers. As a Louisiana court explained, the question of whether such an employee is a statutory employee "turn[s] largely on common-sense considerations of whether the delivery activity was routine or extraordinary for this type of business." *Domino v. Folger Coffee Co.*, 32 So.3d 955, 964 (La. Ct. App. 2010) (quoting 4 *Larson's Workers Compensation Law* § 70.06[8] (2009)). Typically for companies in the manufacturing business the ordinary rule is that the business "ceases with the manufacture of the good, that the trucker who picks up the finished good for delivery to one or more of the manufacturer's customers is not the statutory employee of the manufacturing firm." *Id.* (quoting *Larson's*, *supra*). The *Domino* court found that the transportation employee at issue in that case was in fact a statutory employee because the defendant company was in both the manufacturing and warehousing business. *Id.*

Other courts have also drawn similar conclusions. *See, e.g., Rice v. VVP Am., Inc.*, 137 F. Supp. 2d 658, 669 (E.D. Va. 2001) (transportation worker injured while engaged in "unpacking, sorting, and stocking of the delivery" would be classified as a statutory employee since this was an essential part of the defendant company's business selling and distributing automobile glass, but would not have been a statutory employee had she merely "dropped the delivery off at the [defendant's] front desk"); *Smothers v. Tractor Supply Co.*, 104 F. Supp. 2d

715, 716, 718 (W.D. Ky. 2000) (truck driver for transportation contractor injured while delivering merchandise from retailer's warehouse to its store was a statutory employee, as this was a regular element of the retail business operations); *Heller v. Aldi, Inc.*, 851 S.W.2d 82, 83, 85 (Mo. Ct. App. 1993) (truck driver for produce contractor who was injured while unloading truck at a grocery store was a statutory employee, as the deliveries originated at the grocer's warehouses and ended at its stores, both the driver and the store's employees assisted with unloading, and the store previously owned its own trucking service).

Hence, *Abbott* and *Olmstead* should be read to apply only to transportation/delivery with regard to common carrier workers. In any event, the rulings in *Abbott* and *Olmstead* certainly should not have been extended, as the trial court here did, so far as to apply to maintenance workers like Seay, who worked at the Celanese site continuously and exclusively from 1969 to 1978, during which time his only duties were to work in maintenance to keep the Celanese manufacturing facility in operation.

2. The trial court's reliance on cases involving construction workers, such as *Raines v. Gould*, was also misplaced.

The other cases the trial court relied on in finding that Seay was not a statutory employee all involved construction workers. These cases, however, are factually distinguishable because construction activities require a completely different analysis. Therefore, the trial court's characterization of *Raines* as "acutely relevant authority" is incorrect.

The case primarily relied on by the trial court in ruling against Celanese with respect to construction workers was *Raines v. Gould*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986). That case involved an employee of a subcontractor hired to install an electrical system at a new plant being constructed by the defendant. *See id.* at 542, 343 S.E.2d at 656. The court there examined whether the work he was performing was part of the defendant manufacturer's trade or business,

which was the “manufacturing and selling of batteries of all kinds and related products.” *Id.* at 547, 343 S.E.2d at 659. The court began its analysis by immediately noting that “[o]rdinarily **construction work**, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer.” *Id.* at 543, 343 S.E.2d at 657 (collecting cases from around the country reaching similar conclusions) (emphasis added). The court explained, however, that where a business “by its size and nature is accustomed to carrying on a more or less **ongoing program of construction**, perhaps having a construction division, or has handled its own construction in the past, **construction work delegated to a contractor** may be considered a part of its trade or business.” *Id.* (collecting additional cases) (emphasis added). Ultimately, the court determined that the work activities of the worker which assisted in building the new plant did not constitute the trade or business of the manufacturer. The construction activities to build the new plant were not “an integral part of [manufacturer’s] operations without which it cannot function,” and to hold otherwise would make “employees of every contractor so engaged” a statutory employee of every such manufacturer. *Id.* at 547, 343 S.E.2d at 659.

It is clear that the holding in *Raines* related to construction workers engaged in new construction work or large-scale remodeling. That decision was not intended to apply to dedicated maintenance workers who maintain manufacturing equipment for a manufacturing company. The trial court wrongly concluded that *Raines* is “especially pertinent to, and dispositive of, Hoescht Celanese’s claims.” (Order Denying Mot. to Dismiss at 7; R. p. 61.) On the contrary, *Raines* has no bearing on whether Seay was a statutory employee and thus the trial court erred in relying on it. The proper analysis is set forth in the maintenance worker cases detailed above.

The other construction cases relied on by the trial court are also distinguishable. For example, *Glass v. Dow Chemical Co.*, 325 S.C. 198, 482 S.E.2d 49 (1997) clearly sets forth the distinction between cases involving construction and those involving maintenance or repairs. As the *Glass* Court explained, “where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business.” *Id.* at 202, 482 S.E.2d at 51. The “major task” at issue in *Glass*, for example, was “completely replacing façade panels requiring technical knowledge that was highly specialized.” *Id.* Although the trial court read this to somehow weigh against classifying Seay as a statutory employee, the *Glass* Court’s analysis establishes the exact opposite. Large scale, major construction projects are not the business of a manufacturing entity unless it has its own construction division that would have typically performed such work. By contrast, regular, routine maintenance, such as that done by Seay, presents a completely different circumstance and is properly interpreted by reference to cases *that involve maintenance or repair work* rather than construction. Hence, the trial court erred in its decision to apply common carrier transportation case and construction worker cases to the maintenance worker circumstances here. The trial court should thus be reversed⁸ and judgment entered for Celanese.

⁸ The trial court did not address whether Celanese adequately demonstrated that it “secured the payment of compensation” to its employees in the manner provided by the Workers’ Compensation Code during the time that Seay worked at the Celanese facility (1969 to 1978). See S.C. Code Ann. § 42-5-10. Respondents did not provide any evidence that Celanese lacked the requisite coverage. The Record demonstrates this is a non-issue, and again, the trial court did not address it. (See Insurance Policies, Ex. A to Reply in Supp. of Am. Mot. to Dismiss; Aff. of Garry Allen, Ex. B. to Reply in Supp. of Am. Mot. to Dismiss; Contracts between Celanese and Daniel, Exs. I & J to Mem. in Supp. of Am. Mot. to Dismiss; R. pp. 2129-217, 2529-84.) The Court may also take judicial notice of the Workers’ Compensation Commission’s Carrier History Records, which establish that Celanese maintained proper coverage. The Commission’s website notes that the Insurance and Medical Services Department’s Coverage Division “maintains a historical record of insurance coverage and uses it to confirm the responsible insurance carrier in

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

If this Court determines Celanese is not entitled to have judgment entered in its favor, a new trial should be ordered nonetheless. The trial court erred when it failed to grant Celanese's motion for mistrial or motion for a new trial based on the premature deliberations of the jury. During the initial *voir dire* of the jury, Juror #16 stated that he worked at the "Auriga Polymers that used to be called Celanese" and that he knew some people who worked for Hoescht Celanese. (Tr. p. 52:24-53:3; R. pp. 236-37.) He stated that he never worked for Celanese though, and that he did not have any bias towards Celanese. (*Id.* at 104:5-106:8; R. pp. 288-89.) However, during the middle of trial, on the morning of the fourth day,⁹ the bailiff reported to the trial judge that "one of the young men here feels it's a conflict of interest in him on this." (*Id.* at 514:13-15; R. p. 698.) The resulting examination of Juror #16 made it apparent that the jury had engaged in premature deliberations. As a result, the trial court should have declared a mistrial.

After receiving the above information from the bailiff on day four of trial, the trial judge sent the jury out of the court room and questioned the individual juror. Juror #16 explained that he realized during the trial that he worked at the same facility as Dennis Seay doing "the very same job he does – working on the stretch lines." (*Id.* at 515:10-11; R. p. 699.) He explained that it was "hard to say" whether this would impact his judgment, and that this was "something that is very close to my life." (*Id.* at 516:15-22; R. p. 700.) He said he was not sure of anything specifically that would cause him to not be fair and impartial, but wanted to bring it to the

the event of a work-related accident or injury." Coverage Division, S.C. Workers' Compensation Commission (last visited Oct. 18, 2016), <http://www.wcc.sc.gov/insurance/Pages/CoverageDivision.aspx>.

⁹ At this point the jury had already heard a considerable amount of the Respondents' case, including the video deposition testimony from Seay himself.

judge's attention. (*Id.* at 516:23-518:1; R. pp. 700-02.) Importantly, the trial judge asked him if he had discussed it with anyone else and he stated that he told the other jurors he worked at the same plant. (*Id.* at 518:4-6; R. p. 702.) He also said that he "*asked to talk to you [Judge Hill] about it yesterday*, but I guess it didn't get through." (*Id.* at 518:8-11; R. p. 702.) The trial judge sent Juror #16 back to the jury room and told him not to discuss the case. (*Id.* at 523:16-525:13; R. pp. 707-09.) Celanese and John Crane reserved the right to object while they contemplated what happened and spoke with their clients.¹⁰ (*Id.* at 519:7-520:20; R. pp. 703-04.) Seay's counsel candidly admitted that this new information from the juror "was a wild card issue" and agreed there would be no waiver of any objection if the trial proceeded for a little longer so defense counsel could have the opportunity to consult with their clients on what to do. (*Id.* at 521:3-16; R. p. 705.)

After hearing more of the Respondents' case and breaking for lunch, both Celanese and John Crane moved for a mistrial. (*Id.* at 566:7-570:8; R. pp. 750-54.) The trial judge denied the motion, finding that there was no evidence of premature deliberations and that the questions to Juror #16 from the other jurors were limited to where he worked. (*Id.* at 570:9-573:3; R. pp. 574-57.) Finally, he reiterated that the juror did not give any appearance of bias. (*Id.* at 571:13-16; R. p. 755.)

After denying the motion, and only at the Defendants' request, the trial judge brought Juror #16 back in to ask exactly what was discussed in the jury room. The juror explained at this second questioning that he told the other jurors "where I work, *and* I work on the same stretch lines, section 14, and I do pretty much [the] same job." (*Id.* at 573:12-574:3; R. pp. 757-58.) He

¹⁰ Although both parties objected here, at the beginning of trial, the parties stipulated that any objection by one Defendant would constitute an objection for both Defendants unless the other specifically opted out of the issue. (Tr. p. 237:24-238:19; R. pp. 421-22.)

also acknowledged that “*one of them asked something about asbestos*,” but another juror said they should not be talking about that and they stopped discussing it. (*Id.* at 574:4-14; R. p. 758.) All of this information was much more than the juror previously stated was discussed the first time the trial judge questioned him. In the first questioning, the juror stated only that he told the other jurors that he had worked at the same plant.

The juror also admitted that the other jurors “*all*” asked him what happened when he spoke to the judge alone and that he “said that [the judge] asked me question [sic] if it’s going to affect my judgment and all that. And that’s pretty much it.” (*Id.* at 574:16-575:5; R. pp. 758-59.)

In light of these answers to this second inquiry, the trial judge excused Juror #16. (*Id.* at 575:6-8; R. p. 759.) The Defendants renewed their motions for a mistrial, noting that there was clear evidence of premature deliberations. (*Id.* at 576:12-578:23; R. pp. 760-62.) As John Crane’s counsel argued, there was evidence that jury had begun discussing the case and “from the jury’s perspective, they asked him if there was asbestos in the plant, and the next thing we know, we sent him home.” (Tr. p. 578:7-11; R. p. 762.) The trial court, however, found that the jury was presumed to be following his instructions and disagreed that there was evidence of premature deliberations. (Tr. p. 578:24-579:25; R. pp. 762-63.) Thus, the trial court denied the motion. This was error.

A. South Carolina law supports finding that the trial court should have declared a mistrial.

State v. Aldret is the seminal case on premature deliberations in South Carolina. 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). As the *Aldret* Court reasoned, “premature jury deliberations may affect ‘fundamental fairness’ of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations.” *Id.* The *Aldret*

court explained that premature deliberation standing alone does not warrant automatic reversal. Rather, prejudice must also be demonstrated. *Id.* at 313-14, 509 S.E.2d at 814. If the issue of premature deliberation arises during the middle of a trial, the Supreme Court stated that a trial court should:

conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may voir dire the jurors and, if practicable, “tailor a cautionary instruction to correct the ascertained damage.” If the trial court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered.

Id. at 315, 509 S.E.2d at 815.

The Supreme Court has also recognized “outside influences” as another category of juror misconduct. *See, e.g., State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (“The juror’s action in conducting independent legal research was unquestionably misconduct.”). 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.” *Id.* “In order to receive a mistrial, the defendant must show error and resulting prejudice.” *Id.*

Several procedural errors occurred during the trial court’s handling of Juror #16. First, the court failed to initially conduct a proper hearing and question jurors to ascertain if prejudice had occurred. Although the court originally brought in Juror #16 to ask him about his own possible conflict, the court made little inquiry about what Juror #16 discussed with the other jurors. The trial court made no inquiry of the remaining jurors on the topic.

After ruling on the first mistrial motion, on defense counsel’s request, the trial court brought Juror #16 back in to ask him about what he discussed with the other jurors. (Tr. pp.

572:1-573:11; R. pp. 756-57.) New information not previously disclosed was revealed. The trial court still did not make inquiry of the remaining jurors.

When the trial court did in fact make the follow up inquiry of Juror #16 with respect to his interactions with other jurors, that additional inquiry prompted new information and new mistrial motions. These motions were also denied, and the only action the trial court took ultimately as a result of Juror #16's circumstances and various discussions with the other jurors was to dismiss Juror #16. Again, the court did not question the other jurors.

The trial court erred in finding that Celanese did not suffer any prejudice. The record demonstrates that the other jurors asked Juror #16 where he worked, and that he told them he worked at the same facility doing essentially the same job as Seay. (*Id.* at 518:4-6, 573:12-574:3; R. pp. 702, 757-58.) One juror specifically asked him a question about asbestos at the facility. (*Id.* at 574:4-14; R. p. 758) At least one other juror heard this, and stated that the jury "shouldn't be talking about it." (*Id.* at 574:7-9; R. p. 758.). This indicates the jury knew it was having improper discussions and "shouldn't be." Soon after, the jury saw Juror #16 called into court by himself during the middle of the Respondents' presentation of their case. The Respondents had already played Seay's video deposition testimony talking about the debilitating nature of his mesothelioma and his suffering with the disease. The other jurors then had Juror #16 rejoin them, whereupon they "all" asked him what had happened in his discussions before the judge. He told them "all" that "[the judge] asked me question [sic] if it's going to affect my judgment and all that." (*Id.* at 574:16-575:5; R. pp. 758-59.) Later that afternoon, Juror #16 was **again** told to leave the jury room to see the judge alone. He was thereafter excused and the other jurors never saw him again.

