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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-000816
Case No. 2013-CP-42-3915
S.C. Supreme Court Op. No. 28052

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 REHEARING

Respondents oppose Celanese's Petition for Rehearing[1] for the reasons discussed below.

STANDARDS APPLICABLE TO PETITIONS FOR REHEARING.

A non-prevailing party in the appellate court may request a rehearing but it has no right to a rehearing. Rather, whether an appeal will be reheard is left to the discretion of the court. *See Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 870 (2009) ("The Court of Appeals has discretion as to whether or not to accept rehearing….").

> In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR.
> . . .
> "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal,

[1] Capitalized terms in this Return are defined as in the Petition for Rehearing.

> Shahin Vafai Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

Kennedy v. South Carolina Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

A Justice's disagreement with a majority opinion of the Court, standing alone, should be an inadequate basis to warrant a rehearing. *See Paradis v. Charleston County Sch. Dist.*, S.C. Sup. Ct. Order dated August 18, 2021 (Howard Adv. Sh. No. 28) (Few, J., concurring).

ARGUMENT

This action has been pending for eight years. The Circuit Court entered judgment on the jury's verdict almost six years ago. The parties filed their briefs in Celanese's discretionary appeal to this Court over eighteen months ago. The Court held oral argument on June 11, 2020 and thereafter deliberated for fourteen months before issuing its opinion. This case has been exhaustively briefed and argued from its inception and thoroughly considered by this Court.

The Court's opinion, in reaching the same conclusion as the Circuit Court (on three occasions) and the Court of Appeals, did not overlook or misapprehend any argument or issue. Celanese is not entitled to try its case again in this Court. Rather, the Court should deny the Petition for Rehearing and finally bring this matter to its conclusion.

1. Celanese mischaracterizes the Court's opinion and thereby advances a strawman argument.

Much of the petition is based upon Celanese's mischaracterization of the Court's opinion, resulting in a fallacious "strawman" argument. *See Canesi v. Wilson*, 158 N.J. 490, 518, 730 A.2d 805, 820 (1999) (O'Hern, J., concurring) ("In formal logic, the technique of setting up an argument that does not exist and then refuting that misrepresented argument is called the 'straw man' fallacy.") (citation omitted).

Specifically, Celanese attacks the opinion by repeatedly claiming it adopted a "new refocus analysis" (Petition, pp. 2, 8, 10, 11, 17, 18, 19, 22, 23) and contending the Court, in effect,

substituted that analysis for the applicable statutory language and the "three factor tests" the courts have used to construe that language. (Petition, pp. 18-19). A review of the opinion reveals this description is inaccurate and that Celanese's arguments for rehearing are actually unfair attacks on the strawman it created. *See State v. Perry*, 430 S.C. 24, 55, 842 S.E.2d 654, 670 (2020) (Kittredge, J., concurring) ("It is an unfair tactic to attribute a strawman argument to the State and then righteously tear it down.").

Contrary to Celanese's strawman, the Court's opinion recognized that, in considering a statutory employer defense, the governing language is set forth in S.C. CODE ANN. § 42-1-400 (1976, as amended). (Op., pp. 52-53). That is, whether Celanese may avoid liability for its negligence in this action hinges on whether Daniel undertook to perform "work which was part of [Celanese's] trade, business or occupation." The opinion did not eschew the three judicially developed "tests" to assist in answering that question.[2] (Op., p. 61). Instead, it acknowledged that, before employing those inquiries to evaluate whether work is "part of" a "trade, business or occupation" (which Respondents abbreviate in this Return as "business"), a court must first ascertain the nature of that business.

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[2] The "tests" are whether the subcontractor's work "(1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; *or* (3) has previously been performed by the owner's employees." *Olmstead v. Shakespeare,* 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003).

As noted by Justice Few in oral argument and as suggested by the quotation marks around the term "tests" in the Court's opinion, there is reason to question whether the first two numbered items are indeed tests and whether they are truly distinct. (*See also* Op., p. 65 ("Perhaps the first and second tests are the same….") (James, J., dissenting)). Specifically, they largely reiterate the statutory language but supplement its wording with judicially-adopted adjectives that modify and restrict the breadth of the statute's "part of" language. Moreover, those adjectives (important, necessary, essential, and integral) – which the Court did not initially use to reflect an analytical framework but were simply terms employed by the Court in various cases to describe the relationship of the subcontractor's work to the owner's business – are largely synonymous and provide no meaningful differences in the context of the statutory employment inquiry.

