THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

CNA Holdings, LLC, Petitioner.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Much of Respondents brief is devoted to a discussion of what they want the law on statutory employment to be, rather than applying the settled legal principles established by this Court to the undisputed facts of this case. It is firmly entrenched that for jurisdictional findings under the Workers' Compensation Act, appellate courts have the power and duty to review the entire record and decide the facts in accord with the preponderance of the evidence. Respondents' argument that the Court should adopt a different standard of review asks the Court to set aside decades of precedent.

Respondents also largely ignore the extensive discussion in Petitioner's opening brief explaining how the lower courts' holdings improperly departed form and seek to modify the statutory employee doctrine. Instead, they argue that the decisions comported with a change in the applicable test in *Olmstead*—a change that no other decision has recognized. As the record evidence unequivocally established, Dennis Seay's work was both an important and a necessary, essential, and integral part of Petitioner's manufacturing business. As a result, the statutory employment test is satisfied, and the Workers' Compensation Commission has exclusive jurisdiction over Respondents' claims. This Court should reverse the Court of Appeals and remand with instructions to dismiss this action for lack of jurisdiction.

ARGUMENT

I. The specialized standard of review for jurisdictional questions under the Workers' Compensation Act should not be modified.

A. The Court crafted this standard of review to address the General Assembly's directive regarding jurisdiction over workers' compensation claims.

As this Court explained in *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002), under our State's constitutional structure the court of common pleas has subject matter jurisdiction over a general class of cases, which includes tort actions. *Id.* at 422, 567 S.E.2d at 234. The

General Assembly, however, may choose to remove certain cases from the original jurisdiction of the circuit court. *Id.* at 423, 567 S.E.2d at 234. The General Assembly opted to do this with a category of tort claims via the Workers' Compensation Act, which divested the circuit court of its original jurisdiction by granting exclusive original jurisdiction to the Workers' Compensation Commission. *Id.* The General Assembly manifested its "plain and unambiguous" intent "for employees to seek a remedy from employers for their work-related injury only through the Workers' Compensation Commission and not through the trial courts" by including the phrase "shall exclude all other rights and remedies." *Id.* at 423 n.3, 567 S.E.2d at 234 n.3.

Courts have tied the *de novo* standard of review to the important legislative aims of the workers' compensation system.[1] Like South Carolina, Washington reviews jurisdictional questions *de novo*. *See Silliman v. Argus Servs., Inc.*, 19 P.3d 428, 429 (Wash. 2001). As the *Silliman* court explained, generally speaking, workers injured in the course of their employment

[1] A number of other states apply a *de novo* standard of review to questions relating to workers' compensation jurisdiction. *See, e.g.*, *McKee v. State*, 388 P.3d 14, 17 (Ariz. Ct. App. 2016) ("[W]hether Appellant's wrongful death claim is barred by the exclusive remedy prescribed in the Arizona workers' compensation system is a legal question subject to de novo review."); *Dominguez ex rel. Hamp v. Evergreen Res., Inc.*, 121 P.3d 938, 941 (Idaho 2005) (noting that workers' compensation jurisdictional matters "are questions of law over which this Court exercises free review"); *Augur v. Norfolk S. Ry. Co.*, 154 S.W.3d 510, 514 (Mo. Ct. App. 2005) (stating that the party raising exclusivity of workers' compensation on appeal "must demonstrate, by a preponderance of the evidence, that the trial court lacked subject matter jurisdiction"); *Carbajal v. Precision Builders, Inc.*, 333 P.3d 258, 262 (Okla. 2014) ("[W]hether claimant was an employee or an independent contractor is a jurisdictional issue which requires this Court to exercise a *de novo* review of the record without deference to the findings of fact or legal conclusions made by the trial tribunal or the three-judge panel."); *Clean Sweep Prof'l Parking Lot Maint., Inc. v. Talley*, 591 S.E.2d 79, 81 (Va. 2004) (noting that whether the exclusivity provision of the workers' compensation act applies is a mixed question of law and fact, but the court reviews "*de novo* the trial court's determination that [workers] were not statutory employees); *Silliman v. Argus Servs., Inc.*, 19 P.3d 428, 429 (Wash. 2001) ("We review jurisdiction de novo. . . . [T]he Act generally provides the exclusive remedy to an injured employee; a court lacks jurisdiction to separately proceed."); *Peterson v. Arlington Hosp. Staffing, Inc.*, 689 N.W.2d 61, 63 (Wis. 2004) ("[W]hether a claim is subject to the exclusive remedy provision . . . is a question of law which is reviewed de novo.").

