

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

Sep 09 2021

S.C. SUPREME COURT

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

Appellate Case No. 2019-000816  
Case No. 2013-CP-42-03915

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

Respondents,

v.

CNA Holdings, LLC,.....

Petitioner.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, CNA Holdings, LLC (“Celanese”) respectfully files this Petition for Rehearing. Celanese requests that rehearing be granted regarding Opinion No. 28052 (S.C. Sup. Ct. filed August 11, 2021) (Shearouse Adv. Sh. No. 27 at pp. 50-70, hereafter “Opinion” or “Op.”), and that this Court issue a new opinion ruling in favor of Celanese or, failing that, order rehearing and further oral argument because:

**I. The Court’s Opinion Misapprehends Facts Central To Its Analysis And Holding.**

Facts central to the Opinion’s analysis and holding are misapprehended. These facts include the following:

### A. The “Business Judgment” Or “Business Decision” Facts

Throughout the Opinion, the Court focuses on the “business decision” or “business judgment” of putative statutory employers. (Op. 56, 57, 59, 61, 62)<sup>1</sup> The Opinion crystalizes the centrality of the putative statutory employer’s “business decision” by holding that “today *we refocus on the key question* posed by the statute. In answering the question posed by Section 42-1-400—whether the work contracted out is ‘part of [the owner’s] trade, business or occupation’—the court should focus initially on what the owner decided is part of its business.” (Op. 61; (emphasis added)) The Opinion then elaborates on its new *refocus* analysis, holding that: “In reality, therefore, what is or is not ‘part of’ the owner’s business is a question of business judgment, not law.” (*Id.*)

Having framed the statutory employee analysis standard as a refocus “initially” on the owner’s “business judgment, not law,” the Opinion then finds, as fact, that “[i]n this case, there is no question [Celanese] made a legitimate business decision to outsource its maintenance and repair work. [Celanese] clearly had no intention of avoiding the cost of insuring the workers who did the work against work-related injuries. In fact, ‘to its credit’ as we stated, [Celanese] provided in its contract with Daniel that the workers must be insured and [Celanese] would pay for it. [Celanese] business managers considered the economic interests of the company and determined maintenance and repair was not ‘work which is a part of [its] trade, business or occupation.’” (Op. 62)

---

<sup>1</sup> The Opinion’s statements about the importance of the owner’s business decision include: (i) “the defendant’s management made a business decision to have its own employees handle the work” (*Id.* 56); (ii) “we honored the original business decision” (*Id.* 57); (iii) “[t]he fact the work was performed on one occasion by a contractor did not change the defendant’s business decision to include maintenance and repair . . . as a part of its business” (*Id.*); (iv) “our recognition of the importance of corporate decision making is inescapable” (*Id.*); (v) “[w]e recognized, however, that corporate managers often choose not to make major or otherwise specialized repairs part of their business” (*Id.* 58); (vi) “we put value on the business decisions of management” (*Id.* 59); and (vii) “we honored Daniel’s decision to remove the provision of concrete from the scope of its business even though Daniel’s own employees did the same work on other jobsites.” (*Id.*)

The Opinion’s factual conclusion, that Celanese made the business decision that “maintenance and repair was not ‘work which is a part of [its] trade, business or occupation” (Op. 62), is contrary to the undisputed Record facts, internally inconsistent, and economically unsound. In this regard:

*First*, the only Record evidence and facts regarding Celanese’s “business judgment” and decision are that it is undisputed Celanese’s decision makers believed Mr. Seay’s work was an essential, integral, necessary and important part of Celanese’s trade, business and occupation.<sup>2</sup> Significantly, there is no contrary evidence or facts in the Record concerning the business decision and judgment made by Celanese’s managers.

*Second*, the Opinion’s factual finding about Celanese’s business decision is internally inconsistent and contradictory. Thus, the Opinion finds that, “‘to its credit’ as we stated, [Celanese] provided in its contract with Daniel that the workers must be insured and [Celanese] would pay for it.” (Op. 62) But the only reason Celanese would pay for Mr. Seay’s and other Daniel employees workers’ compensation insurance is because Celanese made the “business decision” that Mr. Seay’s work was an important, necessary, essential and integral part of Celanese’s manufacturing business. Otherwise, there is no rational explanation for why Celanese managers would pay insurance premiums for Daniel employees like Mr. Seay if Celanese had no legal obligation or responsibility for doing so.

The Opinion’s finding that Celanese made the business decision to pay for Mr. Seay’s worker’s compensation insurance simply cannot be reconciled with its conclusion that Celanese “business managers considered the economic interests of the company and determined

---

<sup>2</sup> See the “**Statement Of The Relevant Facts**” with supporting evidentiary citations, at pages 4-7 of Celanese’s “Brief Of Petitioner” filed with the Court in this appeal on December 2, 2019; and see also the Dissent’s summary of the key facts at pages 68-69 of the Opinion.

maintenance and repair was not ‘work which is a part of [its] trade, business or occupation.’ (Op. 62) The “economic interests” of the Celanese company include compliance with the law and thus payment of the insurance premiums necessary to comply with the Workers Compensation Law—not to gratuitously pay insurance premiums for another businesses’ employees for which, under the Opinion’s ruling, Celanese had no responsibility.