The circumstances of Juror #16's dismissal could have only been interpreted one way by the jury. Juror #16's personal circumstances were strikingly similar to Seay's, and not long after another juror asked him about asbestos at the Celanese facility, he was not permitted to be back on the jury. He was dismissed shortly after Seay's testimony.

Juror #16 was brought out, questioned by the trial court, and then sent back to the jury room whereupon he told "all" of the other jurors he was questioned about impartiality. After this, he was brought back out separately from the other jurors, and subsequently excused. These circumstances created the strong inference for the remaining jurors that Juror #16 must have been dismissed because he had information damaging to Celanese. This was only amplified by the trial judge's closing instructions, which suggested that the reason Juror #16 was dismissed was because he could not have been fair and impartial. In his final instructions, the trial judge stated that:

Neither John Crane or Celanese or Mrs. Seay picked y'all because they want you to be a partisan or advocate for them. They picked you *because they believed you could be fair and you could decide this case without any kind of bias or prejudice.*

(Tr. p. 1463:7-12; R. p. 1647.) The inverse of this statement implied that a juror who was not picked, or worse was dismissed, is not someone that could decide the case without bias or prejudice. The highly unusual circumstances here show prejudice, premature deliberations, and considerations by the jurors of outside influences. Lastly, the juror's late-disclosed information—after the jury was empaneled—adversely affected Celanese with respect to its jury selection rights, which separately demonstrates prejudice.

For all of these reasons, the trial court erred in failing to grant Celanese's motions for a mistrial and/or motion for a new trial. Therefore, reversal is warranted and a new trial should be ordered.

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

During Angie Keene's testimony, on the Friday afternoon of the fifth day of trial, Respondents played a video clip of Dennis Seay in hospice care. (Tr. p. 740:22-741:5; R. pp. 924-25.) The clip was between five and ten seconds and consisted entirely of video and audio of Seay calling out: "Help me, Jesus. Lord, help me, Jesus. Oh, help me, Jesus." (Video and Audio of Dennis Seay; Rough Transcript from Oct. 8, 2015 p. 874:17-18, Ex. F to Pls.' Resps. to Def.'s Post-Trial Motions; R. pp. 2689-91.) Prior to playing the video, Respondents' counsel gave no indication what it would involve and stated that he did "not have it plugged into any audio," and that the jury "may not be able to hear it." (Tr. p. 740:22-741:5; R. p. 924-25.)

Admittedly, no objection to the clip was made at the time it was played. However, the next morning of trial (after a long weekend), defense counsel immediately raised an objection. Counsel for Celanese stated that Respondents' counsel came over to him and said that they were going to "show 5 seconds of a video"—without specifying the content—and asked if that was OK. (*Id.* at 766:2-767:4; R. pp. 950-51.) Counsel contended that Respondents' counsel did not say anything about audio and certainly did not explain that the video contained audio of Seay calling to Jesus for help. (*Id.*) Counsel averred that he assumed it had been cleared with someone else on the defense, but learned during the weekend that no one had approved it. (*Id.*) Counsel for Celanese adamantly denied that Respondents' counsel ever told him that Seay discussed Jesus in the video clip and that there was audio. (*Id.* at 770:6-23; R. p. 954.) He stated that he had never had an issue like that come up at any trial and thus he was sure he would have

objected if counsel had told him about the audio. (*Id.*)¹¹ The trial court, however, overruled this objection. This Court should grant a new trial based on the introduction of this unduly prejudicial video clip into evidence.

A. This Court is not precluded from reversal on this ground by the lack of contemporaneous objection, under the circumstances here.

In the order denying Celanese's post-trial motions, the trial court found that Celanese waived this objection by failing to assert it contemporaneously. However, the video was inherently prejudicial and inflammatory, and under the circumstances here, a contemporaneous objection was not necessary.

As detailed above, there was considerable confusion regarding the video. Counsel for Celanese vehemently maintained that he was not made aware of the contents of the video or informed that it would contain audio. Additionally, lead trial counsel for Celanese explained that he did not immediately object because he thought use of the video, without audio, had been cleared by another member of the joint defense team. When the Defendants realized that no one had consented, they both immediately raised their objection. The video was played on a Friday afternoon and Defendants objected and moved for a mistrial the very next morning of trial. Therefore, Defendants should not be penalized for not contemporaneously objecting.

Moreover, even if the Court agrees with the trial court that the objection was untimely, any failure to timely object was excused by the inherently inflammatory nature of the video. Angie Keene and Linda Seay both testified extensively about Dennis Seay's pain and suffering.

¹¹ Seay's counsel stated that he went over during the trial to lead defense trial counsel, Mr. Young, who "was busy doing something else." (Tr. p. 767:13-22; R. p. 951.) Seay's counsel then stated, "I said, Hey Lane, I'm going to show these pictures. And I'm going to play this video, five seconds at the end, where he says 'Jesus' over and over. And I said that to Mr. Elliott too." (*Id.*) Defense counsel denied having been told of the possible use of the video as an exhibit in advance of the trial and denied they were told the video contained audio with Mr. Seay saying "Jesus." (*Id.* at 769:14-770:23; R. pp. 953-54.)

Therefore, this video clip had the sole impact of stirring the jury's sympathy and appealing to the jury's passion. The Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a *vicious, inflammatory* argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (emphasis added).

B. The Trial Court erred by refusing to exclude the video and by refusing to grant Celanese's motion for a mistrial.

While the admission of evidence is left to the sound discretion of the trial judge, his decision will be reversed where that discretion has been abused. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2001)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 and 402, SCRE). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice

means an undue tendency to suggest a decision on an improper basis.” *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotation marks omitted).

The probative value of the Seay video clip here was substantially outweighed by the danger of unfair prejudice. The video clip served no useful purpose other than to play to the jury’s sympathy and passion. Linda Seay and Angie Keene both testified extensively about Seay’s demeanor and condition, as well as his suffering with mesothelioma. Moreover, Seay also testified via deposition about how his life changed for the worse after being diagnosed with mesothelioma. Therefore, the jury had plenty of testimony by which to determine the amount of damages. The video was simply a narrowly prejudicial snapshot of a particularly unfortunate moment towards the end of Seay’s life. The video was designed to stir the jury’s passion rather than accurately portray Seay’s daily life with mesothelioma.

This Court has held that a particular “day-in-the-life” video was not unduly prejudicial. *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). The video in *Haselden*, however, was markedly different from the video at issue in this case. The video in that matter presented a literal view of the plaintiff’s daily activities near the end of her life and was a “realistic depiction of her condition and quality of life.” *Id.* The video showed, among other things, her medications and how a lift was used to move her from her bed to her wheelchair. *Id.* Critically, the audio was turned off while the jury viewed it and her son answered questions via live testimony while it played. *Id.* The Court found that, although it was emotional, the video was “neither graphic, gruesome, nor grotesque.” *Id.* Other courts have admitted videos in similar circumstances. *See, e.g., LaFarge, ex rel. Blizzard v. Kyker*, No. 1:08CV185-SA-JAD, 2011 WL 1742002, at *8 (N.D. Miss. May 5, 2011) (admitting video that was “basic in its making, not exaggerated, and portray[ed] scenes of

ordinary activities (i.e., bathing sleeping),” but ordering that “the entire audio portion of the video” be deleted).

As a case from the Tenth Circuit cautioned, however, “day in the life” 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). These videos should be designed to show how an injury or illness impacted the plaintiff’s daily routine and typical films “show the victim in a variety of everyday situations, including getting around the home, eating meals, and interacting with family members.” *Id.* Day in the life videos introduced during trial raise “obvious dangers of prejudice to the opposing party.” *Id.* Thus, a fair portrayal in a day-in-the-life video would not depict “the victim in unlikely circumstances or performing improbable tasks.” *Id.* “The probative value of a film is greatest, and the possibility of prejudice lowest, when the conduct portrayed is limited to ordinary, day-to-day situations.” *Id.* As the *Bannister* court explained, another important consideration is the fact that film evidence is “dominant,” and the jury is more likely to “better remember” and “give greater weight to” film evidence as opposed to conventional testimony. *Id.* Finally, the court cautioned that day-in-the-life evidence could distract the jury because the benefit of effective cross-examination is lost. *Id.*

Eckman v. Moore, 876 So. 2d 975, 984 (Miss. 2004) is instructive. In that matter, two prejudicial videos were introduced at trial, neither of which accurately portrayed the victim’s routine activities. The first video included pictures of the victim’s stepson at his wedding, a ballgame, and a graduation ceremony, all of which the court found should not have been included. *Id.* at 985. The remainder of the video did show the victim’s routine activities, and the court concluded that portion was admissible. The second video, however, was entirely inappropriate, as it consisted of a short clip of the victim’s mother crying over him sobbing

“Momma loves you, Momma loves you.” *Id.* at 985. The *Eckman* court, collecting cases, explained that where day in the life videos are admitted, the films in question must “truly depict” a day in the life of the victim. *Id.* The court determined that the questionable portions of these videos were not consistent with that requirement. Accordingly, the court reversed and remanded. *See id.*; see also *Thompson v. TRW Auto. U.S., LLC*, No. 2:09-CV-1375-JAD-PAL, 2014 WL 2612271, at *2 (D. Nev. June 11, 2014) (excluding a day in the life video that was an overly dramatized, inaccurate depiction of plaintiff’s daily activities and was designed to gain jury’s sympathy).

The video of Seay calling out for Jesus to help was not an appropriate depiction of a day in his life. It is undisputed that Seay suffered from mesothelioma and that it is a debilitating disease. However, this short video clip—only a few seconds long—was a select portrayal of him at one of the lowest points of his life—in hospice on his deathbed apparently in severe pain. The sole image presented to the jury was of Seay in a particularly difficult moment crying out in agony to Jesus¹² for help. Hence, the video clip was not a proper basis for the jury’s verdict due to its highly prejudicial and inflammatory nature.

Therefore, the mistrial motion should have been granted. As detailed below in Part IV, the improper video was no doubt a factor, along with the juror issue discussed above, behind the jury’s grossly excessive verdict.

¹² In *voir dire*, three of the four veniremen who mentioned in their questionnaires that they would follow their religious beliefs if those conflicted with the court’s instructions ended up seated as jurors (Juror #187, Juror # 189, and Juror #215). (Tr. pp. 56-59, 119-23, 128-30, 156-58, 167-68; R. pp. 240-43, 303-07, 312-14, 340-42, 351-51.) While each ultimately stated that they could take an oath and follow the court’s instructions, these statements in their questionnaires demonstrate that these jurors were very religious individuals.

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

The jury's verdict in this matter was grossly excessive and disproportionate compared to other similar asbestos verdicts. The jury's considerations were motivated by passion; caprice, prejudice, or other considerations not founded on the evidence, particularly the jury's premature deliberations and considerations of outside influences, and the improper video.

Although an appellate court will not set aside a verdict for undue liberality, "if a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence then it is the duty of the trial court and the appellate court to set aside the verdict absolutely." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 33, 410 S.E.2d 21, 24-25 (Ct. App. 1991). Here, the verdict should have been set aside and a new trial ordered.

"Actual damages in a survival action are awarded for the benefit of the decedent's estate. *Welch v. Epstein*, 342 S.C. 279, 546 S.E.2d 408 (2000). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Id.* "In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Id.* The following damages are recoverable in a wrongful death action:

- (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries.

Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972).

Although the wrongful death factors include loss of consortium, it is an independent, rather than derivative, action. *Burroughs v. Worsham*, 352 S.C. 382, 405-06, 574 S.E.2d 215, 227 (Ct. App. 2002). Loss of consortium “arises out of the special relationship between a husband and wife,” *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000), and the damages recoverable are the actual damages arising from “an intentional and or tortious violation of the right of companionship, aid, society and services” of the injured spouse, S.C. Code Ann. § 15-75-20.

In this matter, the jury awarded \$2,000,000 for the survival action, \$5,000,000 for the wrongful death action, \$5,000,000 for the loss of consortium action, and \$2,000,000 in punitive damages, for a total of \$14,000,000. This verdict is grossly excessive and shockingly disproportionate. Compare the verdict here, for example, with the verdict in *Welch*, 342 S.C. 279, 536 S.E.2d 408. In that case, a verdict of \$3,000,000 was affirmed on appeal where pecuniary loss in the amount of \$630,690 was established by the evidence, the decedent was only 37 years of age at the time of his death and his widow was only 28 years old, and his children were 8 and 6. This is in stark contrast to this case, where there was no evidence of pecuniary loss as a result of Seay’s death, Seay was 70 years old, his wife was approximately four years younger, and his children were all emancipated adults. (L. Seay, Tr. 752:14-16, 752:25-753:2, 754:1-8; Court’s Ex. 1, D. Seay Video Dep. at 7:2-7, 8:9-18; Court’s Ex. 5, R. Kradin Video Dep. at 42:1-3; R. pp. 936-38, 1772, 1855.) At the time of his death, Seay had a remaining life expectancy of 13.8 years. (Court’s Ex. 5, R. Kradin Video Dep. at 44:05-19; R. p. 1856.) Moreover, Seay was a cigarette smoker and suffered from diseases unrelated to his asbestos exposure, such as coronary heart disease and angina. (A. Brody, Tr. p. 240:5-14; D. Seay, Tr. p. 441:8-12; Court’s Ex. 5, R. Kradin Video Dep. at 105:9-22, 107:16-108:8; R. pp. 424, 625,

1875-76.) Finally, the amount of medical expenses incurred as a result of his condition was stipulated to be \$280,457.91.¹³ (Tr. p. 721:16-21; R. p. 905.) Despite this, the verdict was over 4.5 times the verdict in *Welch*.

