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.

BRIEF OF PETITIONER

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INTRODUCTION

The singular, outcome determinative question presented in this appeal is whether Dennis Seay ("Seay") was Celanese's statutory employee under the well-established three-factor test recognized by South Carolina law.[1] Both the trial court and the appellate court held that he was not. But in so doing, they erred as a matter of law by refusing to follow governing decisions of this Court regarding the definition, nature, and scope of statutory employment and the public policy supporting that doctrine. The lower courts justified their refusal on an erroneous finding that this Court's long-standing statutory employee precedent was somehow fundamentally altered by *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).

The statutory employment test as articulated by this Court focuses on whether the worker's activity: "(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 v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997)). It is a disjunctive, not conjunctive, test so that if any of the three factors or tests is satisfied, then the worker is a statutory employee. *Glass*, 325 S.C. at 201, 482 S.E.2d at 50.

The Court of Appeals and Respondents recognized that Mr. Seay's work was important and/or necessary to Celanese. However, the Court of Appeals adopted the trial court's rationale that, after *Abbott* and *Olmstead*, there is a new two-step test for determining whether a worker is a statutory employee, specifically: (1) whether the activity was "part or process" of the business of

[1] Celanese raised several other trial court errors for the Court of Appeals to consider, and Celanese believes the Court of Appeals mistakenly affirmed the trial court with respect to those errors. However, in its Petition to this Court, Celanese focused on the statutory employment question since it is the outcome determinative error warranting reversal by this Court.

the defendant company as declared by the employer, and (2) whether the company's own workers ever conducted the activities completed by the worker. The Court of Appeals concluded that, under this standard, Seay was not Celanese's statutory employee.

The Court of Appeals' opinion misapprehends settled law and directly conflicts with precedent of this Court both predating ***and post-dating*** *Abbott* and *Olmstead.* Under the decades old test articulated and reiterated time and again by this Court, and in other decisions of the Court of Appeals, Seay was Celanese's statutory employee because his maintenance work was an important, necessary, essential, and integral part of Celanese's manufacturing business. The Celanese factory could not continue producing product—its entire purpose for existing—without his work. Because the opinion is predicated upon the lower court's legal error in creating a new statutory employee test as a result of its misunderstanding *Abbott* and *Olmsted*, this Court should correct this jugular error, clarify that the tests detailed in *Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 245, 371 S.E.2d 796, 799 (1988) remain the governing standard, and find that Seay was Celanese's statutory employee under *Ost*. This is not a question of disputed fact, but instead, a pure question of law—specifically, does the *Ost* test still govern, or has it been replaced by the newer, different test followed the courts below?

The Court of Appeals' opinion also *sub silentio* reversed South Carolina's legislative and judicial policy favoring inclusion under the South Carolina Workers' Compensation Act ("the Act") by resolving all doubts in favor of ***exclusion*** in this case. This too was plain error, inconsistent with past precedent, and contrary to public policy. Accordingly, this Court should reaffirm that South Carolina's traditional policy of Worker's Compensation Act inclusion remains in effect.

Under *Ost*, Seay's work satisfied the first two tests because it was an important and necessary, essential, and integral part of Celanese's chemical manufacturing business. Therefore,

he is Celanese's statutory employee. Accordingly, this Court should reverse and remand, with instructions to the trial court to dismiss the action for lack of jurisdiction. *See Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002) (explaining that the circuit court is divested of jurisdiction where the Workers' Compensation Act provides the exclusive remedy).

STATEMENT OF THE ISSUE ON APPEAL

I. Did the Court of Appeals err in affirming the trial court's ruling that Dennis Seay was not a statutory employee of Celanese where his maintenance work was an important, necessary, essential, and integral part of Celanese's manufacturing business?

STATEMENT OF THE CASE

Respondents brought this suit asserting that Seay was negligently exposed to asbestos in connection with his work as a millwright for Daniel Construction Company ("Daniel") at Celanese's Spartanburg facility, which caused his mesothelioma. (Compl.; A. 77-95.) Celanese moved to dismiss and/or for summary judgment on the basis that Seay was its statutory employee and, therefore, the Workers' Compensation Act provided the exclusive remedy for his claims. (Mot. to Dismiss & Memo. in Supp.; A. 2648-62.) Celanese's motions relied on the many South Carolina authorities holding that maintenance workers like Seay are typically found to be statutory employees of a manufacturing facility's owner. (*See id.* at 7-12; A. 2656-61.) The trial court denied Celanese's motions and declined to follow the numerous factually analogous maintenance worker cases of this Court. But the trial court also went one step further by concluding that two decisions from this Court involving transportation workers employed by common carriers—*Abbott* and *Olmstead*—were controlling and constituted a significant change in prior governing law. (Order at 3-6; A. 56-59.) Celanese again raised the statutory employee argument in its directed verdict and renewed directed verdict motions, which also were denied. (*See* Trial Transcript ("Tr.") at 1327:5-1332:6; A. 1539-43.)

The matter proceeded to trial on Respondents' negligence claim. At the conclusion of the trial, the jury rendered a verdict finding Celanese liable and awarding $14 million dollars in damages for survival, wrongful death, and punitive damages. (Verdict Form; Judgment; A. 73-76.) Celanese filed post-trial motions, again raising the statutory employee issue. (Mot. for JNOV; A. 2110-27.) But once again, and based upon its understanding of *Abbott* and *Olmsted*, the trial court denied Celanese's post-trial motions in their entirety. (Order; A. 8-53.)