There is an old adage in both politics and the law, which goes like this: ‘To know the truth, follow the money.’ Well, as the Opinion itself says twice (Op. 60, 62), Celanese paid for Mr. Seay’s worker’s compensation insurance, along with the insurance for the other Daniel employees working daily at Celanese’s manufacturing facility. The only reason Celanese did so is because its “business decision” was that Mr. Seay’s work was an important, necessary and essential part of its trade, business or occupation. Moreover, such a “business decision” should come as no surprise given eight decades of prior precedent holding that South Carolina’s public policy favors coverage under the Worker’s Compensation Law, as well as the many cases so holding. Indeed, the Opinion itself recognizes this point, as it observed that “[i]f the infrequently-performed work the subcontracted employees performed in *Marchbanks*, *Boseman*, and *Bell* qualified for statutory employee status, it is difficult to imagine the regular—daily, in fact—maintenance and repair work Seay and his co-workers performed at [Celanese] does not also qualify.” (Op. 56)

*Last*, the Opinion’s conclusion that Celanese made the business decision that Mr. Seay’s maintenance work was not part of its business (Op. 61-62), is necessarily based upon one of two assumptions, either (i) that Celanese is a non-profit charity, or (ii) that Celanese made a business decision that was economically irrational and a waste of corporate assets. In this regard, it is undisputed that Celanese is a publicly held, profit-making business enterprise. There is no rational economic reason for why it would gratuitously pay workers’ compensation insurance premiums

for a subcontractor's employees unless it had made the business decision that the daily work of those employees at Celanese's manufacturing facility was an important and essential part of its business. Whilst Celanese aims to be a good corporate citizen, it is not a non-profit charity. Its business decision to pay for the insurance only makes sense if Celanese decided that Mr. Seay (and other Daniel employees) were its statutory employees.

### **B. The "Who Provides Coverage" Facts**

The Opinion finds that Celanese, "to its credit . . . mandated through contract that the maintenance workers would be insured." (Op. 60) The Opinion also finds that Celanese, again "to its credit," agreed it "would pay for" that Workers' Compensation insurance. (*Id.* 62) But rather than conclude based on these facts that Celanese's business decision was that Mr. Seay and other Daniel employees were the statutory employees of Celanese, the Opinion says that because "[t]he applicable public policy . . . is to ensure that workers are covered under the Workers' Compensation Law . . . [i]t does not matter to the fulfillment of this policy who provides the coverage." (Op. 60)

What the Opinion overlooks is the inherent economic and factual linkage between who pays for the insurance and the fulfillment of the statute's public policy purpose. The only reason a company like Celanese would pay workers compensation insurance premiums for a subcontractor's employees is if Celanese had made a business decision reflecting its judgment that Celanese was a statutory employer obligated to provide and pay for that insurance. The "public policy" and statute's "original purposes" were fulfilled in this case not because Celanese is an eleemosynary institution, but because its business judgment and decision obligated it to do so.

### **C. The "Original Purpose" Facts**

The Opinion states that "[t]he original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers' compensation benefits, because

Daniel provided those benefits.” (Op. 62) But that statement reflects both an incomplete *and* inaccurate rendition of the Record. Indeed, it ignores undisputed facts the Opinion itself relies upon, specifically, that (i) Daniel provided the workers’ compensation insurance benefits because its contract with Celanese “*mandated*” that (*Id.* 60 (emphasis added), 62), and (ii) Celanese—not Daniel—paid for the insurance in order to protect Mr. Seay and other Daniel workers. (*Id.* 62) It is difficult to comprehend how the party that “mandated” and then paid for the workers compensation insurance benefits is not the one fulfilling the “original purpos[e]” of the statutory employee doctrine. (*Id.*)

The Opinion also says “[i]t is not the role of courts to second-guess a legitimate business decision whose effect—far from the improper purposes the statutory employee doctrine was designed to prevent—was actually to guarantee that the workers affected by the decision would be insured against work-related injuries.” (Op. 62-63) But this is precisely the point made by Celanese. Celanese made a legitimate business decision that Mr. Seay and other Daniel employees who provided it with daily maintenance were an essential, necessary, important and integral part of its business, which is why it “actually” took the steps to “guarantee” workers’ compensation insurance for them.

In addition, the Opinion’s holding that “[t]he original purposes [of the statutory employee doctrine] are certainly not served by granting [Celanese] immunity for its wrongful conduct” (Op. 62) once again breaks the linkage between the payment of the Workers’ Compensation Law insurance, the business judgment reasons for that payment, and the immunity that should result from providing such coverage. The entire workers’ compensation scheme depends upon employers who are obligated to provide workers’ compensation insurance actually providing and paying for the insurance. Celanese did that, because its business decision was that Mr. Seay was

a statutory employee for whom Celanese was responsible under the statute. But to hold, as the Opinion does, that Celanese “mandated” and agreed to “pay for it” (*Id.* 60, 62) but nevertheless is not entitled to the accompanying civil liability immunity, breaks the bond between coverage and civil liability protection.

