THE STATE OF SOUTH CAROLINA
In The 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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. Introduction

Respondents attempt to portray the decisions by the trial court and Court of Appeals as being in accord with the long-standing body of case law regarding the statutory employer three factor test in South Carolina. But the trial court and Court of Appeals' decision were based upon those courts' erroneous understanding that the 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) created a ***new*** test, different from the controlling three factor test. The courts below determined that the law as set forth in *Abbott* and *Olmstead* compelled a conclusion that Mr. Seay was not Celanese's statutory employee. However, as Celanese has consistently maintained throughout this case, the holdings of *Abbott* and *Olmstead* related solely to matters involving ***transportation workers*** employed by common carriers. *Abbott* and *Olmstead* did not represent some upending change in the long-standing three factor test for determining whether a worker's activity is part of the putative owner's "trade, business, or occupation" such that the worker is its statutory employee. If they did, this Court would have so ruled, making that explicit. Instead, this Court has continued to apply the traditional three factor test for examining a statutory employee question first articulated in *Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 245, 371 S.E.2d 796, 799 (1988). *See, e.g., Collins v. Charlotte*, 412 S.C. 283, 772 S.E.2d 510 (2015); *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013). Because the courts below erred by holding otherwise, this Court should grant certiorari and reverse.

II. *Abbott* and *Olmstead* did not make a sweeping change in law.

Respondents attempt to obscure the legal holdings of the trial court and Court of Appeals by emphasizing that each case is decided on its facts. True, but irrelevant here, as Respondents argument misses the point that both courts erroneously evaluated the facts on the basis of their

misunderstanding of the law, given that they understood *Abbott* and *Olmstead* to represent a complete break with statutory employment precedent—a break with precedent that drove their conclusion that Mr. Seay could not be a statutory employee. This Court should grant certiorari and correct this error by reaffirming that the traditional three-factor *Ost* test remains the mechanism by which courts should analyze a statutory employment question.

A. The lower courts' holdings were unambiguous in erroneously determining that the applicable test for statutory employer had changed.

At the hearing on Celanese's motion for summary judgment, the trial court stated that it was "persuaded by the *Olmstead* decision," which it said "***overruled quite a body of law about this statutory employer issue***." (July 27, 2015 Motions Tr.; A. 1735:14-24 (emphasis added).) In its order denying summary judgment, the trial court extensively discussed *Abbott* and *Olmstead*, noting *Olmstead*'s overruling of "prior cases to the extent they are in conflict" with its holding and that in *Abbott*, and that under *Abbott* "it is necessary to conduct a case-specific analysis, ***but the focus must be on what type of business the defendant conducts***." (Order at 6; A. 59 (emphasis added).)

The trial court then reiterated this in its order denying Celanese's post-trial motions. Again citing to *Olmstead*—not to *Ost*—it stated that although a case-specific analysis was still necessary, "the focus must be on what type of business the defendant conducts." (Order at 24; A. 31.) Moreover, the trial court explained that a "determination that work is part of an owner's trade or business depends heavily on the company's ***stated business purpose***." (*Id.* at 25, A. 32 (emphasis added).)

In reviewing the trial court's decision, the Court of Appeals agreed that *Abbott* and *Olmstead* represented a break with prior precedent. Without directly analyzing *Olmstead*'s reference to a "change in jurisprudence," the court asserted that the "logic employed . . . ***brought***

new clarity to the abundance of case law on this issue and ***this logic is binding in the present case***." *Keene v. CNA Holdings, LLC*, Op. No. 5625 (S.C. Ct. App. filed Feb. 13, 2019) (Shearouse Adv. Sh. No. 7 at 23) (emphasis added) ("the Opinion"). The Court of Appeals agreed with the trial court that the statutory employee analysis now turns on whether the worker's activity was a "part or process" of the owner's business, that this determination is made by examining "whether the type of work performed by the worker is the same type of work 'the owner' has established as its business," and the "logic applies across all trades, business, and occupations." *Id.* Although the Court of Appeals cited to the three-factor *Ost* test in its recitation of the applicable law, this new standard—not the three factor test—was the standard it applied.

