THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
AUG 05 2019
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Op. No. 5625 (S.C. Ct. App. filed Feb. 13, 2019)
Appellate Case No. 2019-000816

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

v.

CNA Holdings, LLC, ... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN, LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

John D. Kassel
Theile B. McVey
KASSEL MCVEY
P.O. Box 1476
Columbia, SC 29202
(803) 256-4242

Chris Panatier (pro hac vice)
Kevin W. Paul (pro hac vice)
SIMON GREENSTONE PANATIER PC
1201 Elm Street., Ste. 3400
Dallas, TX 75270
(214) 276-7680

Attorneys for Respondents

Other Counsel of Record:

C. Mitchell Brown
Allen Mattison Bogan
Blake Terence Williams
NELSON MULLINS RILEY & SCARBOROUGH, LLP
P.O. Box 11070
Columbia, SC 29211
(803) 799-2000

Attorneys for Petitioner

INDEX

Question Presented 1

Did the circuit court and the court of appeals correctly find Dennis Seay was not Hoechst Celanese's statutory employee?

Introduction 1

Statement of the Case 2

Arguments 6

A. The circuit court and the court of appeals correctly found Mr. Seay was not Celanese's statutory employee 7

i. Statutory employment requires a case-by-case analysis focused on whether the work in question was "part of" the larger business 7

ii. Mr. Seay's work was not "part of" Celanese's business 9

iii. The decisions below are faithful to precedent, which the courts cited in their decisions 12

B. Respectfully, Celanese's arguments for further review are wrong 15

i. The courts below did not change or alter the statutory employment "test" 15

ii. There is no conflict between the decisions below and precedent. Precedent says each case turns on its own facts 16

iii. Finding statutory employment would also thwart the benevolent purpose of the Workers' Compensation Act and be cruel as well as unconstitutional 19

Conclusion 22

QUESTION PRESENTED

Respondents would re-state the question presented as follows:

Did the circuit court and the court of appeals correctly find Dennis Seay was not Hoechst Celanese's statutory employee?

INTRODUCTION

"Statutory" employment is an exception to the rule that an injured worker must be an "employee" to have a workers' compensation claim. It extends coverage to certain independent subcontractors by giving them the right to bring a claim not just against their employer, but against the person or business ultimately benefitting from their work.

This doctrine is aimed at outsourcing. It keeps someone from evading the system by using subcontractors to carry on the business's "work" instead of employees. If, for example, a painting company subcontracts with an outside painter, that person is a statutory employee. The tire and auto shop maintaining the paint company's trucks would typically not be.

Lots of cases address this issue. The outcomes are not always consistent because the key question is whether the subcontractor's work is "part of" the upstream business. That answer varies, just as individual businesses vary from case to case.

This case is about whether maintenance at a Hoechst Celanese manufacturing plant was "part of" Celanese's business or a peripheral activity to that business. Everybody agreed maintenance was important to Celanese. It is important to lots of operations. The circuit court found maintenance was not "part of" Celanese's business. The court of appeals agreed.

Those decisions were faithful to this record and to precedent. They also honored the benevolent purpose of the Workers' Compensation Act—a purpose Celanese seeks to thwart.

Indeed, the irony of this case is that if statutory employment applies (it does not), other parts of the Workers' Compensation Act must fall. This Court should deny review.

STATEMENT OF THE CASE

Dennis Seay worked for Daniel Construction for 10 years in the late 1960s and 1970s doing maintenance at a manufacturing plant in Spartanburg owned by Hoechst Celanese. (App.p.557, line 8 - p.558, line 21).

Celanese was a large manufacturer that made several products. (App.p.998, lines 5-7). From the 1960s to sometime in the 1980s or 1990s it hired Daniel to do all maintenance work at its Spartanburg plant. (App.p.1282, line 16 - p.1284, line 12; p.1412, lines 9-12).

Daniel was a large construction company. (App.p.1510, line 1 - p.1512, line 13). It routinely built and maintained manufacturing plants. *Id.*

In 2013, decades after he left Daniel, Mr. Seay was diagnosed with mesothelioma; a fatal cancer caused by asbestos. (App.p.2086, lines 12:05-12:24). He sued Celanese for premises liability and his wife filed a claim for loss of consortium. (App.p.84 & p.87, ¶49). Wrongful death and survival claims were added after Mr. Seay died. (App.p.72).