are covered by that state's version of workers' compensation—the Industrial Insurance Act. *Id.* This system "compensates employees for injuries sustained on the job regardless of fault" and, "[i]n exchange for this no-fault coverage, employers are granted immunity from separate liability." *Id.* "Thus, the Act generally provides the exclusive remedy to an injured employee; a court lacks jurisdiction to separately proceed." *Id.* Wisconsin's Court of Appeals also detailed a similar policy underpinning for *de novo* review in *Peterson v. Arlington Hospitality Staffing, Inc.*, 689 N.W.2d 61, 64-65 (Wis. 2004). As did Missouri's Court of Appeals in *Augur v. Norfolk S. Ry. Co.*, 154 S.W.3d 510, 514 (Mo. Ct. App. 2005). As the *Augur* court explained, appellate jurisdiction to review the merits of the subject claim is predicated on the trial court having jurisdiction to enter the judgment appealed. *See id.* Thus, if the trial court lacked jurisdiction, "any judgment entered thereon would be void, depriving [this court] of jurisdiction except to reverse the judgment and remand the cause for dismissal by the trial court." *Id.*

South Carolina's act is also designed to balance these competing policy concerns. An overarching goal of the Workers' Compensation Act "is to provide quick and efficient resolution of work-related injury claims so neither employers nor employees become bogged down in complicated and protracted litigation." *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 285-86, 826 S.E.2d 863 (2019) (Few, J.). As the Court recently explained, "[t]he Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) (Hearn, J.). Hence, "workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act," *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010), and "South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the . . . Act," *Spivey v. D.G. Constr. Co.*, 321 S.C. 19, 21-22, 467 S.E.2d 117, 119 (Ct. App. 1996).

The Court developed the specialized standard for the jurisdictional question of whether a worker is an employee under the Workers' Compensation Act to uphold these policy concerns and the General Assembly's clear and unequivocal intent to divest the circuit court of jurisdiction over certain claims.[2] Thus, when deciding a jurisdictional question, the reviewing court has "the power and duty to review the entire record and decide the jurisdictional facts in accordance with the preponderance of the evidence." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 233 (3d ed. 2016) (citing cases). Statutory employment questions fall into this category. *Id.*; *see also Pilgrim v. Eaton*, 391 S.C. 38, 41-42, 703 S.E.2d 241, 242 (Ct. App. 2010) (Few, J.) (noting that statutory employment is a jurisdictional question since "its answer determines the jurisdiction of the commission," and for jurisdictional facts, "an appellate court ***must*** make its own findings according to the preponderance of the evidence after a thorough review of the ***entire record***" (emphasis added)).

B. The standard of review applied in different contexts has no bearing on the governing legal test here.

In their brief here, Respondents make the argument—for the first time in this case—that the settled standard of review should now be discarded. Respondents offer no substantial rationale for doing so; instead, their primary justification appears to be that the Court should depart from the established standard because it has applied different standards of review in other contexts and for other issues. This is without merit. First, that Respondents seek to have this Court adopt a new

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[2] As one leading treatise explained, some courts even permit *de novo* judicial review of workers' compensation orders on the merits. One purpose behind this "is to provide a more consistent statewide treatment of workers' compensation cases that are factually similar." 3 Modern Worker's Compensation *De Novo Review* § 315:6 (Dec. 2019); *see also Mecham v. Labor Comm'n*, 241 P.3d 1217, 1218 (Utah 2010) (noting that the court reviews legal determinations on workers' compensation matters "under a correction-of-error standard, ceding the [Commission] no deference as appellate courts have 'the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction'" (quoting *Salt Lake City Corp. v. Labor Comm'n*, 153 P.3d 179 (Utah 2007))).

