THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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

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

v.

CNA Holdings, LLC,..... Petitioner.

CELANESE'S BRIEF IN RESPONSE TO THE COURT'S OCTOBER 11, 2021 ORDER

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CNA Holdings, LLC ("Celanese") filed a Petition for Rehearing of this Court's August 11, 2021 Opinion in its appeal, Appellate Case No. 2019-000816 (Opinion No. 28052, Howard Adv. Sh. No. 27 at pp. 50-70, referenced as "Opinion" or "Op.") In response, the Court directed the parties to brief three specific issues. Celanese's discussion of these issues is as follows:

I. ISSUE #1: "CNA Holdings' factual point on what it calls 'the undisputed facts that Mr. Seay and his family never pursued worker's compensation benefits, and thus did not receive any." At a minimum, Respondents must address the accuracy of CNA Holdings' point. If the point is acknowledged, no further discussion is necessary."

The factual record both in the trial court and on appeal is undisputed: Mr. Seay and his family never filed for, pursued, or received worker's compensation benefits. The record support for Celanese's statement in this regard includes the following:

A. Record Support In The Trial Court.

(i) Mr. Seay was deposed, and testified under oath, that he did not have a Worker's Compensation case for his asbestos disease. (*See* Celanese's Mem. in Supp. of Supplemental & Am. Mot. to Dismiss or in the Alternative Mot. for Summ. J., filed May 26, 2015, Ex. B – Tr. of Nov. 20, 2014 Dep. of Dennis Seay 53:3-11; A. 2312.)

(ii) Plaintiffs in the trial court did not dispute the fact that Mr. Seay and his family never pursued worker's compensation benefits. To the contrary, Plaintiffs argued that Mr. Seay allegedly had no remedy against Celanese under the Workers' Compensation Act. (*See* Pltfs. Resp. in Opp'n to Supplemental & Am. Mot. to Dismiss or in the Alternative Mot. for Summ. J. 6-8, filed May 26, 2015; A. 2258-60.) Celanese responded by disagreeing with Plaintiffs in this regard. (*See* Celanese's Supplemental & Am. Mot. to Dismiss or in the Alternative Mot. for Summ. J. 1-2, filed July 22, 2015; A. 2148-49.)

(iii) During oral argument on Celanese's Motion for Summary Judgment, Celanese explained that Plaintiffs had not filed a Workers Compensation claim. Again, Plaintiffs

did not dispute this fact. (*See* Tr. of July 25, 2015 Hrg. on Celanese's Supplemental & Am. Mot. to Dismiss or in the Alternative Mot. for Summ. J. 14:20-20:3, 23:4-24:21, 28:4-12; A. 1723-29, 1732-33, 1737.)

(iv) During oral argument on Celanese's Post-trial Motions, Plaintiffs' counsel acknowledged that Plaintiffs had not filed a Workers Compensation claim. (Tr. of Dec. 3, 2018 Hrg. on Celanese's Post-trial Motions 21:23-22:12, 49:20-25; A. 161-62, 189.)

B. Record In The Court Of Appeals.

Respondents (Mr. Seay, *et al.*) argued in the Court of Appeals that Mr. Seay allegedly could not pursue a workers' compensation claim due to the statute of repose. (*See* Final Br. of Respondents 7, 17, filed May 11, 2017; A. 2809, 2819; Respondents' Return to Pet. for Reh'g 5, filed Mar. 15, 2019; A. 2913.) Tellingly, Mr. Seay's failure to even file for workers compensation benefits or make a claim for them means that neither the Commission nor a court ever considered and ruled on his argument, Regardless, Celanese disagreed with Respondents' argument and explained why it is wrong. At no point, however, did Respondents argue that Mr. Seay and his family had filed for workers' compensation benefits. (*See* Final Reply Br. of Appellant 15, filed Apr. 26, 2017; A. 2843.)