Following an eight day trial in 2015 a jury returned verdicts of $2 million for the survival claim, $5 million for wrongful death, and $5 million for loss of consortium. (App.p.75). The circuit court heard Celanese's post-trial motions in December of 2015 and denied them in a 46-page order filed a month later, in January of 2016. (App.pp.8-53).

Celanese's chief defense to the lawsuit was statutory employment. Celanese claimed Mr. Seay was its "statutory employee" because the plant would not have been able to function without the preventative maintenance Daniel workers performed. Celanese said Mr.

Seay's exclusive remedy was a claim under the Workers' Compensation Act. The parties dealt with this issue pre-trial, at the directed verdict stage, and in post-trial motions.

The circuit court gave several reasons for its decision that Mr. Seay was not a statutory employee. It cited this Court's decision in *Glass v. Dow Chemical Co.* that says major repairs, specialized repairs, or repairs a company cannot handle with its own work force are typically not "part of" the company's business. (App.pp.33 & 58). The court also quoted a Fourth Circuit case and a workers' compensation treatise explaining there is "a surprising degree of harmony" and agreement on the general rule that statutory employment "covers all situations in which work is accomplished which this employer ... would ordinarily do through employees." (App.p.59). Again, Daniel workers did all maintenance at the plant.

The circuit court also cited and relied on *Raines v. Gould*, a decision from the court of appeals that says construction is ordinarily outside a manufacturer's trade or business. (App.pp.29 & 59). The circuit court noted language from *Raines* explaining construction may be part of a manufacturer's business if the manufacturer "is accustomed to a more or less ongoing program of construction, perhaps having its own construction division," but the circuit court noted there was no evidence Celanese had a maintenance division or used employees to perform maintenance when Mr. Seay was working for Daniel. (App.pp.30 & 59-60). The court found maintenance in this case was similar to the construction in *Raines*.

The circuit court cited and applied the three-pronged "test" that routinely appears in cases on this topic: that statutory employment applies to an independent contractor whose work is "an important part" of the upstream business, a "necessary, essential, and integral part" of the upstream business, or has been performed by the upstream business's regular

employees. (App.pp.30 & 56). The circuit court also recited precedent explaining there is no easy formula, that each case turns on its own facts, and that the ultimate guidepost is whether the independent contractor's work is "part of" the upstream company's "general trade, business or occupation." *Id.*

The court acknowledged that maintenance was important to Celanese but explained that importance "to" the business was not equivalent to being an important "part of" the business. (App.pp.30-31 & 58). The court explained anyone doing work for Celanese would presumably be doing work that was "important" unless Celanese was in the habit of hiring people to do things that were unnecessary or trivial. (App.p.58). The court read two of this Court's decisions—*Abbott v. The Limited, Inc.* and *Olmstead v. Shakespeare*—to mean the statutory employment "tests" should be applied "practically rather than mechanically." (App.pp.30-31 & 57-58). The court quoted both cases for the proposition that the fact an activity is important "to" a business does not mean the activity is "part of" the business. *Id.*

As already noted, the circuit court addressed statutory employment before trial, at the directed verdict stage, and in the post-trial order. The pre-trial ruling is in a written order. (App.pp.54-61). The directed verdict ruling was oral. (App.p.1542). The post-trial order deals with this issue and several others. (App.pp.28-33) (the key part of the order).

Celanese argued four issues to the court of appeals: statutory employment, a claim of premature jury deliberations, an evidentiary objection, and an argument that the verdict was grossly excessive. (App.p.2751).

As it had done in circuit court, Celanese's basic argument on statutory employment hinged on necessity and importance. Celanese said maintenance on its production lines was

"part of" the manufacturing business because the work was essential. After all, Celanese could not manufacture anything if its production lines were not maintained and working.

The court of appeals addressed this argument and the other issues on appeal in a lengthy opinion filed February 13, 2019. (App.p.2854). This was after an oral argument conducted the previous October. *Id.*

The court devoted nine of the opinion's twenty-three pages to its discussion and analysis of statutory employment. (App.pp.2857-2866). The opinion was unanimous.

The court of appeals said a lot of the same things the circuit court said on this issue. It explained the three-factor "test" had its origin in a case from this Court—*Ost v. Integrated Products*—and it noted precedent's instructions that there is no easy formula and that each case rests on its own facts. (App.p.2859). It interpreted *Abbott* and *Olmstead* as meaning an activity like maintenance is not "part of" a larger business like manufacturing just because the activity is important "to" the larger business. (App.pp.2860-2861).