Finally, the Opinion adds that “Seay’s family presumably received the worker’s compensation benefits [Celanese] obligated through contract that Daniel must provide.” (Op. 62) But this statement is incorrect. It overlooks the undisputed facts that Mr. Seay and his family never pursued worker’s compensation benefits, and thus did not receive any. This statement also overlooks the facts that Mr. Seay and his family obtained settlements from other defendants in this tort action totaling \$1.214 million, pursuant to the setoff entered by the trial court.<sup>3</sup> Indeed, these undisputed facts confirm that allowing the judgment against Celanese to stand will fundamentally alter the decades-long balance between workers compensation and tort law by opening the Courts to a flood of litigation from those whom workers compensation is designed to protect but who will now choose not to pursue workers compensation claims and instead, will roll the proverbial dice by pursuing tort claims seeking greater damages against all South Carolina businesses who traditionally under the law have been exempt from suit as statutory employers. In the end, such an approach and litigation will upset the foundation and frustrate the very purposes of the Workers Compensation Law—ultimately to the detriment of both the employers and employees of this State.

\* \* \*

---

<sup>3</sup> See discussion of these facts, points and the arguments made by Mr. Seay and his family seeking to excuse their failure to pursue a worker’s compensation claim at pages 15-17 of the February 28, 2020 Reply Brief of Petitioner Celanese in this Court.

The misapprehended facts discussed above have significant implications for the future of the statutory employer doctrine in this State, and whether it even exists going forward, as discussed in Sections III, IV and V, below.

**II. Rehearing Should Be Granted To Allow The Parties To Brief The Rationale And Consequences Of The Opinion’s New Analysis.**

The Opinion’s new “refocus” analysis was not argued, considered or briefed by the parties to this appeal. This Court thus did not have the benefit of hearing from the parties (or any amicus) as to their views regarding its implications for the existence and scope of the statutory employee doctrine, or the likely marketplace consequences. Under these circumstances, granting this Petition for Rehearing is appropriate, not only in fairness to the parties and the many thousands of workers and business owners who will be affected by this decision, but also in fairness to the process, so that the Court can have a full exposition of the Opinion’s analysis and inevitable consequences.

**III. The Opinion Rewrites The Workers’ Compensation Law.**

The Opinion acknowledges that “[i]f the infrequently-performed work the subcontracted employees performed in [prior cases] qualified for statutory employee status, it is difficult to imagine the regular—daily, in fact—maintenance and repair work Seay and his co-workers performed at [Celanese] does not also qualify.” (Op. 56) The Dissent agrees, stating that “[t]he totality of these circumstances satisfies two of the three tests” for statutory employment, and that even under the Opinion’s analysis, “Seay’s status as a statutory employee of [Celanese] was much stronger than the employees in our prior cases in which we held the employee was a statutory employee.” (*Id.* 69)

Nevertheless, the Opinion holds Celanese was not Mr. Seay’s statutory employer and, in so doing, rewrites the Workers Compensation Law as well as implicitly overrules decades of prior

precedent to effectively eliminate the statutory employee doctrine altogether for most if not all business owners in the future.

**A. The Opinion’s Analysis Deviates From Settled Rules of Statutory Construction.**

The statutory employee doctrine is not judge-made, but created by the General Assembly and codified in the “South Carolina Workers Compensation Law” as Section 42-1-400 (originally Act. No. 610, 1936 S.C. Acts 1231) (Op. 52-53). To guide enforcement and implementation of Section 42-1-400, this Court adopted the three factor test, which focuses on and is grounded in the statute’s text to determine whether a business owner is or is not a statutory employer. In construing a statute, a Court examines and enforces the statutory language as written. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) (“It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.”); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535–36, 725 S.E.2d 693, 695 (2012) (“[W]e must follow the plain and unambiguous language in a statute and have ‘no right to impose another meaning.’” (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))); *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) (“When reading a workers’ compensation statute this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities . . . ‘The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.’” (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581)).

Consideration of the statute’s purpose, on the other hand, is only appropriate when necessary to fulfillment of the statutory language, or to assist in interpreting a statute that might lack the necessary precision. *Smith*, 419 S.C. at 556, 799 S.E.2d at 483 (“Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to

discern its meaning. ‘[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning’ unless a statutory provision is ambiguous.” (quoting *Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)); see also *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020) (“[I]t is ultimately the provisions of” [the] legislative commands ‘rather than the principal concerns of our legislators by which we are governed.’” (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998))).