standard of review confirms that the decisions below are legally erroneous, as they cannot stand under the existing review standard. Second, the mere fact that the Court utilizes different standard of reviews in other unrelated situations—such as for arbitration agreements and personal jurisdiction—has no relevance here, and does not mean that the standard of review for statutory employment should be modified. As discussed above, the Court developed the specialized standard for the jurisdictional question of whether a worker is an employee under the Workers' Compensation Act to satisfy the General Assembly's express legislative intent. Respondents have not pointed to any authority prohibiting the Court from applying different standards where it deems appropriate or offered a compelling reason weighing against appellate fact finding in the statutory employment context.

Because respondents do not advance any sound reason for departing from, much less setting aside decades of following the established standard of review, the Court should reject Respondents' novel invitation to do so.[3]

C. The lower courts' legal conclusion is in dispute; but the facts are not.

Regardless of the standard of review applied to the trial court's factual findings here, the result remains the same because the key facts are not in dispute. Both parties agree that Celanese was in the chemical manufacturing business and that Seay was engaged in maintenance work on Celanese's machinery. (Br. of Pet'r at 2, 4-7; Br. of Respondents at 1, 11-12.) There are no factual disagreements about the type of business or type of work activity. Instead, the question in this case turns on ***what legal test applies***, as the parties dispute whether the lower courts applied the

[3] There are not "apparent inconsistencies" in the case law as Respondents have suggested. None of the cases cited in footnote 2 of Respondents' brief adopted a different standard of review. In fact, in *Chavis v. Watkins*, 256 S.C. 30, 180 S.E.2d 648 (1961), the Court specifically highlighted that the jurisdictional issue was reviewed and determined on appeal by the "preponderance of the evidence." *Id.* at 32, 180 S.E.2d at 649.

correct legal test to these underlying facts. Even if the Court wholly defers to the lower courts' factual findings, the same legal question remains. Thus, Respondents' standard of review argument also "may be disposed of by one of the great appellate truths: 'whatever doesn't make any difference, doesn't matter.'" *Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp*, 427 S.C. 336, 345, 831 S.E.2d 435, 440 (Ct. App. 2019) (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

II. The Court of Appeals applied an incorrect test and, as a result, erroneously changed the law.

A. The lower courts' reading of *Abbott* and *Olmstead* was misguided.

In purported defense of the judgements below, Respondents now argue both sides of this issue. They contend that *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000) and *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003) did not discard the three-part statutory employment tests. However, they also argue that those cases "***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." (Br. of Respondents at 27 (emphasis added).) Those decisions did not make the fundamental change adopted by the lower courts here.

The last time this Court addressed the question was in *Collins v. Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015). *Collins* should be dispositive here. *Collins* does not discuss, or even cite, *Abbott* or *Olmstead*. Presumably the Court would have done so if those decisions represented the fundamental change to the analysis as Respondents have argued. But it did not.

Instead, *Collins* quoted the same three, oft-repeated tests that guide the statutory employment analysis. The Court even emphasized the adjectives describing the work activity, highlighting the critical significance of the work itself:

> To determine whether the work performed by a subcontractor is a part of the owner's business, this Court must consider whether (1)

> the activity of the subcontractor is an *important* part of the owner's trade or business; (2) the activity performed by the subcontractor is a *necessary*, *essential*, and *integral* part of the owner's business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner.

Id. (emphasis in original). The Court also stressed that the statutory employee relationship depends on the "**nature of the work** performed by the subcontractor." *Id.* (quoting *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997)) (emphasis in original). Here, the undisputed nature of Seay's work means he should have been declared a statutory employee.

Poch v. Bayshore Concrete Prod./S.C., Inc., 405 S.C. 359, 368, 747 S.E.2d 757, 762 (2013) also post-dated *Abbott* and *Olmstead.* In *Poch*, the Court likewise did not ascribe any particular notoriety to those cases and only cited *Olmstead* for its restatement of the three-factor test. Importantly, the Court emphasized the word "or" to highlight the disjunctive nature of the three elements. Again, if *Olmstead* was a sea change in statutory employment law, the Court would have started its analysis with the new standard. But again, it did not. This is yet additional confirmation that the Court of Appeals erred.

