

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

D. Garrison Hill, Circuit Court 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.

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STATEMENT OF ISSUES ON APPEAL

1. What is the proper standard for review of a lower court's findings of fact applicable to a statutory employee defense?
2. Were the Circuit Court and the Court of Appeals correct in finding Dennis Seay was not Hoechst Celanese's statutory employee?

STATEMENT OF THE CASE

Hoechst Celanese ("Celanese") was a large chemical manufacturer that made various products. (App. p. 997, line 23 to p. 998, line 7). It operated a textile plant in Spartanburg, South Carolina. Petitioner is successor in interest to Celanese. (App. p. 2752).

From the 1960s until the 1980s or 1990s, Celanese hired Daniel Construction ("Daniel") to do all maintenance work at its Spartanburg plant. (App. p. 1282, line 16 to p. 1284, line 12; p. 1412, lines 9-12). Daniel was a large construction company that routinely built and maintained manufacturing plants. (App. p. 1510, line 1 to p. 1512, line 13).

Dennis Seay worked for Daniel for ten years in the late 1960s and 1970s performing maintenance at Celanese's Spartanburg plant. (App. p. 557, line 8 to p. 558, line 21). In 2013, decades after he left Daniel, Mr. Seay was diagnosed with mesothelioma, a fatal cancer caused by asbestos. (App. p. 2086, lines 12:05-12:24).

On September 25, 2013, Mr. Seay and his wife filed this action. (App. p. 77). They asserted premises liability claims against Petitioner for Mr. Seay's personal injuries due to mesothelioma and Mrs. Seay's resulting loss of consortium. (App. pp. 84-85 & p. 87, ¶49). After Mr. Seay died from mesothelioma, his personal representative was substituted and the suit was amended to assert wrongful death and survival claims. (App. p. 72).

Petitioner generally denied the allegations of the lawsuit. (App. p. 96). It also asserted an affirmative defense based on the South Carolina Workers' Compensation Act (the "Act").¹ (App. p. 98). Specifically, Petitioner claimed Mr. Seay was its statutory employee and therefore his exclusive remedy was under the Act.

The Circuit Court dealt with the statutory employee defense pre-trial, at the directed verdict stage, and in post-trial motions. In an Order dated July 28, 2015 (App. p. 54), it denied Petitioner's Motion to Dismiss based upon the defense. (App. p. 2606). Petitioner again argued Mr. Seay was a statutory employee at the close of the evidence and sought a directed verdict. (App. p. 1540). The Circuit Court denied the motion. (App. p. 1542).

After the jury returned a verdict in favor of Respondents (App. p. 75), Petitioner filed a Motion for Judgment Notwithstanding the Verdict, in which it renewed its statutory employment argument. (App. p. 2123). The Circuit Court denied this motion in an Order dated January 8, 2016. (App. p. 8; statutory employee discussion at pp. 29-33).

Petitioner appealed on four issues, including statutory employment. (App. p. 2751). In a unanimous opinion (App. p. 2854), the Court of Appeals agreed Mr. Seay was not Petitioner's statutory employee. *Keene v. CNA Holdings*, 426 S.E.2d 357, 827 S.E.2d 183 (Ct. App. 2019).

Petitioner petitioned for rehearing and rehearing *en banc*. (App. p. 2878). The Court of Appeals denied that petition. (App. p. 2929).

By Order dated November 1, 2019, this Court granted certiorari to review the Court of Appeals' ruling on the statutory employee defense.

¹ The Court of Appeals characterized this defense as "statutory employee." Cases have variously labeled the defense not only as the "statutory employee doctrine" but also as the "statutory employer doctrine (or defense)," "statutory employment doctrine (or defense)," "exclusivity defense," and "exclusive remedy defense." In this brief, Respondents use these terms interchangeably to refer to the defense created by S.C. CODE ANN. § 42-1-400 (Repl. Vol. 2015).

STANDARD OF REVIEW

Respondent submits that, as a threshold matter, this Court should address the proper standard of review given apparent inconsistencies in the case law and the effect that the standard of review may have on resolution of this appeal.

Petitioner repeats the oft-quoted conclusion that, because the statutory employee defense is jurisdictional, this Court should conduct a plenary review of the factual record. (Pet. Brief, p. 7). This statement appears grounded in the idea that the determination an injured party is an employee subject to the Act affects the courts' subject matter jurisdiction. *See, e.g., Carter v. Florentine Corp.*, 310 S.C. 228, 230 n. 1, 423 S.E.2d 112, n. 1 (1992), *overruled on other grounds, Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). That premise is suspect. Thus, before it mechanically applies that standard of review because it has done so in previous cases,² this Court should examine more closely whether it is truly the correct standard.

At least arguably, an appellate court's *de novo* review of facts seems proper when it reviews actual issues of subject matter jurisdiction when one considers parties can neither create nor waive that jurisdiction and courts always have the jurisdiction to determine their own jurisdiction. But, in one of its more recent comments on the statutory employer defense, this Court made it clear that "the [workers compensation] exclusivity provision does not involve subject matter jurisdiction."

² Not all cases on this topic have applied this standard (which has also been characterized as a *de novo* or "preponderance of the evidence" standard) in reviewing the factual record applicable to a statutory employer inquiry. *See, e.g., Smith v. T.H. Snipes & Sons*, 306 S.C. 289, 292, 411 S.E.2d 439, 440 (1991) (affirming because "the record supports the findings of the trial court" that plaintiff was a statutory employee); *Chavis v. Watkins*, 256 S.C. 30, 180 S.E.2d 648 (1961) ("The Industrial Commission, reversing its hearing commissioner, concluded that Chavis was an employee. The circuit court affirmed. ... The burden rests on the appellants to show that the circuit court's decision is against the preponderance of the evidence."); *see also Kilgore Group v. South Carolina Emp. Sec. Comm.*, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993) ("In reviewing the Employment Security Commission's decision [that worker was an 'employee'], we must affirm the factual findings of the Commission if they are supported by substantial evidence. Our limited standard of review applies to facts establishing jurisdiction." [citations omitted]).

Sabb v. South Carolina State Univ., 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002). Rather, despite the Act, courts continue to have subject matter jurisdiction over tort actions against alleged statutory employers, *id.* at 422, 567 S.E.2d at 234, and the Act's exclusivity provision simply operates to prevent the exercise of that jurisdiction under certain conditions (*i.e.*, timely assertion and preservation of the defense and proof of facts for its application). *Accord Googe v. Speaks*, 194 S.C. 206, 9 S.E.2d 439, 444-45 (1940) ("The enactment of the Workmen's Compensation Act did not deprive the Court of Common Pleas of jurisdiction of actions relating to master and servant.... Hence it seems to us that where a defendant contends that the Workmen's Compensation Act is applicable the duty is upon it to set it up by way of special defense. ... [S]uch a defense on the part of the employer has been held not a lack of jurisdiction in the court but a want of a cause of action in the plaintiff."). In other words, although the statutory employee defense raises an analysis of jurisdictional facts, it is not a question of subject matter jurisdiction.