Rather than applying the plain statutory text of Section 42-1-400 by following this Court’s traditional three factor test and asking whether the work at issue is “part of” of the owner’s “trade, business or occupation,” the Opinion adopts a new “refocus” analysis in which it centers its analysis on (i) the General Assembly’s “original purpose” for enacting the statutory employee doctrine (Op. 51, 53, 54, 60, 61, 62), and (ii) “on what the owner decided is part of its business.” (*Id.* 61) The Opinion explains its new “refocus” analysis as follows:

“The question posed by section 42-1-400 today is the same key question we addressed in *Marchbanks*: whether the work contracted out is ‘part of [the owner’s] trade, business or occupation.’ Over time, we developed what we called ‘tests’ for courts and the workers’ compensation commission to use in answering the key question. [citations and parentheticals omitted] While each test remains a valid consideration, today, we *refocus* on the key question posed by the statute.

In answering the question posed by section 42-1-400—whether the work contracted out is ‘part of [the owner’s] trade, business or occupation’—the court should focus initially on what the owner decided is part of its business. . . . In reality, therefore, what is or is not ‘part of’ the owner’s business is a question of business judgment, not law. If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company’s business to not include that particular work.”

(*Id.*; emphasis added)

In applying this new “refocus” analysis, the Opinion deviates from settled rules of statutory construction. It does so by elevating the statute’s “original purpose” as modified by an understanding of the “modern economy” (Op. 62) to render meaningless the statutory text. In this regard, *first*, even if one considers the statute’s “original purpose” rather than its text, a statutory interpretation based upon that “original purpose” should not be modified by what allegedly has changed since 1936 to now “become standard in the modern economy.” (*Id.* 62). The original purpose was to protect workers; whether the “modern economy” does it differently than in 1936, or whether in the modern economy it is now “standard . . . for business to bear the cost of insuring workers against injury,” has no relevance to what statutory text means.

*Second*, focusing on the “original purpose” does not answer the “key question”—which is, “whether the work contracted out is ‘part of [the owner’s] trade, business or occupation.’” The three factor test provided alternative tests for answering that statutory text question based upon the factual record. But the Opinion’s new “original purpose” analysis as modified by the “modern economy,” does not.

Now, one might say in rejoinder that the Opinion is not really centered on the “original” statutory purposes as modified by an understanding of the “modern economy,” but instead, that its rationale or *ratio decidendi* is its consideration of the owner’s “business judgement” or “business decision.” But if that is the case, then the Opinion reaches both an illogical and counter-factual conclusion in ruling adverse to Celanese. Thus, the Opinion states that “[i]f a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company’s business to not include that particular work.” (Op.

61) But that sentence’s last clause—“has legitimately defined the scope of her company’s business to not include that particular work”—is not logically or even factually connected to the business owner’s decision to outsource. Why not? Two reasons:

*One*, the business owner’s decision to outsource an essential, integral, necessary business function does not mean that the business does “not include that particular work.” That is simply a conclusion but not one based on the facts of the individual business decision. Nor is it based on any language in the statutory text.

Moreover, *two*, in this case the undisputed factual record was that Celanese’s decision to outsource maintenance did not reflect a business decision by Celanese that Mr. Seay’s work was not part of its trade, business or occupation. To the contrary, the only record evidence is that Celanese’s business decision was that Mr. Seay’s work *was* part of Celanese’s business, which is why Celanese paid for his workers’ compensation insurance.

These two points thus return us to the Opinion’s analytic focus on the statute’s “original purpose,” because the Opinion’s justification for its conclusion that outsourcing means that the business “manager has legitimately defined the scope of her company’s business to not include that particular work” (Op. 61), is the explanation offered on page 62 of the Opinion regarding the “original purpose” as understood in the “modern economy”:

“The original purpose of the statutory employee doctrine was to prevent business managers from outsourcing work for the purpose of avoiding workers’ compensation costs. That purpose has nothing to do with outsourcing work for legitimate business reasons. Moreover, unlike the economy of 1936, it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury. Seay’s family presumably received the worker’s compensation benefits [Celanese] obligated through contract that Daniel must provide. The original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers’ compensation benefits . . . .”

(Op. 62)

In short, by elevating its statutory purpose analysis as informed by the modern economy over that of the statutory text, the Opinion has not only deviated from the traditional rules of statutory construction, but by doing so it has stripped Section 42-1-400 of all meaning. This is because the Opinion focuses not on the question of whether the outsourced work is a “part of” the owner’s business, but instead concludes that as long as the statutory purposes have been fulfilled, any decision to outsource by definition means that the business owner has “defined the scope” of its business to exclude the outsourced work. This elevation of statutory purpose over the statutory text of the statute not only deviates from settled rules of statutory construction, but also cannot be squared with the undisputed factual record in this case.

**B. The Opinion’s Focus On The Original Statutory Purpose Fails To Consider All Of The Statute’s Purposes.**

Yet another concern is the Opinion’s failure to consider the full scope of the statute’s purposes. Thus, the Opinion holds that “[t]he original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers’ compensation benefits, because Daniel provided those benefits.” (Op. 62) This assumes, however, that under the law the statutory purpose was that there can only be one statutory employer. But the problem with this holding is that, until now, that has not been understood to reflect the full scope of the General Assembly’s statutory purposes as previously explained by this Court.

