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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. 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

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

v.

CNA Holdings, LLC..... Petitioner.

**BRIEF OF SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF REHEARING**

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INTEREST OF THE AMICUS CURIAE

The South Carolina Defense Trial Attorneys Association is a civil defense bar organization organized in 1968 with a collective membership of over 1,000 South Carolina lawyers who represent clients in both Federal and State trial courts as well as before the South Carolina Workers Compensation Commission.

The organization has several goals including supporting and working for the improvement of the adversarial system of justice in South Carolina courts and working for the just, speedy and inexpensive determination of every action. As attorneys and counselors, SCDTAA's lawyers evaluate both employment and workers compensation cases and advise their clients regarding the consequences of various transactions and business decisions. In addition, its members give advice regarding their clients' duties and obligations including determinations as to when employers might be responsible for workers compensation insurance and when they are exposed to tort liability.

This case presents significant issues for both trial and workers compensation practitioners in the defense of lawsuits and workers compensation claims. SCDTAA supports the Petition for Rehearing because issues raised by the majority opinion in this case require clarification and further explanation as to the status of the Statutory Employment Doctrine in South Carolina and the rules surrounding the same.

For the foregoing reasons, SCDTAA respectfully requests that this Honorable Court grant leave to present an amicus curiae brief pursuant to Rule 213, SCACR.

ARGUMENT

This Court should grant rehearing on the grounds as set forth by the Petitioner. The SCDTAA agrees with the arguments made by Petitioners in favor of the Court granting rehearing and issuing a new opinion reversing the Court of Appeals and Trial Court in this matter. Further, even if the Court is not inclined to reverse, the Court should at a minimum order rehearing and further oral argument in order to clarify issues raised in the majority opinion which need further clarification.

In addition to the arguments made by the Petitioner, the SCDTAA raises further points: (1) the Supreme Court should specify whether or not the three factor test as set forth in *Smith v. T.H. Snipes Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991) has been abolished and/or modified and (2) if so modified does the refocus on business judgments as set forth by the majority opinion create another factor to consider and as a result create an additional line of discovery in cases involving the Statutory Employment Doctrine.

The Statutory Employment Doctrine in South Carolina is a creature of statute and is found at S.C. Code Ann. §§ 42-1-400, 42-1-410. The majority opinion describes these statutes and the precedent which flow from them as “confusing, often conflicting and always difficult for the workers compensation commission and the circuit court to apply.” *Keene V. CNA Holdings*, No. 2019-000816, 2021 WL 3521085 at *1 (S.C. Aug. 11, 2021). However, as this Court has previously recognized, “[t]he doctrine of state decisis enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent.” *Wehle v. South Carolina Retirement System*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005); *see also Kimble v. Marvel Entertainment*, 576 U.S. 446, 456 (2015). However, the majority opinion by injecting a new analysis into the

doctrine makes what already is recognized as a challenging doctrine even more challenging and more so for the practitioner. Throughout its history, the Statutory Employment Doctrine has been used both as a sword and a shield, with the majority of the precedent decided by this Court involving its use as a sword as opposed to the protection of an injured worker. The majority opinion leaves in question proper application of its use as either a sword or shield, which mandates a rehearing to resolve the unanswered.

I. THE COURT SHOULD REAFFIRM THAT THE PROPER TEST FOR STATUTORY EMPLOYMENT IN SOUTH CAROLINA IS THE THREE FACTOR TEST WITHOUT REGARD TO THE “MODERN ECONOMY”.

For decades, the Courts of this state have relied upon a three factor test consisting of the following to determine statutory employment status:

1. Are the workers activities an important part of the trade or business of the employer,
2. Are the workers activities a necessary, essential and integral part of the business of the employer, or
3. Have the workers activities been previously performed by employees of the employer.

Glass v. Dow Chemical Co., 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). This test has allowed a decision on a case by case basis. See *Ost v. Integrated Products, Inc.* 296 S.C. 241, 244, 371, S.E.2d 796, 798 (1988). The majority opinion in this case noted that this analysis has resulted in differing results based upon the facts and circumstances of a particular case. While a significant portion of the majority opinion is focused on two transportation cases, the dissent properly notes that the analysis of *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) are limited to the transportation realm.