Celanese timely appealed. Celanese raised the controlling issue of law to the Court of Appeals regarding whether the trial court erred in finding that Seay was not Celanese's statutory employee. The Court of Appeals, however, affirmed the trial court and relied on the same erroneous legal analysis as the trial judge. After the Court of Appeals denied rehearing, Celanese petitioned this Court for a writ of certiorari. The Court granted Celanese's petition in an Order dated November 1, 2019.

STATEMENT OF THE RELEVANT FACTS

Seay worked as one of Daniel's employees from 1969 to 1978. (D. Seay, Tr. 359:8-24; A. 557.) During this time, Daniel was the sole and exclusive maintenance provider at the Celanese facility, including for maintenance of the manufacturing equipment and process lines. (*See* D. Seay, Tr. 362:12-24; Court's Ex. 1, D. Seay Video Dep. at 67:2-7; A. 560, 1822-23.) Celanese did not have its own maintenance division at this facility when Seay worked there, but provided all supplies for Daniel's maintenance work. (*See* D. Seay, Tr. 366:3-10; A. 564.) Seay worked on various elements of the Celanese 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. 382:20-383:23, 416:19-21, 418:3-11, 419:2-420:10; A. 580-81, 614, 616-18.)

Seay worked as a millwright, with job duties including making repairs and performing preventative maintenance work on Celanese's manufacturing equipment. (*See* D. Seay, Tr.

427:22-428:9; Court's Ex. 1 at 24:20-25, 26:25-27:6, 61:9-62:19, 67:17-21; A. 625-66, 1806-07, 1823.) A Celanese employee, referred to as the "lead man," would provide instructions to Seay's supervisor at Daniel, who then assigned Seay his daily job duties. (*See* D. Seay, Tr. 374:23-375:9; Court's Ex. 1 at 66:1-67:1; A. 572-73, 1822-23.)

The Celanese facility where Seay worked manufactured synthetic fibers. (D. Seay, Tr. 360:16-21; Court's Ex. 1 at 25:3-8; A. 558, 1807.) As Seay testified, his work on steam lines was vital to the operation of Celanese's manufacturing business because all of the manufacturing equipment he maintained was necessary for and critical to the successful operation of the process lines. (*See* D. Seay, Tr. 382:20-383:23, 416:19-21, 418:3-11; 419:2-420:10; A. 580-81, 614, 616-18.)

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; A. 614 (emphasis added).) Seay further 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.

(*Id.* at 418:3-15; A. 616.) Seay also testified as to the importance of each piece of equipment at the facility:

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; A. 621-22.) Finally, Seay testified that the repairs and preventative maintenance he performed were important, necessary, and essential to the continued manufacturing operations of the Celanese facility:

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; A. 618.) 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 at 76:23-77:6; A. 1826 (emphasis added).)

Ronnie Thompson worked alongside Seay at the Celanese facility from 1973 to 1975. (Court's Ex. 2, R. Thompson Video Dep. at 17:4-24, 98:5-12; A. 1829, 1850.) He similarly testified that the purpose of Daniel's work was to ensure Celanese's production lines remained

operational, which was important and integral to Celanese's manufacturing business. (*Id.* at 97:6-25; A. 1850.) As he explained, production could not proceed if the valves, pumps, and other equipment were not working properly. (*Id.*)

Finally, Celanese's corporate representative—Bruce Bowyer—also echoed this point, explaining that the maintenance work performed by Daniel was a necessary, essential, and integral part of Celanese's business. (B. Bowyer, Tr. 1077:11-15; Aff. of B. Bowyer, Ex. G to Mem. in Supp. of Am. Mot. to Dismiss at ¶ 7; A. 1282, 2451.) It was essential for Celanese to have maintenance workers on site to maintain, repair, and replace equipment. (Aff. of B. Bowyer at ¶¶ 5, 7; Dep. of B. Bowyer, Ex. H to Mem. in Supp. of Am. Mot. to Dismiss at 314:18-315:17; A. 2451, 2561.) Furthermore, the maintenance of equipment and upkeep of production lines was a regular, ongoing part of Celanese's operations. (*See* Aff. of B. Bowyer at ¶ 7; A. 2451.) Without the ongoing maintenance provided by Daniel workers like Seay, the Celanese facility would not have been able to properly function, or function at all, much less consistently produce product for sale. (B. Bowyer, Tr. 1077:11-15; Aff. of B. Bowyer at ¶ 7; Dep. of B. Bowyer at 314:18-315:17; A. 1282, 2451, 2561.)

STANDARD OF REVIEW

"[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)).

ARGUMENT

The Court of Appeals' opinion acknowledges that Seay's work was "essential *for* Appellant's conduct of manufacturing polyester fiber" and "important to the manufacturing

process." (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 23, 27.) Thus, it essentially agreed that under the traditional *Ost* test, Seay's work would have satisfied at least one of the three statutory employment tests. The Opinion, however, held that although this was true, "it does not mean equipment maintenance was a *part or process* of Appellant's manufacturing business." (*Id.*) The Court of Appeals thus looked to *Abbott* and *Olmstead* as support for this being the new test or standard for statutory employees, explaining that those two decisions "brought new clarity to the abundance of case law on this issue." (*Id.*) Respectfully to the Court of Appeals, it is their Opinion in this case that has thrown the entire body of South Carolina statutory employment jurisprudence into a state of confusion. This Court should clarify that *Abbott* and *Olmstead* did not change the traditional *Ost* three factor test and, in fact, are consistent with the long-established body of South Carolina statutory employment case law, as discussed below. Again, under the traditional tests—as the Court of Appeals acknowledged—Seay was Celanese's statutory employee as a matter of law given the undisputed record here.

I. The Court of Appeals' decision violates and conflicts with the public policy favoring inclusion under the Workers' Compensation Act, as well as with many prior decisions of this Court.