Thus, in *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980), this Court examined the breadth and scope of Section 42-1-400’s statutory purposes, and held as a matter of law that more than one employer can be a statutory employer. In *Parker*, a worker employed by a subcontractor was fatally injured and his estate thus sued both the property owner on which the worker was working as well as the general contractor that had hired the subcontractor. At trial, the property owner was exonerated, but a jury verdict was entered in the estate’s favor

against the general contractor. On appeal to this Court, both the property owner and the general contractor argued that the claims against each of them should have been dismissed as a matter of law because they each were a statutory employer of the subcontractors' worker and therefore immune from suit under the Workmen's Compensation Law exclusivity provision.

This Court unanimously agreed. In reaching its decision, the *Parker* Court analyzed the statute as well as the General Assembly's purposes for enacting it. 275 S.C. at 75, 267 S.E.2d at 529. Based upon its analysis, the Court held "as a matter of law that both [the owner] and [the general contractor] were statutory employers of the decedent and, as such, immune from this tort action. They were the statutory employers of the subcontractors' . . . employees, including the decedent, because our compensation law makes them liable to provide workmens' compensation coverage." *Id.* at 70, 267 S.E.2d at 526-27. As the Court explained: "The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business . . . . In consequence, both the owner and the contractors whom he engages to do his work are subjected to the requirements of the Act, *and the workers receive double protection.*" *Id.* at 73, 267 S.E.2d at 528; (emphasis added); *see also Gentry v. Milliken & Company*, 307 S.C. 235, 238, 414 S.E.2d 180, 182 (Ct. App. 1992) (citing *Parker* as holding that a wrongful death suit against the owner and general contractor were barred "because the owner and general contractor were [each] found to be the worker's statutory employers").

In short, the statutory purposes as explained by this Court in *Parker* were not narrowly limited to recognizing a single statutory employer only, particularly given the broad protective purposes of the statute, including the obvious advantage of providing workers with "double

protection.”<sup>4</sup> *Parker’s* holding, as well as its understanding of the statutory purposes, cannot, we submit, be reconciled with the Court’s Opinion in this case, with its narrow focus on whether the injured worker was covered by insurance or not, regardless of who provided it and regardless of whether the work performed by that worker was a part of the business owner’s trade, business or occupation.

Moreover, the General Assembly is presumed to be aware of this Court’s interpretation of its statute in *Parker. Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied*, 523 U.S. 1145 (1998) (there is a basic presumption the General Assembly has knowledge of judicial decisions construing legislation when later statutes are enacted concerning related subjects). As has previously been understood and explained by this Court, if the General Assembly considered a prior decision of the Court or courts outdated, or mistaken, then the General Assembly could have changed the statute to address that concern. *See State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (“Because we are adhering to our earlier interpretation of a *statute*, the General Assembly is free to correct any misinterpretation on our part.”) (emphasis in original).

This Court has for decades stated the purpose of the statute here, and applied the three factor tests. The General Assembly is thus presumed to have understood all this time how its statute was being interpreted and applied. It has not altered this purpose or application, but rather,

---

<sup>4</sup> Ironically, on page 3 of their August 5, 2019 “Return to Petition for Writ of Certiorari,” filed with this Court, Respondents (Plaintiffs) recognized the importance of the statute’s “double protection” purpose when they wrote and admitted that “the “statute’s purpose is to protect workers” and moreover, as “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.’***” (emphasis added).

left it as is. This Court’s new Majority Opinion thus frustrates the statute’s purpose and application as understood by all, including the General Assembly.

**C. The Opinion Rewrites The Statutory Employee Doctrine As Codified.**

It is black letter law that a Court should not rewrite a statute, as that power is reserved to the General Assembly, not the judiciary. *See, e.g., Smith*, 419 S.C. at 559, 799 S.E.2d at 485 (“[W]e must defer to the will of the legislature *as expressed in the Act*. If the policy balance struck by the legislature in Act is to be changed, that prerogative lies exclusively within the province of the Legislative Branch.”) (emphasis added); *id.* (“In honoring separation of powers, we adhere to the principle that a court must not reject the legislature’s policy determinations merely because the court may prefer what it believes is a more equitable result.”); *see also Bostock*, 140 S. Ct. at 1738 (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process.”); § 75:3. Workers’ compensation, 3C Sutherland Statutory Construction § 75:3 (8th ed.) (“[C]ourts cannot provide an interpretation inconsistent with the statute’s language.”).

The Opinion in this case not only renders the current text of Section 42-1-400 meaningless, as discussed above, it also rewrites the statute in at least three ways.