C. Record In This Court.

(i) Respondents opposed Celanese's Petition for Certiorari in this Court, arguing that Mr. Seay had no workers compensation claim to pursue or file, again claiming a statute of repose problem. (Respondents' Return to Pet. for a Writ of Cert. 6-7, 19-20, filed Aug. 5, 2019.) Celanese responded by explaining why Respondents' arguments were wrong and contrary to law. (*See* Pet'r's Reply in Supp. of Pet. for a Writ of Cert. 15, filed Aug. 22, 2019.)

(ii) Respondents opposed Celanese's Opening Brief in this Court, again arguing that Mr. Seay had no workers compensation claim that he could make. (*See* Brief of Respondents

12-13, 30-32, filed Feb. 20, 2020.) In Reply, Celanese once more explained why Respondents were incorrect in making their argument in this regard. (*See* Reply Brief of Pet'r 15-16, filed Feb. 28, 2020.)

(iii) In its Petition for Rehearing of the Court's August 11, 2021 Opinion, Celanese pointed out that "Mr. Seay and his family never sought workers' compensation benefits." (*See* Pet'r's Pet. for Reh'g 7, filed Sept. 9, 2020.) In their Return to Petition for Rehearing, Respondents said nothing about this in response, and did not dispute that fact. In Reply on its Petition for Rehearing, Celanese said again: "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, but sued Celanese instead, thereby upsetting the decades-long balance between workers compensation and tort law." (Petr's Reply in Supp. of Pet. for Reh'g 7 (citations omitted); *see also id.* at 6.)[1]

* * *

The record, in sum, is undisputed and fully supports Celanese's statement that Mr. Seay and his family never pursued worker's compensation benefits, and thus did not receive any.

[1] As Celanese elaborated on further at page 6 of its Sept. 27, 2021 Reply in Support of Petition for Rehearing: "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) 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. Instead, they sued Celanese—precisely what the workers compensation system is designed to avoid." (Petr's Reply in Supp. of Pet. for Reh'g 6.)

II. ISSUE #2: "As addressed in Section II of the petition, 'the rationale and consequences of the opinion's . . . analysis.'"

The Opinion's rationale rewrites the Workers' Compensation Law, is contrary to the undisputed factual record, and overrules decades of precedent. The consequences of its rationale are that the statutory employee doctrine and Section 42-1-400 have been eliminated in all but name only, as has the "double protection" currently provided to subcontracting workers. In addition, retroactive liability has been imposed for conduct taking place years ago that was engaged in based upon the settled expectations of business owners, subcontractors and workers.

A. The Opinion's Rationale Rewrites The Law, Factual Record And Overturns Decades of Precedent.

The statutory employee doctrine was codified by the General Assembly as Section 42-1-400; it is not judge-made. To guide enforcement and implementation of Section 42-1-400, this Court fashioned a disjunctive three factor test, which is grounded in the statute's text to determine whether a business owner is or is not the statutory employer of an injured subcontractor's worker, the putative statutory employee. The relevant portion of the statute (Section 42-1-100) is quoted at page 53 of the Court's Opinion, and the relevant question based upon the statutory text for determining statutory employer-employee status is whether the work performed by the subcontractor's employee "is part of [the owner's] trade, business or occupation." If it is, then the owner is a statutory employer and "shall be liable to pay to any work[er] employed in the work any compensation under this title which he would have been liable to pay if the work[er] had been immediately employed by him." (Op. No. 28052 at 52-53 (quoting S.C. Code Ann. § 42-1-400).)

This Court's three factor test holds that if any one of three factors is satisfied, specifically, whether the work performed (1) is an important part of the trade or business of the employer, or (2) is a necessary, essential and integral part of the business of the employer, or (3) has been previously performed by employees of the employer, then the owner is a statutory employer and

the subcontractor's employee is a statutory employee. *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). This test, which in any given case will turn upon the facts regarding the work performed, has been settled and followed for decades—until now.