The court of appeals ultimately explained that the result was driven by this case's "unique facts." (App.pp.2865-2866). First, the court noted that maintenance at Celanese's plant was exclusively performed by Daniel employees and that no Celanese employees performed this sort of work. (App.p.2865). Second, the court noted the work involved special skills, quoting a Celanese employee's testimony that Celanese hired Daniel because of Daniel's expertise in construction and maintenance. *Id.* (citing App.p.1277, lines 9-13).

Third, the court of appeals echoed the circuit court's observation that Celanese did not present any evidence that construction or maintenance was part of its corporate purpose. *Id.* Fourth, the court mentioned that the written contracts between Daniel and Celanese

carefully distinguished Daniel's work in maintenance and Celanese's work in manufacturing. The contracts said Daniel was completely responsible for maintenance, that Daniel employees were not responsible for operating Celanese's equipment, and that Daniel was not responsible for the actual capacity or productivity of Celanese's equipment. (App.pp.2865-2866). Given all of these factors, the court of appeals found the greater weight of evidence supported the circuit court's decision that Mr. Seay was not a statutory employee.

Celanese petitioned for rehearing and rehearing *en banc*. (App.p.2878). Respondents opposed the petition. (App.p.2909). The court of appeals denied rehearing in a brief order explaining it did not believe there was a basis to hear the case again. (App.p.2929).

ARGUMENTS

There are two main reasons the Court should deny the petition for review.

First, the bottom-line decision is correct. The circuit court and court of appeals correctly found Mr. Seay was not Celanese's statutory employee. Precedent says this is a case-specific analysis and that finding the right answer can be difficult, but here, the record shows Celanese was in the manufacturing business, not the maintenance business. *Daniel* was in the maintenance business; it did this work all over the country and it even had a "maintenance and millwright" division. The decisions below are right.

Second, Celanese's arguments for further review are wrong. The courts below did not change the "test." There is also no conflict between this case and precedent. Precedent says each case stands on its own facts. Celanese says any doubts should count in favor of statutory employment, but this argument collapses on itself because Mr. Seay *never* had a

viable compensation claim. Hijacking the Workers' Compensation Act to bar any remedies for Mr. Seay's death would be cruel, contrary to the Act's purpose, and unconstitutional.

A. The circuit court and the court of appeals correctly found Mr. Seay was not Celanese's statutory employee.

The first reason this Court should deny review is that the circuit court and court of appeals correctly found Mr. Seay was not Celanese's statutory employee.

i. Statutory employment requires a case-by-case analysis focused on whether the work in question was "part of" the larger business.

The laws covering "statutory" employment are found in sections 42-1-400 to -450 of the South Carolina Code. This case involves the first statute in the list, section 42-1-400. That statute explains an upstream person or business—the statute calls them an "owner"—who uses a subcontractor "to perform or execute any work which is a part of [the owner's] trade, business, or occupation," must pay workers' compensation benefits to the subcontractor's employees just as if those workers had been the owner's employees.

This statute's purpose is to protect workers. In *Harrell v. Pineland Plantation* this Court explained the statute exists in case the subcontractor is financially irresponsible. By making the upstream owner liable for benefits, the subcontractor's workers receive "double protection." 337 S.C. 313, 328, 523 S.E.2d 766, 773-774 (1999). Several other cases recognize this purpose. *Glover v. United States*, 337 S.C. 307, 311, 523 S.E.2d 763, 764 (1999); *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 362-363, 2 S.E.2d 825, 836 (1939).

The statute's key language—that the work be "part of [the owner's] trade, business, or occupation"—differentiates the situation where a business is avoiding its obligation to

cover people working "in" the business from the situation where a business legitimately hires outside contractors to do outside work. *Harrell*, 337 S.C. at 323, 523 S.E.2d at 771.

A likely reason why there are so many cases on this issue is that there is no precise formula for judging whether an activity is "part of" someone's "trade or business." In *Ost v. Integrated Products* this Court gleaned three "tests" from precedent: statutory employment applies when the subcontractor's work is "an important part" of the larger business; is "necessary, or essential to, or an integral part" of the larger business; or is customarily performed by the larger business's regular employees. 296 S.C. 241, 244-245, 371 S.E.2d 796, 798-799 (1988). These are constantly repeated in precedent.