**First**, the Opinion writes into the statute a new term, specifically, that if the subcontractor’s employee is covered by workers compensation insurance provided by his or her direct employer (the subcontractor), then the business owner cannot also be a statutory employer. Section 42-1-400 does not say that. Moreover, this Court’s *Parker* decision, *supra*, held the opposite.

**Second**, the Opinion writes out of the statute altogether the following language—“a part of his trade, business or occupation.” That language has no relevance under the Opinion’s analysis,

because all that matters now is whether the statutory purpose was fulfilled by the presence of insurance, regardless of who provides for it. (Op. 60: “It does not matter to the fulfillment of this policy who provides the coverage.”)

*Third*, the Opinion inserts another new term into the statute, one that precludes a business owner from outsourcing if it wants to be a statutory employer. In this regard, the Opinion holds that any business decision to outsource means that “the business manager has legitimately defined the scope of her company’s business to not include that particular work,” so long as the decision to outsource “is not driven by a desire to avoid the cost of insuring workers.” (Op. 61) As this formulation encompasses all or nearly all subcontracting relationships, it is difficult to envision any subcontracting relationship that will in the future give rise to a statutory employee relationship so long as the employee is covered by insurance.

In sum, Section 42-1-400 has been rewritten so that whether there is a statutory employer or not turns only on answering the simple question of: Is the subcontractor’s employee covered by insurance or not? If the answer is yes, as the Opinion suggests it almost always will be because “it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury” (Op. 62), then no business owner can ever be a statutory employer. But a new test for statutory employer and employee status that turns on the existence of insurance is not what the statute provides. And, such a test eliminates the “double protection” referenced in this Court’s *Parker* decision.

Finally, the Opinion asserts that its new “refocus” analysis is not inconsistent with the statute’s purpose or public policy because the “applicable public policy . . . is to ensure that workers are covered under the Worker’s Compensation Law. It does not matter to the fulfillment of this policy who provides the coverage.” (Op. 60) (citations omitted) Accordingly, “[t]he decisions of

the circuit court, the court of appeals, and now this Court, in no way frustrate the policy of the statutory employee doctrine or the Worker’s Compensation Law” given that Mr. Seay was insured by the insurance that Celanese purchased for him and other Daniel workers. (*Id.*) As a result, “[t]he original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of worker’s compensation benefits, because Daniel provided those benefits” under its contract with Celanese, for which Celanese paid. (*Id.* 62). The concern with this holding is that it constitutes a radical change in the statutory employee doctrine, effectively eliminating it for most if not all business owners, and in the end, frustrating the statute’s “original purpose” (Op. 51, 62 ) by putting subcontractor workers at not insignificant risk of having no insurance coverage under the Workers’ Compensation Law, as discussed in Section V, below.

#### **IV. The Opinion Neuters Decades Of Precedent.**

Despite protestation to the contrary, the Opinion renders eight decades of prior statutory employee doctrine case law meaningless in practice. In this regard:

*First*, the traditional three factor test, upon which South Carolina employers have long relied to determine their obligations under the Workers Compensation Law,<sup>5</sup> has been replaced by the Opinion’s new “refocus” analysis. (Op. 61) Thus, although the Opinion says that “each test remains a valid consideration” (*Id.*), it is difficult to envision any scenario under which the three factor test might ever be considered to determine the applicability of the statutory employee doctrine. This is because once a business owner decides to outsource work that “formerly was handled as part of the business,” and does so for business reasons “not driven by a desire to avoid the cost of insuring workers,” then the Opinion holds that the business owner has “legitimately defined the scope of her company’s business to not include that particular work.” (Op. 61) *By*

---

<sup>5</sup> Celanese discussed the three factor test precedents in its December 2, 2019 “Brief of Petitioner,” at pages 9-16, and 19-34.

*definition* the Opinion’s new “refocus” analysis eliminates the need to consider the three factor test because unless the outsourcing is for some illegitimate purpose,<sup>6</sup> outsourcing of work always will result in the conclusion that the company’s business does not include that work.

That the three factor test case law has been neutered by the Opinion is further confirmed by the Court’s statement that “[i]t does not matter to the fulfillment of this policy who provides the coverage.” (Op. 60; *see also* 62)<sup>7</sup> What this means is that a business that contracts with any subcontractor which provided Workers Compensation insurance for the subs’ employees can never be a statutory employer because the Opinion holds that the original statutory purposes have been fulfilled by that coverage. As a result, the three factor test’s analysis as to whether a subcontractor employee’s work is an important “part of” the owner’s business or trade, or is a necessary, essential and integral part of the business, or has previously been performed by the owner’s employees, has no relevance.

