

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

**Sep 27 2021**

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

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**S.C. SUPREME COURT**

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

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

Respondents,

v.

CNA Holdings, LLC, .....

Petitioner.

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**REPLY IN SUPPORT OF PETITION FOR REHEARING**

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Respondents' Return in opposition to Celanese's Petition for Rehearing confirms why granting the Petition is warranted. Before addressing their arguments, however, consider please the jugular question to which Respondents studiously avoid providing any real world answer:

If the Opinion stands, can Respondents (or anyone else) identify a fact pattern in which an upstream employer who outsources work for legitimate business reasons will ever be found to be a statutory employer?

We submit that under the Opinion's new analysis and holding, the answer is no, for three reasons:

One: If the subcontractor has workers compensation insurance, then the Opinion holds the business owner cannot be a statutory employer because the statute's "original purposes are

certainly not served” by granting the owner statutory immunity. (Op. 62; *see also* at 61: “When the public policy favoring coverage is satisfied—as it was here—that policy has nothing to say about providing immunity to the owner.”)

Two: If the business owner for legitimate reasons subcontracts work out, then under the Opinion the answer is the same, and the business owner cannot be a statutory employer. (Op. 61: “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.”)

Three: That leaves only those business owners who seek to avoid the costs of workers compensation insurance, and who then also subcontract with those downstream employers who equally eschew their Workers Compensation Law obligations. But the Opinion says this is unlikely, as in contrast to “the economy of 1936, it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury.” (Op. 62) The implication of this statement, however, is that there is no longer any need for the statutory employee doctrine, much less Section 42-1-400, which explains why it is so difficult to identify under the Opinion any circumstances under which a business owner will be treated as a statutory employer going forward. Moreover, the Opinion does not delve into how or why this “standard in the modern economy” has developed since 1936. But if it has, one strong reason logically would be that business owners believed as a result of the statute (Section 42-1-400) and the Court’s interpretation of that statute under the three factor test that the workers at their facilities performing necessary, essential, important and integral work for their businesses are their statutory employees and thus require the

business owners to put in place the necessary workers compensation system protections, as compared to relying upon the tort system.

In an attempt to answer this jugular question, Respondents proclaim that the facts illustrated on page 10 of their Return will “continue to produce scenarios where an owner will be considered a statutory employer.” (Return 10) But those page 10 “facts” prove just the opposite. Indeed, the only specific fact pattern or “scenario” Respondents identify is where “[a]n owner may decide to supplement its workforce with subcontracted labor, a choice that in many instances would grant the owner statutory employer protection.” (*Id.*) That conclusion is incorrect under the Opinion’s analysis, however. For one thing, Respondents’ hypothetical is not even an outsourcing scenario; instead, it is where the owner has direct employees performing the work and then hires subcontractor employees to supplement that work. For another, if the subcontractor is insured in this scenario, then under the Opinion the “original purposes” of the statutory employee doctrine have been fulfilled and “are certainly not served by granting” the owner statutory immunity. (Op. 62, 60) Finally, Respondents’ hypothetical “scenario” guts the three factor test. That test is *disjunctive*, and an owner is not required to have its own employees perform the work subcontracted out. Yet, that is the premise of Respondents’ hypothetical scenario.<sup>1</sup>

In short, as we asked in the Petition and again now, what role for the statutory employee doctrine going forward under the Opinion? It is more than challenging to envision one.

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<sup>1</sup> *See, e.g.*, the authorities holding that the three factor test is disjunctive, and that the subcontracted work need only satisfy one of the three factors to qualify as a statutory employee. *See, e.g., Raines v. Gould, Inc.*, 288 S.C. 541, 546, 343 S.E.2d 655, 658 (Ct. App. 1986) (“[E]ven work which a business might never perform with its own employees may be considered a part of its trade or business if the work is an integral part of its operations without which it cannot function”); *see also Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 368, 747 S.E.2d 757, 762 (2013) (detailing the three factor test as disjunctive because only one of the factors needs to be satisfied to find statutory employee status).

**I. THE COURT’S OPINION MISAPPREHENDS FACTS CENTRAL TO ITS ANALYSIS AND HOLDING (PETITION 1-5).**

Respondents disagree that facts have been misapprehended, but in doing so are not true to the undisputed record, engage in speculation, and undermine the Opinion itself.