So, why have appellate courts often cited a *de novo* standard of review in statutory employee cases? The answer appears to be rooted in several bases, none of which supports the conclusion that lower courts' factual findings are undeserving of deference.

First, as noted above, cases that have characterized the statutory employee inquiry as one of subject matter jurisdiction are incorrect in light of *Sabb*. Therefore, a subject matter jurisdiction analysis does not provide a reason for a *de novo* factual review.

Second, no explanation for this standard of review appears to be grounded in the Act itself or the early cases construing it.

The first case to construe the Act, *Murdaugh v. Robert Lee Const. Co.*, 185 S.C. 497, 194 S.E. 447 (1937), did not involve a question of employment. However, the Court there held that, in reviewing a conclusion of law as to compensability, it should defer to the Workers

Compensation Commission's findings of fact related to the legal issue but had the power to correct errors of law. *Id.*, 194 S.E. at 451 ("It is frequently necessary in deciding such questions of law to review the facts of the case as they appear in the record, but this court may not pass upon the force and effect of such facts.")³ Consequently, from the inception of the Act, this Court has recognized that questions arising thereunder can be mixed questions of law and fact and that different standards of review apply the legal and factual inquiries.

The first case that addressed jurisdiction under the Act was *Knight v. Shepherd*, 191 S.C. 452, 4 S.E.2d 906 (1939).⁴ There, the jurisdictional question was not whether an employment relationship existed but whether the Act applied to a workers compensation claim by a Georgia employee against a Georgia employer arising out of an accident that occurred in South Carolina. In reviewing the Industrial Commission's conclusion that it lacked subject matter jurisdiction, the Court noted, without reference to any supporting authority:

It is true that as to disputed facts which do not go to the jurisdiction, we are bound by the finding of the Commission, but where the only question presented is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, we have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found it.

Id., 4 S.E.2d 908.

Significantly, the "jurisdictional fact" that was dispositive in *Knight* was that the accident happened in this state, which was undisputed. Rather than overruling the Commission's factual

³ This is not unlike the current "substantial evidence" standard of review that is required by the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-310 to -400 (Repl. Vol. 2005) ("APA"). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

⁴ The first case to address the statutory employee defense was *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939), which was decided five months before *Knight*. Interestingly, *Marchbanks* did not describe the question of the Act's exclusivity in terms of jurisdiction. Moreover, it provides no guidance on the scope of the Court's review of a lower court's findings of fact because the factual record in that case was stipulated.

findings, the Court reversed its legal conclusion that this fact was inadequate to trigger application of the Act. As a result, the *Knight* court's comments about the standard of review applicable to facts were arguably dicta and, in any event, related to a true, "geographic" subject matter jurisdiction issue.

The problem created by this statement is that, as the Court began citing *Knight* for the general proposition that it had the power to decide jurisdictional facts without deference to findings by the Commission or lower court, it also started applying this standard to review the existence of an employment relationship (which it treated as a matter of jurisdiction). See, e.g., *McDowell v. Stille Plywood Co.*, 210 S.C. 173, 179-80, 41 S.E.2d 872, 875 (1947). From there, it continued to cite *Knight*, without further analysis, in cases where statutory employment was a defense. See, e.g., *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 543, 96 S.E.2d 566, 571 (1957).

It appears the only subsequent case where this Court reviewed the underpinnings of this standard of review in the context of applying the statutory employee defense is *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 132 S.E.2d 18 (1963). However, *Bridges* was predicated upon the conclusion that the factual inquiry related to the defense was a determination of subject matter jurisdiction, *id.* at 7-10, 132 S.E.2d at 21-22, a holding that this Court expressly overruled in *Sabb*. 350 S.C. at 422 n. 2, 567 S.E.2d at 234 n. 2. This brings the analysis of this topic back to Respondent's first point above: One cannot rationalize a *de novo* standard of review in this context based upon the premise that it is a matter of subject matter jurisdiction.

Finally, some cases appear to be based upon the rote recitation of the standard of review applicable to issues of law, without regard to whether the court must first make factual findings as a predicate to its application of legal principles. *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007) ("The existence of the employer-employee relationship is a

jurisdictional question. ... The question of subject matter jurisdiction is a question of law. ... On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law.”) (citations omitted). As such, these cases provide no rationale or legal basis for applying this standard to the review of underlying factual findings.

The determination of the statutory employee defense involves a mixed question of law and fact. *See, e.g., McCreery v. Covenant Presbyterian Church*, 303 S.C. 271, 273, 400 S.E.2d 130, 131 (1990); (“The jurisdictional question whether a claimant is an employee is a factual one.”); *Bailey v. Owen Electric Steel Co. of S.C.*, 301 S.C. 399, 392 S.E.2d 186 (1990) (plaintiff is entitled to conduct factual discovery related to statutory employee defense); *Henderson v. Gould, Inc.*, 288 S.C. 261, 269, 341 S.E.2d 806, 811 (Ct. App. 1986) (“Henderson's complaint does not contain allegations from which it can be determined whether the work being performed by his employer was a part of Gould's trade, business or occupation. Therefore, the decision on this issue also will have to await further development of the facts.”). While an appellate court’s power to decide *questions of law* without regard to a lower court’s conclusions is beyond dispute, *see, e.g., Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000) (citing constitutional and statutory authority), Respondent submits an appellate court should review a lower court’s *factual findings* related to that question of law using a more deferential standard.

In other contexts, where the question is whether there are facts that create an impediment to a court’s exercise of its jurisdiction – that is, where a court’s authority to exercise jurisdiction is conditioned on the resolution of a factual inquiry – this Court has applied a deferential standard in reviewing a lower court’s factual findings.

For example, defendants often ask courts to refuse to exercise subject matter jurisdiction when they claim plaintiffs are bound by arbitration agreements. In ruling on the validity of an arbitration defense, a circuit court may be required to make factual findings on topics such as capacity, authorization, waiver, or unconscionability.

In reviewing factual findings related to arbitrability, our appellate courts have deferred to circuit courts' factual findings when supported by evidence. *See, e.g., Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (“a circuit court's factual findings [regarding arbitrability] will not be reversed on appeal if any evidence reasonably supports the findings.”); *Stott v. White Oak Manor*, 426 S.C. 568, 578, 828 S.E.2d 82, 88 (Ct. App. 2019) (“We find there is ample evidence to support the circuit court's factual finding that Decedent was mentally competent at the time Stott signed the Arbitration Agreement. ‘[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings.’ Because Decedent was mentally competent, we find Stott's durable health care power of attorney was not effective to authorize her to sign the [Arbitration] Agreement on Decedent's behalf.”) (citation omitted); *Liberty Builders v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999) (“We now join the majority of jurisdictions granting deference to a circuit judge's factual findings made when deciding a motion to stay an action pending arbitration. We acknowledge that determining whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them.”); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (in reviewing “[t]he validity of an arbitration clause which is attacked on the grounds of unconscionability ... the appellate court's

jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence.”).