A. The Court of Appeals' opinion conflicts with the established legislative and judicial policy favoring inclusion under the Act.

The Act is the ***exclusive remedy*** against an employer for an employee's work-related accident or injury, and "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). The Act provides that this exclusive remedy extends to where an "owner" undertakes to perform work which is "part of his trade, business or occupation" through a subcontractor. *See* 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). This is the statutory employment doctrine.

"Coverage under the Workers' Compensation Act depends on the existence of an employment relationship." *Edens*, 359 S.C. at 439, 597 S.E.2d at 866. 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." *Id.* (emphasis added).

The central 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*, 354 S.C. at 424, 581 S.E.2d at 485. This Court has established a three factor test for examining whether an employee is engaged in such an activity. This test provides that activity is considered "part of [the owner's] trade, business, or occupation" for purposes of the statute if any of the following is true: the worker's activity "(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).

As this Court has long acknowledged, in examining workers' compensation issues, courts must "keep in mind the established rule that the Act should be given a ***liberal construction*** in furtherance of the purposes for which it was designed,' and that the "basic purpose of the Act 'is the ***inclusion of employers and employees, and not their exclusion***.'" *Alewine v. Tobin Quarries*, 206 S.C. 103, 110-11, 33 S.E.2d 81, 83-84 (1945) (quoting *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 72, 15 S.E.2d 833, 835 (1941)) (emphasis added). This policy serves the legislative goal

of providing broad protection to workers. *See Crosby v. Prysmian Commc'ns Cables & Sys. 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 "[t]he employee receives the right to swift and sure compensation," "the employer receives immunity from tort actions by the employee," and this "quid pro quo" has "worked to the advantage of society as well as the employee and employer").

As a result, where a question arises as to 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 Act. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013). The broad construction in favor of inclusion applies equally where the Act is used as a shield to liability under another theory. *Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486.

The Court of Appeals' opinion ignores these policy considerations, implicitly rejecting them. The Court of Appeals should have undertaken its analysis cognizant of the overarching legislative and judicial policy that ***any doubts*** about the worker's status must be resolved in favor of inclusion. Instead, it did not even acknowledge this underlying policy.

While the Court of Appeals did recognize that there are many South Carolina cases involving maintenance workers, it nevertheless 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.) This holding is contrary to the public policy of inclusion, as rather than resolving all doubts in favor of ***inclusion***, the Court of Appeals did the opposite by resolving its supposed doubts[2] respecting statutory employee treatment for Seay in

[2] The key facts here are essentially undisputed, and thus any "doubts" have nothing to do with the facts.

favor of ***exclusion***. This holding is not in accord with, and indeed is contrary to, established South Carolina policy—reflected in many decisions from this Court—and alone warrants reversal.

B. The standard for determining whether Seay was a statutory employee applied by the Court of Appeals directly conflicts with prior decisions of this Court.

The Court of Appeals also affirmed and adopted the trial court's rationale that after *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 by the employer, and (2) whether the company's own workers ever conducted the activities completed by the worker. This standard conflicts with this Court's prior rulings.

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

Since enactment, the 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, this Court developed the three factor test to be used by lower courts to make this determination.

Most recently, this Court addressed a statutory employment question in *Collins v. Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015) (Beatty, J.).[3] *Collins* reaffirmed the three factor *Ost* test, emphasizing 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)). The Court quoted the traditional three factor test and explicitly

[3] 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, the long-standing South Carolina law with regard to the three factor test.

highlighted the words "important," "necessary, essential, and integral," and "identical activity." 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. *Collins* is the law—as it has been for decades—and confirms that these three factors are, and remain still, the components to examine when reviewing the nature of the work. Moreover, the test is a disjunctive one using alternative factors meaning that if any one factor is satisfied, the result should be a finding of statutory employment. *Glass*, 325 S.C. at 201, 482 S.E.2d at 50.

The Court of Appeals departed from this settled three factor test and its decision directly conflicts with the established precedent of this Court. The Court of Appeals' analysis began and ended with a simplistic, narrow examination of whether the work activity met the narrow confines of the defendant company's declared trade or business—without regard to the whether the work is important or essential—and whether the defendant company had in the past used its own employees for the activity at issue. This approach fundamentally differs from the controlling three factor test, as it renders the degree of importance of the work to the business involved irrelevant as long as the worker's activities meet the declared trade or business. Moreover, it ignores the governing policy of inclusion, and compounds that mistake by discarding the long-established principle that the nature of the work 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 constituted the company's declared trade or business. The three factor test

examines the work itself in an effort to avoid such disputes 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 legislative and judicial policy favoring inclusivity and resolves doubts in favor of finding that the employee was a statutory employee.

Here, it is undisputed that Seay was a maintenance worker, and critically, that his work was vital 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 Celanese, if the manufacturing line machinery was not maintained, no goods would have been produced. Seay himself agreed with this straightforward proposition. *See supra* Statement of the Facts.

Despite agreeing that Seay's work was "important" and "essential" to Celanese's manufacturing operation,[4] the Court of Appeals nevertheless found his work was not "part of" the business because maintenance was not its corporate purpose. (*See* Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) If this is now the new law of this state, it will lead to undesirable, unworkable, and inconsistent judicial outcomes contrary to the governing legislative and judicial policy favoring inclusion of workers within the workers' compensation system.

In this regard, consider the following illustration of the problems and confusion created by the Opinion. Under the Court of Appeals' standard: 1) if Celanese declared that maintenance was a part of its business, Seay would be a statutory employee; 2) if Celanese did not declare

[4] In their Return to Celanese's Petition for Rehearing, Respondents also admitted that Seay's work was necessary to Celanese's manufacturing operation. (*See* Resp'ts Return to Pet. for a Writ of Cert. at 1, 10.)

