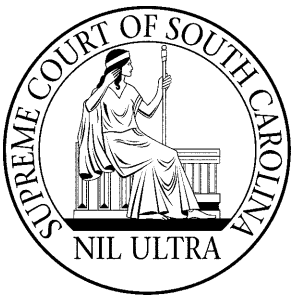

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 13, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Dillon County. Effective February 26, 2019, all filings in all common pleas cases commenced or pending in Dillon County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Chesterfield	Clarendon
Colleton	Darlington	Dorchester	Edgefield
Fairfield	Florence	Georgetown	Greenville
Greenwood	Hampton	Horry	Jasper
Kershaw	Lancaster	Laurens	Lee
Lexington	Marion	Marlboro	McCormick
Newberry	Oconee	Orangeburg	Pickens
Richland	Saluda	Spartanburg	Sumter
Union	Williamsburg	York	

Dillon-Effective February 26, 2019

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
February 7, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Trey Chavez Brown, Appellant.

Appellate Case No. 2016-000526

Appeal From Abbeville County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5624
Submitted September 19, 2018 – Filed February 13, 2019

REVERSED AND REMANDED

E. Charles Grose, Jr., of Grose Law Firm, and Janna A. Nelson, both of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Caroline M. Scrantom, all of Columbia; Solicitor David Matthew Stumbo and Deputy Solicitor Demetrios George Andrews, both of Greenwood; all for Respondent.

THOMAS, J.: Trey C. Brown appeals the circuit court order amending his sentence for murder and possession of a weapon during the commission of a

violent crime and denying his request for additional credit for time served. On appeal, Brown argues the circuit court erred by denying him credit for time served for the entire time period between his arrest date and the date of his guilty plea and sentencing. We reverse.

In 2006, Brown turned himself in to the Aiken County Sheriff's Office for the murder of his father-in-law and was indicted for murder and possession of a weapon during the commission of a violent crime. On August 15, 2007, Dr. Richard Frierson evaluated Brown and found him incompetent to stand trial. As a result, on October 4, 2007, the circuit court ordered Brown to be committed to the South Carolina Department of Mental Health (the Department) for sixty days for competency restoration. In February 2009, the circuit court ordered that Brown be re-evaluated. On March 6, 2009, and April 3, 2009, Dr. Frierson evaluated Brown and found he had a genuine mental illness. Accordingly, the circuit court ordered Brown be committed to the Department for sixty days for competency restoration. After Brown completed his second sixty-day commitment to the Department, Dr. Frierson found Brown was still incompetent and recommended that Brown be civilly committed. Following a hearing, on October 7, 2009, Brown was committed to the Department pursuant to section 44-17-580 of the South Carolina Code (2017). Except for both sixty-day commitment periods, Brown was housed in the county detention center from his arrest until his civil commitment on October 7, 2009. The State dismissed the charges against Brown on October 20, 2009.

In early 2014, the Department began to consider releasing Brown due to his improved condition. As a result, the State re-indicted Brown for murder and possession of a weapon during the commission of a violent crime on February 7, 2014, and requested that Brown be evaluated by Dr. Frierson, who found Brown mentally ill but competent to stand trial. On February 22, 2016, Dr. Frierson evaluated Brown and, again, found him competent to stand trial. Brown remained committed in the Department until the day before he pled guilty. Brown pled guilty on February 29, 2016, and the circuit court sentenced him consecutively to thirty years' imprisonment for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime.

At the sentencing, the circuit court gave Brown credit for time served between his arrest on September 9, 2006, and the State's dismissal of his charges on October 20, 2009, amounting to three years, one month, and eleven days credit for time

served. However, the court denied Brown credit for time served for his civil commitment, the time period after the State dismissed his charges. A few days later, the circuit court issued a consent order amending Brown's credit for time served to also include credit for Brown's pre-trial confinement between February 7, 2014, when the State re-indicted Brown, and February 29, 2016, when Brown pled guilty and was sentenced. The circuit court denied Brown time-served credit "during the time of his commitment to [the Department] between October 20, 2009, and the time of his re[-]indictment on February 7, 2014."

"In criminal cases, the appellate court sits to review errors of law only." *State v. Halcomb,* 382 S.C. 432, 438, 676 S.E.2d 149, 152 (Ct. App. 2009). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the [circuit] court properly applied the law to those facts. In such cases, the appellate court is not required to defer to the [circuit] court's legal conclusions." *State v. Sweat*, 379 S.C. 367, 373, 665 S.E.2d 645, 649 (Ct. App. 2008) (quoting *Nationwide Mut. Ins. Co. v. Prioleau,* 359 S.C. 238, 242, 597 S.E.2d 165, 167 (Ct. App. 2004)).