The Opinion rewrites the Workers' Compensation Law, and renders the three factor test irrelevant in practice, replacing it with a new test.[2] Thus, rather than applying the plain statutory text of Section 42-1-400 by following this Court's three factor test and asking whether the work at issue is "part of" the owner's "trade, business or occupation," the Opinion rewrites the statute to adopt a new "refocus" analysis centered on (1) the General Assembly's "original purpose" for enacting the statutory employee doctrine, (Op. No. 28052 at 51, 53, 54, 60, 61, 63), and (2) "on what the owner decided is part of its business." (*Id*. at 61.) This new test is not in accordance with the prior announced manifest purpose of the statute, rewrites the statute, and overrules decades of precedent, as discussed below.

1. The Opinion's "Original" Statutory Purpose Rationale Rewrites The Statute.

In construing a statute, a Court examines and enforces the statutory language as written. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. . . . '[T]here is no occasion for employing rules of statutory interpretation and

[2] In fairness, the Opinion does state with respect to the three factor test that, "[w]hile each test remains a valid consideration, today, we refocus on the key question posed by the statute." (Op. No. 28052 at 61.) But there is a problem with this statement, specifically, that under the Opinion's new test, there is never a situation where the three factors can be taken into consideration, as in practice, there is no fact pattern that Respondents or anyone else can identity in which an upstream employer who outsources work that is a part of its business for legitimate business reasons will ever be found to be a statutory employer. (*See* Petr's Reply in Supp. of Pet. for Reh'g 1-3 (discussing this problem).)

the court has no right to look for or impose another meaning' unless a statutory provision is ambiguous." (quoting *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995))); *see also Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) ("When reading a workers' compensation statute this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities. 'The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))).

Rather than focusing on whether Mr. Seay's work was part of Celanese's business, however, the Opinion focuses on its view of the statute's "original purpose." Thus, the Opinion states:

> "Today, following our more recent decisions on the statutory employee doctrine, we apply the doctrine in light of the General Assembly's original purpose for enacting it: 'To prevent owners and contractors from subcontracting out of their work to avoid liability for injuries incurred in the course of employment.'" (Op. No. 28052 at 51 (citation omitted).)
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> "Our General Assembly enacted the statutory employee doctrine—as did the legislatures of most states across the country—'to forestall evasion of the act by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers. . . . As we stated in *Glass*, the purpose of the statutory employee doctrine 'is to prevent owners and contractors from subcontracting out their work to avoid liability for injures incurred in the course of employment.'" (*Id.* at 53-54 (citations and footnote omitted).)
>
> "[Celanese] argues the decisions of the circuit court and the court of appeals in this case refusing to apply the statutory employee doctrine 'conflict with the public policy favoring inclusion under the Workers' Compensation Law.' The applicable public policy, however, is to ensure that workers are covered under the Workers' Compensation law. . . . It does not matter to the fulfillment of this policy who provides the coverage. Here, [Celanese] contracted out the maintenance and repair work to a sophisticated international construction company—Daniel Construction—not to a financially irresponsible subcontractor without the capacity to insure its workers. But [Celanese] went further—to its credit—and mandated through contract that the maintenance workers would be insured. The decisions of the circuit court, the court of appeals, and now this Court, in no way frustrate the

> policy of the statutory employee doctrine or the Workers' Compensation Law." (*Id.* at 60 (citation omitted).)
>
> "It is also important to note that the public policy at issue here is not to provide civil immunity to employers like [Celanese] . . . However, 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 60-61.)
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> "The original purpose of the statutory employee doctrine was to prevent business managers from outsourcing work for the purpose of avoiding workers' compensation costs. That purpose has nothing to do with outsourcing work for legitimate business reasons. Moreover, unlike the economy of 1936, it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury. … Seay's family presumably received the workers' compensation benefits [Celanese] obligated through contract that Daniel must provide. The original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers' compensation benefits, because Daniel provided those benefits. The original purposes are certainly not served by granting [Celanese] immunity for its wrongful conduct. It is not the role of courts to second-guess a legitimate business decision whose effect—far from the improper purpose the statutory employee doctrine was designed to prevent—was actually to guarantee that workers affected by the decision would be insured against work-related injuries." (*Id.* at 62-63.)