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, its importance, and how it was essential to the business never changed, yet his status would vary. This is precisely the type of result this Court sought to preclude when it articulated the three factor test focusing the analysis on an examination of the nature of the work.

Under the Court of Appeals' standard, 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—all to the detriment of the workers. The new business would have never had any employees performing any work, and the narrowly declared definition of the business would exclude everyone not engaged in that specific 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 also to maintain and repair the manufacturing equipment. Under the Court of Appeals' holding, no independent contractor involved in the manufacturing of fibers or maintenance and repairs of manufacturing equipment could ever 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, and the long line of prior decisions of this Court, which implement the statute's policy favoring inclusion and the resolution of all doubts in favor of it. Under *Ost*, such manufacturing, maintenance, and repair workers would be covered.

2. The type of work engaged in by Celanese employees is only relevant to the third factor of the *Ost* test—but not the *Ost* test's other two factors.

As courts have repeatedly acknowledged, the three factor test is an "or" test, meaning the subject activity need only satisfy "one of" the "three criteria" for the worker to qualify as a statutory employee. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 368, 747 S.E.2d 757, 762 (2013). Nevertheless, the Court of Appeals found that Seay's work was not "part of" Celanese's manufacturing process because only Daniel (and not Celanese) 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.*) This was plain legal error because such a finding bears ***only*** on the third factor of the test, but not the other two factors 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").

The Court of Appeals supported this proposition by citing to a statement in a 1999 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." *See Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999). This sentence had no supporting citation in *Harrell* and does not appear to have been repeated or followed in any subsequent decisions. Moreover, the *Harrell* court never stated, much less suggested, that it was changing the analysis or converting the three factor test into a singular one.

Indeed, a careful review of the *Harrell* decision reveals that it, in fact, supports Celanese in this case. Thus, in evaluating whether the worker's activity satisfied any of the *Ost* test's three factors, the *Harrell* court, "***focusing on the [worker's] responsibilities***," found that the work was

both "important" and "necessary, essential, and integral." *Harrell*, 337 S.C. at 325, 523 S.E.2d at 772 (emphasis added). The Court reasoned that without the worker's activity, 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). *Harrell* 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*, 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)).

Further, the Court of Appeals failed to follow its own precedent, where it previously held that a company need not have had its own employees engage in the same activity in order for that activity to satisfy the statutory employment 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.").

In its Opinion, the Court of Appeals essentially held that former employee engagement in the same activity is a ***requirement*** in order to find inclusion as a statutory employee. But this cannot be squared with the many prior cases recognizing that the three part test is an "or" test, and only one factor need be met. Celanese needed to maintain its manufacturing machinery in order to produce its goods, and it would have had to use its own employees to perform that maintenance absent the retention of Daniel employees like Seay. *Harrell*, *Carter*, and *Raines* all support the conclusion that Seay was Celanese's statutory employee as a matter of law. This Court should reverse to correct the Court of Appeals' erroneous decision.

C. *Abbott* and *Olmstead* were not a fundamental change in the law.

1. The questions presented and accompanying rulings in those matters were narrow in scope.

Citing to *Abbott* and *Olmstead*, the Court of Appeals found these decisions "brought new clarity" to the statutory employment case law and that their logic was "binding in the present case." (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.) Not so, as a careful examination of both cases and their briefing reveals that their holdings were confined to the transportation worker context and ***not*** intended to have the broad scope or novel reading that the Court of Appeals gave them.

The appellate briefing in *Abbott* and *Olmstead* makes clear that these decisions were meant to be limited to transportation workers, and Celanese respectfully directs the Court's attention to those filings.[5] In *Abbott*, the Court of Appeals affirmed the trial court's finding that the worker was a statutory employee. In the injured worker's petition for rehearing there, he contended that the activity of ***transportation conducted by common carriers*** "should be exempt from the strict application of the three prong test." Pet. for Reh'g at 1-3, *Abbott v. The Limited*, No. 94-CP-21-1430 (S.C. Ct. App. July 7, 1998). Likewise, in the petitioner's brief, the worker argued that the work of common carriers falls into a unique category, and 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'rs 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 unique because "by its very nature, [it] is more susceptible of being categorized as important, essential and necessary," and thus "something more must be shown" to apply the three prong test to common carriers. *See id.* at 3, 5.

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[5] 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).

This Court agreed, holding that "the mere ***recipient of goods*** delivered by a common carrier is not the statutory employer of the common carrier's employee." *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 explicitly overruled two other cases involving the activities of employees of common carriers to the extent they could "be read to hold otherwise." *Id.* at 164 & n.1, 526 S.E.2d at 514 & n.1. However, the Court went no further than that, and did not overrule or suggest it was modifying the traditional three factor test.

The appellate briefing in *Olmstead* was equally limited in scope. Applying *Abbott*, the *Olmstead* trial court drew a distinction between the activities of common carrier workers engaged in delivering ***inventory*** (receipt of goods by the owner) and those engaged in delivering ***finished product*** for sale. *See* Order at 2-3, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. C.P. Mar. 1, 2000) (Kittredge, J.).[6] The worker appealed, contending 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 Appellants at 4, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 28, 2001). Therefore, even the appellant in *Olmstead*—who was arguing for a broader application of *Abbott*—recognized that the holding was limited to common carrier 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 whether the transportation worker is a statutory employee. *Id.* at 5. As the worker explained 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

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

business or manufacturer" or "takes away finished products or raw materials" from the same business or manufacturer. Reply Br. of Appellants at 2, *Olmstead v. Shakespeare*, No. 99-CP-36-186 (S.C. Ct. App. Feb. 28, 2001). The worker did not advocate for an abrogation of all prior South Carolina law governing statutory employees.