> In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing . . . . Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (2018).

In *Blakeney v. State*, our supreme court defined time served as used in section 24-13-40 as "the time during which a defendant is in pre-trial confinement *and* charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." 339 S.C. 86, 88, 529 S.E.2d 9, 10–11 (2000) (emphasis in original). Blakeney was arrested and jailed on August 21, 1992, in Berkeley County for a charge that was unrelated to the one for which he was

ultimately convicted. *Id.* at 87, 529 S.E.2d at 10. On August 31, 1992, the Beaufort County Sheriff's Department placed a hold on Blakeney relating to a robbery that occurred in Beaufort County on August 19, 1992. *Id.* On September 1, 1992, Beaufort County issued an arrest warrant but did not serve it. *Id.* Berkeley County dismissed the charges against Blakeney in late 1993. *Id.* On December 2, 1993, the Beaufort County Sheriff's Department arrested Blakeney on the robbery charge, and Blakeney was subsequently convicted and sentenced. *Id.* The Department of Corrections (DOC) gave Blakeney credit for time served after his arrest on December 2, 1993. *Id.* Blakeney filed a post-conviction relief action, and the PCR judge ordered the DOC to give Blakeney credit for time served from September 1, 1992, the date Beaufort County issued the arrest warrant but chose not to serve it. *Id.* at 88–89, 529 S.E.2d at 11. The supreme court affirmed, finding Blakeney was confined as a result of the hold and charged pursuant to the arrest warrant as of September 2, 1992. *Id.* The court noted:

> If Beaufort County had executed the arrest warrant on September 1, 1992, [Blakeney] would have been entitled to bail; if unable to post a bond, he would have been given credit for time served in the Berkeley County jail while awaiting trial on the Beaufort County charge. Beaufort County's decision not to execute the arrest warrant until December 2, 1993, fifteen months later, should not preclude [Blakeney] from receiving credit from September 1, 1992.

Id.

Although Brown was not technically charged with an offense between October 20, 2009, and February 7, 2014, a finding that Brown is not entitled to time-served credit would conflict with the General Assembly's mandate that prisoners receive credit for all time served. *See Hayes v. State*, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015) ("The requirement that a prisoner receive credit for time served is mandatory."). The statute demands prisoners receive credit for all time served unless "either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense." *Id.* at 560, 777 S.E.2d at 10. Brown was confined as a result of the prosecution of his original charges. The State chose to dismiss Brown's charges when he was deemed incompetent to stand trial. However, when

the State discovered Brown was likely to regain competency, it re-indicted him on the same charges. We find this scenario is similar to *Blakeney*, where the supreme court held a defendant was entitled to credit for time served even though a county waited to execute an arrest warrant for over a year after they issued it. *See Blakeney*, 339 S.C. at 87–89, 529 S.E.2d at 10–11. Had the State left the charges pending against Brown, he would have definitely been entitled to credit for the time he was confined to the Department. *See id.* ("If Beaufort County had executed the arrest warrant on September 1, 1992, [Blakeney] would have been entitled to bail; if unable to post a bond, he would have been given credit for time served in the Berkeley County jail while awaiting trial on the Beaufort County charge. Beaufort County's decision not to execute the arrest warrant until December 2, 1993, fifteen months later, should not preclude [Blakeney] from receiving credit from September 1, 1992."). Denying time-served credit in this scenario would be at odds with the General Assembly's express language in the statute that prisoners receive credit for all time served. *Hayes*, 413 S.C. at 560, 777 S.E.2d at 10 ("Where the terms of a statute are clear, the court must apply those terms according to their literal meaning." (quoting *Allen v. State*, 339 S.C. 393, 395, 529 S.E.2d 541, 542 (2000))).

According to the probate court's 2009 order finding Brown incompetent to stand trial, Brown was ordered to be committed to the "forensics unit" at the Department.[1] Thus, for the entire period Brown was committed, he was housed in the secure facility of the forensics division and kept separate from other patients. Further, the probate court's order has a handwritten notation stating, "Should Mr. Brown regain competency, he shall be discharged to the Abbeville County Detention Center, and the Solicitor shall be notified pursuant to state law." According to section 44-23-460 of the South Carolina Code (2018), if the superintendent of a hospital "believes that a person against whom criminal charges are pending no longer requires hospitalization, the court in which criminal charges are pending shall be notified." Although charges were no longer pending against

[1] According to the Department's website, "Patients in the [G. Weber Bryan Psychiatric Hospital]'s Forensics Division are primarily referred by jails and criminal courts from throughout the state, and are housed separately from patients in the Adult Services Division in a more secure area of the hospital." *See Hospital / Program Services Directory*, South Carolina Department of Mental Health, https://www.state.sc.us/dmh/dir_facilities.htm#Bryan1 (last visited Feb. 7, 2019).