**A. The “Business Judgment” Or “Business Decision” Facts (Petition 2-5)**

The Petition explained that the undisputed factual record establishes that Celanese’s decision makers believed Mr. Seay’s work was an essential, integral, necessary and important part of its manufacturing business. (Petition 2-5) Their belief was confirmed by the testimonial admissions of Mr. Seay and those of his co-worker (Mr. Ronnie Thompson). (*Id.* at 3 & n.2) Celanese’s Petition also explained why the Opinion’s finding about Celanese’s business decision is erroneous. (*Id.* at 3-5)

In short, the importance of this undisputed factual record is that it is contrary to and should have precluded the Opinion’s conclusion that Celanese’s “business judgment” and “decision” was that Mr. Seay was not a statutory employee. (Op. 61-62)

Respondents’ Return fails to address the detailed, undisputed factual record regarding Celanese’s business decision and the application of the three factor test. Instead, they simply proclaim their conclusion that 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.” (Return 4) This is incorrect because:

*First*, that proclamation is a conclusory statement, not record facts.

*Second*, Seay’s work did not involve construction—it was manufacturing equipment maintenance work that was essential, integral to and part of Celanese’s manufacturing business. (Petition 3, n.2)

*Third*, the notion that (i) manufacturing and (ii) maintenance of the manufacturing equipment are unrelated businesses is absurd. Every manufacturing facility to remain in operation requires maintenance of its manufacturing equipment; again, there is no record evidence to the contrary.

*Last*, Respondents ignore the undisputed fact that after Mr. Seay stopped working at Celanese, Celanese made the business decision to no longer outsource manufacturing equipment maintenance and instead, hired its own employees (including those previously working for Daniel) to perform the same maintenance that Mr. Seay previously did. (*See* Mem. in Supp. of Post-Trial Motions p. 11; Dep. of Ronnie Thompson p. 98:5-99:4; Aff. of Bruce Bowyer ¶ 9; A. 163, 2289, 2425, 2452) This undisputed fact is impossible to reconcile with Respondents' argument that manufacturing equipment maintenance at Celanese was not an integral, necessary and essential part of its manufacturing business.

**B. The “Who Provides Coverage” Facts (Petition 5)**

Celanese's Petition explained why Celanese would have had no reason to mandate much less pay for the workers compensation insurance unless it had made the business decision that Mr. Seay was a statutory employee. (Petition 5) Respondents again disagree, but do so by attempting to rewrite the Opinion as well as by engaging in extra-record speculation. As to the Opinion, its findings and statements could not be more clear: “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.” (Op. 62, also at 60) Yet Respondents dispute what the Opinion says, arguing “Celanese did not directly pay for Daniel's workers' coverage” on the theory that the “cost of procuring” the insurance “was simply one component of how Daniel charged Celanese for the work it provided.” (Return 5) Of course, that is not what the Opinion explicitly says; and regardless, it matters not.

For one thing, the contracts provided that Celanese pay Daniel for its workers compensation insurance premiums—and that is the important fact. (*See Contracts; Bowyer Aff.* ¶ 9; A. 1755, 1774, 2452) For another, Respondents’ argument ignores the prior precedent on this point, which Celanese cited in its Petition on page 14. Specifically, in *Gentry v. Milliken & Company*, 307 S.C. 235, 414 S.E.2d 180 (1992), the Court of Appeals held that the contractor’s employee was the owner’s statutory employee in similar circumstances. As in our case, the contract in *Gentry* between owner and contractor required the contractor “to obtain workers’ compensation coverage for its employees” and the owner’s payments to the contractor “included an amount for workers’ compensation coverage.” *Id.* at 307 S.C. 236, 414 S.E.2d 181.

Knowing the fact Celanese contracted to pay for the insurance cannot be reconciled with the Opinion’s conclusion that Mr. Seay was not a statutory employee, Respondents engage in rank speculation as to “other possible reasons why” Celanese “may [have] desire[d] to see its subcontractor’s employees covered by workers compensation.” (Respondents 5-6) But speculation is not evidence; and nothing in the Record supports Respondents’ conjecture.

Finally, Respondents argue that voluntary payment by upstream employers like Celanese of workers compensation insurance for subcontractor employees “is desirable to owners . . . 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.*” (Return 6, emphasis added) This argument is not only speculation, but a chimerical proposition—as the record here illustrates. Mr. Seay and his family never sought workers’ compensation benefits. (*See Post-trial Motions Hrg. Tr.* at 49:20-25; A. 182) Instead, they sued Celanese—precisely what the workers compensation system is designed to avoid.