This new standard is irreconcilable with Respondents' contention that *Abbott*, *Olmsted*, and the Court of Appeals' opinion here were ***consistent*** with prior South Carolina law, and that the test has not changed. This Court should grant certiorari to address the uncertainty and confusion in statutory employment law generated by the Court of Appeals' decision, provide guidance to the bench and bar regarding the standard for analyzing statutory employment, and reverse the Court of Appeals.

B. *Abbott* and *Olmstead* were not intended to effectuate some fundamental shift in statutory employment law.

Respondents fail to address Celanese's analysis of *Abbott* and *Olmstead*. As Celanese highlighted, ***none*** of the briefing in those cases presented the Court with the question of whether the statutory employment test should be completely rewritten much less recast *in toto*. Rather, the parties in those cases recognized the unique nature of transportation by common carriers and crafted their arguments to that context with related analysis. Indeed, in a different case the Court of Appeals recognized the limited scope of *Abbott* and *Olmstead*, noting that they "addressed

statutory employment ***in the common carrier context***." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 219, 661 S.E.2d 395, 400 (Ct. App. 2008) (emphasis added).

Furthermore, the meaning of the Court's "overruling" language in *Abbott* and *Olmstead* is best determined in context, and it is not the broad overruling of precedent understood by the trial court and Court of Appeals. In *Abbott*, the Court overruled two cases finding that an employee of a common carrier was not a statutory employee of a business ***receiving*** goods from the common carrier. *Olmstead*, however, involved an employee of a common carrier engaged in the ***delivery*** of finished goods. The trial court there drew a distinction between ***receipt*** of goods and ***delivery*** of goods in finding the subject driver was a statutory employee, contending that the Supreme Court could have broadened the reach of *Abbott* to "all transportation cases, but chose not to, specifically limiting its holding to receipt of goods." *Olmstead v. Shakespeare*, 348 S.C. 436, 440, 559 S.E.2d 370, 372 (Ct. App. 2002). The Court of Appeals, however, explained that it did not agree with this "overly narrow" reading of *Abbott*, as *Abbott* was "not limited to situations involving a retailer's *receipt* of goods." *Id.* (emphasis in original). Since *Abbott* only involved receipt, it was "unnecessary for the court to address the delivery of goods from a manufacturer to a customer because that issue was not presented."[1] *Id.* This Court agreed, noting in *Olmstead* that it was overruling prior cases to the extent they conflicted with the holdings of *Abbott* (receipt of raw materials via common carrier) and *Olmstead* (delivery of finished goods via common carrier). *Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486.

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[1] The Court's explicit overruling of two cases in *Abbott* while declining to overrule *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990) also supports the limited scope of *Abbott* and *Olmstead*. In *Revels*, although the worker was involved in transportation, his activities went beyond just driving for a common carrier. *See 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). Thus, as the Court of Appeals explained in *Olmstead*, the Court did not overrule *Revels* since the facts involved "more than transportation alone" and was "easily distinguished on its facts." *Id.* This Court presumably agreed with the rationale that *Revels* was not overruled for this reason.

C. The Court of Appeals' holding directly conflicts with this Court's most recent statutory employment decision.

Respondents also failed to address Celanese's argument that the best indicator of what *Abbott* and *Olmstead* meant is found in the language of the subsequent decisions of this Court. As the Petition details, this Court most recently addressed a statutory employment question in *Collins v. Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015). Although it was a transportation case, *Collins* looked to the traditional three factor test of *Ost* ***and did not even cite*** *Abbott* or *Olmstead.* Moreover, the Court explicitly highlighted that the question of whether a worker is a statutory employee depends on the "**nature of the work** performed." *Id.* (emphasis in original). *Collins* also directly emphasized focusing on how important or necessary, essential, and integral the activity was to the putative owner. *See id.* Thus, *Collins* focused on the type of the work performed and its significance—*i.e.*, the traditional three factor analysis—rather than what the lower courts focused on here, which was the declared business of the owner.[2]

D. Other judicial bodies have interpreted *Abbott* and *Olmstead* differently than the Court of Appeals here, necessitating this Court's attention to clarify the law.