Brown as of October 20, 2009, the State continued to receive information about Brown and was notified, pursuant to the probate court's order, as soon as the Department believed Brown could be released due to his improved condition in early 2014. After the State was notified, it re-indicted Brown for the same charges on February 7, 2014, and requested another competency evaluation. Thus, it is clear from the probate court's order and the subsequent actions of the solicitor that the State intended to prosecute Brown as soon as he regained competency.

Moreover, section 44-23-460(2) of the South Carolina Code (2018) would have barred the prosecution of Brown if he had "been hospitalized for a period of time exceeding the maximum possible period of imprisonment to which the person could have been sentenced if convicted as charged." Thus, if Brown had been committed for longer than the possible sentence for his crime, the State would not have been able to re-indict him. The time-served statute mandates prisoners be given "*full credit* against the sentence . . . for time served prior to trial and sentencing." § 24-13-40 (emphasis added). We find, under the limited and unique facts of this case, Brown is entitled to credit for time served even though there were no charges pending against him. Although the charges were technically dropped, the result was functionally the same as if the charges were still pending against Brown. He was confined before trial as a result of his criminal charges and he pled guilty to those charges when he was later re-indicted. *See State v. Higgins*, 357 S.C. 382, 384, 593 S.E.2d 180, 182 (Ct. App. 2004) ("Generally, penal statutes are to be construed 'strictly against the State and in favor of the defendant.'" (quoting *Williams v. State*, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991))). During this period of time, Brown was held in a secure facility with other criminal patients and never released from custody. Thus, we hold Brown is entitled to credit for time served for the period of time he was civilly committed but no charges were pending against him. We remand to the circuit court to give Brown credit for time served between October 20, 2009, and February 14, 2014.

REVERSED AND REMANDED.[2]

LOCKEMY, C.J., and GEATHERS, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

CNA Holdings, LLC, Appellant.

Appellate Case No. 2016-000227

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

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

AFFIRMED

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

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

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

FACTS/PROCEDURAL HISTORY

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

On September 25, 2013, Seay and his wife, Linda Seay, filed this action against Appellant and several other defendants, alleging negligence by failure to warn Seay of the dangers of asbestos, failure to provide adequate safety measures against asbestos dust, and failure to provide safe environmental conditions in the Spartanburg plant. Seay died from advanced mesothelioma on December 29, 2014. Subsequently, Seay's daughter, Respondent Angie Keene, amended the complaint to add causes of action for wrongful death and survival. Appellant then filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, or, in the alternative, for summary judgment pursuant to Rule 56, SCRCP. The basis for this motion was that Seay was a statutory employee of Celanese and, therefore, his exclusive remedy was under the South Carolina Workers' Compensation Act, S.C. Code Ann. §§ 42-1-10 to 42-19-50.[1]

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

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

ISSUES ON APPEAL

1. Did the circuit court err by declining to grant a JNOV on the ground that Seay was a statutory employee of Celanese?

2. Did the circuit court err by declining to grant a mistrial on the ground of jury misconduct?

3. Did the circuit court err by admitting into evidence a video showing Seay crying out in pain?

4. Did the circuit court err by upholding the amount of the jury's verdict?

STANDARD OF REVIEW

Statutory Employee

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

Mistrial

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

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

Evidence

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

New Trial/Excessive Damages

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

LAW/ANALYSIS

I. Statutory Employee

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

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

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

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

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

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

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

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

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

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

"[e]mployees who work for the subcontractor but are not employed to do the work that the owner would normally do would not have a statutory employment relationship with the owner." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] Supplies were kept in a storeroom on site.

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

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

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

II. Mistrial/Jury Deliberations

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

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

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

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

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

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

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

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

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

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

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

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

As to outside influences, a jury must render a verdict free from them. *Harris*, 340 S.C. at 63, 530 S.E.2d at 627. "In determining whether outside influences have affected the jury, relevant factors include (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice." *Id.* "The determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the [circuit] court." *Id.*

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

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

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

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

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

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

III. Mistrial/Video

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

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

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

Preservation

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

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

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

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

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

Merits

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

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

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

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

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

IV. New Trial/Excessive Damages

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

James Wiseman and Judy Wiseman, Appellants.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2016-001903

Appeal From Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5626
Heard December 6, 2018 – Filed February 13, 2019

REVERSED AND REMANDED

Paul E. Tinkler and William P. Tinkler, both of Law Office of Paul E. Tinkler, of Charleston; and Stephen Gordon Dey, of Dey Law Firm, LLC, all of Charleston, for Appellants.

