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S.C. SUPREME COURT

No. 2019-000816

The Supreme Court of the State of South Carolina

ANGELA D. KEENE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DENNIS SEAY, DECEASED, AND LINDA SEAY, RESPONDENTS,

v.

CNA HOLDINGS, LLC,
PETITIONER.

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
HON. D. GARRISON HILL, CIRCUIT COURT JUDGE

BRIEF OF SOUTH CAROLINA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF REHEARING

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INTRODUCTION

This Court had consistently interpreted South Carolina's statutory employee doctrine for 80 years. With only marginal changes, it had applied a long-settled three-part test for determining when an owner would be considered a statutory employer of a contractor's employee for workers' compensation purposes. Under that test's application, "[g]enerally, a higher tier contractor" was "considered the statutory-employer of an employee of a lower tier contractor." *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009). As all Justices agreed, the established test would have led to the conclusion here that Celanese was a statutory employer because equipment maintenance was a regular "part of" its business. S.C. Code Ann. § 42-1-400. That conclusion would have had two consequences: Celanese would have had to pay for workers' compensation coverage, and it would have received statutory immunity from tort liability. That trade-off is the quid pro quo that underlies the workers' compensation system.

The majority's opinion reaches a different conclusion only by upending the settled statutory regime. In its place, the majority's opinion substitutes a new or additional test of uncertain origin, refocusing on whether the owner chose to contract out the relevant work. But the Court's opinion never addresses the foundational principle of stare decisis, under which courts cannot overturn prior precedents absent a compelling justification. That principle is especially important in

cases involving statutory questions like this one, as the General Assembly has repeatedly reenacted the law against the backdrop of the Court's precedents. And any justification for overturning *80 years* of precedent would have to be overwhelming. Yet neither the Court nor respondents have provided *any* justification. Respondents do not even contend that the precedents were wrong. And the reliance interests on the settled three-part test are massive. Businesses all over the State have structured employment and contractual decisions for the last 80 years based on this Court's stable interpretation of the law. Innumerable contracts depend on that interpretation. This case proves the point: the Court's decision disrupts contractual expectations reasonably formed over 40 years ago, and in doing so also seems to impose a retroactive rule of liability. To substitute a new interpretation without even considering these reliance interests conflicts with the fundamental value of the rule of law in promoting stability and certainty. Rehearing is urgently needed to adequately consider stare decisis and the reliance interests of businesses on the existing legal framework.

Rehearing is also needed to consider the consequences of the Court's new approach. The statutory employee doctrine determines when an owner who chooses to contract out work is the employee's statutory employer for workers' compensation purposes. Answering this question with clarity is important because it decides whether an employment relationship receives the quid pro quo underlying the

workers' compensation system: a set employee remedy in exchange for employer immunity from tort liability. Yet under the Court's new approach, the very choice to contract out work eliminates the possibility of being a statutory employer. Statutory employment, then, simply would not exist.

Such a practical elimination of the statutory employee doctrine would hurt employers, employees, and the judiciary itself. Without the doctrine, employers in the State would face enormous uncertainty about the scope of potential liability for any contracted work. Insurers will hesitate to work with businesses who have no way to mitigate the threat of $20 million judgments. The resulting uncertainty would likely discourage businesses from using contractors, altering businesses relationships and increasing costs in ways that will harm both overall employment and consumer prices. And because other States with similar laws retain the long-settled tests for statutory employment, South Carolina will be at a competitive disadvantage.

Employees too will suffer. Apart from the loss of jobs that would likely attend this judicial disruption to business operations, employees could be deprived of the quick, sure remedy provided by the workers' compensation system. And the judiciary will be overrun by hundreds of personal injury claims designed to be handled by the workers' compensation system.

Before taking such an unprecedented step away from the Court's settled precedents—which have formed the basis for innumerable business relationships in this State—the Court should fully consider both stare decisis and the implications of its new approach. Rehearing is needed.