Decisions from both the District of South Carolina and the Workers' Compensation Commission have interpreted *Abbott* and *Olmstead* in line with Celanese's position. For example, in *Matthews v. E. I. du Pont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111 (D.S.C. Nov. 13, 2018), the U.S. District Court explained that although it agreed with the plaintiff that *Abbott* and *Olmstead* provide a "solid framework" for determining whether an individual was a statutory employee, the "facts of those cases [were] ***inapposite***" because they "***focused on whether the receipt or delivery of goods*** to a company is considered part of the business of that company." *Id.* (emphasis added). As here, *Matthews* involved a worker engaged in maintenance

[2] The other more recent decision from this Court, *Poch*, likewise did not ascribe any significant import to *Abbott* and *Olmstead. See generally* 405 S.C. at 368-69, 747 S.E.2d at 761-72.

work on production lines for a chemical manufacturer. The court held that this activity was necessary, essential, and integral to the defendant's manufacturing business, as it "could not manufacture its products without properly functioning facilities, and [plaintiff's] work to properly insulate pipe beams within those facilities was essential to the running of [defendant's] facilities." *Id.* at *5.

Similarly, in *Atkins v. Southland Sanitation, Inc.*, WCC 0719914, 2008 WL 6128578, at *8-9 (S.C. Work. Comp. Comm. June 27, 2008), the Workers' Compensation Commission explained that "***[l]oading and unloading merchandise has repeatedly been held not to be a part of an employer's business***." *Id.* (emphasis added). The commissioner noted that *Abbott* is clearly "the controlling case," as it made "absolutely clear that the ***provision of delivery and unloading services*** does not create a statutory employer relationship," and that the Supreme Court made this point in the "strongest possible way by overruling a line of cases from the Court of Appeals ***that had held otherwise***." *Id.* at *9 (emphasis added).

Although these decisions are merely persuasive here, Celanese brings them to the Court's attention to demonstrate that reasonable judicial minds have different interpretations of *Abbott* and *Olmstead* and their applicability outside of the common carrier context. This, coupled with the fact that no other South Carolina cases have utilized the test employed by the Court of Appeals in the case here, demonstrates the need for this Court to conclusively address this issue.

E. The Court should grant certiorari and reaffirm the traditional analysis for statutory employment and clarify the meaning of *Abbott* and *Olmstead*.

This Court should grant certiorari to address whether the test applied by the trial court, and affirmed by the Court of Appeals, is the new standard for statutory employment under South Carolina law. The many other cases decided after *Abbott* and *Olmstead*, including the *Colliers* and *Poch* decisions from this Court, support the conclusion that it is not. This Court thus should

correct the lower courts' deviations from long-standing precedent and reaffirm that the three factor *Ost* test remains the evaluative analysis that courts must use when facing a statutory employment question. At a minimum, this Court's decision on this issue is needed to clarify the uncertainty in the law generated by the Court of Appeals' interpretation of *Abbott* and *Olmstead*, and the scope of those decisions beyond the transportation context.

The Court also should address the Court of Appeals' statement that "going forward, we decline to automatically assign probative value to any self-serving affidavit of a party's representative in determining whether the preponderance of the evidence shows a worker's activity is actually part of the trade, business, or occupation of the owner." Op. No. 5625 at 26. This proposition does not appear supported by South Carolina precedent and is at odds with this Court's reference to such evidence in *Poch*. *See e,g.*, *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (looking to the testimony of the owner's president about the nature of the work and its importance and necessity); *see also, e.g.*, *Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 264, 437 S.E.2d 156, 158 (Ct. App. 1993) (relying on affidavit of owner's employee stating that the worker's activity was necessary and essential to the business).

If this view of a party's "self-serving evidence" is the law, it will significantly restrict employers' ability to show that a statutory employment relationship exists and is in conflict with long established practice in these cases. The Court of Appeals erred by unilaterally making this vague evidentiary statement and applying it here to cast aside the evidence and testimony presented by Celanese detailing the importance and necessary nature of Mr. Seay's work.

III. Certiorari is also appropriate to clarify that deciding each case on its facts does not render the entire body of statutory employment law irrelevant.