Scarlet Bell Moore, of Greenville, for Respondent.

Jessica Lynn Means, of Hall & Means, LLC, of Charleston, for the Guardian ad Litem.

MCDONALD, J.: Pursuant to an investigation of minor child's (Minor's) allegations of abuse and neglect by her adoptive parents, the South Carolina Department of Social Services (DSS) brought an action against James (Father) and Judy (Mother) Wiseman (collectively, the Wisemans), seeking findings of excessive corporal punishment and abandonment.[1] Although the family court declined to make a finding of abuse and neglect, it found the Wisemans abandoned Minor when they were unable to accept her into their custody upon her release from the Medical University of South Carolina's Institute of Psychiatry (MUSC-IOP). We reverse the finding of abandonment and remand to the family court.

Facts and Procedural History

On January 29, 2016, Mother took away Minor's easy bake oven and iPad because Minor was falling behind in her schoolwork and being disrespectful.[2] At this point, Minor "got up in [Mother's] face" and began screaming, using profanity, and threatening Mother with her fists. Mother told Minor to go outside and cool down; however, Minor remained very upset.

Shortly thereafter, Father arrived home and attempted to calm Minor. When Father tugged on Minor's shirt and asked her to stand up, Minor tried to hit Father with a brick. In his effort to avoid being struck with the brick, Father grabbed at Minor's hair as he fell backward to the ground. Minor then threatened to hit Father with a metal bar, nearly hit Mother with the metal bar, and ran down the street to a neighbor's house.[3]

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[1] The Wisemans adopted Minor when she was ten years old; at the time of the family court proceeding, Minor was thirteen.

[2] According to Mother, the Wisemans previously warned Minor they would throw away Minor's iPad if she used it inappropriately—Minor's school had already disciplined her for using the iPad to email her fifteen-year-old boyfriend.

[3] While Minor was at the neighbor's house, Mother was in contact with Minor's therapist, Sue King, who advised Mother to take Minor to MUSC-IOP for inpatient therapy.

Officer Matthew Treitler of the Horry County Police Department responded to the scene. He testified that when he arrived at the neighbor's house, Minor had "no sign of bruising, scrapes, abrasions, nothing along those lines that would be there if [she had been] thrown up against the bricks or a hard surface or something like that." He further explained "there would be some sign of trauma or something, but I did not observe anything while I was there." Due to Minor's behavior, Officer Treitler believed she needed psychiatric treatment.[4] He testified:

> By the way she was acting and just the emotional states that she was going between. Between being completely hysterical, upset and crying and not talking and then just being completely straight-faced, I mean, within a couple of seconds of one another. I believe that something was going on.

Officer Treitler filed no charges. Instead, he took Minor back to the Wisemans, who drove her to MUSC-IOP, where she was admitted.

DSS received Minor's allegations on February 1, 2016. Later that day, investigative caseworker Dominique Richard contacted the Wisemans. The following day, Richard visited Minor at MUSC-IOP and met with therapist King, an MUSC social worker, and the Wisemans to discuss placement.

During Minor's stay at MUSC-IOP, the Wisemans regularly communicated with Minor and cooperated with the treatment team's recommendations. Minor was discharged from MUSC-IOP on February 11, 2016. However, because she remained "unstable" at the time of her discharge from the short term facility, Minor's treatment team recommended she be placed in a residential treatment facility (RTF). No bed was available at any of the recommended residential treatment facilities.

Although DSS attempted to have MUSC-IOP security take Minor into emergency protective custody, officers declined to do so, stating Minor was not at risk of harm. While the Wisemans testified DSS requested it be allowed to take Minor

[4] Minor was diagnosed with several psychiatric disorders prior to her adoption.

into emergency protective custody to get her the help she needed, DSS denies this conversation ever took place. Instead, caseworker Richard testified the Wisemans refused to take Minor back into their home.

On February 12, 2016, DSS filed a complaint seeking to bring Minor into emergency protective custody. The family court granted DSS's request for ex parte relief, and Minor was placed in a therapeutic foster home pending an opening at Palmetto Pee Dee Residential Treatment Facility (Palmetto). Minor was placed at Palmetto on February 29, 2016, where she began receiving intensive trauma therapy and other psychiatric intervention and treatment.[5] The Wisemans regularly visited Minor and remained in communication with her, all while following the recommendations of Minor's treatment team.