In other words, the Court's opinion is based on the common-sense recognition that a court cannot compare a subcontractor's work with an owner's business until it determines what the owner's business is. As statutory employment cases have repeatedly stated, this is a question to be answered based on the specific facts of the case. *See, e.g., Olmstead,* 354 S.C. at 426, 581 S.E.2d at 486. The opinion did not create a new analysis or test; rather, consistent with existing case law, it undertook an initial factual inquiry of the nature of Celanese's business and, in doing so, considered the fact of "what the owner decided is part of its business." (Op., p. 61).

Consequently, the premise for most of Celanese's arguments – that the opinion created a new analysis at odds with existing case law – is flawed. The real question raised by Celanese's objection to the Court's analysis is whether the Court "overlooked or misapprehended" the parties' arguments when it considered facts relating to Celanese's business decision to hire Daniel. (*See* Petition for Rehearing, pp. 2-5). Clearly, it did not, as demonstrated by the opinion's methodical discussion of and reliance on case law beginning with *Bridges v. Wyandotte Worsted Co.,* 243 S.C. 1, 132 S.E.2d 18 (1963) that endorsed the consideration of facts related to the owner's business decisions. (Op., pp. 56-60).

2. <u>The record supports the Court's factual findings regarding Celanese's "business judgment" or "business decisions."</u>

The Court's opinion did not overlook or misapprehend the record regarding Celanese's decision to hire Daniel to do its maintenance work. (*See* Petition for Rehearing, pp. 2-5). The facts amply demonstrate that maintenance work was specialized and involved expertise Celanese did not possess because it was a manufacturer and not in the construction or maintenance business. (*See generally* Brief of Respondents, pp. 11-12).

3. The Court did not misapprehend the import of facts regarding payment of workers compensation insurance premiums.

Celanese argues that it paid the premiums for workers compensation insurance coverage applicable to Daniel's employees such as Mr. Seay and this fact demonstrates it considered Mr. Seay to be its statutory employee. (*See* Petition for Rehearing, pp. 5-7). The lynchpin of this argument is the following premise, which further scrutiny shows is faulty:

> 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.

(*Id.*, p. 5) (emphasis added).

In fact, Celanese did not directly pay for Daniel's workers' coverage. Instead, in its contract with Daniel, Celanese agreed to pay Daniel a fee based upon Daniel's costs plus a percentage of its payroll. (App. pp. 1726, 1773). Daniel's reimbursable costs and payroll costs included the cost of procuring various types of insurance coverage, including workers compensation insurance. (App. pp. 1726-27, 1773-74). Thus, the cost of workers compensation coverage was simply one component of how Daniel charged Celanese for the work it provided. In this regard, the parties' agreement was not unlike a typical cost-plus contract frequently used in subcontracted work. *See, e.g., Freeman Co. v Bolt*, 968 P.2d 247 (Idaho Ct. App. 1998); *Lewis v. Carnaggio*, 257 S.C. 54, 183 S.E.2d 899 (1971).

As a result, Celanese's payment to Daniel cannot reasonably be construed as an acknowledgment by Celanese that it was a statutory employer of Daniel's employees. Daniel's fee was payable by Celanese as long as Daniel's work was provided pursuant to the contract and regardless of whether it was an important, essential, etc., part of Celanese's business.

Moreover, contrary to Celanese's conclusion, there are other possible reasons why an owner may desire to see its subcontractor's employees covered by workers compensation. The

existence of that coverage would help to ensure that the contractor could attract and retain competent employees to complete its work pursuant to the contract. It would also aid in providing medical treatment and rehabilitation services to employees to assist them in returning to work promptly following a work-related injury. All of these results would promote the efficient completion of the work by the subcontractor. One could even argue that having a subcontractor provide workers compensation coverage for its employees is desirable to owners who acknowledge they are not statutory employers inasmuch as it provides a speedy, no-fault remedy for injured employees who would then be less likely to pursue fault-based claims against an owner, particularly given the right of subrogation granted to workers compensation insurers.