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 finding and the company's argument about other transportation cases, 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 long-standing three factor statutory employee test.

The questions presented in *Abbott* and *Olmstead*, therefore, did not seek (nor brief) a sweeping change in the statutory employment analysis under South Carolina law. Nor did either decision announce or recognize some fundamental change in the three factor test or the law. The Court of Appeals erred in holding otherwise.

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.

In its appellate briefing in *Olmstead*, the defendant company raised the meaning of *Abbott*'s "overruling" language to the Court. 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***. *See* 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). It cited several other common carrier statutory employee cases which *Abbott* did not expressly overrule to support its position that *Abbott* was limited to cases involving receipt of goods only. *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).

This is the underpinning for the *Olmstead* Court's overruling of prior cases "***to the extent they conflicted***" with *Abbott* and *Olmstead.* By doing so, the Court addressed the company's contention that *Abbott*'s explicit overruling of only two receipt of goods cases had special significance limiting its holding to cases arising in that context only. *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 (emphasis added). Again, nothing suggested that the *Olmstead* Court was overruling or modifying the long-standing three factor statutory employee test.

Additionally, the fact that neither *Abbott* nor *Olmstead* overruled *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990) is significant. As the Court of Appeals explained in *Olmstead*, this is in line with *Abbott* explicitly overruling two transportation cases, while declining to overrule this case. In *Revels*, the Court of Appeals 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] general business." *Olmstead v. Shakespeare*, 348 S.C. 436, 440, 559 S.E.2d 370, 372 (Ct. App. 2002), *aff'd as modified*, 354 S.C. 421, 581 S.E.2d 483 (2003) (quoting *Revels*, 301 S.C. at 318, 391 S.E.2d at 731). The Court explained 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 (emphasis added). Moreover, "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.* This Court presumably agreed with the analysis, as it did not modify this portion of the Court of Appeals' opinion in *Olmstead.*

The context of the briefing, arguments, and opinions in both *Abbott* and *Olmstead* makes clear that the "overruling" language was focused on and limited to prior common carrier cases, and was not intended to discard or fundamentally alter the three factor test under South Carolina law. The *Abbott* Court's explicit focus upon and reference to common carrier cases, and the *Olmstead* Court's clarification that *Abbott* concerned "transportation," has to mean something. If this Court intended to discard or change *Ost*'s three factor test for all types of workers to what the Court of Appeals articulated here in our case, it would have said so clearly and directly by specifically overruling or abrogating *Ost*—the prior Supreme Court decision that was the genesis of the three factor test.[7]

The lower courts' finding that *Olmstead* essentially abrogated the entire body of South Carolina statutory employee precedent was misguided. As this Court has long recognized, "it is a well-established general rule that an appellate court . . . should, in the exercise of proper judicial restraint, decide only such questions as are necessary for a determination of the appeal." *Blanford v. Mauterer*, 252 S.C. 146, 159, 165 S.E.2d 633, 640 (1969); *see also Coleman v. Page's Estate*, 202 S.C. 486, 25 S.E.2d 559, 560 (1943) ("A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence

[7] Both *Abbott* and *Olmstead* set forth 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* states the same standard as *Ost*.

that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside."). The lower courts ascribed a scope to *Olmstead* that went well beyond the discrete issues before that Court, and the broad interpretation given to that decision flies in the face of the presumption that the *Olmstead* Court was exercising judicial restraint.

For all these reasons, the Court of Appeals' opinion erroneously interpreted the scope of *Abbott* and *Olmstead*. This Court should reverse.

D. No South Carolina cases issued after *Abbott* and *Olmstead* have found, as the Court of Appeals did here, that the statutory employee tests have changed.

Aside from the present case, two cases from this Court and ten Court of Appeals cases have been decided since *Abbott* and *Olmstead*, but ***none*** reached the sweeping conclusion that the lower courts did here. In fact, most of these decisions hardly mention *Abbott* or *Olmstead*, much less suggest that the two decisions represented a broad, revolutionary change in the law. When these post-*Abbott* and *Olmstead* cases cite to these decisions, it is typically for very general propositions such as *Olmstead's* repeating of the same three factor test from *Ost*.

The cases without substantive analysis of *Abbott* and *Olmstead* 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)

3. *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 factor test)

4. *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*)

5. *Collins v. Charlotte*, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012) (transportation worker case that only cites *Olmstead* for the recitation of the three factor test)

6. *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* merely to support the point that if the activity at issue satisfies even one of the three factors, the injured is a statutory employee)

7. *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)

8. *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 to support that if a worker is a statutory employee he may not maintain a direct negligence cause of action against the employer, and *Olmstead* solely to support the point that the activity need only meet one of the three tests)

9. *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*)[8]

Three Court of Appeals cases have examined *Abbott* and *Olmstead* in greater detail, but none support the Court of Appeals' conclusion here that the three factor test was altered by these decisions. Moreover, all three concerned whether ***transportation*** was an important part of the defendant company's trade or business. None involved the work of maintenance on manufacturing lines, and none suggested that *Abbott* and *Olmstead* were intended to apply beyond the narrow context of common carrier transportation.