In short, that old adage—‘To know the truth, follow the money’—illustrates precisely what is wrong with Respondents’ defense of the Opinion and why the Petition should be granted. (Petition 4)

**C. The “Original Purpose” Facts (Petition 5-7)**

Celanese agrees “[i]t is not the role of the courts to second-guess a legitimate business decision whose effect . . . was actually to guarantee that the workers affected by the decision would be insured against work-related injuries.” (Petition 6; Op. 62-63) But that is one of the reasons why the Petition should be granted, as the record shows Celanese made a legitimate business decision that Mr. Seay and other Daniel employees who provided it with daily manufacturing maintenance were a part of its business—which is why Celanese contracted to pay for their insurance.

Celanese does dispute the Opinion’s characterization and second-guessing of its business decision. By deciding that outsourcing of its manufacturing equipment maintenance must mean Celanese decided that manufacturing equipment maintenance was not part of its business, the Opinion ignores the undisputed factual record and also penalizes Celanese by depriving it of the law’s statutory civil immunity. (Petition 5-7)

Respondents’ principal rejoinder is that Celanese is making an “appeal to policy considerations” that are not for the Court but instead concerns of the General Assembly. (Return 7-8, 12, 13 n.3) That is not Celanese’s point, but is also irrelevant. It is the Opinion that focuses on the statute’s original purposes. All Celanese has pointed out is that the Opinion conflicts with those statutory purposes, and in the process penalizes businesses like Celanese who have done the right thing to comply with the law and protect downstream employees. *See also Parker v. Williams*

*& Madjanik, Inc.*, 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980) (noting that the statutory purpose is achieved when subcontractor employees receive double protection).

Finally, Respondents have no answer to the Opinion’s misunderstanding of the Record, when the Opinion incorrectly states: “Seay’s family presumably received the worker’s compensation benefits [Celanese] obligated through contract that Daniel must provide.” (Op. 62; Petition 7) Mr. Seay and his family never sought workers compensation benefits, (*see* Post-trial Motions Hrg. Tr. at 49:20-25; A. 182), but sued Celanese instead, thereby upsetting the decades-long balance between workers compensation and tort law.

**II. REHEARING SHOULD BE GRANTED TO ALLOW THE PARTIES TO BRIEF THE RATIONALE AND CONSEQUENCES OF THE OPINION’S NEW ANALYSIS. (PETITION 8)**

Respondents argue Rehearing is unnecessary because the grounds for Rehearing already were argued in the parties’ original appeal briefs. (Return 6-7) Not so. While it is true that Celanese explained the various legal, statutory text and statutory policy problems with the lower courts’ decisions, the Opinion’s new “refocus” analysis fundamentally differs from the rationale of the lower courts’ holdings.

For example, the lower courts did not hold that so long as workers compensation insurance was provided it does not matter who provided it. (Op. 60) Nor did the lower courts penalize an upstream employer for providing insurance to downstream subcontractor employees. Likewise, the lower courts did not hold—as does the Opinion—that by outsourcing, a business necessarily has “defined the scope of her company’s business not to include that particular work.” (Op. 61)

We could go on at some length about the differences between the lower courts’ rulings on the one hand, and the Opinion’s analysis and holding on the other. Suffice to say, the Opinion’s

new analysis for determining who is or is not a statutory employer was neither briefed nor argued. As a result, we submit the Court should have the benefit of a Rehearing.

### **III. THE OPINION REWRITES THE WORKERS' COMPENSATION LAW. (PETITION 8-18)**

Respondents disagree, arguing Celanese has crafted “a fallacious ‘strawman’ argument.” (Return 2-4, 9) Not so, for the reasons discussed below.

#### **A. The Opinion's Analysis Deviates From Settled Rules Of Statutory Construction. (Petition 9-13)**

Respondents argue 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?)” (Return 8) The problem, of course, is that is not what the Opinion says, as it holds that so long as Celanese's decision to outsource “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) That holding means outsourcing for any legitimate reason results in a ruling that the owner is not a statutory employer—notwithstanding the text of Section 42-1-400, which focuses on whether the work at issue “is a part of [the owner's] trade, business or occupation.”