Even so, precedents also constantly repeat a disclaimer. *Ost* explains "no easily applied formula can be laid down" and "[e]ach case must be determined on its own facts." 296 S.C. at 244, 371 S.E.2d at 798. Other cases recognize the same thing. *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003); *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997). In other words, these cases are all fact-bound.

This is not new. One of this Court's oldest bellwether decisions—*Marchbanks v. Duke Power*—quotes a Connecticut case explaining:

> No general rule is deducible from the authorities, and it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact, and it was with that in mind doubtless that in [a prior case] the Lord Chancellor said that it was 'neither convenient nor proper to travel beyond the facts of a particular case to lay down general rules to govern cases which may or may not arise hereafter.'

190 S.C. at 361, 2 S.E.2d at 835. Still, precedent makes it plain that the guiding principle is whether the work being done is "part of" the owner's "general trade, business, or

occupation." *Abbott v. The Ltd., Inc.*, 338 S.C. 161, 163, 526 S.E.2d 513, 514 (2000) (quoting *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)).

ii. Mr. Seay's work was not "part of" Celanese's business.

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

Daniel was not a manufacturer. It was a construction company that routinely built and maintained manufacturing plants. (App.p.1511, line 16 - p.1512, line 5). As of 1964, Daniel had built about 400 manufacturing plants in twelve states, more or less. (App.p.1510, lines 1-4). Daniel built the Spartanburg plant and performed all maintenance at the plant until sometime in the 1980s or 1990s. (App.p.1412, lines 9-12; p.1510, lines 14-15). It also handled maintenance at other plants across the country. (App.p.1512, lines 2-5).

Celanese employees worked in manufacturing and made fiber. They did not do maintenance. A Celenese witness explained Celanese employees "were responsible for making polyester and the related products." (App.p.1284, lines 13-19). This was consistent with other testimony. Mr. Seay said Celanese employees were "production workers" doing significantly different work than what he did for Daniel. (App.p.2095, lines 67:12-68:11).

Celanese admitted it was not in the maintenance business. During the pre-trial hearing Celanese argued Mr. Seay's work in maintenance was even more important than construction work would have been because Mr. Seay was doing daily maintenance on the

production lines Celanese used to make its products. (App.p.1713, lines 1-16). The circuit judge responded by asking whether Celanese was in the maintenance business. (App.p.1713, lines 17-20). Celanese's counsel answered that Celanese made polyester fiber. *Id.* When the circuit judge asked again, directly, whether Celanese was "in the construction business, [the] construction maintenance business" in Spartanburg the answer was "no." (App.p.1713, line 21 - p.1714, line 2). Celanese did manufacturing. It did not do maintenance.

Fairness requires acknowledging two things. First, the fact that Celanese was not "in" the maintenance business does not necessarily mean maintenance is not "part of" manufacturing. This was Celanese's basic argument. It said maintenance was "part of" manufacturing because a manufacturer cannot make anything if its systems and equipment are not maintained. (App.p.1714, lines 3-7).

The circuit court noted this argument's shortcomings. Lots of businesses need maintenance. (App.p.1714, line 18 - p.1715, line 6). The court also noted that businesses do not commonly hire people to do unnecessary work. (App.p.147, lines 14-23). The fact that maintenance was important to the business did not make it "part of" the business.

The second thing that should be mentioned was said back at the beginning: this is an area where line-drawing can be difficult. A leading treatise says "peripheral and auxiliary operations such as maintenance, construction, and delivery" are "[t]he activities which produce most of the close cases." 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 70.06[3], at 70-9 (2003). This Court said something similar in *Bridges v. Wyandotte Worsted Co.* when it said "[i]t is especially difficult to lay down any hard and fast rule with regard to such activities as repair and maintenance" because "[t]he practices

of different concerns operating in the same field often vary." 243 S.C. 1, 11, 132 S.E.2d 18, 23 (1963).

Larson's concludes with the following summation that should be helpful here:

> In some of the closer cases, which in the abstract look as though they might be decided either way, the courts rely heavily upon evidence of the past practice of this employer and employers in a similar business. ... From these cases it will readily be seen that the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction, or transportation service. The test ... is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.

Supra p.10, §70.06[10], at 70-21 to 70-22.