Respondents do not even acknowledge *Collins* or *Poch* in their brief. Moreover, they make no effort to explain why no other case post-dating *Abbott* and *Olmstead* interpreted those decisions like the lower courts did here. *Collins* reaffirms the continuing application of the traditional three-factor test for statutory employment, and the Court of Appeals erred in holding otherwise.

B. The Court of Appeals changed the law in contravention of this Court's prior decisions.

The lower courts in this case erroneously interpreted the impact of *Abbott* and *Olmstead* and, through this error, changed the law on statutory employment. The trial court stated that the focus of the legal test is "on the type of business that Celanese conducted." (Order, A. 33.) The Court explained that even if maintenance work is important to the operation, "it does not follow

that such maintenance was a 'part or process' of its synthetic manufacturing business." (*Id.*) The Court of Appeals agreed, finding that although Seay's work was "essential for Appellant's conduct of manufacturing polyester fiber" and "important to the manufacturing process," it did not mean "equipment maintenance was a part or process of Appellant's manufacturing business." (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 23, 27.) The Court of Appeals also found that Seay's work was not "part of" Petitioner's manufacturing process because only Daniel employees performed maintenance and repair on the manufacturing equipment, and this maintenance work was "significantly different" from the work performed by Celanese employees. (Op. No. 5625, Shearouse Adv. Sh. No. 7 at 27.)

It is the holdings of the lower courts ***in this case*** that have fundamentally changed the law, not *Olmstead*. United States District Judge Michelle Childs, a former South Carolina Workers' Compensation Commissioner, found as much in *Zeigler v. Eastman Chem. Co.*, No. 5:17-CV-01010-JMC, 2019 WL 2171142, at *6 (D.S.C. May 20, 2019) and its companion cases.[4] Her initial order predated the Court of Appeals' decision and found that a worker engaged in maintenance on a chemical manufacturer's machinery was a statutory employee because his work was an important part of the manufacturing business. *Id.* at *5. Following the Court of Appeals' opinion, Judge Childs explained that the key question now appears to be "whether the type of work performed by the worker is the same type of work 'the owner' has established as its business." *Id.* Thus, the court was "constrained" to find that "maintenance and repair work of equipment by the employees

[4] *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).

of an independent contractor, without something more, generally does not qualify as part of a manufacturer's and/or seller of goods' trade, business, or occupation." *Id.*[5]

The Court of Appeals erred in its interpretation of *Abbott* and *Olmstead*. As *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008) recognized, these cases "addressed statutory employment ***in the common carrier context.***" *Id.* at 219, 661 S.E.2d at 400 (emphasis added). Common carrier workers present a unique and different set of circumstances, which is why *Olmstead* found that, in such circumstances, something more was necessary than merely showing that transportation was important. A common carrier employee may make deliveries or haul away product from numerous companies each day. And a company may have many different drivers come and go throughout the day. The *Olmstead* rule exists to curtail every such common carrier employee from becoming a statutory employee of every company he or she interacts with during the day, no matter how briefly, solely on the basis of transportation being important or necessary. This is far different from the facts here, where Seay worked on key maintenance at Petitioner's ***facility*** and on the ***same machinery*** every day for many years.

A careful reading of *Abbott* and *Olmstead* demonstrates that the lower courts erred in interpreting them. *Abbott* overruled two 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). Both had found that an employee of a common carrier engaged in the delivery of goods injured on the premises of the defendant company was a statutory employee. In its briefing in *Olmstead*, the putative statutory employee contended that since *Abbott* only overruled ***delivery*** cases, cases involving ***receipt*** of goods from a common carrier were still persuasive and warranted a finding that such a worker is a statutory employee. This is what prompted the *Olmstead* Court's

[5] The court nevertheless found that the "something more" was still satisfied under the facts of the case and confirmed its statutory employment finding.

"overruling" language—to address the other side of the coin of transportation by a common carrier. *Olmstead* signaled that the scope of the overruling was limited, as it only noted that the decision "likely conflicts" with other cases beyond *Neese* and *Hairston*. If the Court intended a wholesale change to the law, and a radical one at that, it would have expressly overruled ***all*** prior statutory employment cases.