Next, Respondents say that “[n]o 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.” (Return 8) The problem with this argument is, one, the rules of statutory construction provide that the text of an unambiguous statute controls, and two, the Opinion's new analysis elevates the General Assembly's “original purposes” as modified by an understanding of the “modern economy” over and in conflict with the statutory text. (Op. 51, 53, 54, 60, 61, 62) Moreover,

focusing on the “original purposes” does not answer the “key question”—*i.e.*, whether the subcontracted work is part of the owner’s business.

Last, the Opinion’s focus on the statute’s “original purposes” vitiates the statutory employee doctrine altogether, as well as eliminates the *liberal construction rule* (Petition 20) and also the *double protection* provided by having more than one statutory employer under the three factor test. (*Id.* 13-16) Tellingly, Respondents say nothing at all about the liberal construction rule or the statute’s double protection policy.

**B. The Opinion’s Focus On The Original Statutory Purpose Fails To Consider All Of The Statute’s Purposes. (Petition 13-16)**

Celanese’s Petition discussed *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980), explaining how the Opinion deviates from *Parker*’s unanimous holding that there can be more than one statutory employer, and, that one of the statutory purposes is to provide workers with *double protection*. *Parker* plainly conflicts with the Opinion’s holding that the “purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers’ compensation benefits.” (Op. 62; *see also* Petition 14 and 15, n. 4).

Respondents’ Return ignores *Parker* but curiously cites *Harrell v. Pineland Plantation*, 337 S.C. 313, 523 S.E.2d 766 (1999) for the proposition that the “purpose of statutory employer immunity is to protect employees of direct employers who are financially irresponsible.” (Return 9) But Respondents’ statement says nothing about the benefits of double protection—with good reason, for *Harrell* itself recognized those. 337 S.C. at 328-29, 523 S.E.2d at 774; *see also* Petition 15, n. 4.

Finally, Respondents’ argument that “[e]xtending statutory immunity to an owner such as Celanese . . . is not consistent with the purpose of the statute, particularly where the outside contractor was financially responsible,” (Return 9), ignores the double protection policy, which is

of particular import because one never knows whether a subcontractor in the end will or will not be financially responsible. The whole concept of double protection is to mitigate against that risk of subcontractor financial irresponsibility.

**C. The Opinion Rewrites The Statutory Employee Doctrine As Codified. (Petition 16-18)**

Respondents argue it is a “strawman” to claim the Opinion rewrites Section 42-1-400. (Return 9), going so far as to assert that Celanese “has misstated the Court’s rationale and overstated the effects of its holding.” (*Id.*) Not so, as even Respondents’ defense of the Opinion confirms the statutory rewrite.

*First*, although Respondents cry “strawman,” they never specifically address much less rebut the three specific ways in which the Opinion rewrites Section 42-1-400. (Petition 16-17)

*Second*, while the Opinion focuses initially on the business judgment and decision of the owner, as Celanese’s Petition noted (Petition 2), the Opinion’s new “refocus” analysis no longer focuses on the three factor test as it makes clear: “While each test remains a valid consideration, today we refocus on the key question posed by the statute.” (Op. 61) Then, in answering that key question, the Opinion holds that outsourcing for legitimate reasons means that the outsourced work by definition is not part of the company’s business, and that this is confirmed when analyzed through the lens of the statute’s “original purposes” as informed by the standards of the “modern economy.” (Op. 61-62; Petition 16-17) This new analysis leaves no room for application of the three factor test, the liberal construction rule, or the statute’s double protection purpose.

*Third*, Respondents also argue 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 . . . [and] this is a question to be answered based on the specific facts of the case.” (Return 4) But the undisputed facts here, including that: (i) Seay

worked to maintain and run the manufacturing lines for the product made at the plant; (ii) his work was important and essential to Celanese's manufacturing business; and (iii) Celanese's conduct in contracting to pay for Daniel's workers compensation insurance, answer that question—*i.e.*, that manufacturing equipment maintenance is a part of Celanese's manufacturing business. And yet the Opinion does not consider those facts (which historically have been controlling in the analysis), finding that outsourcing for a legitimate reason means that “the business manager” has “defined the scope of her company's business to not include that particular work.” (Op. 61) That is a conclusion of law, not fact, and one contrary to the facts of record here. Moreover, that conclusion not only rewrites the statute as explained (Petition 16-17), but effectively eliminates the three factor test, liberal construction rule and double protection policy which have been the law for many decades.