INTEREST OF *AMICUS*

The South Carolina Chamber of Commerce is the State's largest business trade and commerce organization. It represents businesses, industries, professions, and associations of all sizes and types with a unified voice, and promotes the development and expansion of new and existing businesses and industries in the State. Its efforts, in turn, benefit the public, raising the standard of living for South Carolina's citizens. The S.C. Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development. It routinely participates in state litigation as an *amicus*. *See, e.g.*, *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 89, 777 S.E.2d. 176, 206 (2015); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318 n.3, 698 S.E.2d 773, 783 n.3 (2010).

ARGUMENT

I. The Court's opinion contravenes principles of stare decisis.

Rehearing is needed to address stare decisis, a rule-of-law doctrine under which courts will adhere to prior precedent—especially involving statutory interpretation—absent a compelling reason to turn away. There is no real question that

the Court's opinion changes its settled approach to the statutory employee doctrine. All Justices agreed that this case would have been resolved differently before the majority's opinion. So the only question is whether there is any justification for departing from those precedents. Respondents provide none. And it is hard to imagine any justification that could override the significant reliance interests that businesses and employees have in 80 years of contracts, relationships, and ventures premised on this Court's settled statutory employment test. Replacing that test threatens these interests so much that the Court's new rule may well constitute an impermissible retroactive rule of liability. But in any event, stare decisis forbids such an unjustified departure from precedents that have undergirded decades of reliance interests.

A. The majority's opinion adopts a new rule of law.

For many years, this Court used the familiar three-part test to determine whether an employee was engaged in "any work which is a part of [the business's] trade, business or occupation" and was thus a statutory employee. S.C. Code Ann. § 42-1-400. The statutory standard was satisfied if the employee's activities "(1) are an important part of the trade or business of the employer, (2) are a necessary, essential, and integral part of the business of the employer, or (3) have been previously performed by employees of the employer." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d. 49, 50 (1997).

Yet without analyzing these tests, the majority's opinion concludes that the statutory employee doctrine does not apply here. In fact, the majority's opinion acknowledges that under the Court's precedents, "it is difficult to imagine the regular—daily, in fact—maintenance and repair work [this employee] and his coworkers performed" would not qualify. *Keene v. CNA Holdings, LLC*, Op. No. 28052 (S.C. Sup. Ct. filed August 11, 2021) (Shearouse Adv. Sh. No. 27 at pp. 50–70, 56, hereinafter "Op."). That is almost certainly correct. *See, e.g.*, 4 Larson's Workers' Compensation Law § 70.06 (2021 ed.) (collecting cases holding that regular equipment maintenance qualifies); *see also* Op. 65 (dissenting opinion).

But the Court departs from its prior law and "refocus[es]" the analysis on what it identifies as "the key question": "what the owner decided is part of its business." Op. 61. If an employer like Celanese "outsourc[es] the work," it is not a statutory employer. *Id.* And because the statutory employee doctrine was only ever relevant in the context of such contracting relationships, *no* employer would seem to be a statutory employer. *See infra* Part II.

Respondents' claim that this is not "a new analysis" (Return 4) strains credulity. The Court would have come to one result before this opinion. Now it reaches a different result. No other explanation exists than that the Court has created a new rule.

Nor did this Court's decisions in *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000), and *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003), presage the majority's new rule. Both *Abbott* and *Olmstead* merely applied the familiar three-part test, while clarifying that "the fact that it was important" for a business to send or receive goods "does not render" such receipt or delivery "an important part of [its] business." *Olmstead*, 354 S.C. at 424, 581 S.E.2d at 485 (cleaned up). Those cases reiterated "the need for [a] case by case analysis" in applying the three-part test. *Id.* at 426, 581 S.E.2d at 486. Such a detailed analysis is unnecessary under the majority's new rule, which focuses on whether the business chose to contract out the work—a test that in every case will find no statutory employment. On that rule, much of *Abbott* and *Olmstead* would have been surplusage or worse.