First was *Johnson v. Jackson*, 401 S.C. 152, 156, 735 S.E.2d 664, 665 (Ct. App. 2012), which involved a transportation worker engaged in the delivery of goods. The court cited to *Abbott*, explaining that it and other transportation cases found that "***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 *Johnson*, the defendant's business was transportation of equipment, which would include the related tasks of "packing, loading, and unloading[] that

[8] It's noteworthy that the first three decisions following *Abbott* and *Olmstead* barely discussed those cases.

equipment," and thus the worker was the defendant's statutory employee there. *Id. Johnson*, therefore, merely reaffirmed *Abbott* and *Olmstead*'s applicability in the transportation context.

Next was *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 219, 661 S.E.2d 395, 400 (Ct. App. 2008). *Posey* discussed *Abbott* and *Olmstead*, but did not find that either decision modified the general statutory employment test. Rather, the court recognized that they "addressed statutory employment ***in the common carrier context.***" *Id.* at 219, 661 S.E.2d at 400 (emphasis added). *Posey* focused solely on whether the third factor of the test was satisfied, and determined that the transportation worker in question was a statutory employee because the owner's employees previously conducted similar activities. *Id.* at 221-22, 661 S.E.2d at 401.

Finally, *Cooke v. Palmetto Health All.*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005) addressed whether airlifting patients was part of a hospital's trade or business. In examining *Abbott* and *Olmstead*, the court did not find that those decisions had changed the long-standing three factor *Ost* test. The court cited to *Olmstead* solely for its articulation of the 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). Again, it was solely focused on the transportation aspect.

Moreover, two other judicial bodies have issued decisions in conflict with the Court of Appeals here. Both interpreted *Abbott* and *Olmstead* in line with the position advanced by Celanese in this matter. 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). 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 "the controlling case," as it made "absolutely clear that the ***provision of delivery and unloading services*** does not create a statutory employer relationship," and overruled "a line of cases from the Court of Appeals ***that had held otherwise.***" *Id.* at *9 (emphasis added). Although these decisions are merely persuasive, Celanese brings them to the Court's attention to demonstrate that other courts do not agree with how the lower courts in this case understood and interpreted *Abbott* and *Olmstead* and their applicability outside of the common carrier context.

In sum, ***none*** of the other cases issued after *Abbott* and *Olmstead* support the Court of Appeals' formulation of the standard here or its determination that those cases represented a drastic change in the law. This Court should reverse the Court of Appeals and correct this deviation in established precedent.

E. A long line of South Carolina decisions have held that maintenance workers are statutory employees of manufacturing businesses.

The Court of Appeals dismissed as factually distinguishable the numerous maintenance worker cases cited by Celanese that hold to the contrary of the lower courts here. Many South Carolina cases, dating back eight decades, have found maintenance to be an important and/or necessary, essential, and integral part of a manufacturing business. The Court of Appeals' holding departs from, and indeed conflicts with, all of these well-reasoned precedents, which properly reflect the legislative and judicial policy of inclusion, not exclusion. While there is not a separate

legal test focused just on maintenance workers, it is instructive to look at past decisions involving them.

The first maintenance worker 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, as 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) (summarizing *Marchbanks*).

Next, in *Boseman v. Pac. Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940), the Supreme Court ruled that the maintenance of a 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, the mill needed to have work done on the inside of the tank "so that its every day, ordinary service, that of fire protection, could be resumed," since "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 it necessarily followed that painting of the tank was "part of the trade, business or occupation" of the mill and, as a result, 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 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.

In *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, 567 S.E.2d 231 (2002), the Supreme Court again found that maintenance was part of the trade, business, or occupation of the defendant woolen goods manufacturer. *See id.* at 23. The defendant's machinery was operated by electricity derived from its own hydro-electric plant and through power purchased from Duke Power. *See id.* The worker's job was to repair and/or replace the electrical transmission line owned by the defendant company, which the court found was "necessary for the operation of [the] business." *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.*

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) reached the same conclusion. In *Bailey*, the defendant company was "in the business of manufacturing steel" by acquiring scrap metal to fabricate it. *Id.* The contractor 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. The worker was assigned to replace 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, and integral tests were met. *See id.* Moreover, the third prong also was satisfied because the company's employees previously had engaged in this activity. *See id.*

In *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991), *rev'd on other grounds*, 311 S.C. 321, 428 S.E.2d 878 (1993), 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 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 this Court affirmed the trial court's finding. *See id.* at 292, 411 S.E.2d at 442.

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. The 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 also satisfied because Milliken's workers previously had engaged in the activity. *See id.*

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 court explained that the "evidence reveal[ed] that as part of an ongoing maintenance program, it was necessary for [the worker] to remove and dispose of asbestos," and "[p]reventive maintenance, including the removal and reinstallation of insulation, has always been and always will be an ongoing process." *Id.* at 443, 438 S.E.2d at 266. 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.*

Finally, in an opinion that subsequently was vacated on procedural grounds, the Court of Appeals 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). 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, 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 said that "[t]he ***maintenance and repair of manufacturing equipment*** is also a necessary part of Westvaco's business." *Id.* (emphasis added).

In rendering its Opinion here, the Court of Appeals cast aside all of these cases, which provide significant, direct support for Celanese's position that Seay's maintenance work was an important, necessary, integral, and essential part of its manufacturing business. Although each case is fact dependent and a maintenance worker might not be a statutory employee in every case, the common carrier transportation worker cases and their arguments do represent a separate category with a specialized standard governed by *Abbott* and *Olmsted.* Here, Seay's work was an important, necessary, essential, and integral part of Celanese's manufacturing business given that he performed critical maintenance work on the production lines that enabled Celanese to continue operating its factory and producing product. The Court of Appeals' holding to the contrary was legal error, in direct conflict with this Court's prior rulings, and this Court should reverse and correct it. In sum, the lower courts' opinions in this case cannot be squared with a long line of decisions issued by this Court, such as *Marchbanks*, *Boseman*, *Bridges*, *Bailey*, *Smith*, *Gentry*, and *Wheeler*, which all held in similar or functionally indistinguishable circumstances that the maintenance worker at issue was a statutory employee.