The wrongful death and loss of consortium verdicts are excessive. Courts from other jurisdictions have granted new trials for verdicts similar to or less than the amounts awarded in this case. For example, in *Bart v. Union Oil Co. of Cal.*, 540 N.E.2d 770 (Ill. Ct. App. 1989), the court found that a \$2.2 million wrongful death award, which the trial court had remitted to \$1 million, was excessive and remanded for a new trial. *Id.* at 772. In that case, the wife was 66 years old at the time of her husband's death at 63, and the court found that "considering the decedent's age and the emancipation of his children," the award was "beyond the flexible limits of fair and reasonable compensation." *Id.* Similarly, the Florida Court of Appeals reversed a \$7.2 million award for loss of consortium, finding that it was so excessive as to require a new trial. *See ACandS, Inc. v. Redd*, 703 So.2d 492 (Fla. Ct. App. 1997).

Moreover, as Celanese detailed in its motion for a new trial nisi remittitur, this verdict far exceeded similar mesothelioma verdicts from the same time frame. *See, e.g., Clemmer v. John Crane, Inc.*, No. 434434, 2006 WL 7070932 (Cal. Super. Ct. Mar. 28, 2006) (\$1,900,000 verdict consisting of \$1,100,000 in non-economic damages, \$550,000 in economic damages, and \$250,000 in loss of consortium); *Peace v. Special Elec. Co.*, No. 802680/2013, 2014 WL 7671986 (N.Y. Sup. Ct. Oct. 22, 2014) (total award of \$1,612,000, including past and future pain and suffering of victim and past and future loss of society and services for spouse); *Golik v. Georgia Pacific*, No. 1308-11192, 2014 WL 7525708 (Or. Cir. Ct. Dec. 18, 2014) (total verdict

¹³ As Celanese noted in its motion for a new trial nisi remittitur, the amount of compensatory damages the jury awarded was over 42 times this figure. (Mot. for New Trial Nisi Remittitur at 2; R. p. 2076.)

of \$3,957,6723, including \$1,286,111 in damages to surviving spouse and \$830,555 to each of the decedent's three children); *Estate of Serven v. John Crane, Inc.*, No. 101202978, 2012 WL 8751702 (Pa. Com. Pl. Dec. 4, 2012) (total verdict of \$650,000 for wrongful death claim brought by survivors of 67 year old man); *Brandes v. Brand Insulations, Inc.*, No. 14-2-21662-9SEA, 2015 WL 4741479 (Wash. Super. Ct. Apr. 6, 2015) (total verdict of \$3,500,000, remitted by trial court to \$2,500,000). Finally, in a 2011 mesothelioma case, the New York Supreme Court Appellate Division reduced an award for past pain and suffering from \$3,650,000 to \$1,500,000 and an award for loss of consortium from \$1,670,000 to \$260,000. *Penn v. Amchem Prods.*, 85 A.3d 475, 477 (N.Y. S. Ct. App. Div. 2011).

In light of the foregoing, the verdict was excessive and shockingly disproportionate, particularly in light of the amount Seay's stipulated medical expenses. The verdict was also not in line with verdicts in similar mesothelioma cases. This indicates that the jury's verdict was motivated by passion, caprice, prejudice, or other considerations not founded on the evidence. Instead of focusing on the evidence and testimony properly introduced at trial, the jury based its verdict on improper conclusions drawn from the issues surrounding Juror #16 and the highly prejudicial video. Therefore, because the jury's verdict was not founded on the evidence, the verdict should be set aside in its entirety.

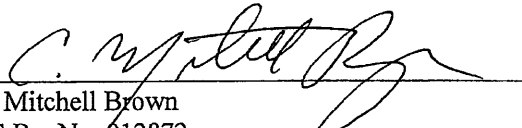
CONCLUSION

Based on the forgoing, the Court should reverse the judgment of the trial court and enter judgment in favor of Celanese. Failing this, the Court should reverse and remand for a new trial absolute.

Signature on Following Page

Respectfully submitted,

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April 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

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SC Court of Appeals

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

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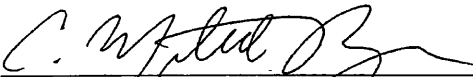
CNA Holdings, LLC, ...

Appellant.

CERTIFICATE OF COUNSEL

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

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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):

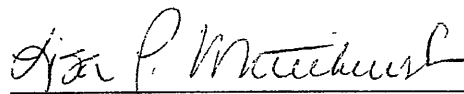
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Personal Representative of the Estate of
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v.

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Arguments	7
I. The trial court correctly found Dennis Seay was not Hoechst Celanese's statutory employee. Hoechst's "trade or business" was manufacturing, not construction or maintenance	8
a. This is a case-specific analysis controlled by whether the injured worker was laboring "in" the putative employer's "trade or business"	8
b. Mr. Seay was not working in Hoechst's trade or business. Hoechst manufactured polyester fiber; it was not a construction or maintenance company	9
c. This reasoning is faithful to precedent, which the trial court cited in its orders	12
d. The cases Hoechst cites are meaningfully different from this case and Hoechst seeks a ruling violating the statute's purpose instead of honoring it	15
II. The trial court acted within its discretion in finding the jury followed instructions and did not engage in premature deliberations	17
III. The trial court acted within its discretion in denying Hoechst a mistrial based on the video. There was no proper objection to this cumulative evidence and no reason a mistrial would be necessary	18
IV. The trial court did not abuse its discretion when it held the jury's verdict appropriately reflected the devastating injuries Mr. Seay and his family suffered	20
Conclusion	22

TABLE OF AUTHORITIES

<i>Abbott v. The Limited,</i> 338 S.C. 161, 526 S.E.2d 513 (2000)	12, 13
<i>Bowers v. Charleston & W. C. Ry. Co.,</i> 210 S.C. 367, 42 S.E.2d 705 (1947)	20
<i>Boseman v. Pacific Mills,</i> 193 S.C. 479, 8 S.E.2d 878 (1940)	15
<i>Collins v. Seko,</i> 412 S.C. 283, 772 S.E.2d 510 (2015)	9
<i>Dial v. Niggel Associates,</i> 333 S.C. 253, 509 S.E.2d 269 (1998)	19
<i>Drake v. Raybestos-Manhattan, Inc.,</i> 241 S.C. 116, 127 S.E.2d 288 (1962)	17
<i>Edens v. Bellini,</i> 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004)	14
<i>Gentry v. Milliken & Co.,</i> 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992)	15
<i>Gibbs v. State,</i> 403 S.C. 484, 744 S.E.2d 170 (2013)	19
<i>Glass v. Dow Chem. Co.,</i> 325 S.C. 198, 482 S.E.2d 49 (1997)	9, 15, 16
<i>Glover v. United States,</i> 337 S.C. 307, 523 S.E.2d 763 (1999)	8
<i>Gordon v. Rothberg,</i> 213 S.C. 492, 50 S.E.2d 202 (1948)	20
<i>Harrell v. Pineland Plantation,</i> 337 S.C. 313, 523 S.E.2d 766 (1999)	8, 9
<i>Lindsey v. City of Greenville,</i> 247 S.C. 232, 146 S.E.2d 863 (1966)	19

<i>Marchbanks v. Duke Power,</i> 190 S.C. 336, 2 S.E.2d 825 (1939)	15, 16
<i>Olmstead v. Shakespeare,</i> 354 S.C. 421, 581 S.E.2d 483 (2003)	9, 12, 13, 14, 15, 16
<i>Ost v. Integrated Products,</i> 296 S.C. 241, 371 S.E.2d 796 (1988)	9
<i>Parker v. Williams & Madjanik, Inc.,</i> 275 S.C. 65, 267 S.E.2d 524 (1980)	17
<i>Posey v. Proper Mold & Engineering,</i> 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008)	14
<i>Raines v. Gould, Inc.,</i> 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986)	12, 23, 14, 15, 16
<i>Smith v. T.H. Snipes & Sons,</i> 306 S.C. 289, 411 S.E.2d 439 (1991)	15
<i>State v. Aldret,</i> 333 S.C. 307, 509 S.E.2d 811 (1999)	18
<i>State v. Harris,</i> 340 S.C. 59, 530 S.E.2d 626 (2000)	17
<i>State v. Simpson,</i> 325 S.C. 37, 479 S.E.2d 57 (1996)	19
<i>Toyota of Florence v. Lynch,</i> 314 S.C. 257, 442 S.E.2d 611 (1994)	19
<i>Watson v. Wilkinson Trucking Co.,</i> 244 S.C. 217, 136 S.E.2d 286 (1964)	21
<i>Wheeler v. Morrison Machine,</i> 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993)	14, 15
<i>Woodard v. Westvaco,</i> 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993)	15

Cases from other jurisdictions

<i>Burroughs v. Westlake Vinyls, Inc.</i> , No. 5:07-CV-89-R, 2008 WL 5192237 (W.D. Ky. Dec. 11, 2008)	16
<i>Dominio v. Folger Coffee Co.</i> , 32 So. 3d 955 (La. Ct. App. 2010)	16
<i>Jones v. Lily Tulip Cup Corp.</i> , 158 F. Supp. 944 (W.D. Mo. 1958)	16
<i>Singleton v. J. P. Stevens & Co.</i> , 533 F. Supp. 887 (D.S.C. 1982)	15
<i>Smith v. FCX</i> , 744 F.2d 1378 (4th Cir. 1984)	16

Statutes & Court Rules

S.C. Code Ann. § 42-1-400 (2015)	8
S.C. Code Ann. § 42-11-70 (2015)	17
Rule 103, South Carolina Rules of Evidence	19

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court correctly found Dennis Seay was not Hoechst Celanese's statutory employee when Mr. Seay worked for a construction company and when construction maintenance was not part of Hoechst's manufacturing business.
- II. Whether the trial court abused its discretion when it found the jury followed the court's instructions and did not engage in premature deliberations.
- III. Whether the trial court abused its discretion when it denied Hoechst Celanese's motion for a mistrial after there was no timely objection to the evidence in question and when a mistrial was not necessary.
- IV. Whether the trial court abused its discretion when it held the jury's verdict appropriately reflected the devastating injuries Mr. Seay and his family suffered.

STATEMENT OF THE CASE

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

A. Abbreviated background.

This case arises from occupational exposure to asbestos. Dennis Seay was diagnosed with mesothelioma—"asbestos cancer"—in August of 2013. (R.p.2051, line 12:07-12:08). He and his wife filed this lawsuit the next month. (R.p.70).

Mr. Seay died in December of 2014. (R.p.65). He was 70 years old. (R.p.397, lines 11-12). The suit was amended to state wrongful death and survival claims. (R.pp.63-65). These were in addition to Mrs. Seay's claim for loss of consortium.

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

The jury returned a defense verdict acquitting John Crane. (R.pp.1656-1657).

The jury returned plaintiffs' verdicts against CNA of \$2 million on the survival claim, \$5 million for wrongful death, \$5 million for loss of consortium, and—after a separate hearing—\$2 million in punitive damages for wrongful death. (R.pp.1656-1657; p.1678). The verdict's date was October 8, 2015.

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

The trial court heard the motions two months later, in December of 2015. (R. p.134). The court denied the motions in an order filed the next month. (R.pp.1-46). The order is 46 pages long and analyzes every issue, in detail.

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

Mr. Seay was exposed to asbestos while working for a construction company—Daniels Construction—more than 40 years before he was diagnosed with cancer. He worked for Daniels for about 10 years during the 1960s and 1970s. (R.p.543, lines 10-23). Multiple experts explained Mr. Seay's on-the-job exposure caused his cancer. (R.p.650, lines 14-21); (R.p.2062, lines 15:21-15:24). This was Mr. Seay's only job working around asbestos. (R.p.2055, lines 23:13-23:25).

Daniels assigned Mr. Seay to work at a polyester plant in Spartanburg owned by Hoechst Celanese. (R.p.2055, lines 24:14-25:02). Mr. Seay was a millwright. (R.p.2056, lines 25:03-25:23). He summarized his job, and Daniels Construction's job at this plant, as maintaining the equipment and keeping it running. *Id.* Daniels did this work at plants across the United States. (R.p.1484, lines 2-5). A Hoechst witness explained Daniels was hired

because it was a qualified contractor that could do the "expert work" Hoechst needed "both in construction and maintenance." (R.p.1256, lines 9-13).

Mr. Seay was exposed to asbestos in two principal ways. He worked with insulation and he worked with gaskets. (R.p.2056, line 27:12 - p.2057, line 27:22). He repaired and maintained equipment like pumps, valves, and other components of the plant's pipelines, bringing him into constant contact with the gaskets and insulation used in those pipelines. (R.p.555, lines 12-13; p.2057, lines 28:08-28:18). The record contains multiple references to the significant dust Mr. Seay's work produced. (R.p.555, line 12 - p.556, line 24; p.621, line 4-7; p.2058, line 58:25 - p.2059, line 61:07). This was an extremely dirty job, and Mr. Seay did it.

Plaintiffs' theory against Hoechst was premises liability: Plaintiffs alleged Hoechst knew its factory had asbestos, Hoechst knew asbestos was hazardous, and Hoechst failed to warn Mr. Seay in spite of Hoechst's superior knowledge. (R.p.1543, lines 12-18). Plaintiffs claimed Hoechst had sophisticated knowledge of the danger—Hoechst was a large manufacturer that knew of over 40 "red flags" about the hazards of asbestos before Mr. Seay set foot at its plant. (R.p.1545, l. 2 - p.1548, l. 18). Yet Mr. Seay never received training on asbestos and never saw any warnings the plant contained asbestos. (R.p.612, lines 5-12).

Daniels had more knowledge than Mr. Seay, but not much. A Daniels employee explained he had never heard OSHA standards were *not* designed to protect against cancer. (R.p.1490, line 10 - 1495, line 20). Plaintiffs presented evidence Hoechst *knew* these standards were insufficient and that cancer could occur with only slight asbestos exposure. (R.p.1348, line 2 - p.1350, line 10).

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

First, Plaintiffs argued Hoechst made a calculated decision to use asbestos because it was cheaper. (R.p.1672, lines 5-7). An internal document from 1949 demonstrated Teflon gaskets performed best, but because Teflon was more expensive, Hoechst concluded it should only be used when "economically justified." (R.p.1330, line 10 - p.1331, line 23).