Thus, there is no question that the majority's opinion departs from 80 years of precedent. Though the majority insists that the three tests remain "valid consideration[s]," Op. 61, it is hard to see how. Under the old tests, if a company negotiated with a subcontractor to sell its product or perform maintenance care on an essential structure, then the subcontractor's employees were considered statutory employees of the principal business. *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 246, 371 S.E.2d 796, 799 (1988); *Boseman v. Pacific Mills*, 193 S.C. 479, 483, 8 S.E.2d 878, 880 (1940). And if a business hired a subcontractor to perform work

that was "customarily done by defendant's employees," then the employee of the subcontractor was a statutory employee. *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 12, 132 S.E.2d 18, 23 (1963). No longer are these conclusions correct. Now, the bare act of outsourcing is dispositive. The old tests have no apparent place in the Court's new rule.

B. In adopting a new rule, the Court disregarded principles of stare decisis and important reliance interests.

Despite its departure from a longstanding legal regime, the Court does not so much as mention the doctrine of stare decisis, which requires a special justification to alter precedent. "No rule is more deeply imbedded in Anglo-American decisional law than stare decisis." *McCall v. Batson*, 285 S.C. 243, 255, 329 S.E.2d 741, 747 (1985) (Chandler, J., concurring). Stare decisis "exists to insure a quality of justice which results from certainty and stability." *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (cleaned up). "A court's decision to depart from precedent is not to be made casually; it must be explained carefully and fully to insure that the court is not acting in an arbitrary or capricious manner." 20 Am. Jur. 2d Courts § 127.

Stare decisis is especially strong where the precedents involved are part of "a body of decisions" building upon each other and reaching similar conclusions. *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012). The doctrine is stronger still in the context of statutory interpretation because "the General Assem-

bly is free to correct any misinterpretation." *One Coin–Operated Video Game Mach.*, 321 S.C. at 181, 467 S.E.2d at 446. Thus, "[i]t is manifestly in the public interest that the" construction of statutes "remain[s] permanently settled" by the courts. *Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (cleaned up). A settled interpretation gives the General Assembly a stable background against which to legislate and allows citizens to structure their affairs with certainty. *See Jenkins v. Atl. Coast Line R. Co.*, 84 S.C. 343, 66 S.E. 409, 413 (1909) ("[T]he rule of stare decisis is highly salutary in producing certainty as to the law, whereas vacillation destroys respect for the court.").

Here, stare decisis is at its zenith. Before the Court is an established body of precedents dating back 82 years and involving a question of statutory interpretation. The General Assembly has repeatedly reenacted and amended the workers' compensation scheme in light of those settled precedents. *See, e.g.*, 1997 Act No. 65, § 1; 1996 Act No. 442, § 1; 1962 Code § 72-111; 1952 Code § 72-111. And "[w]hen a statute which has been construed by a court of last resort is included in a codification of laws thereafter adopted, without significant change in phraseology, the presumption is that the legislature intended to adopt such construction." *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247–48 (1964); *cf. Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016)

("[T]he Legislature's failure to alter a statute constitutes evidence the Legislature agrees with this Court's interpretation of the statute." (cleaned up)).

To depart from such a settled framework, respondents would have to show an overwhelming justification. *Cf. McLeod*, 396 S.C. at 655, 723 S.E.2d at 203. "The relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." 20 Am. Jur. 2d Courts § 125. Not only would respondents have to show that the existing framework is erroneous, they would have to show that "the error is apparent, manifest, and dangerous in its tendencies." *Chamblee v. Tribble*, 23 S.C. 70, 79 (1885). But respondents do not even argue that the old test was wrong. That test is the product of 80 years of careful deliberation and case-by-case clarification, and no one can doubt that the series of cases was well-reasoned. Without a claim of error, there cannot be any justification from departing from precedent. Particularly given the General Assembly's acquiescence in this Court's longstanding interpretation, departing from that interpretation here would amount to an improper exercise of legislative judgment.