Following a three-day trial on the merits, the family court found DSS did not meet its burden of proof as to the allegation of physical abuse but issued a finding of abandonment against the Wisemans.[6] The family court denied the Wisemans' motion to reconsider the final merits order and abandonment finding.

Standard of Review

The appellate court reviews decisions of the family court de novo. *See Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam) (stating the appropriate standard of de novo review as articulated in *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)). "In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. However, this broad scope of review does not require this court to disregard the findings of the family court." *Lewis*, 392 S.C. at 384, 709 S.E.2d at 651 (quoting *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)).

Law and Analysis

The Wisemans argue the family court erred in finding they abandoned Minor because (1) the facts of the case do not support the finding of abandonment; (2) the

[5] As of July 27, 2017, Minor was still in treatment at Palmetto.

[6] At the time of trial, Minor had been at Palmetto for approximately three months.

Wisemans' fear of harm negated the intent necessary to establish abandonment; (3) a finding of abandonment cannot be supported because DSS admittedly could not and would not allow Minor to return to the Wisemans' home during the pendency of the investigation; and (4) the evidence established the Wisemans' actions were dictated by the "force of circumstances and dire necessity." *See Hamby v. Hamby*, 264 S.C. 614, 617, 216 S.E.2d 536, 538 (1975). We agree.

"'Abandonment of a child' means a parent or guardian wilfully deserts a child or wilfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child." S.C. Code Ann. § 63-7-20(1) (Supp. 2018). In *Hamby*, our supreme court recognized that "the question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances." 264 S.C. at 617, 216 S.E.2d at 538. The court explained "abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Id.* (quoting 2 Am. Jur. 2d *Adoption* § 32). However, abandonment "does not include an act or course of condu[c]t by a parent which is done through force of circumstances or dire necessity." *Id.* (quoting 2 Am. Jur. 2d *Adoption* § 33).

Here, the evidence reflects the Wisemans did not willfully abandon Minor when they surrendered her to DSS shortly after she was discharged from MUSC-IOP. Richard testified DSS took Minor into custody "first because the Wisemans feared that [Minor] was going to harm them, and they did not want to allow her into the home" and because her therapist, her counselor, and the doctors at MUSC "recommended [Minor] be placed into an RTF." Likewise, Mother explained she was afraid to take Minor home because she had threatened to kill the Wisemans; Mother wanted Minor to get the help she needed before returning home and potentially making additional false allegations of abuse; and Mother believed DSS agreed to place Minor in its custody until a space was available at a residential treatment facility.

DSS caseworker Tara Cobb testified DSS became involved after receiving a report that Minor was at MUSC-IOP, and the Wisemans refused to take her home due to her behavior. However, Mother explained she and Father intended to support Minor while she received the treatment she needed so she could return home. In fact, the Wisemans have never expressed that they did not want Minor to return

home following the completion of her treatment. *Contra id.* (explaining "abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child" (quoting 2 Am. Jur. 2d *Adoption* § 32)). To the contrary, the Wisemans have been very involved with Minor's treatment, participated in regular family counseling sessions, traveled to see her each week, followed the recommendations of her counselor and treatment team, and expressed their desire that Minor return home following the completion of her treatment.

Significantly, caseworker Richard's testimony at trial demonstrates DSS would not have returned Minor to her parents following her discharge from MUSC-IOP "because the recommendation was for her to go to an RTF." Richard confirmed that while Minor could have gone home with the Wisemans if a safety plan were in place, DSS would have asked for relative placement until the agency was able to complete its investigation. Richard further stated that while it was inappropriate at the time of trial, "[t]he agency's goal is for [Minor] to definitely be returned to the Wisemans" after she "complete[s] her treatment where she is at Palmetto."[7]

Our supreme court has explained that abandonment "does not include an act or course of condu[c]t by a parent which is done through force of circumstances or dire necessity." *Id.* (quoting 2 Am. Jur. 2d *Adoption* § 33). Here, undisputed testimony establishes the Wisemans were afraid to bring Minor home immediately following her discharge from MUSC-IOP due to her threats and past behavior. Further, it was DSS's own opinion that it was "too risky" for Minor to return home. Minor's entire treatment team recommended Minor be placed in an RTF upon her