Second, Plaintiffs said Hoechst ignored its promises. (R.p.1672, lines 7-8). Hoechst promised to audit contractors like Daniels to ensure compliance with safety procedures. (R.p.1369, line 6-17). Hoechst did not have any documents showing these audits happened, (R.p.1369, line 24 - p.1370, line 3), and the evidence showed a complete breakdown of this pledge. Workers like Mr. Seay were not educated about asbestos and protective equipment like masks and respirators were not required or available. (R.p.559, lines 10-22). An expert explained why these shortcomings were critical. (R.p.667, line 12 - p.668, line 21).

Plaintiffs' final argument for punitive damages relied on evidence Plaintiffs believed showed a culture of concealment. Hoechst's internal memos from the 1960s instructed employees to avoid creating written reports of hazardous material test results because such reports were a "serious legal hazard." (R.p.1381, line 2 - p.1383, line 12); see also (R.pp.2063-2073). In the event something *was* written, it was to omit interpretative opinions. *Id.* A "confidential" document from 1979 advised the proper way to answer an employee's question about hazardous materials was with a prepared statement emphasizing the data was "inconclusive," exposures were being monitored, and exposures were controlled below appropriate limits. (R.p.1361, line 21 - p.1362, line 23).

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

John Crane's chief defense was to point at the insulation. This company sold gaskets and gasket material and consistently argued Mr. Seay's work with gaskets did not expose him to enough asbestos to cause mesothelioma. (R.p.403, line 6 - p.404, line 10; p.1001, line 19 - p.1003, line 5; p.1583, lines 1-23). The verdict for John Crane indicates this defense worked.

John Crane also disputed when it learned asbestos was hazardous but had to explain past testimony about the company's knowledge and actions in the 1940s. (R.p.1083-1084).

Hoechst's principal defense is its first issue on appeal: Hoechst argued Mr. Seay was its "statutory" employee. The court denied Hoechst's motion to dismiss, issuing a written order after a hearing. (R.pp.55-62). The court renewed this ruling at the directed verdict stage, (R.p.1514, lines 14-24), and in its post-trial order. (R.pp.21-26).

Statutory employment is determined by whether the injured worker performed work that was part of the putative employer's "trade or business." If this question is answered affirmatively, an injured worker may not bring a civil suit for damages because a workers' compensation claim is the worker's exclusive remedy. At each juncture in this case, the trial court concluded that while Mr. Seay's work was obviously important to Hoechst, it was not part of Hoechst's *business*. As the court observed at the directed verdict stage, "they [Hoechst] weren't in the maintenance business." (R.p.1514, lines 19-20).

Hoechst's second appellate issue is an allegation of juror misconduct. During the fourth day of trial, one of the jurors notified the court of a potential conflict of interest. (R.p.698, line 13 - p.699, line 4). This juror then disclosed to the court he worked at the same plant, now owned by a different company, and did the same job as Mr. Seay. (R.p.699,

lines 5-16). The juror disclosed this fact to other jurors after he was asked where he worked, and when another juror inquired whether the plant contained asbestos, a third juror reminded the jury they were not to discuss the case. (R.p.702, lines 2-6; p.757, line 6 - p.758, line 14).

Both defendants moved for a mistrial. (R.p.750, line 17 - p.752, line 8). The court excused the juror but denied a mistrial, explaining there did not appear to be any premature deliberations. (R.p.754, line 9 - p.756, line 7). In fact, this juror had informed *everyone* he worked at a plant formerly owned by Hoechst *before* jury selection. (R.p.752, line 10 - p.753, line 9). The court believed the issue was benign and said so in ruling after questioning the juror a second time, at Hoechst's request. (R.p.762, line 24 - p.763, line 20).

Hoechst's third appellate issue is a challenge to a piece of evidence. During Mr. Seay's daughter Angie's testimony, Plaintiffs introduced a five to ten second video of Mr. Seay while he was in hospice. (R.p.924, line 14 - p.925, line 5). This was immediately before Angie was asked about her father's suffering and before she explained her father suffered "worse than I can imagine anybody suffering." (R.p.925, lines 6-8).

The next court day (4 days later due to the weekend), Hoechst objected to the video, seeking a mistrial or that the video be stricken. (R.p.950, line 7 - p.951, line 4). Plaintiffs' counsel agreed not to use the video again. (R.p.955, line 6 - p.956, line 15). The post-trial order held the objection was waived and there was no prejudice. (R.pp.28-29).

Hoechst's final appellate issue relates to the amount of the verdicts. Hoechst argued the verdicts were grossly excessive. (R.pp.2082-2083). The trial court rejected this argument noting the unrelenting pain Mr. Seay experienced before his premature death and the overwhelming loss his family has suffered. (R.pp.31, 38, 40).

ARGUMENT

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

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

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

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

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

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

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

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

The statutory employee doctrine is a creature of statute. Section 42-1-400 of the Code (2015) is part of the Workers' Compensation Act. The statute explains when a business owner uses a subcontractor "to perform or execute any work which is a part of his trade, business, or occupation," the business owner is liable to pay workers' compensation benefits as if the injured subcontractor had been the business' own employee.

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

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

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

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

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

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

A former Hoechst employee explained Hoechst is a large chemical company; at one time perhaps the second largest chemical company in the world. (R.p.976, lines 22-24). He

said Hoechst has "many different businesses" including fibers, chemicals, pharmaceuticals, and agrochemicals. (R.p.977, lines 5-7). Hoechst has "many" different manufacturing plants. (R.p.1313, lines 8-9). In fact, in the 1970s Hoechst manufactured a product containing asbestos. (R.p.1313, lines 14-17). Hoechst's plant in Spartanburg made polyester fiber. (R.p.1256, line 23 - p.1257, line 1; p.1313, lines 7-13).

Hoechst's employees worked in the manufacturing process. The same Hoechst witness explained Hoechst employees "were responsible for making polyester and the related products." (R.p.1263, lines 13-19). This was consistent with other testimony. Mr. Seay said Hoechst employees were "production workers" doing work that was significantly different than his work. (R.p.2060, lines 67:12-68:11). Hoechst emphasized this in closing argument, telling the jury Hoechst did not have a maintenance department when Mr. Seay worked there. (R.p.1592, lines 14-22). Hoechst focused on making fiber. *Id.* Hoechst workers and Daniels employees "did not work near each other." *Id.*

Daniels is a construction company. (R.p.1494, lines 18-24). As of 1964, it had built about 400 manufacturing plants in twelve states, more or less. (R.p.1482, lines 1-4).

In fact, Daniels built this plant; the same plant where Mr. Seay was exposed to asbestos. (R.p.1482, lines 14-15). Daniels also provided maintenance services to plants across the country. (R.p.1484, lines 2-8). Daniels performed all maintenance work at this plant until sometime in the 1980s or 1990s. (R.p.1391, lines 9-12).

Hoechst's argument focused on the fact that Mr. Seay's work was important. Hoechst said it could not keep making polyester unless it maintained its system. (R.p.137, lines 1-5; p.1513, lines 12-15; p.1684, line 24 - p.1686, line 7).

The trial court noted this argument's shortcomings: every business needs preventative maintenance and Mr. Seay's work was obviously important because businesses do not hire people to do unnecessary and wasteful work. (R.p.140, lines 14-23; p.1686, line 18 - p.1687, line 6). The court correctly observed statutory employment does not hinge on whether the work is important, but on whether the work is an important "part of" Hoechst's trade or business.

The court used the correct test in articulating its ruling. It noted there was no evidence Hoechst had a maintenance division or had used employees to perform work like Mr. Seay performed. (R.pp.26 & 60-61). The court rejected the defense because although maintenance was undoubtedly important, maintenance was not a part of Hoechst's trade or business. (R.p.1514, lines 14-24; p.1707, lines 16-18).

The record supports the court's ruling. Hoechst's core business did not involve construction and maintenance. Hoechst did not have employees doing this work and it had no maintenance division. Instead it contracted with Daniels, whose business *was* maintenance. Hoechst used the different nature of these businesses to its advantage, arguing it contracted with Daniels precisely *because* Daniels was in construction. (R.p.1590, lines 4-14). Hoechst claimed Daniels was an asbestos abatement contractor, (R.p.1365, lines 5-23), and argued Daniels' work required special skills. (R.p.1262, line 23 - p.1263, line 1).

Daniels was not an asbestos abatement contractor, (R.p.1499, lines 6-22), but Hoechst's point stands: these two companies had different businesses. Hoechst limited its business to manufacturing and it was Hoechst's prerogative to do so. Mr. Seay was not working in that business. For that reason, he is not a statutory employee.

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

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

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

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

The same analysis applies here: maintenance was important to Hoechst, but Hoechst did not have a maintenance division and none of its employees did preventative maintenance. The trial court noted this prominently in its orders. (R.pp.26, 59).

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

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

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

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

Olmstead is written broadly. It speaks of a change in “*the state’s* jurisprudence.” 354 S.C. at 426, 581 S.E.2d at 486 (emphasis added). This applies to more than a single application: It modifies the full scope of the statute’s effect. *Id.* The Court explained this change likely conflicted with other, unnamed cases. *Id.* Hoechst said the case was narrow, but the trial court correctly saw *Olmstead* as having wide impact. (R.pp.137-138).

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

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

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

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

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

(Ct. App. 2004); *Wheeler*, 313 S.C. 440, 443, 438 S.E.2d 264, 266 (Ct. App. 1993). The trial court gave another example in the hearing below, differentiating between Hoechst and DuPont (the manufacturer in a prior case) by noting DuPont had a construction division, a history of construction activity, and was "pretty much" in the construction business. (R.p.1685, lines 6-11). Hoechst's situation was "a far different situation." (R.p.1685, l. 10).

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

Smith v. T.H. Snipes & Sons contains no analysis and predates the *Olmstead* decision. *Smith*, 306 S.C. 289, 411 S.E.2d 439 (1991). *Boseman v. Pacific Mills* also predates *Olmstead* and is questionable because the injured worker used special equipment. Compare *Boseman*, 193 S.C. 479, 8 S.E.2d 878 (1940) with *Glass*, 325 S.C. at 202, 482 S.E.2d at 51 (explaining "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business.").

The manufacturers in *Woodard v. Westvaco*, *Gentry v. Milliken*, and *Marchbanks v. Duke Power* had used regular employees for the same work they outsourced to subcontractors. *Woodard*, 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993); *Gentry v. Milliken & Co.*, 307 S.C. 235, 236, 414 S.E.2d 180, 181 (Ct. App. 1992); *Marchbanks*, 190 S.C. 336, 366, 2 S.E.2d 825, 837 (1939). Hoechst did not use employees to do maintenance until years after Mr. Seay left, and although Hoechst was free to change its business at any time, there is no authority for applying that change to Mr. Seay after the fact.

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

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

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

Hoechst cites several foreign cases. The Supreme Court has explained few cases from other jurisdictions "afford any help" because "[t]he various Workmen's Compensation Acts are so different," *Marchbanks*, 190 S.C. at 344, 2 S.E.2d at 828, but it is not necessary to distinguish these based on any generality. Each one is distinguishable after examination.

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

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

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

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

There is no protection in the Workers' Compensation Act for Mr. Seay. The Act's statute of repose bars him from making a workers' compensation claim because his disease was not contracted within two years year of his last exposure to asbestos. S.C. Code Ann. § 42-11-70 (2015). The discovery rule applies to the Act's statute of limitations, see *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 123, 127 S.E.2d 288, 292 (1962), but that says nothing of the repose deadline, which would plainly apply to Mr. Seay who contracted cancer decades after leaving Daniels. A statutory employee would get access to "swift and sure" compensation. The idea that Mr. Seay would get "swift and sure" anything in the workers' compensation system is a joke.

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

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

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

Hoechst cannot demonstrate an abuse of discretion. The trial court examined this juror twice. (R.p.698, line 13 - p.709, line 14) and (R.p.756, line 21 - p.759, line 25). Those examinations led the court to believe the episode was an example of the jury following its instructions, saying it sounded like one juror asked whether the plant contained asbestos and another juror said "we're not supposed to be talking about the case." (R.p.762, line 24 - p.763, line 4). The juror in question explained this was the end of the discussion; he did not answer the question. (R.p.758, lines 4-14). The trial court believed this was a harmless encounter. (R.pp.26-27). That view of the facts has evidentiary support.

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

Hoechst never asked to question other jurors or for a curative instruction. (R.p.703, line 7 - p.707, line 2; p.750, line 17 - p.763, line 25). Hoechst insisted on a mistrial; a request the court properly denied. There is no evidence a mistrial was necessary.

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

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

the fourth of that day's six segments of witness testimony. (R.p.924, line 14 - p.925, line 5). There was no objection to the video while it was played. There was no objection immediately after it was played. There was no objection during the remainder of that day's proceedings. Instead, the objection came at the beginning of the next day in court, which was four calendar days later because of the weekend. (R.p.950, line 6 - p.951, line 4).

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

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

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

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

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

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

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

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

The order recognized that damages in a survival action include recovery for the decedent's conscious pain and suffering. (R.p.31). Mr. Seay suffered for 4 or 5 years before he was diagnosed with cancer. (R.p.2051, lines 12:07-13:02). He had fluid drained from his lungs 11 times, his lung collapsed, he had multiple surgeries, and he attended his deposition with two broken ribs that could not be repaired because his doctors did not want to cut into his side again. (R.pp.2051, line 13:07 - p.2052, line 16:01). As he got sicker, he stayed in constant pain, had no appetite, and threw up whatever he ate. (R.p.2053, lines 19:04-19:14). He could not sleep. (R.p.2054). He had so much pain he prayed to die. (R.p.2061, lines 71:08-79:15). John Crane's expert admitted mesothelioma is "a bad cancer" and "has a lot

of pain.” (R.p.2074, lines 145:09-146:02). Plaintiffs’ counsel summarized this evidence in arguing for a substantial award. (R.pp.1557-1560).

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

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

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

No comparative analysis is required. Unliquidated damages are largely a matter of judgment based upon the facts of each case. *Watson*, 244 S.C. at 224, 136 S.E.2d at 289. Hoechst acknowledged during the post-trial hearing there have been “higher, even much higher damage awards,” summarily claiming those verdicts were “outliers.” (R.pp.150-151). The post-trial record contains no explanation at all of why these verdicts shock the conscience. (R.pp.134-184, 1932-1936, and 2082-2087).