Even if respondents had tried to assert some error, the overwhelming reliance interests here would require adherence to precedent. Reliance interests tend to be especially strong in "matters of contract," *State ex rel. George v. City Council of Aiken*, 42 S.C. 222, 228, 20 S.E. 221, 223 (1894), "where parties may have acted in

conformance with existing legal rules in order to conduct transactions," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). This case proves the point: Celanese structured its compensation arrangements 50 years ago to pay for maintenance employees' workers' compensation because it then would have been considered their statutory employer. And Celanese expected to receive the statutory benefit of the bargain: tort immunity.

Thousands of contracts formed over the last 82 years likewise rely on what had been the settled law of this State. Businesses structured relationships with both employees and contractors based on that law. They chose how to specialize, where to expand, and with whom to contract based on that law. But absent rehearing, those reliance interests will be destroyed by the Court's adoption of a new rule that demolishes the foundation for past contracts. Pulling the rug out from under businesses now would be inconsistent with stare decisis and contrary to the fundamental value of the rule of law.

Indeed, by changing the terms of the statutory immunity available to owners, the majority's opinion would appear to impose "liability where none previously existed." *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). When courts adopt such new substantive rules, they must be applied only prospectively, for "retroactive relief would [be] unfair and inappropriate." *Id.* at 9, 377 S.E.2d at 586. This Court has recognized that decisions modifying statutory immunity are

substantive decisions that can only be applied prospectively, for such decisions "effect[] more than remedial or procedural changes": "They create[] liability where none had previously existed." *Id.* (collecting cases); *see also Marcum v. Bowden*, 372 S.C. 452, 455, 643 S.E.2d 85, 86 (2007) (prospective-only application where "our decision today creates tort liability where formerly there was none"); *Brown v. Anderson Cnty. Hosp. Ass'n*, 268 S.C. 479, 488, 234 S.E.2d 873, 877 (1977) (holding that because "hospitals in this State have acted in reliance upon the old rule of charitable immunity and may not have taken steps to protect themselves with adequate liability insurance," the decision would not be applied retroactively). The Court's new rule here reasonably falls within this doctrine, yet the Court apparently gave it retroactive effect to decades-old contracts without considering this issue.

Finally, this case is a particularly bad vehicle for uprooting precedent. Marginal cases can present disagreement in applying the three-factor test to determine whether an owner is a statutory employer. But not this case. The Court should hesitate before overturning precedent when application of that precedent is clear and the statute's interpretation has long been thoroughly outlined by this Court.

None of these points has been briefed by the parties, which only underscores the need for rehearing. No one briefed this crucial legal issue because there was no sign that 82 years of precedents were on the chopping block. And the Court did not

consider how stare decisis or the retroactivity doctrine governing substantive new rules applies to its new test. As shown, stare decisis requires the Court to stick with its settled approach. But at a minimum, the Court should grant rehearing to consider how its approach can be squared with stare decisis, the overwhelming reliance interests here, and the rule of law.

II. The Court's opinion threatens the statutory employee doctrine.

Absent rehearing, the statutory employee doctrine itself faces an uncertain future. Because the primary question in these cases is now evidently "what the owner decided is part of its business," Op. 61, it is hard to imagine any scenario under which a business that contracts or subcontracts out work, no matter how essential to its business, will ever be treated as a statutory employer. After all, the majority's new test treats the very act of contracting out work as proof positive that the work is *not* part of the owner's business. And even if the majority's test does not formally eliminate the statutory employee doctrine, as a practical matter it will. Few businesses would choose to sustain the costs of workers' compensation premiums for contract employees, especially if they need to instead conserve assets to manage risks for much more costly tort judgments.

If the Court's opinion did not mean to substitute this new test for the long-settled one, then rehearing is required to clarify the state of the law. And if the Court's opinion means what it says—that the bare act of contracting out work

means the owner is *not* a statutory employer—then rehearing is warranted to adequately consider the threat that this test poses to the statutory employee doctrine and the broader workers' compensation system. Because no party advocated this dramatic change in the law, the Court did not have the benefit of briefing and consideration of this new approach's consequences. And those consequences would be stark: Should the statutory employee doctrine fall into disuse—as it would, under the Court's current opinion—employers, employees, and the judiciary itself will suffer.