It is understandable that Celanese would say certain things tend to show maintenance might be "part of" the general manufacturing business. There was constant maintenance at the plant; enough to justify hiring Daniel to perform maintenance for a period of at least twenty years. There is also the fact that Celanese eventually brought maintenance work "in house." When Daniel's people began moving to another location in the 1980s or 1990s Celanese hired many of those people as employees. (App.p.1850, lines 98:10-24). This shows something that was already obvious: Celanese's business always needed maintenance.

Even so, other things point strongly in favor of the rulings below. Mr. Seay did specialized work. Celanese hired Daniel because Daniel had expertise and Celanese did not. Also, maintenance is not "part of" the manufacturing process. Daniel's workers did not manufacture anything or make any components of the product Celanese made. Celanese made and sold polyester fiber. It did not manufacture or sell "maintenance." *Daniel* sold maintenance. Maintenance was plainly "part of" Daniel's business, not Celanese's.

It is common for large businesses to rely on a number of peripheral activities that are always around but are not "part of" the business. In that sense, this case boils down to the question whether it is possible for a business to legitimately separate manufacturing from maintenance. Put differently, the case turns on whether manufacturers must, of necessity, always be in "the maintenance business" as well as "the manufacturing business."

The record does not bear out that manufacturers must necessarily be in the maintenance business. That certainly was not the way Celanese operated, and it seems to have been fairly common for manufacturers to be structured the same way because Daniel was plainly in the business of building and maintaining plants for manufacturers around the country. Nothing suggests this arrangement was an attempt to evade workers' compensation.

Nobody contests maintenance was important. It was just as important as the work that went in to building the plant, receiving raw materials, loading the finished product for transportation, and delivering the finished product to customers. But that does not mean maintenance is "part of" the manufacturing business. At the end of the day, there was and is no evidence, to use *Larson's* words, that maintenance is "normally carried on through employees rather than independent contractors." This activity was admittedly indispensable, but the evidence did not show it was "part of" manufacturing.

iii. The decisions below are faithful to precedent, which the courts cited in their decisions.

Before discussing precedent it is important to mention precedent's repeated instruction that each case involving a claim of statutory employment turns on its own facts. Cases with some similarities may nevertheless produce different outcomes because important facts are different.

The circuit court noted that each case turns on its own facts (App.pp.30 & 56) but it also found two particular precedents instructive.

The first of these was this Court's decision in *Olmstead v. Shapespeare*. That case recites the familiar language of the three statutory employment "tests" and the fact that each case must rest on its facts. 354 S.C. at 423-427, 581 S.E.2d at 484-486. It then explains that even though a task is important to an upstream business, it does not follow that the task is automatically "part of" the upstream business. 354 S.C. at 423-427, 581 S.E.2d at 484-486.

The circuit court read *Olmstead* to require the court to examine the type of business Celanese was conducting. (App.pp.31 & 51). The upstream business in *Olmstead* designed and manufactured fiberglass products. The injured worker was a truck driver. This Court explained that although delivering products was important to the upstream business, that did not necessarily mean delivery was "part of" the upstream business. *Id.* at 426, 581 S.E.2d at 486. The upstream business did not own any delivery trucks and none of its employees worked in delivery beyond loading cargo. *Id.* Delivery was not "part of" its business. *Id.*

The same analysis applies here: maintenance was important to Celanese, but Celanese did not have a maintenance division and none of its employees did maintenance until decades after Mr. Seay left. The circuit court noted this in its orders. (App.pp.33 & 61).

The second case the circuit court found particularly instructive was the decision of the court of appeals in *Raines v. Gould.* That case held an electrician installing an electrical system at a manufacturing plant was not the statutory employee of the plant's owner. *Raines,* 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986). The plant's owner—Gould, Inc.—had been involved in constructing several facilities, but it did not have a construction division and no

construction work was performed by its regular employees. *Id.* at 547, 343 S.E.2d at 659. Instead, Gould prepared designs for the facilities or oversaw the design process, and in some instances Gould provided supervising personnel giving general assistance to contractors and subcontractors. *Id.* The court of appeals reasoned "[e]very manufacturer must have a plant, but this fact alone does not make the work of constructing a plant part of [a manufacturer's] trade or business." *Id.*

The circuit court took two things from *Raines*. First, it noted the case's general observation that construction and installation work is ordinarily outside a manufacturer's trade or business. (App.p.59). Second, it acknowledged the case's recognition that these activities may be part of a manufacturer's business if the manufacturer has "a more or less ongoing program of construction, perhaps a construction division, or has handled its own construction in the past," and explained there was no evidence Celanese had a maintenance division or performed work of this size and scope. (App.pp.29-30 & 59-60).