CONCLUSION

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

May 11, 2017

Respectfully submitted,



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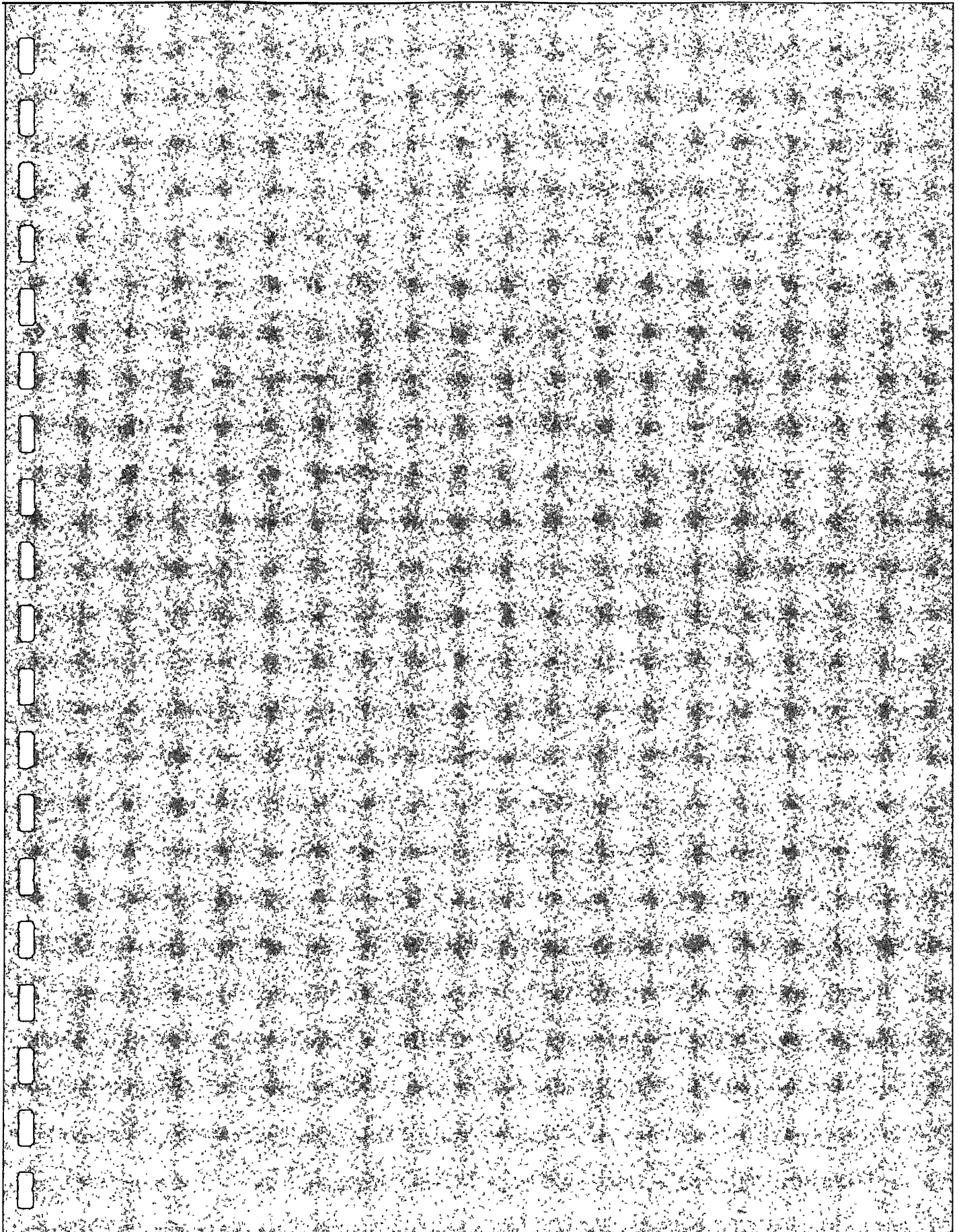
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Judge

Appellate Case No. 2016-000227
Case No. 2013-CP-42-3915

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SC Court of Appeals

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

v.

CNA Holdings, LLC Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	Error! Bookmark not defined.
ARGUMENT	1
I. SEAY WAS CELANESE'S STATUTORY EMPLOYEE UNDER SOUTH CAROLINA LAW	1
1. <i>Abbott and Olmstead</i> did not change the tests for determining whether a worker's activities are part of the putative statutory employer's trade, business, or occupation under South Carolina law.....	1
2. Subsequent cases addressing statutory employment contradict Respondents' argument.....	7
3. Respondents' argument is overly restrictive and contrary to South Carolina precedent	10
4. Seay was Celanese's statutory employee.....	12
5. Respondents' policy argument was rejected by the <i>Olmstead</i> Court	15
6. Respondents' reliance on <i>Raines v. Gould</i> is also misplaced	16
7. Because Seay was a statutory employee of Celanese, this Court should reverse	16
II. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL AFTER LEARNING THAT THE JURY PREMATURELY DELIBERATED AND CONSIDERED OUTSIDE INFLUENCES	17
III. THE TRIAL COURT ERRED BY REFUSING TO EXCLUDE THE UNAUTHORIZED VIDEO OF SEAY CRYING OUT FOR JESUS TO HELP HIM AND BY FAILING TO GRANT CELANESE'S MOTION FOR A MISTRIAL	19
IV. THE TRIAL COURT ERRED BY FAILING TO GRANT A NEW TRIAL DESPITE A GROSSLY EXCESSIVE VERDICT	20
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abbott v. The Limited, Inc.</i> , 338 S.C. 161, 526 S.E.2d 513 (2000).....	1, 2
<i>Cooke v. Palmetto Health Alliance</i> , 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005).....	9
<i>Edens v. Bellini</i> , 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004)	7, 11
<i>Fortner v. Thomas M. Evans Const. & Dev., LLC</i> , 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013)	14
<i>Freeman v. McBee</i> , 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)	5
<i>Gentry v. Milliken & Co.</i> , 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992).....	11
<i>Glass v. Dow Chem. Co.</i> , 325 S.C. 198, 482 S.E.2d 49 (1997).....	2, 14
<i>Hancock v. Wal-Mart Stores, Inc.</i> , 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003).....	7, 8
<i>Johnson v. Jackson</i> , 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012).....	8, 9
<i>Marchbanks v. Duke Power Co.</i> , 190 S.C. 336, 2 S.E.2d 825 (1939)	11
<i>Olmstead v. Shakespeare</i> , 348 S.C. 436, 599 S.E.2d 370 (Ct. App. 2002)	2, 3, 4
<i>Olmstead v. Shakespeare</i> , 354 S.C. 421, 581 S.E.2d 483 (2003).....	1, 2, 3, 15
<i>Ost v. Integrated Prods., Inc.</i> , 296 S.C. 241, 371 S.E.2d 796 (1988).....	1
<i>Posey v. Proper Mold & Engr., Inc.</i> , 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008)	9, 10
<i>Raines v. Gould, Inc.</i> , 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986).....	11, 16
<i>Revels v. Hoechst Celanese Corp.</i> , 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990)	4
<i>State v. Aldret</i> , 333 S.C. 307, 509 S.E.2d 811 (1999).....	19
<i>Toyota of Florence v. Lynch</i> , 314 S.C. 257, 442 S.E.2d 611 (1994)	20
<i>United States v. Resko</i> , 3 F.3d 684 (3d Cir. 1993).....	19
<i>Wise v. Wise</i> , 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011)	5
<i>Woodard v. Westvaco</i> , 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993).....	11

ARGUMENT

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

Respondents incorrectly contend that the Supreme Court's decisions in *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000) and *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003) represented a major change in South Carolina's statutory employee jurisprudence. Respondents argue that *Olmstead* changed the law such that the worker must be "laboring in" the putative employer's trade or business to meet the definition of a statutory employee. In other words, they assert that the proper inquiry for determining whether a worker is a statutory employee is to narrowly define the company's "trade or business," and then determine whether the worker's activities match that trade or business. They define the trade or business of Celanese as manufacturing, and contend that since Seay was a maintenance worker and not a manufacturing worker, he is not a statutory employee. In other words, Respondents assert that Celanese would have to be *in the maintenance business* for Seay to have been a statutory employee, even though his work activities were crucial to the operation of the manufacturing lines on which he worked. This argument is a distortion of long established South Carolina jurisprudence and is unsupported by any case law, including *Abbott* or *Olmstead*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, in *Posey v. Proper Mold & Engr., Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008), the Court of Appeals explicitly acknowledged the limited application of *Abbott* and *Olmstead*. *Posey* involved a truck driver working for a trucking contractor who was injured while making a delivery of plastic injection molds to a manufacturer. The Court noted that “[o]ur supreme court in *Abbott* . . . and *Olmstead* . . . addressed statutory employment *in the common carrier context*.” *Id.* at 219, 661 S.E.2d at 400 (emphasis added). However, despite

acknowledging this general principle, the Court *affirmed* the trial court's determination that the truck driver *was* a statutory employee of the manufacturer. The *Posey* Court explained that the manufacturer's employees often made these same deliveries and that, unlike *Abbott* and *Olmstead*, the manufacturer was "more than just a recipient or shipper of goods." *Id.* at 22, 661 S.E.2d at 401. Thus, the truck driver there was the manufacturer's statutory employee there.

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

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

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

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

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

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

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

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

4. Seay was Celanese's statutory employee.

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

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

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

27:6, 61:9-62:19, 67:17-21; R. pp. 611-12, 1778-79, 1792-93, 1795.) A Celanese employee, referred to as the “lead man,” would provide instructions to Seay’s supervisor at Daniel, who would then give Seay his daily job duties. (See D. Seay, Tr. pp. 374:23-375:9; Court’s Ex. 1, D. Seay Video Dep. at 66:1-67:1; Dep. of D. Seay (Nov. 20, 2013), Ex. B to Mem. in Supp. of Am. Mot. to Dismiss at 42:19-43:2; R. pp. 558-59, 1794, 2267.) The Celanese facility where Seay worked manufactured synthetic fibers. (D. Seay, Tr. p. 360:16-21; Court’s Ex. 1, D. Seay Video Dep. at 25:3-8; R. pp. 544, 1779.) As Seay himself testified, his work on steam lines was vital to the operation of Celanese’s business, because all of the equipment he maintained, such as pumps, valves, and gear boxes, was critical to the successful operation of the manufacturing process lines at the facility. (See D. Seay, Tr. pp. 382:20-383:23, 416:19-21, 418:3-11; 419:2-420:10; R. pp. 566-67, 600, 602-04.) The repairs and preventative maintenance Seay performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility. (See D. Seay, Tr. p. 420:5-10; Court’s Ex. 1, D. Seay Video Dep. at 76:23-77:6; R. pp. 604, 1798.)

Ronnie Thompson, another Daniel contractor who worked with Seay, confirmed that keeping the production lines operating was important to Celanese’s manufacturing business, as production could not proceed if the valves, pumps, and other equipment were not working properly. (Court’s Ex. 2, R. Thompson Video Dep. at 17:4-24; R. p. 1801.)

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

G to Mem. in Supp. of Am. Mot. to Dismiss at ¶¶ 5, 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 2409, 2519.) Furthermore, the maintenance of equipment and upkeep of production lines was a regular, ongoing part of Celanese's operations. (See Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; R. p. 2409.) Without the ongoing maintenance provided by Daniel workers like Seay, the Celanese facility would not have been able to properly function and consistently produce product for sale. (B. Bowyer, Tr. p. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; R. pp. 1261, 2409, 2519.) The maintenance work provided by the Daniel employees was so valuable to Celanese that in later years Celanese directly hired the Daniel maintenance workers as Celanese employees. (Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 10; R. p. 2410.)

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

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

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

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

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

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

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

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

Finally, as Celanese detailed in its opening brief, *Raines v. Gould*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986) is inapposite. *Raines* involved the employee of a subcontractor hired to install an electrical system at a new plant being constructed by the defendant. *See id.* at 542, 343 S.E.2d at 656. The *Raines* Court examined whether the work he was performing was part of the defendant manufacturer's trade or business, which was the "manufacturing and selling of batteries of all kinds and related products." *Id.* at 547, 343 S.E.2d at 659. The *Raines* Court held that construction of the *new plant* was generally outside the manufacturer's trade or business. The *Raines* Court noted that an exception may arise, however, where the business "by its size and nature is accustomed to carrying on a more or less ongoing program of construction, perhaps having a construction division, or has handled its own construction in the past." *Id.* (collecting additional cases). In other words, *Raines* simply recognized that the construction of the manufacturing plant itself, under the facts of that case, was not part of the defendant company's business of manufacturing and selling batteries. Once construction finished, the construction workers' task in *Raines* was complete and they would not be involved in the actual manufacturing activity. This is in stark contrast to workers like Seay, whose activities were essential to the continued operation of Celanese's manufacturing plant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

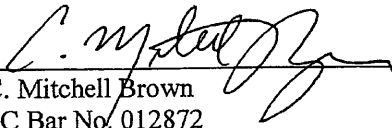
CONCLUSION

For the reasons stated herein and in Celanese's opening brief, the Court should reverse the judgment of the trial court and enter judgment in favor of Celanese. Failing this, the Court should reverse and remand for a new trial absolute.

Signature on Following Page

Respectfully submitted,

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April 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

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

RECEIVED

APR 26 2017
SC Court of Appeals

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

Respondents,

v.

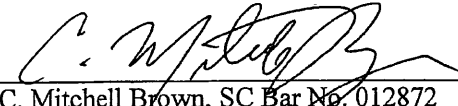
CNA Holdings, LLC, ...

Appellant.

CERTIFICATE OF COUNSEL

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

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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):

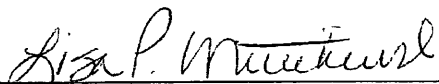
Pleadings:

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April 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela D. Keene, Individually and as Personal
Representative of the Estate of Dennis Seay, Deceased,
and Linda Seay, Respondents,

v.

CNA Holdings, LLC, Appellant.

Appellate Case No. 2016-000227

Appeal From Spartanburg County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5625
Heard October 2, 2018 – Filed February 13, 2019

AFFIRMED

C. Mitchell Brown, Allen Mattison Bogan, and Blake
Terence Williams, all of Nelson Mullins Riley &
Scarborough LLP, of Columbia, for Appellant.