[7] This court is perplexed with DSS's seeking of the abandonment finding under the facts of this case and in light of the caseworker's equivocal testimony, the treatment team's recommendations, and the caseworker's admission that DSS would not have returned Minor to the Wisemans immediately upon her release from MUSC-IOP because of the recommendation that minor be placed in a residential treatment facility. We recognize DSS was in a difficult position due to the lack of an available RTF bed and the federal funding requirement that DSS seek a finding of abandonment in situations such as this one. But, the Wisemans should not be penalized for bureaucratic hardships. Nor would this court seek to chill the willingness of prospective adoptive parents prepared to care for children suffering oppositional attachment disorder or other health issues.

discharge from MUSC-IOP due to the severity of her emotional issues as well as the risk of harm to herself and others. Therefore, following our de novo review, we find the Wisemans' actions were compelled by the force of circumstances and dire necessity rather than any intent to abandon Minor.

Conclusion

For the foregoing reasons, we reverse the finding of abandonment and order that the Wisemans' entries be removed from DSS's database of abuse and neglect. We remand this matter to the family court as our opinion alters Minor's protective custody premised upon the finding of abandonment. Because we recognize that changes may have taken place of which we are unaware, we ask the family court to convene with all parties present, including any necessary therapists, to consider Minor's condition and whether it is now appropriate to release her from foster care back to her parents.

REVERSED AND REMANDED.

KONDUROS and HILL, JJ., concur.

KONDUROS, J., concurring: I concur with the majority and agree that a finding of abandonment should not have been made against the Wisemans. I applaud the family court's efforts to try and craft a solution to a terrible situation, but the Wisemans remained steadfastly involved with Minor, which contradicts the plain meaning of abandonment.

Because abandonment was the only ground of abuse and neglect found against the Wisemans, I concur that their names—if they have been added—should be removed from the central registry of abuse and neglect.

Likewise, because our decision in this case ends the involvement of DSS in the care and treatment of Minor, I would encourage the family court to hold a permanency planning hearing to effectuate a plan of return of Minor to their care. The Wisemans may or may not be in a position to accept the full responsibility of Minor based on our ruling, and the sooner that is addressed the better for this family.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Georgetown County, Appellant,

v.

Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown, Defendants,

Of whom The South Carolina Department of Transportation and the City of Georgetown are the Respondents.

Appellate Case No. 2017-000234

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5627
Heard December 5, 2018 – Filed February 13, 2019

AFFIRMED

Louis H. Lang and George Albert Taylor, both of Callison Tighe & Robinson, LLC, of Columbia, for Appellant.

David Leon Morrison, of Morrison Law Firm, LLC, of Columbia, for Respondent City of Georgetown, and Lisa A. Reynolds, of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent South Carolina Department of Transportation.

Robert E. Lyon, Jr. and John K. DeLoache, both of the South Carolina Association of Counties, of Columbia, for the Amicus Curiae South Carolina Association of Counties.

HILL, J.: This appeal requires us to determine whether a county may sue another political subdivision and the South Carolina Department of Transportation (SCDOT) for inverse condemnation. Because we hold the property Georgetown County (the County) alleges was inversely condemned is not "private property" within the meaning of the Takings Clause of S.C. Const. art I, § 13, and further hold the County may not sue SCDOT, a state agency, on such a claim, we affirm dismissal of the County's claim.

I.

The County alleges the City of Georgetown (the City) and SCDOT, while engaged in a joint water drainage project, altered the water table, causing sinkholes to form and damaging public buildings and real property owned by the County. The County brought numerous causes of action against the City, SCDOT, and their private contractors, including one for inverse condemnation against the City and SCDOT. The City and SCDOT moved to dismiss the County's inverse condemnation claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP). The circuit court granted the motion to dismiss, which the County now appeals.

II.

In deciding a Rule 12(b)(6) motion, the trial court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiff's favor, asks whether the complaint would entitle the plaintiff to relief under any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). We use the same standard to review the dismissal order on appeal. *Id*.

A. Inverse Condemnation and the South Carolina Takings Clause

An inverse condemnation claim derives from the Takings Clause of our state constitution, which provides: "Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13(A). The County urges us to interpret "private property" as used in

the Takings Clause to mean any property not owned by the condemnor, here the State. The County suggests this interpretation furthers the intent motivating the Takings Clause, i.e. to justly compensate a property owner for the taking. According to the County, it is damaged by the State's condemning of their property no less than a private citizen would be and is no less entitled to the just compensation our constitution guarantees.