Celanese has never suggested that maintenance workers are ***always*** statutory employees of manufacturing companies. The Court of Appeals was simply not correct in intimating that it had.

Rather, while acknowledging that each case should be decided on its facts, Celanese merely contended that prior cases ***involving maintenance workers and manufacturing companies*** would provide the best lens through which to examine whether Mr. Seay's maintenance activities met one or more of the *Ost* factors. This is not an equitable matter where the court is simply balancing the equities under the facts before it. Statutory employment is an established test the courts apply to determine whether, under the facts, the worker is a statutory employee ***as a matter of law***.

Statutory employee precedent is not irrelevant simply because of the need to consider the facts. The question is what does the law say about how those facts are to be evaluated. This is why statutory employment cases often look to the facts of prior matters involving similar work activity and compare them to the facts of the case before the court in making the determination.

Respondents contend that the Court of Appeals properly cast aside this significant body of statutory employment cases involving maintenance workers because a treatise states that the test should be whether "this indispensable activity is, in that business, normally carried on through employees rather than independent contractors." (Br. of Resp. at 11 (quoting 4 Arthur Larson et al., *Larson's Workers' Compensation Law* § 70.06[3], at 70-9 (2003).) This portion of *Larson's*, however, is in conflict with the numerous South Carolina cases holding otherwise for maintenance workers. As a respected South Carolina treatise explains, "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 ed. 2012) (emphasis added); *see also Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986) (maintenance worker case stating this proposition); *see also Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 893 (D.S.C. 1982), *aff'd*, 726 F.2d 1011 (4th Cir. 1984) (finding that a maintenance

worker was a textile mill's statutory employee because even though the mill's employees had not engaged in the repair activity, the "continued maintenance and repair . . . w[as] absolutely essential to the continued operation of the textile plant").

The Court of Appeals erred by explaining away the extensive body of persuasive authority involving maintenance workers, which supports that Seay's work rendered him Celanese's statutory employee. This Court should grant certiorari to correct this mistake.

IV. Seay was Celanese's statutory employee.

A. Seay's work activity meets the first two *Ost* tests.

This case is distinct from many statutory employee cases because the parties agree about the work Mr. Seay did and its significance to Celanese. Respondents' brief candidly acknowledges that "[e]verybody agreed maintenance was important to Celanese." (Br. of Resp. at 1, 10.) Respondents also admit that Celanese being in the manufacturing business did not necessarily mean that maintenance was not a "part of" its business. (*Id.* at 10.) Where the parties disagree is what the applicable test is and whether, under that test, Seay was Celanese's statutory employee.

If the Court follows *Collins* and looks to the nature of the work and its significance to Celanese, both parties appear to agree that Seay was Celanese's statutory employee. Celanese contends this is the proper analysis, and that under the *Ost* three factor test the evidence conclusively supports that Seay's maintenance work was important, necessary, essential, and integral to Celanese's manufacturing business, as the Celanese factory could not continue producing product—its entire purpose—without his work.

Under the Court of Appeals' formulation (and Respondents' position), however, the analysis instead turns on whether Celanese is in the maintenance business. Respondents contend that since Celanese was not in the maintenance business, Seay's maintenance work was not "part of" Celanese's trade, business, or occupation. This is not correct under South Carolina law, which

favors the liberal inclusion of workers as statutory employees. As Celanese has consistently detailed, the long line of cases involving maintenance offer the best guidance on this issue. Many of these cases have found that maintenance is an important and necessary part of a manufacturing business where, like here, production could not occur in the absence of the maintenance work.