Therefore, the fact Celanese reimbursed Daniel for workers compensation premiums as part of Daniel's contractual fee does not lead to the conclusion that Celanese always considered itself to be a statutory employer of Daniel's workers like Mr. Seay. More importantly, the purposes of the statutory employment doctrine are not thwarted by denying Celanese immunity from suit simply because it paid this contractual fee to Daniel.

4. The parties addressed issues related to the rationale and consequences of the Court's decision.

When one properly considers the rationale employed by the Court – as opposed to embracing Celanese's recasting of it as a "new refocus analysis" – it should be clear that the facts and legal principles applied by the Court were thoroughly addressed by the parties in their briefs. For example, Respondents noted in their brief:

- "[E]very case requires a factual analysis of the alleged statutory employer's business, a factual analysis of the plaintiff's (or workers' compensation claimant's) direct employer's work, and a comparison of the two – a 'case by case' inquiry that is dependent upon the specific facts of each situation." (Brief of Respondent, p. 13).

- "[B]efore inquiring whether a plaintiff's work is 'part of' a defendant's business, a court must define a defendant's business based upon its fundamental purpose…." (*Id.*, p. 15).

- "[T]he [*Olmstead*] Court not only reinforced the necessity of a factual analysis and comparison of a plaintiff's work and a defendant's business…." (*Id.*, p. 17).

- "Both the Circuit Court and the Court of Appeals compared the nature of Celanese's manufacturing business at the Spartanburg plant (or its "basic operation") with the maintenance work Daniel performed there to find that Daniel's work was not part of Celanese's business." (*Id.*, p. 19).

- "[T]he lower courts properly studied the nature of Celanese's business as an initial matter. In that analysis, it was appropriate for them to consider the fact that Celanese did not perform maintenance because defining a party's business for the purpose of a comparison is a matter of determining both what it is and what it is not." (*Id.*, p. 27).

Contrary to Celanese's contention (Petition for Rehearing, p. 8), not only were these legal principles and rationale before the Court, so too were Celanese's policy-based arguments regarding the potential broader effects of a decision adverse to its interests. Indeed, in its request for this Court to conduct a discretionary review of the Court of Appeals' decision, Celanese ominously forecast:

> If [the Court of Appeals' holding] is now the new law of this state, it will lead to undesirable, unworkable, and inconsistent judicial outcomes contrary to the governing legislative and judicial policy favoring inclusion of workers within the workers' compensation system.

(Petition for Writ of Cert., p. 12).

Later, Celanese expounded on this argument in its brief, predicting "widespread confusion," loss of protection to injured workers, and other dire consequences if this Court were to affirm the Court of Appeals. (Brief of Petitioner, p. 36).

In short, there is no factual basis for the Court to grant a rehearing to allow Celanese to argue these points a second time. Additionally, to grant a rehearing for this purpose would be contrary to established standards governing petitions for rehearing. *See Kennedy v. South Carolina Ret. Sys.*, 349 S.C. at 532, 564 S.E.2d at 322.

Finally, it would be improper in light of separation of powers principles for this Court to engage in a policy-driven decision as the Court's role is to interpret and apply the statute while

policy matters are properly left to the General Assembly. *See Smith v. Tiffany*, 419 S.C. 548, 559-60, 799 S.E.2d 479, 485 (2017).

5. The Court's opinion did not deviate from statutory construction rules.

Celanese claims the Court failed to apply the "plain statutory text" of S.C. CODE ANN. § 42-1-400 (1976, as amended) but instead adopted a "new refocus analysis" that improperly considered the purpose of the statute and facts related to how Celanese defined its business. (Petition for Rehearing, pp. 9-13). As noted above, this argument initially suffers from the flawed premise that the Court's decision represents a new analysis at odds with the statutory language. In fact, the opinion rests upon application of the express statutory language and application of facts in the record to that language (*i.e.,* what do the facts show Celanese's business to have been?). (*See* headings 1 & 2, *supra*).