In short, even though a circuit court’s ruling that a case is subject to arbitration results in a refusal to exercise subject matter jurisdiction – just as a finding that a defendant is a statutory employer will cause a circuit court to decline to exercise jurisdiction – an appellate court reviewing that ruling must determine whether there is evidence supporting the circuit court’s factual findings and, if that evidence is adequate, must affirm those findings.

Another example of a condition to the exercise of subject matter jurisdiction is the existence of personal jurisdiction. Although a court may have subject matter jurisdiction over a dispute, it may not hear the matter unless it has personal jurisdiction over the parties. This, of course, involves a factual inquiry and determination.

On appeal from a ruling whether a defendant has sufficient minimum contacts to sustain the exercise of personal jurisdiction over it, this Court is bound by a lower court’s factual findings if they have any evidentiary support. *Hammond v. Cummins Engine Co.*, 287 S.C. 200, 204, 336 S.E.2d 867, 868 (1985); *see also Industrial Equipment Co. v. Frank G. Hough Co.*, 218 S.C. 169, 61 S.E.2d 884 (1950) (in addressing whether a defendant was properly served so as to trigger personal jurisdiction, this Court noted: “The question of jurisdiction has often confounded the wisest of courts and for that reason this Court has adhered to the rule that a finding by the Circuit Court as to jurisdiction or lack of jurisdiction will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.”).

Stated differently, when resolving this threshold issue of whether a court with subject matter jurisdiction should hear a controversy, appellate courts defer to lower courts’ factual findings.

In a similar vein, a court that has subject matter jurisdiction over a dispute may refuse to hear it if the plaintiff has failed to exhaust his administrative remedies, an inquiry that can involve a factual determination. As is the case with the statutory employee defense, litigants and courts have at times confused this concept with subject matter jurisdiction. *See, e.g., Betterson v. Stewart*, 238 S.C. 574, 579, 121 S.E.2d 102, 105 (1961). Also like the statutory employee defense, this Court has clearly stated that exhaustion of administrative remedies “does not involve subject matter jurisdiction.” *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000). “The doctrine of exhaustion of administrative remedies is generally considered a rule of ‘policy, convenience and discretion, rather than one of law, and is not jurisdictional’” *Id.*, quoting *Vaught v. Waites*, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989), citing *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973); *but see Adamson v. Richland County School Dist. One*, 332 S.C. 121, 128, 503 S.E.2d 752, 756 (Ct. App. 1998) (a circuit court lacks jurisdiction to entertain an action to enjoin an administrative agency from taking an action adverse to a plaintiff when the agency has not yet made a determination).

Appellate courts apply an abuse of discretion standard when reviewing whether a plaintiff failed to exhaust administrative remedies.

Whether administrative remedies must be exhausted is a matter within the trial judge’s sound discretion and his decision will not be disturbed on appeal absent an abuse thereof. An abuse of discretion occurs when: (1) a judge’s ruling has no evidentiary support; or (2) the judge makes an error of law.

Adamson v. Richland County School Dist. One, 332 S.C. 121, 125, 503 S.E.2d 752, 754 (Ct. App. 1998) (citations omitted).⁵ In other words, an appellate court reviews a lower court’s factual

⁵ If the defense is based upon a failure to exhaust remedies within an agency governed by the APA, the review of factual findings is subject to the substantial evidence standard generally applicable to APA appeals. *Compare Brown v. James*, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010) and *Chapman v. S.C. Dep’t of Soc. Servs.*, 420 S.C. 184, 188, 801 S.E.2d 401, 403 (Ct. App. 2017). This is also a deferential standard applied to factual findings.

findings on the question of exhaustion of administrative remedies under an “any evidence” standard.

In each of the above contexts, the courts have subject matter jurisdiction but are confronted with an initial factual inquiry whether there is an impediment to exercising that jurisdiction. The same is true of the statutory employee analysis. Also in each of those contexts, this Court has held it should affirm factual determinations of lower courts unless they lack all evidentiary support.

Given the parallels between those situations and the issue here – and given that the present factual inquiry does not involve a question of subject matter jurisdiction – Respondent submits it would be incorrect to apply automatically a *de novo* standard of review in an appeal of factual findings related to a statutory employment defense. Instead, the Court should apply the same deferential standard of review it employs in other circumstances where courts have subject matter jurisdiction that can be conditionally restricted based upon the determination of a factual inquiry.

ARGUMENT

1. Facts

Celanese was a chemical manufacturer. It was a large company with many different businesses including fibers, chemicals, agrochemicals, and pharmaceuticals. (App. p. 997, line 23 to p. 998, line 7). Celanese owned several manufacturing plants. (App. p. 1334, lines 8-9). Its Spartanburg plant made polyester fiber. (App. p. 1277, line 23 to p. 1278, line 1).

Celanese was admittedly not in the construction or maintenance business. (App. p. 1713, line 17 to p. 1714, line 2). Its Spartanburg plant did not have a maintenance department or maintenance workers. (App. p. 1284, lines 10-12; p. 1620, lines 16-19). Its employees worked in textile manufacturing – they did not do maintenance. (App. p. 1284, lines 10-19; p. 1620, lines 19-20; p. 1713, lines 17-20). They were “production workers” whose work differed significantly

from maintaining and repairing existing equipment or installing new equipment. (App. p. 1620, lines 2-3; p. 2095, lines 67:12-68:11).

Conversely, Mr. Seay's employer, Daniel, was not a manufacturer. It was a national construction and maintenance company that built hundreds of manufacturing plants and routinely maintained them. (App. p. 1510, lines 1-4; p. 1511, line 16 to p. 1512, line 5; p. 1527, lines 6-15). Daniel built Celanese's Spartanburg plant, constructed expansions to the plant, remodeled it, and performed all maintenance there through the period of Mr. Seay's employment and up until the 1980s or 1990s. (App. p. 1276, line 18 to p. 1277, line 6; p. 1412, lines 9-12; p. 1510, lines 14-15; p. 1512, lines 9-13). Daniel's workers did not manufacture anything; they did not make polyester fiber or related products that Celanese manufactured.

Celanese hired Daniel given its expertise in construction and maintenance and its stature in the industry. (App. p. 1277, lines 9-22). The maintenance work performed by Daniel's employees such as Mr. Seay required technical expertise and specialized skill. (App. p. 1283, line 18 to p. 1284, line 1). Celanese lacked the ability and expertise to do this work. Written contracts between Daniel and Celanese (App. pp. 1753, 1772) carefully distinguished Daniel's work in maintenance and Celanese's work in textile manufacturing: Daniel was completely responsible for maintenance (App. pp. 1753, 1772); Daniel employees were not responsible for operating Celanese's equipment (App. pp. 1758-59, 1779); and Daniel was not responsible for the actual capacity or productivity of Celanese's equipment. (App. pp. 1759, 1779, 2865-66). In performing maintenance work at the plant, Daniel's workers such as Mr. Seay did not work around Celanese's employees. (App. p. 1284, lines 20-23).