A. The new test would lead to uncertainty for employers.

First, employers across the State would be hurt by this change in settled workers' compensation law. The Court's opinion dismissed any concern for employers, stating that "the public policy at issue here is not to provide civil immunity to employers." Op. 60. According to the Court's opinion, "when the public policy favoring coverage is satisfied—as it was here—that policy has nothing to say about providing immunity to the owner." *Id.* at 61.

But the employer's immunity is a central part of the system. As this Court has explained, the statute provides a "quid pro quo approach to workmen's compensation": the "employee receives the right to swift and sure compensation," and "the employer receives immunity from tort actions by the employee." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980). In other

words, "[t]he immunity imposed by the Act parallels the liability imposed by the Act." Beard et al., The Law of Workers' Compensation Insurance in South Carolina ch. 12-II-A-2 (6th ed. 2012). This Court has made the point repeatedly: "the General Assembly's intent when it enacted this legislation" was that the employee be protected and "[i]n return, the employer receives immunity from other remedies which ordinarily might be sought by the employee." *Parker*, 275 S.C. at 74, 267 S.E.2d at 528; *accord Freeman Mech., Inc. v. J.W. Bateson Co.*, 316 S.C. 95, 98, 447 S.E.2d 197, 199 (1994) ("[O]ne who has obligations under the Act enjoys the immunities under the Act."); *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 544, 96 S.E.2d 566, 572 (1957) ("[T]he basic purpose of the Compensation Act is the inclusion of employers *and* employees." (emphasis added)); The Law of Workers' Compensation Insurance in South Carolina ch. 12-I-B ("[A]n employee whose injury is covered by workers' compensation is entitled to compensation regardless of fault. In exchange, the employee forfeits his right to sue the employer at common law.").

In other words, providing immunity to the employer is part and parcel with protecting the employee. The two goals cannot be separated. If a new test changes the incentives to participate in the workers' compensation system, both employers and employees will necessarily be affected. And in this case, both would be harmed by the majority's extreme limitation on the statutory employee doctrine.

Under the majority's weakened statutory employee doctrine, employers will face massive uncertainty. Participating in the workers' compensation system allows businesses to structure their affairs to protect employees, gain stability and predictability, and reduce long-term costs. One of the most dangerous threats to any business is uncertainty, especially uncertainty in how the law will apply. And if businesses cannot contract out any work without exposing themselves to unknowable tort liability, *see* S.C. Code Ann. § 42-1-550, they will face significant uncertainties and risks in their operations. The threat of such "uncertain and indeterminate" "employer's liability" is why this Court has repeatedly rejected theories that would "allow recovery" in particular cases: such theories would create "a substantial inroad into our statutory compensation scheme." *Parker*, 275 S.C. at 75, 267 S.E.2d at 529. Yet that is what the Court's opinion here does.

The consequences of this uncertainty would be severe. With the threat of eight-figure tort claims hanging over every contracting relationship, insurers will be forced to raise rates to cover South Carolina businesses. Business costs—and costs of goods to consumers—will rise. Employment will fall. For businesses without the ability to obtain sufficient insurance, a single tort judgment could be terminal.

Such risks would force businesses to re-evaluate the benefits of continuing existing contracting relationships and would also likely deter businesses from en-

tering new contracting relationships, instead incentivizing them to keep all work in house. This will hurt small businesses and startups that can specialize and provide services at lower costs—and their potential employees. Once again, not only will this raise the cost of doing business in South Carolina, it will raise the prices consumers have to pay for both goods and services.