Even though each case is different, the general facts in *Raines* are relatively similar to this case. Both cases dealt with manufacturers that had some involvement in managing a subcontractor's work. As Celanese did here, the manufacturer in *Raines* gave general directions and provided supervisory personnel to coordinate the subcontractor's activities. And as was true here as well, the manufacturer in *Raines* did not have a division doing the sort of work the subcontractor was doing or have any employees doing the sort of work the subcontractor was doing.

The court of appeals noted both of these precedents. Like the circuit court, it read *Olmstead* to mean the fact that certain work is essential "for" a particular business does not

automatically mean the work is an essential "part of" the business. (App.p.2861). It mentioned *Raines* as well, in two footnotes. (App.pp.2859 n.2 & 2862 n.4).

The court of appeals also devoted a substantial amount of time to explaining why it did not agree with Celanese's argument that precedent required the court to find Mr. Seay was a statutory employee. There, as here, Celanese claimed maintenance workers are always statutory employees of manufacturers.

The court of appeals rejected this argument, and rightly so. The court found it was inconsistent with precedent's instruction that there is no easy formula for determining whether particular work is "part of" a larger trade, business, or occupation and that each case must be determined on its own facts. (App.p.2862). The court understood Celanese to be making an argument that statutory employment was based on categories—Celanese said *Raines* was distinguishable because it dealt with building a manufacturing plant, *Olmstead* was distinguishable because it dealt with moving things from a manufacturing plant, and that maintaining a plant was different and could not be divorced from manufacturing. The court of appeals correctly found this argument was not persuasive. Instead, the court chose to follow precedent's instruction that each case stands on its own.

B. Respectfully, Celanese's arguments for further review are wrong.

The second reason this Court should deny review is that Celanese's arguments for further review are wrong.

i. The courts below did not change or alter the statutory employment "test."

Celanese claims the circuit court and the court of appeals have overruled precedent, adopted a new test, and disregarded the three guideposts that are often repeated in precedent:

that statutory employment includes work that is an important part of a business, a necessary or essential part of a business, or work that has been previously done by employees.

It is hard to see how the decisions below give any support to that interpretation. The circuit court explicitly repeated the three "tests." (App.pp.30 & 56). It also expressly recited that the ultimate guidepost is whether the subcontractor's work was "part of" the owner's general trade or business and that each case turns on its own facts. (App.pp.30 & 56).

The court of appeals did the same. (App.p.2859). The court of appeals also emphasized that the conclusion in this case was driven by the case's "unique facts." (App.p.2865). This was not a sweeping decision. It was fact-bound, just as all cases in this area are fact-bound.

ii. There is no conflict between the decisions below and precedent. Precedent says each case turns on its own facts.

Celanese also says the decision below conflicts with precedent.

It is hard to see how this could be true given precedent's instruction that each case rests on its own facts. All businesses are not required to be the same. Statutory employment prevents a business from thwarting the Workers' Compensation Act by using outside workers to perform the business's core operation, but nothing prevents a business from crafting its own identity and deciding what its business is and what its business is not.

The Court need not take Respondents' word for this. Precedent already identifies boundaries.

Two cases—*Harrell v. Pineland Plantation* and *Carter v. Florintine Corp.*—stand for the proposition that a business owner may not subcontract-out the entire business.

Carter, the older of the cases, involved a business whose sole asset was a shopping mall. 310 S.C. 228, 230, 423 S.E.2d 112, 113 (1992). That business was held to be the statutory employer of someone working for the management company that ran the mall. *Harrell* similarly involved a partnership that had a singular focus; it owned and operated a plantation used as a vacation resort. 337 S.C. at 318, 523 S.E.2d at 768. There as well, the partnership was held to be the statutory employer of the property manager that operated and maintained the plantation. These cases recognize that someone cannot be a passive owner who claims to have no active business and delegate the business's real operations to subcontractors. Ownership of something is not a discreet business in and of itself.

A third case—*Ferguson v. New Hampshire Insurance Co.*—is a marker showing how a business is free to craft its own identity. That case involved a business with a limited scope; the alleged statutory employer in *Ferguson* matched people who rented moving trucks with people who were willing to help in the moving process. 412 S.C. 203, 207, 771 S.E.2d 851, 853 (Ct. App. 2015). The court of appeals held the upstream business was not the statutory employer of someone who was hired to help someone else move, explaining the upstream business was not in the moving business but was merely operating a marketplace, like a broker. *Id.* at 211, 771 S.E.2d at 856.