It is the law of the case that Mr. Seay contracted mesothelioma as a result of exposure to asbestos while performing maintenance work at Celanese's Spartanburg plant. Mr. Seay had no

workers compensation claim related to his disease because it was not contracted within two years year of his last exposure to asbestos. *See* S.C. CODE ANN. § 42-11-70 (Repl. Vol. 2015).

2. The Law of Statutory Employment

The statutory employee doctrine is an exception to the rule that an injured worker must be a direct employee to have a workers' compensation claim. It extends coverage to certain independent subcontractors by giving them the right to bring a claim not just against their direct employer, but also against the party ultimately benefitting from their work. The doctrine is aimed at outsourcing; it prevents a business from avoiding responsibility under the Act by using subcontractors to carry on its work instead of employees. *See generally Harrell v. Pineland Plantation*, 337 S.C. 313, 328, 523 S.E.2d 766, 773-74 (1999).

Since the doctrine was first applied in *Marchbanks v. Duke Power Co.*, *supra*, numerous cases have addressed its application. Outcomes vary because every case requires a factual analysis of the alleged statutory employer's business, a factual analysis of the plaintiff's (or workers' compensation claimant's) direct employer's work, and a comparison of the two – a “case by case” inquiry that is dependent upon the specific facts of each situation. *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003).

A tort plaintiff will be considered a defendant's statutory employee if the facts demonstrate he was engaged in “work which is *part of* [the defendant's] trade, business, or occupation” for which the defendant (referred to as the “owner”) contracted with plaintiff's direct employer to perform. S.C. CODE ANN. § 42-1-400 (Repl. Vol. 2015) (emphasis added).

This Court has developed three tests to answer this factual question:

[An] activity is considered “part of [the owner's] trade, business, or occupation” for purposes of the statute if it (1) is an important *part of* the owner's business or trade; (2) is a necessary, essential, and integral *part of* the owner's business; *or* (3) has previously been

performed by the owner's employees. If the activity at issue meets even *one* of these three criteria, the injured employee qualifies as the statutory employee of "the owner."

Olmstead, 354 S.C. at 424, 581 S.E.2d at 485 (some emphasis in original; citations omitted).

Importantly, "[s]ince no easily applied formula can be laid down for determining whether work in a particular case meets these tests, each case must be decided on its own facts." *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 51 (1997), citing *Ost v. Integrated Prods.*, 296 S.C. 241, 371 S.E.2d 796 (1988). Stated differently, despite these generalized standards, it is necessary for the court to make "an individualized determination of the facts of each case in which statutory employment is alleged." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486

If the facts prove a plaintiff is a defendant's statutory employee, then the court must determine whether S.C. CODE ANN. § 42-1-540 (Repl. Vol. 2015) – known as the Act's "exclusive remedy provision," *Machin v. Carus Corp.*, 419 S.C. 427, 534, 799 S.E.2d 468, 472 (2017) – is applicable.⁶ If so, it operates to bar any tort recovery by the plaintiff against the defendant and limits his remedy to those provided by the Act. *Carter v. Florentine Corp.*, 310 S.C. 228, 230-31, 423 S.E.2d 112, 113 (1992), *overruled on other grounds*, *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).

Like most judicially crafted standards, the first two tests described above have gone through a process of refinement as additional decisions have applied them.⁷ Notably, over the past

⁶ Resolving factually that a worker is a statutory employee does not automatically trigger application of the exclusive remedy provision; rather, the court must still make a legal determination whether it applies. *See, e.g., Harrell v. Pineland Plantation*, 337 S.C. 313, 523 S.E.2d 766 (1999) (although plaintiff was defendant's statutory employee, defendant could not rely upon the Act's exclusive remedy provision).

⁷ Respondents do not address the third test (whether the work has previously been performed by the owner's employees) because there is no suggestion it applies under the present facts.

few years, decisions from this Court have focused upon and shed greater light on the meaning of the phrase “*part of the owner’s business*” in each of these two tests.

Initially, in *Glass v. Dow Chemical Co.*, 325 S.C. 198, 482 S.E.2d 49 (1997), the Court refused to apply the statutory employment defense in the context of repair and replacement work. The defendant in *Glass* was in the business of chemical manufacturing, including production of a product called Sarabond. The plaintiff was injured while replacing a façade that was damaged when Sarabond applied to it failed. The defendant initiated the work because of a settlement with the building’s owner, MUSC, by retaining plaintiff’s direct employer to perform the work.

The Court’s consideration of the statutory employee defense in *Glass* focused first on the nature of the defendant’s business and then whether the repair and replacement work was part of that business. Significantly, the Court compared the “basic operation” of the defendant’s business, *id.* at 202, 203, 482 S.E.2d at 51, with the work by plaintiff. This demonstrates that, before inquiring whether a plaintiff’s work is “part of” a defendant’s business, a court must define a defendant’s business based upon its fundamental purpose – in *Glass*, that was the manufacture of chemicals. Equally importantly, the Court held that a defendant’s ability and expertise to perform work such as that done by the plaintiff is a factor in determining whether that work is part of its business.

Additionally, 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. Here, the major task of dismantling the outer walls of MUSC and of completely replacing facade panels required technical knowledge that was highly specialized. Additionally, Dow was completely unable to handle the repairs with its own work force because its immediate employees were not trained in construction.

Id. at 202, 482 S.E.2d at 51 (citation omitted).

Next, in *Abbott v. The Limited*, 338 S.C. 161, 526 S.E.2d 513 (2000), this Court held that a delivery truck driver was not the statutory employee of a retailer. In discussing whether the

plaintiff's delivery of stock for resale was an important, integral, or essential part of defendant's retail business, the Court made two important distinctions that inform subsequent interpretation of the statutory employment tests. First, just because a service is "important to" a defendant's business does not make it "an important part of" that business. *Id.* at 163, 526 S.E.2d at 514. Second, the fact an activity is "essential for the conduct of [defendant's] business" does not mean it is "part of" its business. *Id.* at 163-64, 526 S.E.2d at 514.

While the *Abbott* opinion is relatively short, one can divine further insight as to the Court's reasoning from its express overruling of two Court of Appeals cases, *Neese v. Michelin Tire Corp.*, 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996) and *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985). Like *Abbott*, each case involved the provision of items used by the defendant in its business – an activity that was important and essential *to* the defendant's business but not an important, integral, or essential *part of* the defendant's business.

In *Neese*, the defendant's business was the manufacturing of tires and the plaintiff's activity was unloading spools that defendant used to move components of the manufacturing process. Based on *Abbott*, the plaintiff was not a statutory employee because his conduct was not part of the manufacturing process which was the defendant's business.

In *Hairston*, the defendant dealership's business was car sales and the plaintiff's activity was loading cars to be sold. While that defendant's receipt of retail stock was important to its business, the activity was not part of the sales process and therefore, in light of *Abbott*, was not part of its business.