Indeed, the statute cannot be applied without a judicially-fashioned analysis to review relevant facts. Celanese acknowledges as much in noting that the "three factor test" was judicially adopted to "guide enforcement and implementation of Section 42-1-400." (Petition for Rehearing, p. 9). No rule of statutory construction requires that, in implementing a statute via a judicially-fashioned analysis, the courts should ignore the purpose (*i.e.*, the policies) behind the statute; in fact, that purpose should guide how to fashion the analysis. Even Celanese admits it is appropriate to consider the statute's purpose "when necessary to fulfillment of the statutory language." (*Id.*)

This Court has long considered the policy and purpose of the statute important when considering how to analyze the unique facts of each case to determine whether the statutory employment defense applies. *Harrell v. Pineland Plantation,* 337 S.C. 313, 323, 523 S.E.2d 766, 771 (1999) (the three factors were created to implement "the policy of the statutory

section"). Accordingly, the Court did nothing new or improper when it incorporated considerations of the statute's purpose into its decision.

6. The Court considered all purposes of the statutory employment doctrine.

In contrast to Celanese's contention (Petition for Rehearing, pp. 13-16), the Court's opinion notes, discusses, and balances all purposes of the statute. (Op., pp. 53-54, 62-63). Its holding is consistent with the purposes of the statutory employment doctrine as previously recognized by the Court. *See, e.g., Harrell*, 337 S.C. at 328, 523 S.E.2d at 773 ("The purpose of statutory employer immunity is to protect employees of direct employers who are financially irresponsible."). Extending statutory immunity to an owner such as Celanese, whose business does not include the type of specialized work it retained an outside contractor to provide, is not consistent with the purposes of the statute, particularly where the outside contractor was financially responsible.

7. The Court did not rewrite the statutory employment doctrine.

In support of its effort to retry this appeal, Celanese trots out yet another strawman, contending the Court has attempted to rewrite Section 42-1-400. Celanese claims:

> [T]he 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.

(Petition for Rehearing, p. 16).

> [T]he 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."

(*Id.*, p. 17).

Ultimately, Celanese goes so far as to assert that the Court has "effectively eliminat[ed]" the statutory employment doctrine "for most if not all business owners." (*Id.*, p. 18).

Celanese has misstated the Court's rationale and overstated the effects of its holding.

Again, as discussed above, the opinion neither ignores nor changes the language of Section 42-1-400; rather, it applies its language by initially asking the question that must be answered first: What is the owner's business? This is not a "new term" the Court has added to the statute but one the statute expressly includes.

In answering that question, the Court recognized it is relevant to consider the owner's business decisions as evidence of how it defined its business. Those decisions may include whether the owner believed its direct employees could perform the work at issue (Op., p. 61), an inquiry that is entirely consistent with the third factor of the "three factor test" that Celanese argues the Court effectively discarded. *See also Glass v. Dow Chemical Co.,* 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997) (considering the "basic operation" of the business and holding: "[W]here repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business."). An owner may decide to supplement its workforce with subcontracted labor, a choice that in many instances would grant the owner statutory employer protection. *See, e.g., Poch v. Bayshore Concrete Prods./S.C.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2103). Also, it is proper to consider whether an owner's decision to subcontract was motivated "by a desire to avoid the cost of insuring workers" (Op., p. 61) because a decision driven by this goal helps to answer whether the owner viewed the work as part of its business; in other words, an owner would not seek to avoid the cost of insuring a subcontractor's workforce unless it viewed the subcontractor's work as part of its business for which it had liability under the Act.

Not only are these facts relevant to the proper threshold inquiry under Section 42-1-400 but, as illustrated above, continue to produce scenarios where an owner will be considered a statutory employer under the "three factor test," in contrast to Celanese's conclusion otherwise.

8. The Court's opinion does not "neuter" decades of precedent.

Without citing a single case – only an article from SOUTH CAROLINA LAWYERS WEEKLY – Celanese claims the Court's opinion "neuters" the "three factor test" and cases that have applied it. (Petition for Rehearing, p. 19). A review of prior case law and a correct understanding of the opinion demonstrate otherwise.