Finally, the lower courts' conclusion here is not possible to reconcile with the disjunctive nature of the three factor test, further confirming that the lower courts improperly changed the law. Numerous cases have held that statutory employment can exist where a defendant company ***never*** previously engaged in the activity with its own employees.[6] Respondents characterize Petitioner's argument that the third factor is not relevant to the other two tests as a "logical fallacy," but it is merely repeating what the courts have long recognized and held.

For all these reasons, the Court of Appeals erred in its analysis of the scope of *Abbott* and *Olmstead*, which resulted in an improper change in the law.

C. While each case is determined on its own facts, prior case law drives the analysis of how those facts should be analyzed.

Respondents next argue that previous maintenance worker cases are not particularly instructive on the grounds that each statutory employment case is fact-driven. Under Respondents' framework, however, the inquiry would solely involve applying the new tests articulated by the Court of Appeals without reference to the holdings of any other past decision. This is not supported

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[6] *See Boseman v. Pac. Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940); *Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986); *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 498, 334 S.E.2d 825, 827 (Ct. App. 1985), *overruled on other grounds by Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000); *see also Smith v. FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984); *Matthews v. E. I. du Pont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111, at *5 (D.S.C. Nov. 13, 2018); *Provau v. YRC, Inc.*, No. 4:16-CV-00422-RBH, 2017 WL 1541880, at *4 (D.S.C. Apr. 28, 2017); *Singleton v. J. P. Stevens & Co.*, 533 F. Supp. 887, 890 (D.S.C. 1982), *aff'd*, 726 F.2d 1011 (4th Cir. 1984).

by statutory employment precedent as the courts have many times looked to precedent for assistance in determining whether the facts satisfy any of the three factors of the disjunctive statutory employment test.

For example, *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008) looked to guidance from *Abbott* and *Olmstead* because they also "addressed statutory employment in the common carrier context." *Id.* at 219, 661 S.E.2d at 400. Similarly, *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003) looked to *Meyer v. Piggly Wiggly No. 24, Inc.*, 338 S.C. 471, 527 S.E.2d 761 (2000) for direction on whether a mere vendor/vendee relationship existed since that would weigh against finding statutory employment. Finally, *Glass v. Dow Chemical Company*, 325 S.C. 198, 482 S.E.2d 49 (1997) looked to *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939) and *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993) to help determine if the repair work at issue met one or more of the statutory employment tests. These are just a few of many examples. Respondents' argument appears to be that a trial court should make a fact-based decision without regard to any prior precedent, and then the appellate courts should defer to the trial court's fact finding. This argument should be rejected. For one thing, it would insulate trial court decisions from any meaningful appellate review. For another, it would likely lead to incongruous results depending on which trial judge decided which case. There is no good reason to abandon this Courts' many decades of precedent, or its methodology for ensuring the proper application of the statute at issue here, which mandates inclusive rulings on statutory employment.

D. The record evidence overwhelmingly supports statutory employment.

Three different witnesses testified about the important and necessary nature of Seay's work to Celanese's manufacturing business. Seay gave testimony to this effect, in addition to Petitioner's corporate representative and another former Daniel millwright who also worked at the

facility involved. That testimony directly placed Seay's work within two of the three statutory employment tests, and is thus dispositive of the statutory employment question. The Court of Appeals ignored this testimony.

Respondents also ignore this testimony in their brief. Instead, they make a generalized argument about maintenance work in an attempt to devalue Seay's work. This effort to rhetorically transform the undisputed factual record into a generalized argument about "maintenance" should be rejected. Petitioner has never contended that ***all*** maintenance workers are statutory employees of manufacturers. But under the facts of ***this*** case, Seay's work was important and essential to Celanese so as to render him a statutory employee because it was directly tied to ensuring that the manufacturing machinery of the Petitioner kept running and producing goods. Indeed, such was the only evidence.

If the Court agrees with Petitioner here, its agreement would not require much less mandate that "manufacturers would always be in the maintenance business," as Respondents suggest. Maintenance workers would still only be statutory employees where the evidence established that the maintenance work was important to the manufacturing operation.