Additionally, courts have held in other contexts that what Respondents would call "peripheral" activities were sufficiently important so as to render them part of the owner's trade, business, or occupation. For example, in *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 105, 431 S.E.2d 631, 632 (Ct. App. 1993), the Court of Appeals noted that security services were a necessary part of an automobile dealership's business. *Id.* The dealership was, of course, in the business of selling and servicing cars, not security. Nevertheless, the court found that security services were a part of its business. *See id.* Similarly, in *Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 262–63, 437 S.E.2d 156, 157 (Ct. App. 1993), the subject worker was engaged in clean-up activities and the court found that this was an important part of a chemical manufacturer's business. *Id.* Finally, in *Voss v. Ramco, Inc.*, 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997), the court found that a worker selling product for a manufacturing company was its statutory employee since "selling the equipment it manufactures is an essential part of the [company's business," as this was an "activity without which [it] could not remain in business." *Id.*

B. The authorities cited by Respondents are inapposite.

As detailed in the Petition, the *Harrell* case cited by Respondents did not hinge on the status of the defendant as a "passive owner who claims to have no active business." Instead, the Court again focused on the ***worker's responsibilities*** and whether they were "important" and "necessary, essential, and integral" to the owner. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 325, 523 S.E.2d 766, 772 (1999). The Court reasoned 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). Here, Celanese would certainly have had to hire its own employees to do the maintenance work that Mr. Seay did if it had not contracted with Daniel, and in fact later did so.

Moreover, *Ferguson v. New Hampshire Ins. Co.*, 412 S.C. 203, 771 S.E.2d 851 (Ct. App. 2015) is easily distinguishable due to the highly attenuated nature of the work activity of the putative statutory employee. As the *Ferguson* court explained, the defendant company operated an internet marketplace enabling users to rent trucks and hire moving companies. *Id.* at 207, 771 S.E.2d at 853. The subject worker did the physical moving work, which was not part of the defendant's online marketplace business. *See id.* at 211, 711 S.E.2d at 854-56. Critically, the court noted that the worker's direct employer was ***not obligated to perform any work for the defendant***, "and was only obligated to perform [moving] jobs for customers that selected his company and scheduled an appointment for his services." *Id.* As the Workers' Compensation Commission stated, the defendant neither engaged in any moving activity itself ***nor contracted with anyone else to do so***. *See Ferguson v. Amerco/u-Haul*, No. 1023143, 2013 WL 4713532, at *6 (S.C. Work. Comp. Comm. Aug. 7, 2013). The worker's direct employer merely viewed the defendant's service as an advertising platform, s*ee id.* at *4, and testified that he was not the defendant's subcontractor. *Ferguson*, 412 S.C. 207 n.3, 711 S.E.2d at 854 n.3. The worker's activities, therefore, were so disconnected from the primary purpose of the putative owner so as to render them unimportant and not essential. Contrast this with Mr. Seay, whose work did bear a direct and tangible relationship to the manufacturing process and was sufficiently important, necessary, and essential so as to render it a part of Celanese's business. Finally, another significant point of distinction is that the worker in *Ferguson* ***was not even an employee of the purported direct employer***. *See id.* at 212, 711 S.E.2d at 856. This rendered him exempt from the Act, which does not apply to casual employees. *See id.*; *see also* S.C Code Ann. §§ 42-1-130 and -360.

As these cases provide, the courts have not played the siloed, matching game proposed by Respondents and adopted by the Court of Appeals where a worker is ***only*** a statutory employee if his work activity precisely matches the company's stated business purpose—*i.e.*, a security guard for a security company, a salesman for a car dealership, or a janitorial worker for a cleaning company. To hold otherwise would violate *Harrell*'s recognition that a statutory employment rule which excludes many workers and employers from the Act's coverage is "against this Court's policy." 337 S.C. at 323 n.2, 523 S.E.2d at 771 n.2.

C. Only the third factor involves an analysis of whether the defendant's own employees engaged in the activity.

As South Carolina courts have reiterated many times, the *Ost* test is an "or" test. Therefore, the lower courts' suggestion that the important and necessary, essential, and integral tests should look to whether the defendant company's workers previously engaged in the activity was pure error and in plain conflict with established law. The Court of Appeals and Respondents again relied on *Larson's* to support this incorrect proposition. Respondents thus discount the maintenance worker cases cited by Celanese as "meaningfully distinguishable" because in some of those cases the company also used regular employees for the same work. However, such an argument directly conflicts with the repeated refrain that ***only one*** *Ost* factor needs to be met, and identical activity conducted by the owner's employees ***is only one prong***. *See Collins*, 412 S.C. at 289, 772 S.E.2d at 514. The Court of Appeals erred by holding otherwise, and Court should grant certiorari and reverse.