After *Abbott*, this Court decided *Olmstead v. Shakespeare*. There, the Court reiterated its holding in *Abbott* and eliminated any confusion resulting from the brevity of its opinion there.

Olmstead also involved a plaintiff's provision of services (unloading and transportation of finished products) that were important to the defendant's business (the manufacture and sale of fiberglass utility poles). However, the Court found that plaintiff's work was not a part of the defendant's business, noting: "Shakespeare designs and manufactures fiberglass products. It is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486. Thus, the Court not only reinforced the necessity of a factual analysis and comparison of a plaintiff's work and a defendant's business but also further demonstrated a difference between an activity which is important, integral, or essential to a business and one that is an important, integral, or essential *part of* a business.

The *Olmstead* opinion provides additional guidance. In discussing the intent behind its decision in *Abbott*, the Court explained that the plaintiff's delivery of goods there was not part of the defendant's business because "transportation of goods is important to nearly all businesses." *Id.* at 426, 581 S.E.2d at 486. As such, it indicated that services which are typical to businesses in general should not be considered part of a defendant's specific business.⁸ That the scope of this conclusion extends beyond the context of transportation of goods to or from a manufacturing or

⁸ This conclusion is consistent with prior decisions. For example, in *Raines v. Gould, Inc.*, 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986), *cited with approval in Glass*, 325 S.C. at 203, 482 S.E.2d at 51, the court refused to apply the statutory employment defense to a worker installing an electrical system at the defendant's plant, stating:

[T]he record does not indicate the work being performed by Raines in constructing the plant for Gould was an integral part of its operations without which it cannot function. Every manufacturer must have a plant, but this fact alone does not make the work of constructing a plant a part of the trade or business of every manufacturer who engages a contractor to construct a plant. Otherwise, the employees of every contractor so engaged would be the statutory employees of every such manufacturer.

Raines, 288 S.C. at 547, 343 S.E.2d at 659.

retail business is demonstrated by the Court's further comments as to the significance of its decision in *Abbott*:

Abbott represents a change in this state's jurisprudence on what activity constitutes "part of [the owner's] trade, business or occupation" under section 42-1-400, and likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the Abbott opinion. As such, we now overrule all prior cases to the extent they are in conflict with our holding in Abbott and now in this case.

Id. at 426-27, 581 S.E.2d at 486 (emphasis added).

Notably, in the above italicized language, the *Olmstead* court spoke in broad terms rather than stating "*Abbott* represents a change in whether transportation of goods constitutes 'part of [the owner's] trade, business or occupation' under section 42-1-400," which would have been appropriate if it intended its holding to be narrowly construed. Moreover, *Olmstead* did not simply overrule transportation cases, it overruled "all prior cases" in conflict with its and *Abbott's* holdings that "important, integral, or essential *to* a business" is not the equivalent of "an important, integral, or essential *part of* a business" as required by the statutory analysis.

3. Under a deferential standard of review, the lower courts properly found Mr. Seay was not Celanese's statutory employee.

Respondents recognize that the Court may decide to review the factual findings below by giving deference to the lower courts (*i.e.*, whether evidence supports their findings) or by continuing to apply a *de novo* standard whereby it makes its own findings of fact based upon the preponderance of the evidence. Accordingly, Respondents address the relevant factual findings separately under each standard of review.

a. The evidence supports the lower courts' findings as to the basic operation of Celanese's business.

As discussed above, the first step in determining whether Mr. Seay's work was part of Celanese's business is defining that business. The Circuit Court found that Celanese's business at

the Spartanburg plant was the operation of a plant to manufacture polyester fibers. (App. pp. 29). The Court of Appeals found likewise. (App. p. 2865).

There is ample evidence to support this factual finding. (*See, e.g.*, App. p. 1277, line 23 to p. 1278, line 1). Indeed, Petitioner does not contest the fact that its business in operating the Spartanburg plant was to manufacture synthetic fibers. (Pet. Brief, pp. 5, 13).

The Court should affirm this finding of fact.

- b. The evidence supports the lower courts' findings regarding the nature of Daniel's work for Celanese.

The second step in the Court's statutory employment analysis is to determine the nature of Daniel's work for Celanese. *See Harrell v. Pineland Plantation*, 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999) (focus is on plaintiff's direct employer's work for owner). Here, both the Circuit Court and the Court of Appeals found that Daniel's work was all the maintenance of Celanese's Spartanburg plant and its equipment. (App. pp. 8-9, 55, 2855).

Again, this finding is supported by the record. (*See, e.g.*, App. p. 1277, lines 9-22; p. 1283, line 18 to p. 1284, line 1; pp. 1753, 1772). Petitioner does not dispute this finding. (Pet. Brief, p. 4).

The Court should affirm this finding of fact.

- c. The evidence supports the lower courts' finding that Daniel's work was not part of Celanese's business.

Both the Circuit Court and the Court of Appeals compared the nature of Celanese's manufacturing business at the Spartanburg plant (or its "basic operation") with the maintenance work Daniel performed there to find that Daniel's work was not part of Celanese's business. (App. pp. 29-30, 33, 2865-66). The crux of this appeal is whether this factual finding was correct.

The evidence supports this finding; therefore, this Court should affirm the lower courts.⁹

As the above review of the facts demonstrates, not only were Celanese's business (textile manufacturing) and Daniel's business (construction and maintenance) completely different, at the only point where they intersected (maintenance of the Spartanburg plant) both parties took great pains via contractual provisions to maintain the separate nature of their work.

The four judges who have addressed the statutory employment issue in this case (at the Circuit Court and the Court of Appeals) all found these facts persuasive and these facts certainly support their finding that Daniel's work was not part of Celanese's business. If the Court is to accord deference to the lower courts' factual findings regarding the nature of Celanese's business and Daniel's work, this case presents a particularly appropriate context in which to do so. *See Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 11, 132 S.E.2d 18, 23 (1963) ("It is especially difficult to lay down any hard and fast rule with regard to such activities as repair and maintenance" because "[t]he practices of different concerns operating in the same field often vary.").

Further demonstrating the distinct nature of each company's business is the fact that Celanese's employees did not do maintenance; instead Celanese hired Daniel to maintain its plant because Daniel had expertise and Celanese did not. The work performed by Daniel's workers like Mr. Seay was specialized work. *See Glass*, 325 S.C. at 202, 482 S.E.2d at 51 (specialized repair work that the defendant cannot handle with its own work force is typically not part of its business).

⁹ Because the deferential standard of review only requires the Court to determine whether there is evidence to support the lower courts' factual findings, in this section of the brief Respondents do not respond to Petitioner's argument that the facts give rise to the competing inference or conclusion that part of its business was maintenance of its plant and equipment (*see* Pet. Brief, p. 29). Rather, Respondents respond to that argument under heading 4.c. below addressing a *de novo* standard of review. To the extent the Court considers Respondents' response relevant to a deferential review, Respondents incorporate it herein by reference.

There was no evidence that Daniel's workers manufactured any product or components of the product Celanese made. Maintenance was part of Daniel's business, not Celanese's.