We disagree with the County's interpretation that the private property referred to in the Takings Clause means any property not owned by the condemnor. The Takings Clause does not define what it means by private property, so we must turn to the "ordinary and popular meaning" of the term. *See Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002); *Private*, The American Heritage Dictionary of the English Language (1978) ("4. Belonging to a particular person or persons, as opposed to the public or the government: *private property*."); *Private*, Webster's Ninth New Collegiate Dictionary (9th ed. 1988) ("[I]ntended for or restricted to the use of a particular person, group or class . . . belonging to or concerning an individual person, company, or interest."). Public is an antonym of private. We therefore hold the term private property as used in the Takings Clause of the South Carolina Constitution applies only to property owned by a private citizen, private corporation, or non-public entity. It does not encompass property owned by the State, its agencies, political subdivisions (including counties and municipal corporations), or other public entities. *See Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean.") (Holmes, J.); *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824) ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

Our holding was foreshadowed over a century ago in *Edgefield County v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E 801 (1916). At issue in that case was whether Edgefield County could sue a power company for flooding county roads. An Act of the General Assembly had authorized the power company to build a dam across the Savannah River, and the authority included a general power of condemnation. *Id*. at 322-27, 88 S.E. at 804–06. The circuit court denied the power company's demurrer to the county's complaint. Affirming the circuit court, the supreme court remarked the State could have flooded or even closed the county's road "and Edgefield could not complain about it." *Id*. at 328, 88 S.E. at 806–07. Likewise, the State, by the Act, could have "expressly" granted the power company the right to flood the roads. *Id*. The court observed: "[I]f the company should thereby flood the private property of the citizen, then under constitutional protection

it would need to make compensation to those persons who suffered a particular injury from the nuisance. *But public property, we think, does not fall within the protection of the Constitution.*" *Id*. at 328–29, 88 S.E. at 807 (emphasis added) (citations omitted). The court went on to hold that because the Act did not expressly delegate to the power company the right to flood the particular county road at issue, the county could sue the power company for damages. *Id.* at 330, 88 S.E. 807

SCDOT and the City claim *Edgefield County* shores up their position. The County—unsurprisingly—deems the "public property" remark dictum. Whether the statement in *Edgefield County* rises (or sinks) to the level of dictum is not important to our task today. What is important is our supreme court has once before explained the scope of the State's eminent domain power and its interplay with the Takings Clause in the context of an alleged condemnation of public property. *Yaeger v. Murphy*, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987) ("[T]hose who disregard dictum, either in law or in life, do so at their peril.").

Several other states have held "private property" as used in the state takings clauses of their state constitutions does not include property owned by political subdivisions of a state. *See Bd. of Water Works Trs. of City of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 71 (Iowa 2017); *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 916–17, 923 (Mo. 2016) (en banc) (finding sewer district failed to state a claim for inverse condemnation and rejecting its argument that "this [c]ourt should interpret the words 'private property' as used in article I, section 26 [of the Missouri Constitution] to include 'public property' that is damaged by other unrelated public entities").

B. Federal Takings Law

The County is right that we have relied on federal common law in interpreting South Carolina's Takings Clause. *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007). The United States Supreme Court has held the federal Takings Clause applies when the federal government takes public land owned by a state or its political subdivisions. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.").

But we have never looked to federal law for the meaning of private property as used in Article I, § 13. The decision in *50 Acres of Land* is no solace to the County because the Supreme Court has recognized the obligation of just compensation does not arise when a sovereign state transfers public property from one governmental

use to another. *United States v. Carmack*, 329 U.S. 230, 242 n.12 (1946); *see also Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 n.2 (Tex. 2004) (citations omitted) ("The City cites several cases from other states that it contends support a municipality's constitutional right to compensation from the state. Those cases, however, are either distinguishable in that they involved statutorily created eminent-domain rights, or inapposite in their reliance on federal authority. The relationship between a city and state, which are not separate sovereigns, is not analogous to that between the federal government and a state.").

C. The Takings Clause and Home Rule

There is another basis for upholding dismissal of the County's inverse condemnation claim against SCDOT. As a state-created agency, SCDOT is an arm of the state. *Riley v. S.C. State Highway Dep't*, 238 S.C. 19, 24, 118 S.E.2d 809, 810 (1961). Like SCDOT, the County is a creature of the state. Political subdivisions of the state have no ancestor other than the state and its citizens, nor do they possess a separate sovereignty. *See Hibernian Soc'y v. Thomas*, 282 S.C. 465, 472–73, 319 S.E.2d 339, 343–44 (Ct. App. 1984); *see also City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–87 (1923). Accordingly, we hold the County may not bring an inverse condemnation claim against its "creator," the state. *Richland Cty. Recreation Dist. v. City of Columbia*, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986); *City of Reno v. Washoe County*, 580 P.2d 460, 463 (Nev. 1978) ("[T]he City, as a political subdivision of the State, may not raise the issues of taking of property without due process of law or just compensation and the impairment of its contracts, as against the State, its creator.").