The three factor test, in short, asks a different but now irrelevant question based upon the statutory language—*i.e.*, was the work of the subcontractor’s employee necessary, essential and an integral part of the business, or important to the business? In contrast, the Opinion’s new “refocus” analysis simply asks whether the statute’s “original purposes” were fulfilled and, if so,

---

<sup>6</sup> The Opinion does not define what is a “legitimate” or illegitimate business decision for these purposes. But in the context of its analysis, legitimacy clearly turns on the answer to the singular question of whether the reason for outsourcing was or was not designed to avoid the costs of providing workers’ compensation insurance for a subcontractor’s workers. (Op. 61)

<sup>7</sup> While the Opinion expresses the view that it is not overruling the three factor test, this is not how the Opinion is being understood by many of those reading the Opinion. *See, e.g.*, the following from South Carolina Lawyers Weekly: “[T]he Aug. 11 decision overrules prior cases that had analyzed the issue of whether a worker was a statutory employee by broadly considering only whether the workers were performing work that was part of the employer’s ‘trade, business or occupation.’” Heath Hamacher, *Supreme Court narrowly defines ‘statutory employee’*, SOUTH CAROLINA LAWYERS WEEKLY, Aug. 23, 2021, <https://sclawyersweekly.com/news/2021/08/23/supreme-court-narrowly-defines-statutory-employee/>.

it does not matter who fulfilled them and the business owner is highly unlikely to ever be treated as a statutory employer.

*Second*, the liberal construction rule adopted and followed by this Court and the Court of Appeals also has been eliminated.<sup>8</sup> This is because the Opinion’s analysis turns on the legitimacy of the outsourcing, which is narrowly defined as “not driven by a desire to avoid the cost of insuring workers.” (Op. 61; *see also* 62) Accordingly, rather than a liberal construction favoring inclusion, and inclusion leading to *Parker’s* “double protection,” the Opinion’s analysis is driven by changes in the “modern economy” where allegedly “it has become standard” for “businesses to bear the cost of insuring workers against injury.”<sup>9</sup> (*Id.* 62) Again, like the three factor test, the liberal construction rule has no legal relevance under this new analysis, for whether or not a worker is a statutory employee under the Opinion now turns on the existence of the insurance coverage—not on whether the work of the subs’ employee is an important, necessary, essential and integral “part of” the owner’s business.

**V. The Opinion Will Produce Negative Outcomes In The Marketplace And For Subcontractor Employees.**

From the perspective of South Carolina business owners and employers, the consequences of the Opinion’s analysis and holding will be deleterious. So too from the standpoint of subcontracting employees, the very persons the Workers Compensation Law is supposed to protect.

---

<sup>8</sup> Celanese discussed the liberal construction rule precedents in its December 2, 2019 “Brief of Petitioner,” at pages 9-10. *See, e.g., Alewine v. Tobin Quarries*, 206 S.C. 103, 110-11, 33 S.E.2d 81, 83-84 (1945) (quoting *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 72, 15 S.E.2d 833, 835 (1941)); *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013).

<sup>9</sup> No evidence in the Record supports this statement or conclusion.

*First*, the Opinion’s analysis—with its “refocus” on the owner’s “business judgment” evaluated narrowly through the lens of the law’s “original purposes”—penalizes businesses like Celanese who have complied with and relied upon the statutory employee doctrine to purchase workers compensation insurance to protect subcontractor employee workers. Thus, Celanese made the “legitimate business decision” to outsource because its decision was “not driven by a desire to avoid the cost of insuring workers.” (Op. 61-62). Celanese paid for that insurance and did so because Celanese believed it was obligated to do so in order to protect workers like Mr. Seay who, under the three factor test, were its statutory employees. But the Opinion now penalizes Celanese for paying those insurance premiums by holding that it paid significant sums of money to purchase insurance for subcontractor employees it did not have to pay. Not only that, but Celanese has been stripped of the civil immunity under the statute that it was supposed to have received in exchange for providing and paying for the insurance coverage.

Put simply: the Opinion penalizes Celanese (and the many businesses like it) because although Celanese paid the Workers’ Compensation Law insurance premiums it believed it was obligated to pay under the traditional three factor test, Celanese has now been denied the statute’s civil liability immunity on the basis that it is not a statutory employer. If the Opinion stands, Celanese’s payment of substantial insurance premiums, for years, will turn out to have been both unnecessary and a complete waste of corporate assets.

*Second*, going forward, economically rational businesses (like Celanese) will not pay the workers compensation insurance premiums of subcontracting employees. To do so would be a waste of corporate assets given the Opinion’s holding. As a result, subcontracting employers will have to pick up the insurance tab, which many will do, but many others, particularly smaller ones, likely may not. Regardless, the resulting confusion and litigation over who is responsible under

the Opinion for procuring and paying for the insurance coverage protection that the law requires should not be underestimated.