The facts show that the only point where Daniel's work and Celanese's work in any sense overlapped was with respect to equipment at the plant. But each party's use of that equipment was so different that the lower courts' finding is amply supported by the evidence. Daniel's role was to maintain the equipment; therefore, when it was working on the equipment, it was not using it to manufacture anything. Celanese used the equipment for an entirely different task – to manufacture polyester; it did not perform maintenance on the equipment while it was working with it. The parties used the equipment for different purposes at different times. Celanese derived revenue (the ultimate object of its business) directly from the production of polyester via its use of the equipment but did not receive direct revenue from Daniel's maintenance work.

4. Even if the Court were to apply a *de novo* standard of review, it should hold that the lower courts properly found Mr. Seay was not Celanese's statutory employee.

The Court should affirm the lower courts' factual findings even if it reviews the record *de novo* and makes its own findings of the preponderance of the evidence.

- a. The lower courts' findings as to the basic operation of Celanese's business were correct.

As this finding is effectively uncontradicted and uncontested, the Court should affirm the findings of the Circuit Court and Court of Appeals as to Celanese's business based on the evidence cited above.

- b. The lower courts' findings regarding the nature of Daniel's work for Celanese were correct.

This finding is also essentially uncontradicted and uncontested. Thus, the Court should affirm the findings of the Circuit Court and Court of Appeals as to Daniel's work based on the evidence cited above.

c. The lower courts correctly found that Daniel's work was not part of Celanese's business.

Petitioner offers little factual support for its view that Daniel's work was part of Celanese's business. Its position is summarized in the following statement: "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." (Pet. Brief, p. 29). The facts it claims support this position are:

- The equipment in the plant was a "key component" of its manufacturing process;
- Seay repaired and maintained the equipment; and
- Repairs and maintenance were "important to" the process because its plant could not operate and it could not manufacture product if the equipment did not function.

(Pet. Brief, pp. 4-7).

Petitioner's "but-for" approach (but for maintenance, equipment does not function; but for functioning equipment, the plant does not operate) overly simplifies the degree of evidence necessary to demonstrate that work is "part of" a business. As a deduction, it answers (at most) whether maintenance is "important to" the business, not whether it is "part of" the business. Yet, as the Court of Appeals found, this does not prove statutory employment. (App. pp. 30-31, 58).

Such a "but-for" analysis fails to undertake any real analysis of Celanese's business. Instead, it is a generic proposition that could be applied equally to any business that uses equipment in a manufacturing process (or for any other purpose, for that matter). This is inconsistent with the "case by case" analysis required in the statutory employment setting. If the Court were to accept Petitioner's approach, it would broaden the scope of statutory employment in a fashion counseled against in *Raines v. Gould, Inc.*, 288 S.C. 541, 547, 343 S.E.2d 655, 659 (Ct. App. 1986) and would effectively overrule many cases finding no statutory employment.

For example, applying Petitioner’s reasoning to *Abbott v. The Limited*, the Court would not have needed to undertake an examination of the parties’ work beyond stating:

- The receipt of inventory was a “key component” of defendant’s retail sales process;
- Plaintiff delivered the inventory to defendant; and
- Defendant’s receipt of the inventory was “important to” the retail sales process because defendant could not make sales without inventory to sell.

Of course, that is directly contrary to the Court’s holding in *Abbott*, where it held: “The fact that it was important to Retailer to *receive* goods does not render the delivery of goods an important part of Retailer’s business.” 338 S.C. at 163, 526 S.E.2d at 514 (emphasis in original).

Similarly, *Olmstead v. Shakespeare* could have been decided as simply as:

- The delivery of product to purchasers was a “key component” of defendant’s manufacturing and sales process;
- Plaintiff participated in delivery of the product; and
- Delivery of product was “important to” defendant’s manufacturing and sales process because it could not make sales without delivering product and there was no need to manufacture product if it could not sell it.

But that is the opposite of what the Court decided. Instead, it ruled: “Although delivery by common carrier was certainly important to Shakespeare’s operation, it does not follow that such delivery was “part or process” of its manufacturing business.” 354 S.C. at 426, 581 S.E.2d at 486.

The distinction is probably best grasped in the present case by paraphrasing Chief Judge Sanders’ comments in *Raines*:

Every manufacturer must have a plant [or it would not be able to produce product], but this fact alone does not make the work of [maintaining] a plant a part of the trade or business of every manufacturer who engages a contractor to [maintain] a plant. Otherwise, the employees of every contractor so engaged would be the statutory employees of every such manufacturer. We are aware of no case in any jurisdiction holding this and do not believe this is what the legislature intended when it enacted the South Carolina Workers’ Compensation Act.

288 S.C. at 547, 343 S.E.2d at 659.¹⁰

As stated throughout this brief, to determine whether an activity is part of a defendant's business, the Court must first make a factual determination as to the nature of that business, not just assume that anything related to it in an "important" fashion is necessarily part of it. Here, Celanese operated a textile manufacturing plant. But what is the nature of that business? Stated differently, how does one define its "basic operation"? *Glass*, 325 S.C. at 203, 482 S.E.2d at 51.

It appears there is no case law in this state that defines "manufacturing" or the "business of manufacturing." However, in other states where this issue has arisen – some in the workers' compensation setting – courts have generally held that the business of manufacturing consists of three essential elements: (1) raw material and (2) a process that changes the raw material to (3) a product that is different from the raw material. *See, e.g., Stafford v. U.S. Cattle Corp.*, 389 So.2d 923, 925 (Miss. 1980); *Lopanic v. Berkeley Cooperative Gin Co.*, 191 So.2d 108, 112-13 (Miss. 1966); *Prentice v. City of Richmond*, 197 Va. 724, 729-30, 90 S.E.2d 839, 843 (1956); *Buchanan v. Blair*, 90 Kan. 420, 133 P. 709, 710 (1913). This definition is consistent with South Carolina statutory definitions from contexts other than workers' compensation. *See, e.g., S.C. CODE ANN. § 12-6-3588(B)(2)* (Supp. 2019) ("Manufacturing" means fabricating, producing, or manufacturing raw or unprepared materials into usable products, imparting new forms, qualities, properties, and combinations."); *S.C. CODE ANN. § 12-37-1310* (Repl. Vol. 2014) ("Every person

¹⁰ To take this point to its extreme, most businesses cannot function without utility services such as power, phone, water, and internet; therefore, the provision of these services is important to those businesses. Similarly, many businesses require motor vehicles to transport employees, customers, or product; thus, vehicle repair and maintenance workers provide a service that is important to those businesses. Many businesses have goods delivered and receive other services (for example, law firms and courts use paper, get copier repairs, and receive IT services; day care centers use diapers and juice; delivery companies use vehicle fuel), all of which are important to those businesses. In none of these scenarios would this state's statutory employment jurisprudence support the logical leap from "important to" to "part of" to allow providers to recover workers compensation benefits from the beneficiaries of their services.

engaged in making, fabricating or changing things into new forms for use or in refining, rectifying or combining different materials for use shall be held to be a ‘manufacturer.’”¹¹; S.C. CODE ANN. § 31-24-110(A) (Supp. 2019) (“‘Manufacturing sector’ means establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products, including, but not limited to, plants, factories, or mills, and characteristically use power-driven machines and materials-handling equipment.”); S.C. CODE ANN. § 39-4-101(4) (Supp. 2019) (“‘Manufacturer’ means a person, a business establishment, a business, or other legal entity engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild products or goods, or components thereof.”).