The County contends that, as far as the Takings Clause is concerned, its symbiotic relationship with the State was severed by the enactment of Home Rule. The County notes Home Rule granted it the right to own property in its own name, S.C. Code Ann. § 4-1-10(2) (1986), and the Home Rule Amendments to our constitution require constitutional provisions such as the Takings Clause to be "liberally construed" in favor of local government, S.C. Const. art. VIII, § 17.

The County's argument disfigures the Home Rule concept. Nothing in the Home Rule Amendments changed the reality that counties were created by the State, nor did Home Rule endow counties with a separate sovereignty for purposes of the Takings Clause. *Knight v. Salisbury*, 262 S.C. 565, 570, 206 S.E.2d 875, 876–77 (1974) ("State Constitutions are not grants of power to the General Assembly but are restrictions upon what would otherwise be plenary power."); *see* Underwood, *The Constitution of South Carolina, Volume II: The Journey Toward Local Self-Government* 177 (analyzing framers' debates concerning Home Rule Amendments

and noting Article VIII, section 17 did not "reverse the traditional view that local governments in this country do not possess inherent power. Subdivisions still have only such power as the state grants either in the constitution or statutes . . .").

III.

The County next claims it is entitled to compensation under the Eminent Domain Procedure Act (the Act), S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). The County contends it is covered by the Act because the definitional sections of the Act include a public entity as a "person" and, consequently, a condemnee. *See* S.C. Code Ann. § 28-2-30(6), (16) (2007). The County further asserts that because the General Assembly intended that all exercises of eminent domain occur through the Act, the Act entitles the County to just compensation. S.C. Code Ann. §§ 28-2-20, -90 (2007).

We again disagree. First, the definitional sections of the Act cannot supplant the plain meaning of private property as used in Article I, § 13.

Second, the exclusivity the Act refers to "contemplates that the exclusiveness shall only apply to those cases or situations which are embraced within the machinery of the condemnation statutes." *Godwin v. Carrigan*, 227 S.C. 216, 225, 87 S.E.2d 471, 475 (1955). At least as to the fundamental issue of whether a taking of private property has occurred, the architecture and remedies of the Act cannot be superimposed on an inverse condemnation claim, which springs from the Constitution. *See Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 479–81, 556 S.E.2d 693, 698–99 (2001) (rejecting SCDOT's argument that statutory interest rate set forth in Act controlled in inverse condemnation action); *cf. Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("In light of the historical treatment of an inverse condemnation action as equivalent to an eminent domain case, we conclude [the] statutory right to a jury trial on the issue of compensation applies as well in inverse condemnation actions."). The General Assembly was careful to note the Act was not designed to "alter the substantive law of condemnation," which includes the doctrine of inverse condemnation. S.C. Code Ann. § 28-2-20 (2007). It is called inverse condemnation because the normal taking procedure has been inverted: the government has taken private property without initiating the formal condemnation process of the Act. *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004); *S.C. State Highway Dep't v. Moody*, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976). Therefore, the Act does not affect our conclusion that the term private property as used in the Takings Clause of the South Carolina Constitution does not include public property.

IV.

As its final argument, the County insists public policy compels us to find the Takings Clause reaches the inverse condemnation of public property because of the fiscal burdens such takings inflict. The County notes courts have relied upon the policy of burden-sharing in explaining the reason for awarding just compensation for the exercise of eminent domain. *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001) ("The purpose of the Takings Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))). The United States Supreme Court found this policy strong enough to override the plain meaning of private property in the Fifth Amendment. *50 Acres of Land*, 469 U.S. at 31 ("When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property."). Commentators have debated the practical sense of requiring just compensation for intergovernmental takings. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829 (1989); Payne, *Intergovernmental Condemnation As A Problem in Public Finance*, 61 Tex. L. Rev. 949 (1983); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 Colum. L. Rev. 1083, 1110 (1967).

We conclude the controlling public policy here was ratified by the people and enshrined in South Carolina's Takings Clause, whose reference to private property we have held does not include public property. We cannot stretch the meaning to match a party's public policy preference, even if we agreed with it, for our limited role is to say what the law is, not what it should be. *Gaud v. Walker*, 214 S.C. 451, 481, 53 S.E.2d 316, 329 (1949) ("Our duty is to declare the law, not to make it.").

The order of the circuit court dismissing the County's inverse condemnation claim is

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.