This case fits neatly within these boundaries. There is no claim Celanese's relationship with Daniel was an attempt to subcontract all of Celanese's business or avoid the Workers' Compensation Act. Celanese knew its plant required maintenance. It made the decision to hire an expert firm like Daniel, probably because Daniel was in the maintenance business and Celanese was not.

As to Celanese's claim that precedent requires a finding of statutory employment, the key cases Celanese cited below were *Marchbanks v. Duke Power*, *Boseman v. Pacific Mills*, *Smith v. T.H. Snipes & Sons*, *Gentry v. Milliken*, *Woodard v. Westvaco*, *Wheeler v. Morrison Machine*, and *Edens v. Bellini*. Five of those cases—*Marchbanks*, *Gentry*, *Woodard*, *Wheeler*, and *Edens*—are readily and meaningfully distinguishable because the upstream businesses in those cases used regular employees for the same work they also outsourced to subcontractors.[1] None of those cases involved the situation where, as here, maintenance was exclusively performed by outside contractors for an extended period of time.

The court of appeals correctly explained *Smith v. T.H. Snipes & Sons* involved a welder who was repairing a machine the upstream business used in its regular operations. (App.p.2862) (citing 306 S.C. 289, 411 S.E.2d 439 (1991)). The decision contains virtually no analysis—it explains the case was decided on stipulations. *Id.* at 292, 411 S.E.2d at 440. *Smith* also predates this Court's decision in *Glass v. Dow Chemical Co.* which explained major and specialized repairs are generally not part of an upstream business. 325 S.C. at 202, 482 S.E.2d at 51.

Boseman v. Pacific Mills also predates *Glass* and is of questionable value because the injured worker there was using special equipment and doing work that had not previously been done by the upstream business's employees. The injured worker in *Boseman* was painting a water tower that serviced a textile mill and was held to be the mill's statutory

---

[1] See *Marchbanks*, 190 S.C. at 366, 2 S.E.2d at 837; *Gentry*, 307 S.C. 235, 236, 414 S.E.2d 180, 181 (Ct. App. 1992); *Woodard*, 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993); *Wheeler*, 313 S.C. 440, 443, 438 S.E.2d 264, 266 (Ct. App. 1993); and *Edens*, 359 S.C. 433, 443-444, 597 S.E.2d 863, 868-869 (Ct. App. 2004).

employee on the grounds that the mill could not function without the water tower. 193 S.C. 479, 483, 8 S.E.2d 878, 880 (1940). It is also hard to reconcile *Boseman* with *Raines* and understand how upgrading a plant's water tower is different from upgrading a plant's electrical system.

The court of appeals handled these cases the right way. The court discussed many of them but ultimately returned to precedent's instruction that each of these cases rest on their own facts. (App.p.2865). This is an area where general pronouncements are often more confusing than they are helpful for the precise reason that the size and scope of the businesses that are involved can vary widely from cases to case. There is no conflict between the result here and the result in other cases. The facts here are different.

iii. Finding statutory employment would also thwart the benevolent purpose of the Workers' Compensation Act and be cruel as well as unconstitutional.

Celanese continues to claim that any doubts in this case should be construed in favor of statutory employment.

Respondents do not believe this is a close case with any serious doubts to construe one way or the other. Celanese was a large and sophisticated operation that made a deliberate decision to hire Daniel because Daniel was in the maintenance business and Celanese was not. Even so, it bears mentioning that Celanese is seeking to pervert the purpose behind the Workers' Compensation Act and that if statutory employment *did* apply, it would require other parts of the Act to fall.

The reason Celanese's argument perverts the Act is that Mr. Seay never had a viable workers' compensation claim. The statute of repose for occupational diseases bars him from

making a workers' compensation claim because his mesothelioma was not contracted within two years year of his last exposure to asbestos. S.C. Code Ann. § 42-11-70 (2015).