When the Court considers the nature of Celanese’s business, it should do so within the framework of these concepts – which are largely self-evident, regardless of supporting legal authority. As such, it should regard Celanese’s business as a manufacturing process that changes chemical (raw material) into polyester (finished product).

With these three elements in mind, it becomes easier to appreciate the effects of the case law discussed above. For instance, as to the first element, in light of *Abbott*, an independent contractor delivering raw material to a manufacturing business for its workers to then process would not be a statutory employee because his work, while important, was only ancillary to and not part of the business. Similarly, as regards the third element, *Olmstead* informs us that loading and delivering a manufacturer’s finished product is important and ancillary to a manufacturer’s business but not part of that business. Thus, it appears that, to be part of a manufacturing business, a contractor’s work must be part of and not merely ancillary to the second element of

¹¹ A business that operated textile plants was held to be a “manufacturer” under this statute. *In re Mayfair Mills*, 295 B.R. 827, 835 n. 9 (Bkrcty. D.S.C. 2002).

manufacturing; that is, it must be part of the process whereby defendant's workers turn raw materials into finished product.

Maintaining equipment involved in that process is no more a *part of* that process than the supplying of anything else used in the process (*e.g.*, raw material, supplies, equipment, or safety apparatus). Rather, like other activities that may be considered important, essential, etc., to the business, maintenance is ancillary to the process itself.

Raines illustrates this fact. There, the plaintiff was involved in the installation of an electrical system in the defendant's plant, where defendant's employees would use it as part of the process of manufacturing batteries and related products. 288 S.C. at 547, 343 S.E.2d at 659. No doubt, "but-for" electricity, the defendant's operation would not function; however, this fact was insufficient for the court to find plaintiff's work was part of defendant's business. Instead, the court looked to the specific needs of defendant's battery manufacturing process and, finding that plaintiff's work was in the nature of a service that is needed by manufacturers in general, concluded it was not part of the defendant's business. The same rationale applies to a comparison of Daniel's repair and maintenance work with Celanese's polyester manufacturing process.

Petitioner claims the Circuit Court and the Court of Appeals overruled precedent, adopted a new test, and disregarded this Court's three-part test for statutory employment. (*See, e.g.*, Pet. Brief, pp. 1-2, 12). On the contrary, both courts relied upon the three-part test discussed above, as interpreted by more recent cases such as *Abbott* and *Olmstead*. (App. pp. 30, 56, 2859). Neither court claimed to create a new test and to overrule precedent, nor did they.

Petitioner's characterization of the lower courts' reasoning appears to be an overreaction fueled by its disagreement about two things: (1) the scope of the *Abbott* and *Olmstead* decisions

(Pet. Brief, p. 17); and (2) the relevance of the fact that Celanese itself did not perform maintenance work. (Pet. Brief, p. 15).

Petitioner claims: “*Abbott* and *Olmstead* were not a fundamental change in the law.” (Pet. Brief, p. 15). It is correct that these cases did not discard the three-part test to be applied in statutory employment cases, nor did the Court of Appeals hold to the contrary. But they did signal a change in how courts are to address the “part of” language of the statute and the first two of the three tests. *See Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 (“*Abbott* represents a change in this state’s jurisprudence on what activity constitutes ‘part of [the owner’s] trade, business or occupation’ under section 42-1-400.”). Rather than approaching that question in the superficial manner in which previous cases had – equating “important to” or “essential to” with “part of” – courts in the wake of *Abbott* and *Olmstead* must now analyze that issue more deeply.¹² That is exactly what the lower courts did in this case.

As such, the lower courts properly studied the nature of Celanese’s business as an initial matter. In that analysis, it was appropriate for them to consider the fact that Celanese did not perform maintenance because defining a party’s business for the purpose of a comparison is a matter of determining both what it is and what it is not. That this fact is relevant to the third test for statutory employment does not mean it is irrelevant to the first two tests, contrary Petitioner’s efforts to reason otherwise.¹³

¹² This shift is why the Court expressly overruled two cases in *Abbott* and, in *Olmstead*, went further and overruled “all prior [conflicting] cases.” 354 S.C. at 426-27, 581 S.E.2d at 486.

¹³ Petitioner appears to deduce: “If a court considers the third statutory employment test, then it is relevant whether a defendant used its own employees to do the subject work; but, if the court is not considering the third test, it is irrelevant whether the defendant used its own employees to do the work.” However, this argument commits the logical fallacy of denying the antecedent. *See Tobey v. U.S.*, 794 F. Supp. 2d 594, 601 (D. Md. 2011).

Finally, the “maintenance worker cases” cited by Petitioner as grounds for reversal (Pet. Brief, pp. 25-29) are either no longer binding authority or at least distinguishable.

When this Court overruled all cases that conflicted with the *Abbott* and *Olmstead* approach to defining “part of” a defendant’s business, *Olmstead*, 354 S.C. at 426-27, 581 S.E.2d at 486, it arguably overruled the holdings in *Marchbanks v. Duke Power*, 190 S.C. 336, 2 S.E.2d 825 (1939), *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940), *Bell v. S.C. Elec. & Gas*, 234 S.C. 577, 109 S.E.2d 441 (1959), *Bridges v. Wyandotte Worsted Co.*, 243 S.C.1, 132 S.E.2d 18 (1963), *Bailey v. Owen Elec. Steel Co. of S.C.*, 298 S.C. 36, 378 S.E.2d 63 (Ct. App. 1989), *Smith v. T.H. Snipes & Sons*, 306 S.C. 289, 411 S.E.2d 439 (1991), *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992), and *Wheeler v. Morrison Machine*, 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993) to the extent they simply equated “important to” a business as “part of” a business. For example, the *Boseman* opinion’s analysis mirrored the simplistic, “but for” approach urged by Petitioner and which this Court rejected in *Abbott* and *Olmstead*:

[T]he mill desired that the work on the inside of the tank be completed as soon as possible so that its every day, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence, this tank was particularly *necessary and essential* in the operation and carrying on of the business of the mill. *It, therefore, follows* that the painting of the tank was such a *part of the trade, business or occupation* of the [mill]....

Boseman, 8 S.E.2d at 880 (emphasis added).