F. A number of District of South Carolina and Fourth Circuit cases applying South Carolina law also have held that maintenance workers are statutory employees of manufacturing businesses.

The Court of Appeals' opinion also ignored federal court decisions finding maintenance or repair workers to be statutory employees. For example, in *Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 893 (D.S.C. 1982), *aff'd*, 726 F.2d 1011 (4th Cir. 1984), the subject 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.* Thus, the court found the worker was a statutory employee.

Next was *Smith v. FCX, Inc.*, 744 F.2d 1378 (4th Cir. 1984). In that case, the plaintiff worker was an electrical contractor hired to repair a dryer and electrical system at a grain market. *Id.* at 1379. The defendant company "could perform no such electrical work through its own employees, for it employed no electricians, but it had engaged" the worker's employer to do such work "on many occasions." *Id.* The Fourth Circuit explained that a worker is a statutory employee 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." *Id.* The trial court found that the electrical worker's activity satisfied this criterion and the Fourth Circuit affirmed. *See id.*

The Fourth Circuit's decision in *Eades v. United States*, 168 F.3d 481, 1999 WL 25549 (4th Cir. 1999) (unpublished table decision) is also instructive. *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 Fourth Circuit 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.* Even if the business never performed the work with its own employees, it may still be "integral" to a "company's basic operations . . . 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 Fourth Circuit determined that the subject 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. The worker's activities were a highly specialized and narrow category of maintenance, and a "bolt of lightning" would have a better chance of interrupting the hospital's operations than failure to conduct electrical testing. *Id.* 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.* Thus, *Eades* stands in sharp contrast to the facts here, where Seay's work was routine and a regular part of the day-to-day maintenance—and thus operation—of the plant.

In *Provau v. YRC, Inc.*, No. 4:16-cv-00422-RBH, 2017 WL 1541880 (D.S.C. Apr. 28, 2017), the District of South Carolina found that a maintenance worker hired to perform repairs on the defendant transportation company's tractor trailer was its statutory employee. *Id.* at *1. The testimony supported the conclusion that the worker's activity was necessary and essential to the defendant's business, as the maintenance was "very important for mechanical breakdowns" and

"keeping equipment up." *Id.* at *2. The testimony also showed that if the vehicles were not maintained, it would impact the company's ability to make deliveries or pickups. *Id.* Therefore, the court found that the first two statutory employee tests were met. The court found that the maintenance activity was: (1) an important part of the defendant's freight transportation business, and (2) was integral to the business ensuring the safe operation and orderly working of its fleet of vehicles. *Id.* at *3. In reaching this conclusion, the court observed that "South Carolina courts have indeed determined that maintenance and repair are important to businesses similar to YRC." *Id.* The court also found that the third test was satisfied because the defendant employed mechanics doing the same job at other terminals across the company. *Id.*

Zeigler v. Eastman Chem. Co., No. 5:17-CV-01010-JMC, 2018 WL 5266620 (D.S.C. Oct. 23, 2018)[9] reached the same conclusion. *Zeigler* arose out of an accident at a chemical manufacturing facility. Eastman previously owned the entire facility but sold a number of production lines to the contractor's employer. The injured contractor engaged in preventative maintenance on all of the production lines, including the lines retained by Eastman. *See id.* at *2. The contractor's employer provided Eastman's entire operations and maintenance workforce at the time of the incident. S*ee id.* at *1. The court explained there was no dispute of fact that Eastman's business required the presence of chemical product, and without such product it could not sell or produce anything. *Id.* at *6. The court also noted there was no dispute that the worker was performing preventative maintenance on one of the lines producing chemicals for Eastman. *Id.* Thus, it found that the worker was Eastman's statutory employee. [10]

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[9] Zeigler has two companion cases: *Vann v. Eastman Chem. Co.*, No. 5:17-CV-01013-JMC, 2018 WL 5266618, at *1 (D.S.C. Oct. 23, 2018) and *Jackson v. Eastman Chem. Co.*, No. 5:17-CV-01015-JMC, 2018 WL 5266502, at *1 (D.S.C. Oct. 23, 2018).

[10] After the Court of Appeals issued its Opinion here, the plaintiffs moved to reconsider contending that their work no longer met the statutory employment tests under the new standard. Although

Finally, the most recent federal decision, *Matthews v. E. I. du Pont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111 (D.S.C. Nov. 13, 2018), also found a maintenance worker to be a statutory employee. In *Matthews*, the plaintiff worked for a company that contracted with DuPont to perform asbestos insulation on pipes within DuPont facilities. *See id.* at *1. The court noted that DuPont had a wide-ranging business including textiles, chemical, paint, engineering, and construction. *See id.* at *2. However, DuPont acknowledged it did not manufacture thermal insulation and was not an "insulation company" or "insulating contractor." *See id.* DuPont nevertheless contended that the contractor's activity was essential, necessary, and integral to its business because it ensured continued production of its products and allowed for the expansion and renovation of its facilities. *See id.* at *4.