What's more, the Court's new test will put South Carolina at a significant competitive disadvantage. Most States continue to adhere to predictable, well-settled statutory employer tests similar to that which formerly governed here. *See* 82 Am. Jur. 2d Workers' Compensation § 107 (collecting cases).[1] Those States, with high "degree of harmony," agree that "if the defendant is a business which by its size and nature" carries out an "ongoing program" of equipment "maintenance," such jobs "delegated to a contractor will be brought within the" statutory employee

[1] *See also, e.g.*, *Moore v. Virginia Int'l Terminals, Inc.*, 283 Va. 232, 236 n.1, 720 S.E.2d 117, 119 n.1 (2012) (asking whether the "activity is, in that business, normally carried on through employees" (cleaned up)); *Dominio v. Folger Coffee Co.*, 2009-1278 (La. App. 4 Cir. 2/10/10), 32 So. 3d 955, 957–58, *writ denied*, 2010-0570 (La. 5/21/10), 36 So. 3d 232 (considering various similar factors); *Murray v. Goodyear Tire & Rubber Co.*, 46 S.W.3d 171, 176 (Tenn. 2001) (asking whether "the work being performed by a subcontractor's employees is part of the regular business of the company or is the same type of work usually performed by the company's employees"); *Warden v. Hoar Const. Co.*, 269 Ga. 715, 716, 507 S.E.2d 428, 430 (1998) ("The quid pro quo for the statutory employer's potential liability is immunity from tort liability.").

doctrine. 4 Larson's Workers' Compensation Law § 70.06 (collecting cases). Thus, in most other States, Celanese would easily be considered a statutory employer.

If South Carolina takes a different approach—especially one that imposes such high costs on businesses—businesses will be discouraged from investing in South Carolina. They will prefer to operate in States with predictable, stable workers' compensation regimes that do not expose them to high litigation risks. And companies that do business in multiple states will suffer from cross-border uncertainty and the disruption of a harmonious legal regime. The disconnect between the Court's new rule and the rules in other States with similar statutes counsels for rehearing. *See Nolan v. Daley*, 222 S.C. 407, 412, 73 S.E.2d 449, 451 (1952) (interpreting South Carolina's workers' compensation law in accord with similar laws in other states).

Finally, late in the majority's opinion, it seemingly introduces another layer of complexity into its new analysis, stating that an owner is not a statutory employer if it contracts for the work *and* "if the decision to do so is not driven by a desire to avoid the cost of insuring workers." Op. 61. This qualification is difficult to understand, for it suggests that the owner *would* be a statutory employer if it contracted work out for the express purpose of avoiding workers' compensation costs. (Otherwise, the qualification adds nothing.) But why would the law deny immunity to a business like Celanese that tries to make proper workers' compensation pay-

ments while conferring immunity on a business that tries not to? And how would this result promote "the public policy favoring coverage"? *Id.*; *cf. Warden*, 269 Ga. at 716, 507 S.E.2d at 430 (noting that making a "general contractor who required subcontractors to carry insurance" "liable in tort" but allowing a "general contractor who did not require insurance" to "escape tort liability" "would undercut the purpose of . . . ensur[ing] that employees are covered by workers' compensation"). For that matter, why would an employee's coverage depend on the motivation behind an owner's business decisions? And how are courts supposed to determine that motivation?

More broadly, essentially all business decisions result from weighing costs and benefits. Businesses obtain insurance to mitigate risk and fulfill legal requirements. If there is no benefit to an owner like Celanese from making workers' compensation payments for contractors' employees, then of course it will not make them. It makes little sense for a legal test to hinge on the owner's "desire" to incur costs whose corresponding benefits depend on whether the test is satisfied. The owner cannot even know whether he has such a "desire" unless he knows the result of the legal test. And if the legal test will always subject him to the risk of eight-figure judgments, then he should presumably spend his limited resources trying to obtain tort liability insurance rather than making unnecessary workers' compensation payments.

Because of these uncertainties in the Court's new approach—uncertainties that will impose massive costs on businesses in the State—rehearing is needed.

B. The new test would deny employees a sure remedy.

As discussed, the Court's new test disincentivizes businesses from ensuring that contractors carry workers' compensation. This result will undermine the statutory goal of broad workers' compensation coverage for all employees. This Court has said that the "statutory employee doctrine converts conceded non-employees into employees for purposes of the Workers' Compensation Act" with the goal of "prevent[ing] owners and contractors from subcontracting out their work to avoid liability." *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1. The majority's new rule, however, says that any owner that makes a "business decision to outsource" work will *not* come within the doctrine, Op. 62, putting its rule in direct opposition to the "original purpose" invoked by the majority itself, *id.* at 51.