Moreover, *Marchbanks*, *Bridges*, *Bailey*, *Gentry*, and *Wheeler*, are readily and meaningfully distinguishable because the upstream businesses in those cases used regular employees for the same work they also outsourced to subcontractors. None of those cases involved the situation where, as here, maintenance was exclusively performed by outside contractors for an extended period of time. *Smith v. T.H. Snipes & Sons* is also distinguishable because it predates

this Court's decision in *Glass v. Dow Chemical Co.*, where it held that major and specialized repairs are generally not part of an upstream business. 325 S.C. at 202, 482 S.E.2d at 51.

In summary, the lower courts not only found factually that Daniel's work was significantly different from and not part of Celanese's business but also applied the correct legal standards to guide their analysis. Because their findings are consistent with the preponderance of the evidence and the applicable law, this Court should affirm those findings.

5. The lower courts were correct in denying Petitioner the protection of the Act.

This Court should also affirm the Circuit Court's and Court of Appeals' conclusion of law that Petitioner is not entitled to the protection of Act as a defense to Respondents' claims.

- a. Because Mr. Seay was not Celanese's statutory employee, the Act's exclusivity provision does not apply.

Because Mr. Seay was not Petitioner's direct employee, the only way Petitioner can avail itself of the Act's exclusivity provision, S.C. CODE ANN. § 42-1-540 (Repl. Vol. 2015), is if Mr. Seay was its statutory employee. *See Poch v. Bayshore Concrete Prods./S.C.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2103) (exclusivity applies to direct and statutory employees). The lower courts were correct in so holding and this Court should affirm their legal conclusion as a correct application of the law.

Moreover, given the factual finding that Mr. Seay was not injured while performing work for Daniel that was part of Celanese's business at the Spartanburg plant, the Circuit Court and the Court of Appeals correctly concluded, as a matter of law, that Appellants' remedy against Petitioner is exclusively under the Act. This Court should affirm this conclusion as a correct application of the facts to the established law.

- b. Granting Petitioner the protection of the statutory employment defense would be contrary to the benevolent purpose of the Act, unfair, and unconstitutional.

As an additional sustaining ground, Respondents submit that affording Petitioner the benefit of the Act's *quid pro quo* without any of its burdens would pervert the Act's purpose and deny Appellants any remedy for Mr. Seay's illness and death.

Petitioner continues to claim that any doubts in this case should be construed in favor of statutory employment. (Pet. Brief, pp. 9-10). This concept should not come into play because, as discussed above, this is not a factually close case with any serious doubts to construe one way or the other.

Ironically, the rule cited by Petitioner is designed to provide greater protection to injured workers, not to deny all legal remedies, which would be its effect if it controlled the Court's decision here. *See* S.C. CODE ANN. § 42-11-70 (Repl. Vol. 2015) (statute of repose for occupational diseases bars a workers' compensation claim because Mr. Seay's mesothelioma was not contracted within two years year of his last exposure to asbestos).

The "beneficent purpose" of the Act, *Marchbanks*, 190 S.C. at 361, 2 S.E.2d at 835, is actively thwarted by finding statutory employment in a case where the injured worker never had any way to make a claim for workers' compensation. *Cf. Harrell*, 337 S.C. at 328-29, 523 S.E.2d at 774 (in refusing to apply exclusivity to a statutory employer, the Court stated: "Pineland urges this Court to adopt an interpretation of the Act that would allow it to claim tort immunity without complying with the quintessential obligation imposed upon it by the Act – the duty to *secure* the payment of compensation. To accept Pineland's position would go against the clear mandates of the Act and overrule this Court's prior decisions which have consistently interpreted statutory employer liability as providing 'double protection' for employees."). On this point, it also bears mentioning that in many of the cases cited by Petitioner (*e.g.*, *Marchbanks*, *Boseman*, and several

others), the injured worker had either already recovered workers' compensation benefits or his right to bring a claim was stipulated. None of those cases involved the situation where a finding of statutory employment left an injured worker without *any* avenue for compensation.

This unfairness – arguably, cruelty – would not just be a statutory problem. It would violate the South Carolina Constitution's guarantee that "every person shall have a speedy remedy [in court] for wrongs sustained." S.C. CONST. ART. I, § 9. While the Constitution does not guarantee "full compensation" to all injured persons, *Wright v. Colleton Cty. Sch. Dist.*, 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990), that is different than leaving a plaintiff and his family without any remedy or compensation whatsoever for their loss at the hands of an adjudicated at-fault defendant.

The Pennsylvania Supreme Court used this reasoning to hold that an injured worker who contracted mesothelioma could maintain a tort claim against his employer because to hold otherwise would leave the injured worker without any remedy. *Tooev v. AK Steel Corp.*, 623 Pa. 60, 81 A.3d 851 (2013). The court noted the average latency period for mesothelioma is 30 to 50 years and said it was "inconceivable" to assume the legislature, in enacting a scheme to protect injured workers, intended to leave employees who suffered the most serious injuries possible without any remedy. *Id.*, 81 A.3d at 863-64.

Pennsylvania is not an outlier. Maryland's highest court has held that unreasonable restrictions which leave innocent victims with no compensation are unconstitutional. *Jackson v. Dackman Co.*, 422 Md. 357, 30 A.3d 854, 869 (2011).

To be clear, there is no need to reach any issues involving Petitioner's attempted perversion of the Act or the cruel effects of denying all remedies to Mr. Seay's family. The Circuit Court and the Court of Appeals correctly found that statutory employment did not apply. If, however, statutory employment did apply, the end result should be the same. A result that would bar any

remedies for Mr. Seay's death would be unfair, contrary to the purpose of the Workers' Compensation Act, and unconstitutional.

CONCLUSION

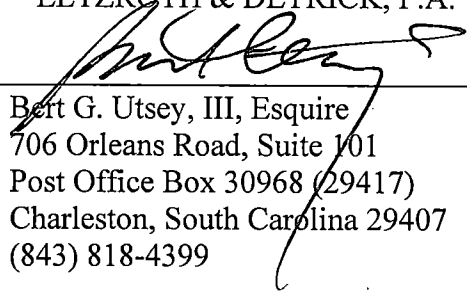
For the reasons set forth above, this Court should affirm the decision of the South Carolina Court of Appeals.

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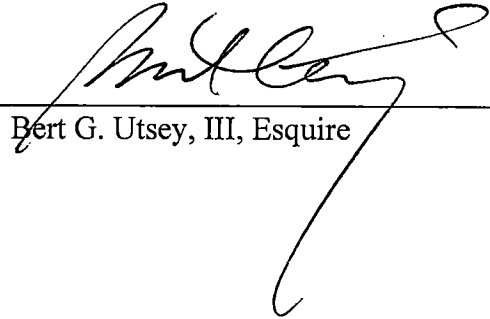
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I certify that the foregoing Brief of Respondents complies with Rule 211(b) SCACR.



Bert G. Utsey, III, Esquire

February 18, 2020
Charleston, South Carolina

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SOUTH CAROLINA COURT

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.


PROOF OF SERVICE BY MAIL

I certify that I have served the BRIEF OF RESPONDENTS on the Appellant herein by mailing same via U.S. First Class Mail, postage prepaid, on February 18, 2020, addressed to counsel of record:

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