D. The construction worker line of cases are distinguishable.

Raines, which the trial court said was "acutely relevant authority" is not only distinguishable, but confirms the errors of the courts below. *Raines* involved an employee of a subcontractor hired to install an electrical system at a new plant being constructed by the defendant.

Raines v. Gould, 288 S.C. 541, 542, 343 S.E.2d 655, 656 (Ct. App. 1986). The 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 court began its analysis by clarifying 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) (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, it determined that the worker's activities assisting in building the ***new*** plant did not constitute the trade or business of the manufacturer, as this was not "an integral part of [manufacturer's] operations ***without which it cannot function***." *Id.* at 547, 343 S.E.2d at 659 (emphasis added).

Raines simply recognized that the ***construction*** of a brand new 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 their work would have no bearing on the actual manufacturing process. On the other hand, if construction work was part of the company's business, then "construction work delegated to a contractor may be considered a part of its trade or business." *Id.*

The facts in *Raines* are in stark contrast to workers like Seay, whose activities were ***essential*** to the continued operation of Celanese's manufacturing facility. Moreover, even *Raines* recognized that construction work can be part of an employer's trade or business if such work is pursuant to an "ongoing program of construction . . . or has handled its own construction in the

past," *id.* at 547, 343 S.E.2d at 659, a point that cannot be squared with Respondents' arguments here or the lower courts' decisions, but instead confirms Celanese's position—*i.e.*, in this case, Seay's work was part of the company's "ongoing program" of necessary maintenance work.

Glass v. Dow Chemical Company explored the construction versus maintenance dichotomy, explaining that "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." 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997). In *Glass*, the defendant company was Dow Chemical, which manufactured a mortar additive used in installing the panels. *Id.* The "major task" at issue in *Glass* was "completely replacing façade panels" that had used the Dow product, which required "technical knowledge that was highly specialized." *Id.* The court found that this ***post-manufacturing, post-sale***, large-scale repair was not a part of Dow's manufacturing business. *See id.* The facts in *Glass* were very different from those here, where Seay's work was directly responsible for keeping the production lines running to enable Celanese to manufacture product.

V. Respondents' policy argument is unwarranted and inappropriate.

Celanese has never denied that Mr. Seay suffered immensely with mesothelioma. However, as sympathetic as his plight was, this does not have any bearing on the jurisdictional calculus of whether his work activities rendered him a statutory employee.

By raising the statutory employment doctrine, Celanese was relying upon its rights under the law of this state. Respondents disagree, suggesting that Celanese is being "cruel" by defending itself and raising the issue, and their attempt to paint Celanese's well-grounded legal arguments as nefarious is unwarranted as well as bad policy. To put it plainly, Respondents are making a prejudicial jury trial argument that it is somehow "cruel" and unfair for a company to defend itself on the basis of a recognized defense in any case in which a worker is injured or suffered. That is not the law. Indeed, this Court previously recognized that the statutory employee doctrine may be

raised both affirmatively by a claimant or as a defense by a company, and that the Workers' Compensation Act's broad construction in favor of coverage is just as applicable where "used as a shield to prevent recovery under another theory." *Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486. Moreover, Celanese's counsel would have been remiss to ***not*** raise this defense, as failing to do so would have violated their duty to zealously advocate in their client's best interest.

Finally, the viability of Mr. Seay's potential worker's compensation is irrelevant. Respondents did not cite any South Carolina authority supporting such a proposition. The issue of interpreting the statute of repose is also beyond the record. The statutory employment question is a jurisdictional issue and the potential merits of the claim in another forum are not before the Court. Respondents' suggestion that Mr. Seay's family would be left without a remedy is also not accurate. The trial court here entered an Order granting a setoff to account for the $1.214 million in compensation that the Respondents received via settlements with other parties in this action.

CONCLUSION

For the reasons stated in Celanese's Petition and herein, the Court should grant certiorari.

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THE STATE OF SOUTH CAROLINA
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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 a Writ of Certiorari**

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Dated: August 22nd, 2019.