In affirming the Court of Appeals and the Circuit Court, this Court in its decision rejected both the notion that transportation workers should be treated differently under the law and the corresponding argument that the holdings of *Abbott v. The Limited*, 338 S.C. 161, 526 S.E.2d 513 (2000) and *Olmstead* were somehow limited to a transportation context. These topics were briefed by the parties and squarely before the Court. (Brief of Petitioner, pp. 17-19; Brief of Respondent, pp. 17-18).

Having reached this conclusion, the Court provided greater context and clarity for the language from *Abbott*, 338 S.C. at 164 n.1, 526 S.E.2d at 514, n.1 (in which the Court expressly overruled *Neese v. Michelin Tire Corp.,* 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996) and *Hairston v. Re: Leasing, Inc.,* 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985)) and from *Olmstead*, 354 S.C. at 426-27, 581 S.E.2d at 486 ("*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of [the owner's] trade, business or occupation' under section 42-1-400, and likely conflicts with cases other than the ones we explicitly overruled in footnote 1 of the *Abbott* opinion. As such, we now overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case.").

Simply put, as a result of its decisions in *Abbott* and *Olmstead* over eighteen years before its opinion in the present case, the Court noted the evolution of and changes in statutory employer law which Celanese now seeks to undo and, more importantly, overruled or "neutered" the

previous case law upon which Celanese clings for support. (*See* Op., p. 60 ("The trend away from *Marchbanks* [*v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1939)] and *Boseman* [*v. Pacific Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940)] – and the broad view of an employer's 'trade, business or occupation' those opinions represented – was firmly established by this Court by the time this case reached the court of appeals.")). The Court's opinion did not extend those holdings but only rebuffed the suggestion that they were limited to the transportation context. Again, the parties' briefs fully addressed this topic. (Brief of Petitioner, pp. 19-22; Brief of Respondent, pp. 17-18).

Nor did the Court's opinion "neuter" the "three factor test" as Celanese claims. (Petition for Rehearing, p. 19). The opinion has no affect on the third test (whether the work has been performed by the owner's direct employees) as that fact will continue to inform the courts as to the nature of the owner's business. The first and second tests (arguably just a single inquiry) will also remain relevant in differentiating between parts of an owner's business that are essential, integral, etc., and those which are not. However, courts will not need to reach these questions if the subcontractor's work is not part of an owner's business – a threshold inquiry that is entirely consistent with the language of Section 42-1-400.

9. <u>The opinion will not negatively affect the market and injured workers.</u>

In its final salvo, Celanese returns to its now-familiar refrain that the opinion significantly alters the law, that change is bad, and that the Court should consider policy-based arguments like marketplace effects before applying the statute as it did. (Petition for Rehearing, pp. 20-24).

As discussed above, this appeal to policy considerations is improperly addressed to the Court. (*See* heading 4, *supra*). Moreover, if the evolution of the statutory employer doctrine signals the "sky is falling," Celanese is late in complaining – the proverbial sky already fell when the Court decided *Abbott* and *Olmstead* in the early 2000s.

Lastly, the scenario of injured workers being left without workers compensation insurance coverage as a result of the Court's opinion is unlikely based on existing provisions of the Workers Compensation Act. Specifically, S.C. CODE ANN. § 42-1-415(A) (1976, as amended) addresses the scenario described by Celanese and provides a remedy that protects the injured worker and provides relief to an owner or higher tier contractor that would be considered a statutory employer.[3]

CONCLUSION

For the foregoing reasons, as well as the reasons discussed in their earlier brief, Respondents respectfully request that the Court deny Celanese's Petition for Rehearing.

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

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

CLAWSON FARGNOLI UTSEY, LLC

/s/ Bert G. Utsey, III
Bert G. Utsey, III
706 Orleans Road, Suite 101
Charleston, South Carolina 29407
(843) 970-2700

Attorneys for Respondents

September 20, 2021
Charleston, South Carolina

[3] The fact the General Assembly has addressed this potential problem via legislation further cements the conclusion that it is the constitutionally proper body to consider policy-based arguments regarding how the Act should apply and the extent of its protections.