It would be wasteful to recite all of the cases explaining that the Workers' Compensation Act was designed to protect injured workers, not to harm them. In *Marchbanks*, this Court said the Act should be liberally interpreted in light of its "beneficent purpose" and to avoid "harsh results." 190 S.C. at 361, 2 S.E.2d at 835. In *Kennerly v. Ocmulgee Lumber Co.* this Court said "[t]he primary purpose of a workmen's compensation act is to protect the workman who actually does the work." 206 S.C. 481, 488, 34 S.E.2d 792, 795 (1945). In *Parker v. Williams & Madjanik* this Court reviewed how workers' compensation is based on the need to provide injured workers with "adequate compensation" and that providing swift and sure compensation is the quid pro quo that justifies giving employers immunity from suit in tort. 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980). In *Ost*, this Court explained the Act's "primary objective is to create and preserve" the rights of injured workers. 296 S.C. at 247, 371 S.E.2d at 799. This is just a sample. Many cases use this sort of language.

That purpose is actively thwarted by finding statutory employment in a case where the injured worker never had any way to make a claim for workers' compensation. And on this same point, it bears mentioning that many of the cases Celanese cites—cases like *Marchbanks*, *Boseman*, and several others—are cases where the injured worker had either already recovered workers' compensation benefits or where the right to bring a claim was stipulated. None of those cases involved the situation where statutory employment left an injured worker without *any* avenue for compensation.

This sort of senseless cruelty would not just be a statutory problem. It would violate the South Carolina Constitution's guarantee that "every person shall have a speedy remedy [in court] for wrongs sustained." S.C. Const. art. I, § 9. This Court has held that the Constitution does not guarantee "full compensation" to all injured persons, *Wright v. Colleton Cty. Sch. Dist.*, 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990), but that is different than leaving a plaintiff like Mr. Seay and his family without any remedy and with no compensation whatsoever—none—for their loss.

In 2013 the state of Pennsylvania used this reasoning to hold that an injured worker who contracted mesothelioma could maintain a tort claim against his employer because to hold otherwise would leave the injured worker without any remedy. *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013). The court noted the average latency period for mesothelioma is 30 to 50 years and said it was "inconceivable" to assume the legislature, in enacting a scheme to protect injured workers, intended to leave employees who suffered the most serious injuries possible without any remedy. *Id.* at 863-864.

Pennsylvania is not an outlier. Maryland's highest court has held unreasonable restrictions leaving innocent victims with no compensation are unconstitutional. *Jackson v. Dackman Co.*, 30 A.3d 854, 869 (Md. 2011). The Larson treatise makes the same point a different way, explaining:

> Suppose a statute were passed which said that, in the event of any highway collision, suit must be commenced within two years of the last presidential election. This is in no way sillier or more oppressive than a statute which says that a person who gets a bit of grime in an eye in 1990 which causes only slight irritation must bring a claim for blindness within one year of that time—blindness does not develop until 1992.

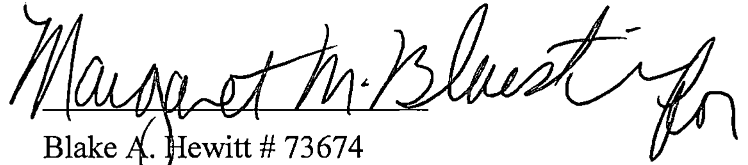
7 Larson & Larson, *supra* p.10, §126.07[1], at 126-38.

To be clear, there is no need to reach any issues involving the perversion of the Workers' Compensation Act and the cruelty of denying any remedy to Mr. Seay's family. The circuit court and the court of appeals correctly found that statutory employment did not apply. If, however, statutory employment *did* apply, the end result would be the same. A result that would bar any remedies for Mr. Seay's death would be cruel, contrary to the purpose of the Workers' Compensation Act, and unconstitutional.

CONCLUSION

For the foregoing reasons this Court should deny the petition.

Respectfully submitted,



August 5, 2019

Chris Panatier (pro hac vice)
Kevin W. Paul (pro hac vice)
SIMON GREENSTONE PANATIER BARTLETT PC

John D. Kassel # 3286
Theile B. McVey # 16682
KASSEL MCVEY

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
AUG 05 2019
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Op. No. 5625 (S.C. Ct. App. filed Feb. 13, 2019)
Appellate Case No. 2019-000816

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

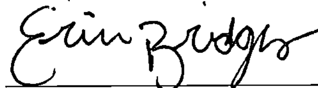
v.

CNA Holdings, LLC, ... Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

C. Mitchell Brown
A. Mattison Bogan
Blake T. Williams
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, SC 29211



August 5, 2019

Erin Bridges