*Fourth*, Respondents' arguments confirm the breadth of statutory rewrite. Respondents say the Opinion applies the statutory language by asking: “What is the owner's business?” (Return 10) Yet, that question does not track the statutory language. To be true to the statutory text, the question should be: Is the outsourced work “a part of” the owner's trade, business or occupation—not simply ‘what is the owner's business?’ Asking the ‘what is the owner's business’ question rewrites the statute to significantly narrow its application, and leads to counter-factual simplistic labeling. For example, if the business is manufacturing, under Respondents' argument maintenance of the manufacturing equipment is not part of the business. But that proposition is contrary to the record here. Moreover, the notion that manufacturing equipment maintenance is not part of a manufacturing business would come as a surprise if not a shock to manufacturing enterprises generally and Celanese in particular, for without manufacturing equipment maintenance, there is no manufacturing business as the record in this case shows—including the

fact that subsequent to the events giving rise to this lawsuit, Celanese brought manufacturing equipment maintenance back in-house, and no longer outsources it. *See* p. 5, *supra*.

*Fifth*, Respondents also argue the Court looked at the owner’s business decision “as evidence of how it defined its business,” including whether “the owner believed its direct employees could perform the work at issue.” (Return 10) But the three factor test is *disjunctive*. Considering only factor three, whether the owner believed its direct employees could perform the work at issue, improperly fails to consider the first two factors at all.

*Last*, Respondents argue “an owner would not seek to avoid the cost of insuring a subcontractor’s workforce unless it viewed the subcontractors’ work as part of its business for which it had liability under the Act.” (Return 10) This sentence as written makes no sense. Moreover, a business owner like Celanese picks up the tab for insurance because it believes it is obligated to do so as a statutory employer—not because it believes it is not a statutory employer.

#### **IV. THE OPINION NEUTERS DECADES OF PRECEDENT. (PETITION 18-19)**

Respondents disagree, saying Celanese does not “cit[e] a single case—only an article from SOUTH CAROLINA LAWYERS WEEKLY.” (Return 11) Well, as to the neutered cases, both the Majority and Dissent identify prior decisions under which “it is difficult to imagine” that Mr. Seay’s work “does not also qualify” for statutory employee status. (Op. 56, 69; *see also* the many other cases cited in Celanese’s Brief of Petitioner at 26-34 and Reply Brief of Petitioner at 22-24, and the National Association of Manufacturer’s Notice of Intent to Request Leave to File an Amicus Curiae Brief at 1 (*See* Notice, filed Sept. 10, 2021))<sup>2</sup>

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<sup>2</sup> For avoidance of doubt, Celanese submits that the following decisions of this Court and the Court of Appeals are no longer good law under the Opinion, as their analysis and/or holdings cannot be reconciled with that of the Opinion’s (cases identified in reverse chronological order, starting with most recent): (i) *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (liberal construction rule, and disjunctive nature of three factor test); (ii) *Posey v. Proper Mold &*

Taking a different tack, Respondents next argue that the prior precedent *Celanese* cites is not neutered by the Opinion, but instead was “overruled or ‘neutered’” eighteen years ago by the Court’s decisions in *Abbott v. The Limited*, 338 S.C. 161, 526 S.E.2d 513 (2000), and *Olmstead v. Shakespeare*, 354 S.C. 436, 559 S.E.2d 370 (2003). (Return 11-12) That assertion is incorrect, and *Celanese* will not repeat its arguments again now except to note that the Opinion itself does not suggest that 18 years ago *Abbott* and *Olmstead* overruled masses of prior precedent regarding the statutory employee doctrine. (See Br. of Pet’r at 17-25, and Reply Brief of Pet’r at 6-10)