Moreover, Respondents suggest an absurd result. Under their position, one could argue that a worker hired to change out molds while an assembly line is running would not be the manufacturer's statutory employee since the manufacturer is not in the "mold changing business." Likewise, a worker who cleans out machinery to enable the next production run to start and operate would not be a manufacturer's statutory employee because the company is not in the "cleaning business." These results would fly in the face of decades of decisions by this and other courts, and also conflict with the policy behind the statutory employment doctrine since it would permit companies to narrowly define their business and to avoid workers' compensation.

Concern over this very outcome is what prompted the *Harrell* court to note that "[w]hatever the parties contract to call their relationship ***is not controlling*** in a statutory employment analysis." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 322, 523 S.E.2d 766, 770 (1999) (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). *Harrell* cautioned against a rule permitting an owner to "subcontract out all of his work . . . and greatly avoid any compensation responsibility," as this would exclude many workers from the Act's coverage in frustration of the General Assembly's intent and "against this Court's policy." *Id.* at 324 n.3, 523 S.E.2d at 771 n.3.

These concerns, along with the directive that any doubts as to a worker's status be resolved in favor of inclusion under the Act, *see Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013), are what prompted this Court to focus on the ***nature of the work*** rather than the defendant company's declared business. Respondents note that Celanese and Daniel "took great pains via contractual provisions to maintain the separate nature of their work," but this is irrelevant in light of the policy concerns underlying the statutory employment doctrine. Indeed, crediting Respondents argument would enable employers to avoid the Act's applicability altogether—as this Court previously has warned against. This Court should reject this erroneous standard and reaffirm its long-standing precedent.

E. *Raines* and *Glass* do not change the result.

Finally, the *Raines* and *Glass* decisions actually support a finding of statutory employment here. Both cases easily are distinguishable because they involved an activity—unlike Seay's work here—that was a highly unique, ***one-time event*** for the putative statutory employer.

Raines concerned an employee of a subcontractor hired to install an electrical system at a new plant being constructed by the defendant. *Raines v. Gould*, 288 S.C. 541, 542, 343 S.E.2d

655, 656 (Ct. App. 1986). The court found that the worker's activities building the ***new*** plant did not constitute the trade or business of the defendant manufacturer, as this was not "an integral part of [the manufacturer's] operations without which it cannot function." *Id.* at 547, 343 S.E.2d at 659. The court recognized that the construction of a brand new manufacturing plant, under the facts of that case, was not an important or necessary part of the defendant company's business of manufacturing and selling batteries. Once plant construction was finished, the construction workers' task in *Raines* was complete and their activity would have no bearing on the actual manufacturing process. However, the court recognized that construction work ***can*** be part of an employer's trade or business if such work is pursuant to an "ongoing program of construction . . . or [when the company] has handled its own construction in the past." *Id.* at 547, 343 S.E.2d at 659.

Glass v. Dow Chemical Company also explored the construction versus maintenance dichotomy, explaining that "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997). In *Glass*, the defendant company was Dow Chemical, which manufactured a mortar additive used in installing façade panels. *Id.* The "major task" at issue in *Glass* was replacing panels that used the Dow product, which required "technical knowledge that was highly specialized." *Id.* The court found that this post-manufacturing, post-sale, large-scale repair was not a part of Dow's manufacturing business. *See id.* As the court explained, the workers' repair work was primarily being done out of the defendant company's "desire to avoid litigation costs." *Id.*

Thus, in both *Raines* and *Glass*, the activity was intended to be a one-time, specialized event. Contrast that with Seay's work, which was part of Celanese's "ongoing program" of preventative and operational maintenance work. Seay was essentially a Celanese employee in all

but name, as he worked at the same Celanese facility doing the same job on the same equipment day in and day out. *Raines* and *Glass*, therefore, actually support that Seay was Celanese's statutory employee.