John D. Kassel and Theile Branham McVey, both of
Kassel McVey, and Blake Hewitt, of Bluestein
Thompson Sullivan LLC, all of Columbia; and Chris
Panatier and Kevin W. Paul, both of Simon Greenstone
Panatier Bartlett PC, of Dallas, Texas, for Respondents.

GEATHERS, J.: In this wrongful death action, Appellant CNA Holdings, LLC challenges the circuit court's denial of its motions for a judgment notwithstanding the verdict (JNOV), new trial absolute, and new trial nisi remittitur. Appellant argues the circuit court erred by concluding that Dennis Seay was not a statutory employee of Appellant's predecessor in interest, Hoechst Celanese Corporation (Celanese), pursuant to section 42-1-400 of the South Carolina Code (2015). Appellant also argues the circuit court erred by (1) declining to grant a mistrial on the ground of jury misconduct; (2) admitting into evidence a video of Seay crying out in pain; and (3) upholding the amount of the jury's verdict. We affirm.

FACTS/PROCEDURAL HISTORY

From 1971 to 1980, Seay performed maintenance work at the Celanese polyester plant in Spartanburg. Celanese had contracted with Daniel Construction Company, Seay's employer, to handle all maintenance work at its Spartanburg plant, and Daniel assigned Seay to work at this plant. Seay's duties included maintaining and repairing pumps, valves, condensers, and other equipment. In performing this work, Seay came into contact with asbestos gaskets, packing, and insulation materials. Tragically, in August 2013, Seay was diagnosed with mesothelioma, a type of lung cancer.

On September 25, 2013, Seay and his wife, Linda Seay, filed this action against Appellant and several other defendants, alleging negligence by failure to warn Seay of the dangers of asbestos, failure to provide adequate safety measures against asbestos dust, and failure to provide safe environmental conditions in the Spartanburg plant. Seay died from advanced mesothelioma on December 29, 2014. Subsequently, Seay's daughter, Respondent Angie Keene, amended the complaint to add causes of action for wrongful death and survival. Appellant then filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCPP, or, in the alternative, for summary judgment pursuant to Rule 56, SCRCPP. The basis for this motion was that Seay was a statutory employee of Celanese and, therefore, his exclusive remedy was under the South Carolina Workers' Compensation Act, S.C. Code Ann. §§ 42-1-10 to 42-19-50.¹

¹ See S.C. Code Ann. § 42-1-540 (2015) ("The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee . . . as against his employer, at common law or otherwise, on account of such injury, loss of service[,], or death.").

The circuit court denied the motion and conducted a trial from September 28 through October 2, 2015, and from October 6 through 8, 2015. At the conclusion of the trial, the jury found that the negligence of Celanese caused Seay's mesothelioma and awarded \$2 million in actual damages to Seay's estate for its survival claim; \$5 million in actual damages to Seay's estate for its wrongful death claim; and \$5 million in actual damages to Linda Seay for her loss of consortium claim. The jury also found Celanese was willful, wanton, and reckless and awarded \$2 million in punitive damages. Appellant filed motions for a JNOV, new trial absolute, and new trial nisi remittitur, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by declining to grant a JNOV on the ground that Seay was a statutory employee of Celanese?
2. Did the circuit court err by declining to grant a mistrial on the ground of jury misconduct?
3. Did the circuit court err by admitting into evidence a video showing Seay crying out in pain?
4. Did the circuit court err by upholding the amount of the jury's verdict?

STANDARD OF REVIEW

Statutory Employee

"[D]etermination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Consequently, this [c]ourt has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013) (quoting *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201–02, 482 S.E.2d 49, 51 (1997)).

Mistrial

"The granting or denying of a motion for mistrial is within the sound discretion of the trial [court]. Absent an abuse of discretion, the decision of the trial [court] will not be overturned on appeal." *Mishoe v. QHG of Lake City, Inc.*, 366

S.C. 195, 202, 621 S.E.2d 363, 366 (Ct. App. 2005) (citation omitted). "An abuse of discretion occurs [when] the trial court is controlled by an error of law or [when] the [c]ourt's order is based on factual conclusions without evidentiary support." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000).

Evidence

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) (quoting *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011)). "Determining whether prejudice exists 'depends on the circumstances[,] and 'the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" *Id.* (quoting *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998)). "Prejudice in this context means 'there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence.'" *Id.* (quoting *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)).

New Trial/Excessive Damages

"[I]f a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence[,] then it is the duty of the trial court and the appellate court to set aside the verdict absolutely." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 33, 410 S.E.2d 21, 25 (Ct. App. 1991). Nonetheless, "the jury's determination of damages is entitled to substantial deference[.]" and the circuit court's decision on whether to grant a new trial based on the amount of the verdict "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

LAW/ANALYSIS

I. Statutory Employee

Appellant asserts the circuit court erred by declining to grant a JNOV on the ground that Seay was a statutory employee of Celanese. Appellant argues that Seay's

maintenance and repair work on plant equipment was a part of the business of Celanese, which was manufacturing polyester fiber, because the plant would not have been able to properly function without the maintenance and repair work performed by Seay and other Daniel employees.

"The statutory employee doctrine converts conceded non-employees into employees for purposes of the Workers' Compensation Act." *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1. "The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." *Id.* Section 42-1-400 created the concept of a statutory employee:

When any person, in this section and [s]ections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is *a part of his trade, business[,] or occupation* and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title [that] he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (2015) (emphasis added). Pursuant to section 42-1-540, the exclusive remedy for an injured statutory employee is the Workers' Compensation Act. Therefore, even if a business organization does not have a direct employment relationship with a worker, the Workers' Compensation Act limits the worker to its provisions as the exclusive remedy for injuries he received while engaged in activity considered part of the organization's trade, business, or occupation.

Here, in its order denying Appellant's JNOV motion, the circuit court found that the "trade, business[,] or occupation" of Celanese was the manufacture of polyester fibers, and all Celanese employees were engaged in making these fibers. The circuit court also found the maintenance and repair work performed by Seay and other Daniel employees was "significantly different" from the work performed by Celanese employees and, therefore, concluded that Seay was not a statutory employee of Celanese. The court explained, "Although maintenance of the equipment in the plant may have been important to Celanese's operation, it does not

follow that such maintenance was a 'part or process' of its synthetic fiber manufacturing business."

Our courts have traditionally applied three tests in determining whether a worker is engaged in activity that is part of the organization's trade, business, or occupation: (1) the activity is an important *part of* the organization's business or trade; (2) the activity is a necessary, essential, and integral *part of* the organization's business; or (3) the activity has previously been performed by the organization's employees. *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003) (emphases added). These tests were first articulated by our supreme court in 1988 in *Ost v. Integrated Products, Inc.*, 296 S.C. 241, 245, 371 S.E.2d 796, 798–99 (1988) by drawing on three previous opinions of the court. See *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 132 S.E.2d 18 (1963), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002); *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940); *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939).² However, the court has acknowledged, "Since no easily applied formula can be laid down for determining whether work in a particular case *meets these tests*, each case must be decided on its own facts." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 (emphasis added) (quoting *Glass*, 325 S.C. at 201, 482 S.E.2d at 51); *accord Ost*, 296 S.C. at 244, 371 S.E.2d at 798; *see also Meyer v. Piggly Wiggly No. 24, Inc.*, 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000) ("Only one of these three tests need be met[,] but there is no easily applied formula and each case must be decided on its own facts.").

Ultimately, "[t]he guidepost is whether or not that which is being done is or is not *a part of* the general trade, business[,] or occupation of the owner." *Id.* at 473–74, 527 S.E.2d at 763 (emphasis added) (alteration in original) (quoting *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)). Simply put,

² See also *Raines v. Gould, Inc.*, 288 S.C. 541, 547, 343 S.E.2d 655, 659 (Ct. App. 1986) (holding the defendant's "trade or business" did not encompass the plaintiff's installation of an electrical system at a plant being constructed for the defendant because its mere involvement with the construction of numerous facilities on its property was not accompanied by the creation of a construction division or performance of construction work "by its regular employees"); 6 Arthur Larson et al., *Larson's Workers' Compensation* § 70.06[1] (Matthew Bender Rev. Ed. 2017) (analyzing cases across multiple jurisdictions with statutes comparable to section 42-1-400 and concluding they "agree upon the general rule of thumb that the statute covers all situations in which work is accomplished [that] this employer, or employers in a similar business, would ordinarily do through employees").

"[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." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999).

The parties in the present case dispute the significance and precedential value of two relatively recent supreme court opinions, namely *Abbott v. The Ltd., Inc.*, 338 S.C. 161, 164, 526 S.E.2d 513, 514 (2000), and *Olmstead*. In *Abbott*, the plaintiff, who worked for a common carrier, slipped and fell on the premises of a retailer while he was delivering goods to the retailer. 338 S.C. at 162, 526 S.E.2d at 514. The supreme court reversed this court's conclusion that the plaintiff was the retailer's statutory employee. *Id.* at 164, 526 S.E.2d at 514. The court stated,

The fact that it was important to Retailer to *receive* goods does not render the delivery of goods an important *part of* Retailer's business. "The mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is *a part or process of* the business."

Id. at 163–64, 526 S.E.2d at 514 (second and third emphases added) (quoting *Caton v. Winslow Bros. & Smith Co.*, 34 N.E.2d 638, 641 (Mass. 1941)).

In *Olmstead*, our supreme court affirmed this court's conclusion that the plaintiff, an employee of a common carrier, was not a statutory employee of the defendant, a business that designed and manufactured fiberglass products. 354 S.C. at 426, 581 S.E.2d at 486. The plaintiff loaded the defendant's fiberglass utility poles onto a trailer for delivery to the defendant's customer, and the defendant then instructed the plaintiff to remove some defective poles. *Id.* at 422, 581 S.E.2d at 484. While removing these poles, the plaintiff was injured. *Id.*

The court conceded that delivery by common carrier was important to the defendant's operation but held, "it does not follow that such delivery was 'part or process' of its manufacturing business." *Id.* at 426, 581 S.E.2d at 486 (quoting *Abbott*, 338 S.C. at 164, 526 S.E.2d at 514).

Abbott represents a change in this state's jurisprudence on what activity constitutes "part of [the owner's] trade, business[,] or occupation" under section 42-1-400, and likely conflicts with cases other than the ones we explicitly

overruled in footnote 1 of the *Abbott* opinion. As such, we now *overrule all prior cases to the extent they are in conflict with our holding in Abbott and now in this case.*

Id. at 426–27, 581 S.E.2d at 486 (emphasis added). Respondents argue that this language applies to all types of contract workers, not merely employees of common carriers, and that the circuit court in the present case correctly interpreted *Olmstead* as having a broad impact. On the other hand, Appellant argues that *Olmstead* and *Abbott* are not binding on this court because those opinions addressed statutory employment in the transportation setting whereas the present case involves maintenance.

Regardless of what the court meant by "a change in this state's jurisprudence,"³ the logic employed by the court in *Abbott* and *Olmstead* brought new clarity to the abundance of case law on this issue and this logic is binding in the present case. Accordingly, the circuit court correctly determined that even though the maintenance work Seay performed was essential *for* Appellant's conduct of manufacturing polyester fiber, it does not mean that equipment maintenance was a *part or process of* Appellant's manufacturing business. In sum, the analysis in *Abbott* and *Olmstead* is true to the legislative intent underlying section 42-1-400, which seeks to determine whether the type of work performed by the worker is the same type of work "the owner" has established as its business, and its logic applies across all trades, businesses, and occupations, allowing each case to be decided on its own facts.

This court's more recent precedent is consistent with the analysis in *Abbott* and *Olmstead*. In *Johnson v. Jackson*, one of the defendants, a full-service transportation company specializing in shipping high-value technological equipment, had contracted with a temporary employment agency "to use several of its workers, including [the plaintiff], to load computers at Palmetto Health for subsequent delivery to HP Financial Services." 401 S.C. 152, 156, 735 S.E.2d 664, 666 (Ct. App. 2012). This court held that the plaintiff was a statutory employee of the company and distinguished the cases cited by the plaintiff by observing that in each of those cases, "transportation was not a main and integral part of the defendant's business" and "the basic operation of the putative employer *differed greatly* from the activity in which the plaintiff was engaged at the time of injury." *Id.* at 164, 735 S.E.2d at 670 (emphasis added). The court stressed, "Here, [the

³ *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486.

defendant's] business is transportation of technological equipment, which necessarily includes packaging, loading, and unloading that equipment." *Id.*

Appellant also argues that previous appellate opinions addressing contract workers in a maintenance setting compel the court to conclude that Seay was Appellant's statutory employee: "[C]ourts applying South Carolina law have held for decades that maintenance is an important and essential part of a manufacturing business."⁴ However, this type of sweeping statement contradicts longstanding precedent acknowledged by Appellant that cautions, "no easily applied formula can be laid down for the determination of whether . . . work in a given case is a part of the general trade, business[,] or occupation of the principal employer" and that "[e]ach case must be determined on its own facts." *Ost*, 296 S.C. at 244, 371 S.E.2d at 798. Therefore, we reject Appellant's contention that only those opinions addressing a maintenance setting have any precedential value to the present case. Nonetheless, we will address these opinions below for the benefit of the bench and bar.

Appellant cites *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991), in support of its argument that Seay was a statutory employee. In *Smith*, the defendant hired the plaintiff's decedent, a self-employed welder, to repair a metal shearing machine used in the defendant's business operation. 306 S.C. at 290, 411 S.E.2d at 439. The welder was fatally injured while repairing the machine. *Id.* However, in applying the three alternative tests for determining whether a worker was engaged in activity that is part of the defendant's trade, business, or occupation,

⁴ Appellant also assigns error to the circuit court's reliance on opinions addressing statutory employment in the construction setting, namely *Glass*, 325 S.C. at 202, 482 S.E.2d at 51 (holding the plaintiffs, both welders for a construction contractor in charge of replacing a building's facade, were not statutory employees of the defendant, a manufacturer of a chemical compound used as a mortar additive, because the manufacturer commissioned the construction project merely in settlement of litigation involving the mortar additive, and the construction activity was not a part of the defendant's trade), and *Raines*, 288 S.C. at 542, 547, 343 S.E.2d at 656, 659 (holding the plaintiff, an employee of a subcontractor commissioned to install an electrical system at a plant "being constructed for [the defendant] by a general contractor" was not the defendant's statutory employee because his work "was not a part of the trade or business of" the defendant, which was "the '[m]anufacturing and selling [of] batteries of all kinds and related products'"). We hold the circuit court properly relied on these opinions because they reinforce the concept that each case must be decided according to its own facts.

the court noted, "the evidence as to these considerations was the object of stipulations agreed upon prior to the evidentiary hearing." *Id.* at 292, 411 S.E.2d at 440. Further, the opinion does not indicate the content of the stipulations or the type of business in which the defendant engaged or otherwise elaborate on the facts. Therefore, we question whether this opinion is applicable to the analysis in the present case.