Consider a simple hypothetical, but soon to be real world example: A business owner like Celanese no longer pays for the subcontracting employees' insurance because it is not a statutory employer and not required to do so under the Opinion. The subcontractor says or even promises that it will obtain the insurance, but in fact, does not do so or goes bankrupt and is unable to do so. What is the result in the subsequent litigation? The business owner can legitimately say it relied upon the Opinion's new "refocus" analysis, and that it did not outsource for the purpose of avoiding paying insurance. But at the same time, the "original purposes" of the statute will be frustrated, and the subcontractor's employees will have no insurance protection at all.<sup>10</sup>

The three factor test may not be perfect, but then again, no test ever is. But it does have the advantage of an established body of case law *grounded in the statutory text* to determine whether the work of the subcontracting employee is a "part of" the owner's trade, business or occupation. In that way, and enhanced by the liberal construction rule, the traditional three factor test achieves the statute's "original purposes." In contrast, the Opinion's new "refocus" analysis is entirely focused on whether there is insurance or not, regardless of who provides it. But this new approach severs the link between (i) the business owner (and employer) responsible for paying for the insurance from (ii) the civil liability immunity benefit that until now has been attendant to

---

<sup>10</sup> If the answer to this example is that business owners like Celanese are guarantors for their subcontractor's promises to provide the requisite insurance, or are otherwise liable in the event their subs default in obtaining the required insurance coverage, then the Opinion has rewritten the statute yet again to hold that business owners are ultimately responsible and liable for providing the workers compensation insurance for subcontracting employees but are still not entitled to the statutory civil liability immunity.

paying for that insurance. As a result, the future litigation arising over who is responsible for subcontractor employees and their insurance protection will become significant.

*Last*, the Opinion’s new analysis creates perverse economic incentives in the marketplace that conflict with the Workers Compensation Law’s fundamental purpose, and in the future will likely injure subcontractor employees. Thus, under the Opinion businesses like Celanese that subcontract out essential work that until now has been considered part of their business under the statute’s three factor test, will no longer have any reason or obligation to pay the insurance premiums for the subcontractors’ workers. This is particularly true because they will receive no civil liability immunity in exchange for paying for the insurance. Thus, business owners’ decisions in the future not to pay for the insurance will “not [be] driven by a desire to avoid the cost of insuring workers” but instead, by a decision not to waste corporate assets by making payments they are not obligated to make and that provide them with no benefits. This new economic incentive created by the Opinion inevitably will result in a loss of Workers Compensation Law protection for subcontractor employees, particularly for smaller subcontracting parties who are more likely to default on their Workers Compensation Law obligations, putting at risk the very employees that the statute is designed to protect. Moreover, the Opinion also will incentivize injured workers to circumvent the Workers Compensation system by (i) rewarding those who pursue tort claims and (ii) by penalizing businesses like Celanese who pay for workers’ compensation insurance—precisely what has taken place in this case.

In sum, although the Opinion describes the existing “body of jurisprudence” regarding the statutory employee doctrine as “confusing, often conflicting, and always difficult for the workers’ compensation commission and the circuit court to apply (Op. 51), the Opinion’s new “refocus” analysis will not eliminate these concerns but instead, will upset the decades-long balance between

workers compensation and tort by giving rise to a flood of tort litigation, resulting either in a loss of insurance protection for subcontracting workers, penalties for businesses like Celanese who pay for the insurance premiums but receive no civil immunity protections in return, or confusion and litigation in the marketplace as to whether and under what circumstances, if ever, the statutory employee doctrine applies and to whom.

### **CONCLUSION**

The statutory employee doctrine is codified in the Workers Compensation Law, as Section 42-1-400. It has meaning, and serves a purpose—to obligate business owners to protect the employees of their subcontractors in exchange for which the business owners receive statutory civil liability immunity. But under the Opinion’s new analysis, Section 42-1-400 as written has no meaning, and indeed, has been rewritten to eliminate the statutory employee doctrine anytime that a subcontractor has workers compensation insurance for its employees, regardless of who pays for that insurance. That is not what the statutory text provides, as the test for whether a business owner is a statutory employer does not turn on whether or not the subcontractor’s employees are protected by workers compensation insurance. But if the Opinion is now the law, then going forward business owners like Celanese will no longer pay the insurance premiums for their subcontractors’ employees, and in the end, there will be confusion in the insurance marketplace and litigation in the courts of this State over who is responsible for protecting the subcontractor’s employees, as well as increased risks that many subcontractor employees, particularly for smaller subs, will be left unprotected—a result contrary to the statute’s “original purposes.” Accordingly, for the reasons discussed above, as well as the arguments set forth in Celanese’s appellate briefs and other filings, all of which are incorporated herein, this Court should grant rehearing and issue a new opinion reversing the Court of Appeals and trial court, and entering judgment in favor of

Celanese as a matter of law. Failing that, this Court should at minimum order rehearing and further oral argument regarding in this matter.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: s/ C. Mitchell Brown \_\_\_\_\_

C. Mitchell Brown

SC Bar No. 012872

E-Mail: mitch.brown@nelsonmullins.com

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Blake T. Williams

SC Bar No. 100794

E-Mail: blake.williams@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

KIRKLAND & ELLIS LLP

Richard Godfrey (*admitted Pro Hac Vice*)

E-Mail: richard.godfrey@kirdand.com

300 North LaSalle

Chicago, IL 60654

(312) 862-2391

*Attorneys for CNA Holdings, LLC*

Columbia, South Carolina

September 9, 2021