III. *Olmstead* is dispositive of Respondents' policy argument.

Respondents chose to pursue a tort claim rather than a workers' compensation claim. Although Respondents contend (without support) that they would have been without a remedy under the Workers' Compensation Act, that issue has not been explored. The statute of repose for pulmonary diseases like mesothelioma provides that no claimant is entitled to compensation unless such disease was contracted within two years after the last exposure to the hazard which caused the disease. *See* S.C. Code Ann. § 42-11-70. Expert testimony could have established Seay's mesothelioma was contracted within two years of the last exposure, even if it was not discovered until later. This was the conclusion in *Powell v. Yeargin Constr. Co.*, No. 0617676, 2008 WL 5066354 (S.C. Work. Comp. Comm. Oct. 29, 2008), where the commission determined the claimant had a viable claim despite his last exposure being in 1983 since he ***contracted*** the disease within two years of his last exposure to asbestos and prior to the resulting disability. *Id.* at *3.[7]

Regardless, a statute of repose is designed to foreclose certain claims that would otherwise be viable, and this harsh result is one of the legislative policy considerations balanced by the General Assembly in enacting it. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it

[7] As Celanese argued at the hearing on summary judgment, "[i]n speaking with practitioners and staff attorneys at the workers' comp office, Plaintiff's interpretation that the claim must be filed within two years of the law [sic] exposure is not how the cases are reviewed and decided in SC." (6/27/2015 Hrg. Tr. at 24:12-18; A. 1733.)

even exists." (quoting *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n. 6 (Minn. 2005))). In interpreting the occupational disease statute of repose, the Workers' Compensation Commission noted that "[n]otwithstanding the latency period of asbestos related diseases such as asbestosis, the legislature has never amended this provision and its intent is abundantly explicit." *Truax v. Daniel Constr.*, No. 0411701, 2009 WL 1433538, at *3 (S.C. Work. Comp. Comm. Mar. 27, 2009). Respondents' speculation here that the statute of repose might apply did not grant Respondents the right to pursue a tort claim.

As the District of South Carolina has explained: "[c]ourts in other jurisdictions have also considered similar workers compensation statutes and ***rejected the argument that a statute of repose removes an occupational injury beyond the reach of the exclusive remedy provision***." *Matthews v. E. I. du Pont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111, at *8 (D.S.C. Nov. 13, 2018) (emphasis added) (collecting cases); *see also Hendrix v. Alcoa*, 506 S.W. 3d 230, 237 (Ark. 2016) (rejecting a similar argument, acknowledging that although mesothelioma has a long latency period, the statute of repose "represents a policy-driven, legislative judgment").[8] As *Matthews* reasoned, while the statute of repose "may seem unfair" the court is not tasked with legislating. *Id.* Thus, any impact of the Workers' Compensation Act's statute of repose does not allow the worker "to seek compensation through a civil lawsuit." *Id.*

In any event, this Court in *Olmstead* already addressed Respondents' policy argument that the Court should consider the potential unfairness of the exclusive remedy provision of the Workers' Compensation Act where statutory employment is asserted as a shield. The Court rejected the Court of Appeals' finding in *Olmstead* that the broad construction in favor of coverage

[8] The *Hendrix* court noted that its "holding is consistent with the decisions of our sister states in Illinois, Iowa, and Kansas" and that only *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013) stands in contradiction. *Id.* at 237 n.3.

is not "as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory." *Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486. As the Court explained, it has "not previously adopted a different standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory, and declines to do so now." *Id.* (emphasis added).

Nor would Respondents be left without a remedy as they suggest. Again, Respondents opted to pursue a tort claim rather than a workers' compensation claim despite the risk the court would find that Seay was a statutory employee. Finally, Respondents received settlements from other defendants to this tort action totaling $1.214 million, pursuant to the setoff entered by the trial court.

For all these reasons, the Court should reject Respondents' policy argument, which is contrary to settled law and conflicts with the Legislature's intent.

CONCLUSION

Seay's maintenance work was an important and a necessary, essential, and integral part of Petitioner's manufacturing business. As a result, he was Petitioner's statutory employee and his exclusive remedy is pursuant to the Workers' Compensation Act. This Court should reverse the Court of Appeals and remand with instructions to dismiss this action for lack of jurisdiction.

Signature on Following Page

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February 28, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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