Many employees could be left uncovered by the majority's new rule. The smallest contractors are not required to provide workers' compensation insurance, while other small contractors are necessarily more likely to go into default due to their size. An employee of such a contractor who is injured cannot receive the certain, quick coverage provided by workers' compensation. Instead, he faces a years-long quest to prove liability against a small entity that is likely to default. That quest will be made much harder by the various common law tort defenses, includ-

ing comparative negligence. And imposing third-party liability (as here) is still more difficult.

Thus, the Court's new test will return such injured employees to the situation they faced before the workers' compensation system: being "injured while doing the work" but "left without remedy." *Smith v. Fulmer*, 198 S.C. 91, 97, 15 S.E.2d 681, 683 (1941). Workers' compensation was designed to alleviate that problem. *See Parker*, 275 S.C. at 69, 267 S.E.2d at 526. But the Court's new test exacerbates it.

Respondents suggest that S.C. Code Ann. § 42-1-415 "provides a remedy that protects the [uninsured] injured worker and provides relief to an owner or higher tier contractor that would be considered a statutory employer." Return 13. But swamping the Uninsured Employer's Fund with claims was surely not the intent of § 42-1-415. And to say that the statute "provides relief" to "a statutory employer" ignores that few owners would be considered such employers under the Court's new test. It also ignores that the owner "cannot seek indemnity from the Uninsured Employer's Fund when the immediate employer has breached its duty to secure workers' compensation insurance." Law of Workers' Compensation Insurance ch. 1-XIII-G. Finally, it ignores the burdens placed on owners who seek to transfer liability to the Fund. *See Hopper*, 383 S.C. at 315, 680 S.E.2d at 3.

The majority's opinion places a heavy emphasis on the happenstance that Celanese paid for these employees to be insured by the workers' compensation system. Thus, by ruling in the employee's favor, "the public policy favoring coverage is satisfied." Op. 61. That is not so, for three reasons. First, as discussed, similarly situated employers will now have little incentive to provide coverage. Second, under the Court's new test, future employees will be less likely to have coverage. Third, the "coverage" turned out to be meaningless for all involved in this case: the employer was denied the benefit of the bargain, the employee did not rely on workers' compensation, and the judiciary has spent nearly a decade litigating the resulting controversy.

C. The new test would overwhelm the judiciary with personal injury cases.

As explained, the Court's new test discourages coverage by owners of contracted employees. Employees who are injured but not covered will have "no choice but to look to the courts for compensation." *Parker*, 275 S.C. at 69, 267 S.E.2d at 526. And even if they were covered by a viable contractor or the uninsured fund, the Court's opinion creates a significant incentive to file a tort claim against the owner anyway. Courts will be inundated with claims that the workers' compensation system was supposed to—and is designed to—handle. Litigation costs and burdens on the courts will skyrocket, thereby depriving employers, employees, and the courts of one of the intended benefits of the workers' compensa-

tion scheme: "escape from personal injury litigation." *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 364, 2 S.E.2d 825, 836 (1939).

CONCLUSION

As all Justices agreed, until this opinion, the employment relationship here would have fallen within the settled statutory employee doctrine. And because the parties did not brief other issues, the Court has not had the benefit of a full debate about stare decisis or the merits of its new approach to workers' compensation in South Carolina. That approach would have serious consequences for coverage, discouraging employers from covering contracted employees and depriving employees of a sure remedy. And it would disrupt decades of expectations by business across the State. Before adopting such an unprecedented approach, this Court should grant rehearing to carefully consider its consequences.

Respectfully submitted,

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SEPTEMBER 29, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCAR, I, Christopher E. Mills, an attorney, certify that the foregoing complies with the applicable length and formatting requirements of Rules 211, 213, and 267, SCAR.

Dated: September 29, 2021

s/ Christopher Mills
Christopher E. Mills