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*Eng’g, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008); (iii) *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) (double protection policy of statute); (iv) *Wheeler v. Morrison Machinery Co.*, 313 S.C. 441, 438 S.E.2d 264 (Ct. App. 1993); (v) *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992); (vi) *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991), *holding limited on other grounds by Smith v. Squires Timber Co.*, 311 S.C. 321, 428 S.E.2d 878 (1993); (vii) *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990); (viii) *Bailey v. Owen Elec. Steel Co. of S.C.*, 298 S.C. 36, 378 S.E.2d 63 (Ct. App. 1989), *rev’d on other grounds*, 301 S.C. 399, 392 S.E.2d 186 (1990); (ix) *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980); (x) *Bridges v. Wyandotte Worsted Co.*, 243 S.C.1, 132 S.E.2d 18 (1963), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002); (xi) *Bell v. S.C. Elec. & Gas Co.*, 234 S.C. 577, 109 S.E.2d 441 (1959); (xii) *Alewine v. Tobin Quarriers*, 206 S.C. 103, 33 S.E.2d 81 (1945) (liberal construction rule); (xiii) *Boseman v. Pac. Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940); (xiv) *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825 (1936). And this list does not even include the many more decisions which heavily rely upon the three factor test to analyze the statutory employee status of the injured worker—cases whose rationale and analysis are not in accord with the Opinion, including cases such as (xv) *Collins v. Charlotte*, 412 S.C. 283, 772 S.E.2d 510 (2015). Finally, in order to justify the lower court’s decisions in our case, Respondents’ Feb. 18, 2020 Brief argues at page 28 that this Court in “*Abbott* and *Olmstead* ... arguably overruled the holdings in *Marchbanks* . . . *Boseman* . . . *Bell* . . . *Bridges* . . . *Bailey* . . . *Smith* . . . *Gentry* . . . and *Wheeler*.”

In addition, the following decisions of the federal courts applying South Carolina law also cannot be reconciled with the Opinion’s analysis and/or holding: (xvi) *Matthews v. E.I. DuPont de Nemours & Co.*, No. 4:16-CV-02934-RBH, 2018 WL 5978111 (D.S.C., Nov. 13, 2018); (xvii) *Provau v. YRC, Inc.*, No. 4:16-cv-00422-RBH, 2017 WL 1541880 (D.S.C. Apr. 28, 2017); (xviii) *Smith v. FCX, Inc.*, 744 F.2d 1378 (4th Cir. 1984); and (xix) *Singleton v. J.P. Stevens & Co.*, 533 F. Supp. 887 (D.S.C. 1982), *aff’d*, 726 F.2d 1011 (4th Cir. 1984).

Regarding the three factor test, Respondents argue that test retains its validity (Return 12), but they cannot explain how under the Opinion. Once a business owner has decided to outsource work for reasons “not driven by a desire to avoid the cost of insuring workers” (Op. 61), or where the subcontractor’s workers are insured (Op. 60, 62), the three factor test has no relevance because that test asks a different question based upon the statutory language: Was the work of the subcontractor’s employee necessary, essential, important and an integral “part of” the business? The Opinion’s new analysis, in contrast, assumes that outsourcing for legitimate reasons means that the outsourced work is not part of the business, and then asks whether the statute’s “original purposes” were fulfilled. These are two different analyses and questions, resulting in two fundamentally different answers.

**V. THE OPINION WILL PRODUCE NEGATIVE OUTCOMES IN THE MARKETPLACE AND FOR SUBCONTRACTOR EMPLOYEES. (PETITION 20-24)**

Respondents offer no substantive response to the array of negative consequences for injured workers, subcontractors, business owners and the courts resulting from the Opinion. (Petition 20-24) What Respondents do argue is that policy-based arguments are for the General Assembly, not the Court. (Return 12) But Respondents miss the point: Celanese is not making policy arguments to persuade the Court to change the law. Rather, Celanese is objecting that the Opinion not only conflicts with the statute as written, but also impairs the very policies that the Workers Compensation Law was adopted to achieve.

Finally, Respondents cite to Section 42-1-415(A), arguing that Section makes it “unlikely” workers will be without workers compensation protection under the Opinion. (Return 13) But that Section is not the answer, as first, it ultimately shifts the risks of contractors who default on their workers compensation obligations to the State’s Uninsured Employers’ Fund—an outcome

imposing costs upon the State that the current system and law impose upon statutory employers and their subcontractors through the double protection scheme discussed in *Parker* and *Harrell*. Second, while Section 42-1-415(b) provides that it shall not “be construed to abrogate the immunity to tort liability of any . . . project owner who may be considered a statutory employer,” under the Opinion’s analysis Celanese and the many companies like it are no longer considered statutory employers. In short, reliance upon Section 42-1-415(A) will increase costs to the State, increase litigation over upstream employers seeking reimbursement from the Fund, and increase the risks to injured workers.

### **CONCLUSION**

For the reasons discussed above as well as in the Petition and prior briefing, Celanese respectfully requests that its Petition be granted.

*Signature on Following Page*

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