The majority opinion sua sponte interjects “the consideration of realities of the modern economy” as a basis upon which to hold that Seay was not a statutory employee of the Petitioner. The modern economy analysis and focus of the majority on business management principles suggests that the Court has moved past the three part tests. This needs further analysis if it is to be the law. Certainly while some employers in South Carolina are part of the new economy, the vast majority in South Carolina’s agriculture and manufacturing businesses remain easily susceptible and able to be governed by the three factor test without the addition of modern business management principles. If the consideration of these principles is now part of the substantive analysis of the statutory employment doctrine, rehearing is appropriate to, at the very least, provide some clarity as to the appropriate analysis of this test.

II. IN ANNOUNCING A NEW TEST FOR STATUTORY EMPLOYMENT, THE MAJORITY OPINION NEGLECTS TO ADDRESS CIRCUMSTANCES IN WHICH THE INJURED WORKER IS SEEKING WORKERS COMPENSATION.

In the case before the Court the decedent Respondent sought a recovery in tort rather than workers compensation and the Petitioner asserted statutory employment as a defense. Lost in the decision is any analysis of how the majority opinion would apply to an injured worker seeking coverage under the workers compensation system as opposed to a tort recovery. While there is suggestion in the briefing that Seay had workers compensation available and chose not to pursue it - that is irrelevant to this analysis. Many injured workers seek the certainty and immediacy of workers compensation particularly in instances in which there is no clear tort remedy. By creating new standards for the analysis of statutory employment, the path for that injured worker is more confusing and difficult to apply. The majority opinion seems to be premised on the fact that Daniel Construction

was a viable financial entity but fails to consider potential outcomes if the converse had been true. The rehearing sought by the Petitioner should be granted in addition to the reasons set forth in the petition to address and clarify the circumstances in which the Statutory Employment Doctrine is available to a claimant seeking workers compensation.

III. INJECTION OF THE MODERN ECONOMY AND BUSINESS JUDGMENT WITHOUT CLARIFICATION CREATES THE POTENTIAL FOR ADDED AND UNNECESSARY DISCOVERY TO WHAT WAS ALREADY A STRAIGHTFORWARD RULE.

The membership of the SCDTAA lives in a world in which discovery is the rule and trials are the exception. Many commentators agree that the prevalence and abundance of discovery provides a disincentive for the disposition of lawsuits or workers comp claims on their merits. The addition of new factors which require the application of the modern economy and business judgment to the facts of a particular case only creates the potential for more unnecessary discovery.

Prior to this decision, the decision as to whether an individual was a statutory employee was based on a straightforward three factor test. As evidenced by the history, outlined by both the majority and the dissent, an analysis of those factors in particular cases resulted in winners and losers. In fact, historically, maintenance workers like Mr. Keene typically were found to be statutory employees. A long line of South Carolina cases have held that maintenance workers are statutory employees of manufacturing business. It was only with the advent of the transportation cases that there began to be some change in the case by case approach to statutory employment. Based on the majority opinion, a statutory employment-based motion potentially will result in discovery into the management or financial arm of a company to understand the motivations behind the decision to use a subcontractor. This will create another category of discovery to be done in order to reach

a result. Nothing in the facts of the case compel this result but this opinion creates the opportunity for more interrogatories, requests for production and depositions. While that may not be the intention of the majority, decisions often have unintended consequences. As a result rehearing should also be granted to clarify the weight to which business judgment or the modern economy should be a test or factor to be considered and how those might be resolved.

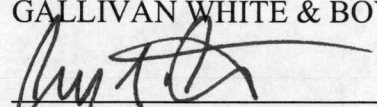
CONCLUSION

For the foregoing reasons, as well as those stated by the Petition, the Court should grant the Petition for Rehearing to clarify the issues as set forth by the amici as well as those raised by the Petitioner and any other amici.

Respectfully submitted,

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