The court explained that *Abbott* and *Olmstead* provide a "solid framework" for determining whether an individual was a statutory employee, but 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). The court then looked to the long-established three factor test and, most relevant to this case, agreed with DuPont's argument that the work was essential. The court found that DuPont "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 DuPont's facilities." *Id.* The court explained that even if it were to "narrowly define DuPont's business as the manufacturing of chemicals and synthetic

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the District Court agreed that *Keene* appeared to have changed the tests, it nevertheless found that the new standard articulated by the Court of Appeals was met under the facts before it. *See Zeigler v. Eastman Chem. Co.*, No. 5:17-CV-01010-JMC, 2019 WL 2171142, at *6 (D.S.C. May 20, 2019); *Vann v. Eastman Chem. Co.*, No. 5:17-CV-01013-JMC, 2019 WL 2171143, at *6 (D.S.C. May 20, 2019); *Jackson v. Eastman Chem. Co.*, No. 5:17-CV-01015-JMC, 2019 WL 2171144, at *1 (D.S.C. May 20, 2019). The plaintiffs each appealed. The Fourth Circuit consolidated the cases, and briefing is ongoing. A central question is whether the District Court properly analyzed the meaning and impact of the Court of Appeals' decision here.

fibers," as the plaintiff suggested, "maintenance of the plant in which the manufacturing is performed" would still be "vital, essential, and necessary to the operation of DuPont's business." *Id.* at *5. The contractor "confirmed that without the insulation of spin beams, the nylon products" made at the facility where he worked could not have been made, as his work "in insulating these pipes was essential to the proper functioning of all of the plants." *Id.* Finally, DuPont's direct employees relied on the proper operation of the piping on which the contractor worked, strongly suggesting that his "work as an insulator, specialized or not, was essential to DuPont's business." *Id.* Thus, the court found that the maintenance of the pipes was important and essential to DuPont's business. *See id.*[11]

These decisions, several of which post-dated *Abbott* and *Olmstead*, are further support for the proposition that a long line of statutory employment precedent holds that maintenance work can be an important part of a manufacturer's trade or business, and is in many cases. The Court of Appeals' decision cannot be reconciled with this contrary authority, which it overlooked, and thus should be reversed.

G. The Court of Appeals' reliance on the contractual language between Celanese and Daniel, rather than the evidence and testimony, was misplaced.

Finally, the Court of Appeals also erred by giving an unwarranted degree of import to the contractual language between Celanese and Seay's direct employer, Daniel. The court highlighted that the scope of work from the 1972 and 1975 contracts between Celanese and Daniel provided that Daniel would furnish supervision, labor, equipment, etc. to perform continuous routine

[11] Although the court found that the third test was also met because DuPont had direct employees who sometimes performed the same work on an infrequent basis, it explained that even if this was not the case "summary judgment is still appropriate because the facts . . . still meet either of the first two tests." *Id.*

maintenance, and that Daniel was not responsible for operating the machinery. (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27-28.)

That statement misses the point, as Seay ***was responsible*** for maintaining the machinery, so that the machinery could operate. Moreover, as this Court previously has explained, "[w]hatever the parties contract to call their relationship ***is not controlling*** in a statutory employment analysis." *Harrell*, 337 S.C. at 322, 523 S.E.2d at 770 (emphasis added); *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 on the statutory employee question). The Act makes this 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. The contract, therefore, was not determinative or even the best evidence for evaluating whether Seay was a statutory employee. The contractual language contains no discussion about the nature of the work that millwrights like Seay performed. (*See* Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27-28.)

Further, the Court of Appeals disregarded the testimony of Celanese's corporate representative, as well as that of Seay and Thompson. As discussed above, ***all three*** witnesses testified that the work of the Daniel millwrights was important, necessary, and essential to the continued operations of the Celanese manufacturing facility. Nevertheless, the Court of Appeals characterized the testimony of Celanese's corporate representative as "self-serving," and declined to assign it any probative value. Moreover, it did not mention the testimony of Seay and Thompson.

The Court of Appeals' failure to consider this testimony, combined with its mistaken emphasis on the contractual language between Daniel and Celanese, reflected its misinterpretation of the proper analysis under this Court's precedent. Hence, this Court should reverse.

II. If left undisturbed, the Court of Appeals' decision will upend settled law and expectations, and have significant, negative policy ramifications.

The impact of the Court of Appeals' opinion, if permitted to stand, will be significant. First, and at a minimum, it will cause widespread confusion. The Court of Appeals' decision constitutes a functional overruling of the three factor *Ost* test. This Court will have to set forth new guidance that will take considerable time and resources for the trial courts to adapt and apply, as the decades of prior cases previously decided under the *Ost* test will be of marginal or no use at all. Second, statutory employee issues will transform into factual disputes governed by unclear, inconsistent, and evolving legal standards. The resulting uncertainty will hamper the ability of businesses and workers alike to be able to understand their status. Third, affirmance of the Court of Appeals' decision will undermine, if not reverse, this State's policy, transforming the policy from one of inclusion into one of exclusion. Finally, permitting the decision to stand would injure workers by reducing the scope of the statutory employee doctrine, which is specifically designed to protect workers by expanding workers' compensation liability. These considerations constitute further support for this Court reaffirming the traditional three factor test and reversing the Court of Appeals and trial courts' decision by holding that Seay was Celanese's statutory employee as a matter of law.

CONCLUSION

The evidence and testimony establish that Seay was Celanese's statutory employee because his maintenance work was an important, necessary, essential, and integral part of Celanese's manufacturing business. The Court of Appeals reached its contrary conclusion only by (i)

violating this Court's prior precedents, (ii) disregarding South Carolina's policy of inclusion, and (iii) fundamentally altering the three factor *Ost* test. The Court should reverse the Court of Appeals' erroneous decision and remand with instructions to dismiss this matter for lack of jurisdiction.

Respectfully submitted,

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December 2, 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. 2019-000816
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, ... Petitioner.

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):

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