Appellant also cites *Wheeler v. Morrison Mach. Co.*, 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993). In *Wheeler*, the plaintiff worked for an asbestos removal contractor, and while removing asbestos at a Springs Industries plant, he fell into a piece of textile equipment, injuring his right hand. *Id.* at 441, 438 S.E.2d at 265. Springs had an ongoing maintenance program that included removing and disposing of asbestos from plant machinery and its connecting pipes, and Springs employees routinely performed this maintenance. *Id.* at 443, 438 S.E.2d at 266. When asbestos removal became subject to a licensing requirement, Springs began to hire outside contractors specializing in asbestos removal to perform this maintenance but it also had some employees who were licensed for emergency asbestos removal. *Id.* The plaintiff was injured during this time period. *Id.* This court concluded that the plaintiff was engaged in work that was part of Springs' "trade[,] business[,] or occupation." *Id.*

In addition to the fact that the defendant's own employees were engaging in the activity in which the plaintiff was involved, the court was persuaded by the testimony of an employee of the defendant stating that this particular activity was "necessary for the fabric or the finishing process" at the plant and there was no way to "do the maintenance work on the pipe in the area" of the project in question "without removing the asbestos." *Id.* at 443–44, 438 S.E.2d at 266 (emphasis added). However, we are bound by the supreme court's subsequent opinion in *Olmstead* distinguishing between an activity that is **important to, or necessary for**, the defendant's operation and activity that is actually **part of** that operation. See *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 (stating that while delivery of the defendant's product to its customer by common carrier was important to the defendant's operation, "it does not follow that such delivery was "part or process" of its manufacturing business" (quoting *Abbott*, 338 S.C. at 164, 526 S.E.2d at 514)).

Post-dating *Olmstead* is this court's opinion in *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004). In *Edens*, a mechanical contracting firm had assigned the plaintiff's decedent to the Abbeville plant of a textile company where he assisted the company's employees "in various plant-related projects for about a year prior to his fatal on-the-job accident." 359 S.C. at 437–38, 597 S.E.2d at 865.

On the day of the accident, the decedent had been helping plant employees with "install[ing] a cylinder on the door of a dye vat in the robotic shuttle area." *Id.* at 438, 597 S.E.2d at 865. When he later returned to this area to check for any leakage, the shuttle accidentally pinned the decedent against a dye vat, and he later died from his injuries. *Id.* at 438, 597 S.E.2d at 866.

In concluding that the decedent's work on the dye vat project met all three tests for determining whether a worker is a statutory employee, this court relied on the affidavits of the decedent's supervisor (also an employee of the mechanical contracting firm) and a manager employed by the defendant. *Id.* at 443–44, 597 S.E.2d at 868–69. The supervisor stated that the decedent assisted the defendant's maintenance associates when they requested it but he did not bring any "specific or unique expertise to the project." *Id.* at 444, 597 S.E.2d at 869. The supervisor also stated, "Maintaining operations equipment in the dye package plant was an important and necessary part of [the defendant's] business at the Abbeville Plant." *Id.* at 443, 597 S.E.2d at 869.

The affidavit of the defendant's manager tracked the language of all three tests first articulated in the 1988 opinion in *Ost*—he stated that the decedent was under the direction of the defendant's employees when he was helping them modify the door to a dye vat and that the defendant's employees could have performed this work, which was neither special nor unique. *Id.* at 444, 597 S.E.2d at 869. The manager also stated,

Maintaining operations equipment and machinery in the dye package plant and modifying the dye vats in the dye package plant to make them more productive were *important and necessary parts of [the defendant's] business* at the Abbeville plant. Making the dye vats productive was an *integral aspect of the dye package plant operations*. Therefore, the work done to the door of the dye vat at issue *was an important part of [the defendant's] operations* in Abbeville.

Id. (emphases added). These affidavits cinched the case outcome in the defendant's favor. However, going forward, we decline to automatically assign probative value to any self-serving affidavit of a party's representative when determining whether the preponderance of the evidence shows a worker's activity is actually part of the trade, business, or occupation of the owner. Simply asserting that an activity is part of the owner's trade, business, or occupation does not make it so. *See Poch*, 405

S.C. at 367, 747 S.E.2d at 761 ("[D]etermination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Consequently, this [c]ourt has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." (quoting *Glass*, 325 S.C. at 201-02, 482 S.E.2d at 51)); *Meyer*, 338 S.C. at 473-74, 527 S.E.2d at 763 ("[T]he guidepost is whether or not that which is being done is or is not *a part of* the general trade, business[,] or occupation of the owner." (emphasis added) (first alteration in original) (quoting *Hopkins*, 208 S.C. at 311, 38 S.E.2d at 6)).

Nonetheless, to the extent that the maintenance cases cited by Appellant have precedential value, the unique facts of the present case support the circuit court's conclusion that Seay's work, while important to the manufacturing process performed by Celanese employees, was not part of that process and, thus, Seay was not a statutory employee of Celanese. Only Daniel employees performed maintenance and repairs on the equipment in the Spartanburg plant. None of the Celanese employees performed this type of work. Further, a Celanese employee admitted that Celanese contracted with Daniel because it was "a qualified, capable contractor that can do the *expert* work that [Celanese] needed done, both in construction and maintenance." (emphasis added). As aptly noted by the circuit court, Appellant "has presented no evidence that its corporate purpose included equipment maintenance."

Moreover, the written contracts between Celanese and Daniel clearly distinguish between the nature of Daniel's work and the nature of the business in which Celanese was engaged, manufacturing polyester fibers. In both the 1972 and 1975 contracts, Section 1, "Scope of Work," states, "The Contractor shall furnish all necessary supervision, labor, equipment, tools, materials, supplies, and incidentals necessary to perform continuous routine maintenance; operation of utility equipment; and emergency, supplementary, or temporary maintenance services as may be required by the Owner."⁵ In the 1972 contract, Section 8, "Installed Equipment," states,

Under no circumstances shall Contractor be responsible for operation of Owner's equipment, unless it is expressly agreed in writing that the Contractor shall supervise its personnel in the performance of such services. Equipment installed by the Contractor shall not be operated by the

⁵ Supplies were kept in a storeroom on site.

Contractor, unless and until a signed acceptance thereof and release of responsibility for further operation has been furnished to the Contractor. Under no circumstances shall the Contractor be responsible for the actual capacity, productivity, or suitability for its intended use of mechanical, process, or production equipment.

This language also appears in section 8 of the 1975 contract, with the exception of the second sentence. While these contracts provided for Celanese to reimburse Daniel for workers' compensation premiums, it was Daniel who carried this insurance on its employees.

Based on the foregoing, the preponderance of the evidence supports the circuit court's conclusion that Seay was not a statutory employee of Celanese.

II. Mistrial/Jury Deliberations

Appellant asserts that the circuit court erred by declining to grant a mistrial on the ground of jury misconduct because the jury engaged in premature deliberations and considered outside influences. We disagree.

Following Respondents' presentation of four witnesses, Juror #16 advised the circuit court that he was concerned about a conflict of interest because he was working at the same plant where Seay had worked and he was performing work that was identical to Seay's work. Juror #16 explained that he did not realize until after he heard some testimony that Seay had worked at the precise plant at which Juror #16 was working and that Seay had precisely the same job that Juror #16 had.⁶ Juror

⁶ During voir dire, the circuit court did not mention the precise plant at which Seay had worked or Seay's precise job duties. The circuit court posed the following question during voir dire: "And then there were some other companies who were affiliated with or related to Celanese, and that would be: Hystron, Hystron Fibers, Hoechst, Hoechst Fibers, Hoechst Celanese. Has anyone ever worked for them, or had a member of their immediate family work for them, or have any relationship whatsoever with these companies?" Juror #16 responded, "I'm working for Auriga Polymers, which used to be called Celanese. I know some people [who] worked for Hoechst Celanese." The circuit court asked Juror #16 and the other prospective jurors responding to the question if there was anything that would keep them from being fair and impartial or if there was any reason why they could not decide the case solely on the evidence and the law, to which there was no response.

#16 stated that he had asked to speak with the court on the previous day, and the circuit court indicated it had just learned of the request. Juror #16 also stated that other than responding to a question about where he worked, he did not discuss his concern with the other jurors.

Nonetheless, Appellant sought a mistrial. The circuit court denied the motion, concluding there was no evidence that the jury had been tainted or had engaged in premature deliberations, but the court indicated that Juror #16 would be excused from further service. Appellant requested further examination of Juror #16, who then advised the court that he told the other jurors he did the same work that Seay had done and worked at the same plant where Seay worked. He also indicated a second juror "asked something about asbestos" but a third juror stated they should not be discussing that. He then recalled that after his first colloquy with the court, upon his return to the jury room, the other jurors asked him what happened. He merely told them that the court asked him if his place of work and job duties would affect his judgment. After the circuit court excused Juror #16 from further service, Appellant renewed its motion for a mistrial, which the circuit court denied.

After the trial's conclusion, Appellant challenged the circuit court's denial of the mistrial motion in its motion for a new trial. In its order denying the motion, the circuit court repeated that there was no evidence of premature deliberations or of any outside influences affecting the jury's verdict.

"The granting of a motion for a mistrial is an extreme measure [that] should be taken only when an incident is so grievous that the prejudicial effect can be removed in no other way." *Mishoe*, 366 S.C. at 202, 621 S.E.2d at 366–67. "The burden is on the moving party to show not only error, but also the resulting prejudice." *Id.* at 202, 621 S.E.2d at 366. Further, "[t]he granting or denying of a motion for mistrial is within the sound discretion of the [circuit court]. Absent an abuse of discretion, the decision of the [circuit court] will not be overturned on appeal." *Id.*

Moreover, the circuit court "is in the best position to determine the credibility of the jurors;" therefore, the appellate court grants the circuit court "broad deference on this issue." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). Likewise, "the [circuit] court has broad discretion in assessing allegations of juror misconduct." *State v. Aldret*, 333 S.C. 307, 313, 509 S.E.2d 811, 814 (1999). "[U]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." *Id.* (quoting *State v. Kelly*, 331 S.C. 132, 141, 502 S.E.2d

99, 104 (1998)). "[A] defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial." *Id.* at 314, 509 S.E.2d at 814.

When an allegation of premature jury deliberations arises during trial, the circuit court

should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. *If requested by the moving party*, the court may *voir dire* the jurors and, if practicable, 'tailor a cautionary instruction to correct the ascertained damage.'"

Id. at 315, 509 S.E.2d at 815 (emphasis added) (quoting *United States v. Resko*, 3 F.3d 684, 695 (3d Cir. 1993)).

As to outside influences, a jury must render a verdict free from them. *Harris*, 340 S.C. at 63, 530 S.E.2d at 627. "In determining 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." *Id.* "The determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the [circuit] court." *Id.*

Here, none of the parties actually mentioned premature deliberations in discussing Appellant's mistrial motion. The circuit court raised the issue sua sponte in addressing the mistrial motion. After granting Appellant's request for further questioning of Juror #16, the circuit court concluded there were no premature deliberations and noted that one of the jurors was actually enforcing the circuit court's instructions not to discuss the case.

Critically, it was incumbent on Appellant to ask the circuit court to voir dire the remaining jurors on their possible premature deliberations, but Appellant did not do so. We note that in *Aldret*, the supreme court held the appellant was procedurally barred from raising the issue of premature deliberations on appeal not only due to his failure to raise the issue to the circuit court at the first opportunity to do so, but also due to his failure to ask the circuit court to voir dire the jurors concerning this issue. 333 S.C. at 316, 509 S.E.2d at 815 ("In light of Aldret's delay in seeking relief in this case, however, and his failure to specifically request the trial court to voir dire the jurors concerning the premature deliberations, we affirm his conviction for

DUI." (emphasis added)). Therefore, we affirm the circuit court's finding that there was no evidence of premature deliberations.

Appellant argues that the circumstances of Juror #16's dismissal, i.e., the remaining jurors seeing him leave the jury room for questioning on two occasions and later learning that he was excused from further service, "created the strong inference for the remaining jurors that [he] must have been dismissed because he had information damaging to Celanese." Appellant also argues these circumstances show that it was prejudiced by outside influences on the jury. We disagree. The possibility that the remaining jurors inferred Juror #16 had information damaging to Celanese is pure speculation. Appellant failed to seek follow-up questioning of the remaining jurors concerning these circumstances; thus, Appellant has not carried its burden of showing actual prejudice. Therefore, we affirm the circuit court's finding that there was no evidence of any outside influence affecting Appellant's right to a fair trial based on Juror #16's presence on the jury.

Finally, Appellant maintains that the late disclosure of Juror #16 concerning his conflict adversely affected its "jury selection rights, which separately demonstrates prejudice." Appellant presents this point in one sentence, neither elaborating nor citing any supporting authority. Therefore, we consider this argument abandoned. *See In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001), *modified on other grounds by Matter of Chapman*, 419 S.C. 172, 180 n.6, 796 S.E.2d 843, 847 n.6 (2017) ("A bald assertion, without supporting argument, does not preserve an issue for appeal."); *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Further, we note that the information given by Juror #16 during voir dire was enough to place Appellant on notice that this juror had the potential to be sympathetic to Seay. *See supra* n. 6. At this stage of the litigation, Appellant still had an opportunity to exercise a peremptory strike of this juror. Therefore, this precise argument has no merit.

Based on the foregoing, the circuit court properly denied Appellant's mistrial motion on the ground of Juror #16's interaction with the remaining jurors.

III. Mistrial/Video

Appellant contends that the circuit court erred by admitting into evidence a video of Seay crying out in pain and declining to grant a mistrial based on the video's presentation. We disagree.

At trial, Seay's daughter, Angie Keene, testified concerning Seay's character, his relationship with her and other family members, and his suffering from mesothelioma. During Keene's testimony, Respondents played a video of Seay while he was in hospice care. The video, which lasts less than one minute, shows Seay lying in a bed and softly crying out, "Help me, Jesus" multiple times. There were no objections prior to, during, or immediately after the video was played for the jury.⁷ In fact, after Keene completed her testimony, Respondents presented a video deposition of another witness and presented the testimony of Linda Seay before Appellant finally objected to the video of Seay on the next morning of court proceedings, which actually occurred four calendar days later. Appellant argued the video was "highly improper" and requested a mistrial, which the circuit court denied.

In its new trial motion, Appellant argued the audio accompanying the video was "unauthorized" and prejudicial. In its order denying the motion, the circuit court concluded Appellant waived its argument that it was prejudiced by the video by failing to make a contemporaneous objection. The circuit court also concluded the video did not unduly prejudice Appellant because the jury heard other evidence that Seay "died an agonizingly painful death" and this was an undisputed fact in the case.

Preservation

Respondents argue this issue is unpreserved because Appellant did not make a timely objection to the presentation of the video but waited until the next day of court proceedings (four calendar days later) to object. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (holding that the appellant's failure to contemporaneously object to certain testimony could not be "later bootstrapped by a motion for a mistrial"). Appellant argues its failure to contemporaneously object to the video was due to the confusion surrounding its admission. *See supra* n. 7. Appellant also argues that its failure to raise a contemporaneous objection should be excused by the inflammatory nature of the video. In support of this

⁷ Appellant's trial counsel told the circuit court that Respondents' counsel failed to give him advance notice that the video was accompanied by audio and included a reference to Jesus. Appellant's counsel also advised the court that he did not object immediately after the video was played because he "just assumed" the video had been cleared by another member of the defense team and he later learned that the video "was not cleared with anyone."

argument, Appellant cites the following proposition from *Toyota of Florence, Inc. v. Lynch*: "[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

The *Toyota* opinion addressed an inflammatory closing argument that included three hand-drawn posters depicting men with Asian features and another poster depicting mushroom cloud explosions in each southeastern state comprising the defendant's business territory. *Id.* The court explained, "We can hardly conceive of a more outrageous argument than that made here. While we do not condone [the appellant's] failure to make a contemporaneous objection, we find it would be wholly unreasonable for any attorney to anticipate this type of abhorrent conduct." *Id.*

Even if precedent addressing the misconduct of counsel during a closing argument could be used as comparable authority for granting a mistrial based on inflammatory evidence, the video in the present case does not provoke the kind of outrage expressed in the *Toyota* opinion. Therefore, we will not excuse Appellant's failure to make a contemporaneous objection to the video. Nonetheless, we address the merits for the benefit of the bench and bar.

Merits

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke*, 421 S.C. at 558, 808 S.E.2d at 628 (quoting *Commander*, 396 S.C. at 262–63, 721 S.E.2d at 417). "Determining whether prejudice exists 'depends on the circumstances[,] and 'the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" *Id.* (quoting *Taylor*, 333 S.C. at 172, 508 S.E.2d at 876). "Prejudice in this context means 'there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence.'" *Id.* (quoting *Vaught*, 366 S.C. at 480, 623 S.E.2d at 375).

Here, Appellant references the other evidence of Seay's struggles with mesothelioma in support of its argument that the video "served no useful purpose other than to play to the jury's sympathy and passion." However, Appellant never raised this particular ground to the circuit court; rather, Appellant merely asserted that the video was "highly improper." *See State v. Geer*, 391 S.C. 179, 191, 705 S.E.2d 441, 448 (Ct. App. 2010) ("A party need not use the exact name of a legal

doctrine in order to preserve it, *but it must be clear that the argument has been presented on that ground.*" (emphasis added) (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 378–79 (Ct. App. 2005) (holding the appellant's argument on appeal was not preserved because he argued a different ground before the circuit court).

Further, the record shows that mesothelioma is a particularly "bad cancer" that "requires a lot of pain medication" and caused Seay to suffer "enormously." Therefore, the video of Seay crying out in pain did not unfairly exceed what was necessary to fully inform the jury of the extent of Seay's pain and suffering, a compensable element of his total damages. See *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281–82 (1969) ("In personal injury actions[,] great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages; and as a broad general rule[,] any evidence [that] tends to establish the nature, character, and extent of injuries [that] are the natural and proximate consequences of [the] defendant's acts is admissible in such actions, if otherwise competent." (quoting *Merrill v. Barton*, 250 S.C. 193, 196, 156 S.E.2d 862, 863 (1967))); *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014) ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence" (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998))); *Johnson v. Horry Cty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) ("Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (quoting *State v. Owens*, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001))).

Based on the foregoing, the circuit court properly denied Appellant's mistrial motion. See *Mishoe*, 366 S.C. at 202, 621 S.E.2d at 366–67 ("The granting of a motion for a mistrial is an extreme measure [that] should be taken only when an incident is so grievous that the prejudicial effect can be removed in no other way."); *id.* at 202, 621 S.E.2d at 366 ("The burden is on the moving party to show not only error, but also the resulting prejudice."); *id.* ("The granting or denying of a motion for mistrial is within the sound discretion of the [circuit court]. Absent an abuse of discretion, the decision of the [circuit court] will not be overturned on appeal.").

IV. New Trial/Excessive Damages

Appellant maintains that the circuit court should have granted a new trial because the verdict was grossly excessive. We disagree.

"[I]f a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration *not founded on the evidence*[,] then it is the duty of the trial court and the appellate court to set aside the verdict absolutely." *Caldwell*, 306 S.C. at 33, 410 S.E.2d at 25 (emphasis added). The amount of unliquidated damages that "a jury might properly award . . . is largely a matter of judgment based upon the facts and circumstances of each case." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). "In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] where the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." *Id.* Further, "the jury's determination of damages is entitled to substantial deference[,] and the circuit court's decision on whether to grant a new trial based on the amount of the verdict "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch*, 342 S.C. at 303, 536 S.E.2d at 420.

As we previously stated, the jury in the present case awarded \$2 million in compensatory damages to Seay's estate for the survival claim; \$5 million to Seay's estate for the wrongful death claim; and \$5 million to Linda Seay for her loss of consortium claim. The jury also found Celanese was willful, wanton, and reckless and awarded \$2 million in punitive damages. In its order addressing Appellant's new trial motion, the circuit court very thoroughly addressed how the \$2 million award for the survival claim was supported by the evidence of the many medical procedures Seay had to undergo before and after his diagnosis; the physical and mental suffering he endured; and the evidence of Seay's health, vigor, and active family life before he became ill with mesothelioma. *See id.* at 303, 536 S.E.2d at 420–21 ("Actual damages in a survival action are awarded for the benefit of the decedent's estate. Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." (citation omitted)).

Likewise, the circuit court detailed how Linda Seay's testimony concerning her 47 years of marriage to her best friend supported the \$5 million loss of consortium award and, in combination with the testimony of Seay's daughter, supported the \$5 million wrongful death award. *See* S.C. Code Ann. § 15-75-20 (2005) ("Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society[,] and services of his or her spouse."); *Welch*, 342 S.C. at 304, 536 S.E.2d at 421 ("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death.

Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." (citations omitted)).

As to the \$2 million punitive damages award, the circuit court examined the many sources of knowledge Celanese had concerning the dangers of working with asbestos and the company's continued use of asbestos insulation, gaskets, and packing for years after learning of these dangers. *See Clark v. Cantrell*, 339 S.C. 369, 378–79, 529 S.E.2d 528, 533 (2000) ("The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future. Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." (citation omitted)). The court also noted the failure to warn contract workers about the danger of asbestos exposure or provide them with any protection or protocols to prevent them from breathing in the dust. The circuit court thoughtfully compared all of these awards with awards in other mesothelioma cases and with the legislative cap on punitive damages and concluded the awards were not excessive. *See* S.C. Code Ann. § 15-32-530 (Supp. 2018) (providing that with certain exceptions, a punitive damages award "may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars"); *e.g.*, *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 54, 691 S.E.2d 135, 152 (2010) (holding that the punitive damages award to the plaintiff in a fraud action was not grossly excessive and was consistent with those of comparable cases); *Jenkins v. Few*, 391 S.C. 209, 224, 705 S.E.2d 457, 465 (Ct. App. 2010) (holding that the 3.6 to 1 ratio of punitive damages to actual damages awarded was "within the range of comparable cases and those most often upheld by South Carolina courts").

On appeal, Appellant argues the jury was motivated by passion, prejudice, "or other considerations not founded on the evidence, particularly the jury's premature deliberations[,] . . . considerations of outside influences, and the improper video." However, Appellant has failed to make a showing that the circumstances surrounding Juror #16's dismissal influenced the jury's verdict. *See supra* section II. Further, the presentation of the video of Seay crying out in pain was necessary to fully inform the jury of the extent of Seay's pain and suffering and was not unfairly prejudicial. *See supra* section III. Moreover, Appellant admitted before the circuit court that there have been much higher awards in other mesothelioma cases. Finally, the evidence supported the damages awards in this case.

As to compensatory damages, the parties stipulated that Seay's medical expenses were \$280,457.91. Additionally, Seay's deposition indicates he had to have fluid drained from his lungs 11 times; he had to endure 3 lung surgeries; he was unable to have surgery on two broken ribs because doctors were concerned about cutting into him anymore; he was temporarily unable to breathe due to collapsed lungs; the chemotherapy made him sick; he was hospitalized for dehydration 3 times; he was unable to keep food down; he was in constant pain from scar tissue; his sleep was poor because he felt like he was lying on marbles; and the pain medication was ineffective. Seay also described the emotional toll the disease had taken on him. During his first two lung surgeries, biopsies were taken and both were negative for cancer. But after the third surgery, he was told he had "asbestos cancer" and had only 12 to 18 months to live. This "hit [Seay] like a tractor and trailer truck had run over [him] . . . [I]t was a terrific blow." When asked what was the hardest part about having mesothelioma, Seay replied, "it is knowing that you're going to leave here, definitely going to leave here, and you know it's going to be soon." Additionally, his wife and daughter testified regarding his relationship with them and other family members and the void left by his death.

As to punitive damages, the record shows that Celanese received from Union Carbide an asbestos toxicology report, dated December 16, 1970, indicating that mesothelioma had been associated with even slight exposure to asbestos. Additionally, an epidemiological study performed by two physicians in 1930 recommended, *inter alia*, that workers exposed to asbestos receive not only training and warning about the risk involved but also respirators or respiratory masks, when necessary, to filter out the dust. Yet, Seay was never warned about the danger of asbestos or instructed to wear a respirator or mask, and he never saw any insulation workers wearing this protection.

Further, Respondents make a compelling argument that the evidence shows a "culture of concealment" at Celanese. An internal memorandum for the commercial hazards committee, dated "February, 1963," stressed the "serious legal hazard" in creating written interim reports or correspondence and encouraged (1) keeping such documentation "to a minimum," (2) avoiding "all general correspondence relating to such matters," (3) confining the contents to factual data, and (4) omitting any opinions. Additionally, a May 21, 1979 document, labeled as "Confidential," directed the preparation of a "backup statement" for plant supervisors to use when an employee requested information on "suspect material." The document required the statement to "emphasize that data is inconclusive and will be verified or refuted

by further, more refined testing" and to also emphasize "that exposures are being monitored and controlled below appropriate limits."

In sum, the circuit court properly concluded that the damages awards were supported by the evidence and were not excessive.

CONCLUSION

Based on the foregoing, we affirm the circuit court's order denying Appellant's post-trial motions.

AFFIRMED.

LOCKEMY, C.J., and THOMAS, J., concur.

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

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.

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):

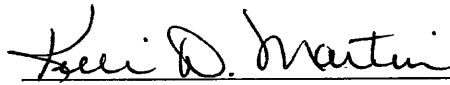
Pleadings: **Petition for Rehearing and Suggestion for Rehearing En Banc**

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A handwritten signature in cursive script, reading "Kelli D. Martin", written in black ink over a horizontal line.

Kelli Diamond Martin
Sr. Administrative Assistant

Dated: 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

Appellate Case No. 2016-000227
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Angie Keene, Individually and as
Personal Representative of the Estate of
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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).

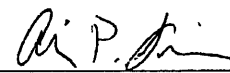
The petition for rehearing should be denied.

Respectfully Submitted,

March 15, 2019

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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

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

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
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March 15, 2019


Erin Bridges

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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D. Garrison Hill, Circuit Judge

Appellate Case No. 2016-000227
Case No. 2013-CP-42-3915

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MAR 22 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.

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.

Signature on Following Page

Respectfully submitted,

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March 22, 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

RECEIVED

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

MAR 22 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: **Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc**

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A handwritten signature in dark ink, appearing to read "GreenHilman", written over a horizontal line.

Eileen Hindman
Administrative Assistant

Dated: March 22, 2019

The South Carolina Court of Appeals

Angela D. Keene, Individually and as Personal
Representative of the Estate of Dennis Seay, Deceased,
and Linda Seay, Respondents,

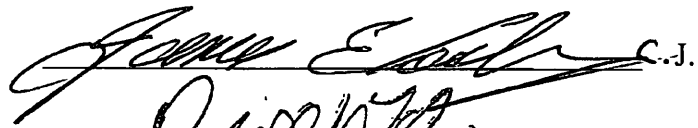
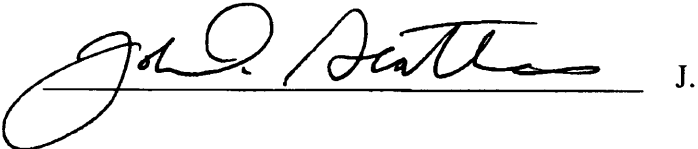
v.

CNA Holdings, LLC, Appellant.

Appellate Case No. 2016-000227

ORDER

After careful consideration of the petition for rehearing, the Court has found no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:
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Allen Mattison Bogan, Esquire
Theile Branham McVey, Esquire

FILED

May 13, 2019

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