The Opinion's new test and description of the statute's "original purpose" is too narrow, and will produce the very risks to employees the statute was enacted to protect against. Thus:

First, the statute's text focuses on whether the work performed by the subcontractor's employees "is a part [of the owner's] trade, business or occupation." The statute does not consider much less focus upon whether the statute's purposes were met by the owner or someone else. Nor does the statute consider whether the subcontracting was for legitimate or illegitimate purposes. And, it does not direct the courts to determine statutory employee status based upon an understanding of worker protections in the "modern economy." In short, the Opinion's statutory purpose rationale and holding constitutes an abrogation of the statutory text—*i.e.*, the statutory phrase, "a part of [the owner's] trade, business or occupation" has been stripped of all meaning.

Second, focusing on the "original purpose" simply does not answer the jugular question, which is, whether the work contracted out "is a part of [the owner's] trade, business or occupation."

The three factor test provided alternative tests for answering that statutory text question based upon the factual record. But the Opinion's new "original purpose" analysis as modified by the "modern economy," does not.

Third, Celanese submits that the Opinion's rendition of what is the statute's "original purpose" is too narrow, as the statutory purpose was much broader than "[t]o prevent owners and contractors from subcontracting out of their work to avoid liability." (Op. No. 28052 at 51, 53-54, 62-63.) That formulation guts the statute. The purpose of the statute was to protect workers, whether owners or subcontractors were intentionally or unintentionally trying to avoid liability or not. For example, assume the subcontracting was for one of the Opinion's "legitimate" purposes and with a responsible contractor. Under the Opinion's rationale, there would be no statutory employer-employee relationship. But then, a recession happens and the contractor goes belly up. What then? Under the Opinion's rationale, the owner is not a statutory employer, the workers are not statutory employees, and instead, are left unprotected, with the result being that the broad statutory policy of protecting subcontractor employees is unfulfilled. Such outcomes cannot be reconciled with the plain statutory text, nor with the statute's original purpose of providing protection to subcontracting employees.

Fourth, the Opinion's narrow description of the statute's "original purpose" fails to consider the full scope of the statute's purposes, and in doing so overturns this Court's prior precedent. Thus, as Celanese discussed on pages 13-16 of its September 9, 2021 Petition For Rehearing, the Opinion expressly assumes that under the law the statutory purpose was that there can only be one statutory employer.[3] But that assumption has not been the long-held understanding

[3] The Opinion makes this clear when it states: "The original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers' compensation benefits, because Daniel provided those benefits." (Op. No. 28052 at 62.) Of course, Celanese

of the full scope of the General Assembly's purposes in enacting Section 42-1-400, as previously explained by this Court. Thus, in *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980), this Court unanimously held that there can be more than one statutory employer, and that this was appropriate so as to achieve the General Assembly's purposes in enacting the statute: "The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business . . . . In consequence, both the owner and the contractors whom he engages to do his work are subjected to the requirements of the Act, *and the workers receive double protection*." *Id*. at 275 S.C. at 73, 267 S.E.2d at 528 (quoting *Blue Ridge Rural Elec. Co-op. v. Byrd*, 238 F.2d 346 (4th Cir. 1956)) (emphasis added); *see also Gentry v. Milliken & Company*, 307 S.C. 235, 238, 414 S.E.2d 180, 182 (Ct. App. 1992).

Parker's holding, as well as its explanation of the statute's purposes, cannot be reconciled with the Opinion in this case, with its narrow focus on whether the injured worker was covered by insurance or not, regardless of who provided it and regardless of whether the work performed by that worker was a "part of" the business owner's trade, business or occupation. "Double protection," the concept of ensuring that the statutory goals are achieved by providing workers—those "who are exposed to the risks of its business"—has now been dispensed with by the Opinion. This double protection policy is of particular importance 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 the risk of subcontractor financial irresponsibility being borne by injured workers. Whilst this Court's previously announced "manifest purpose" of the statute—

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paid for the benefits and mandated that they be provided. (Pet'r's Pet. for Reh'g 5; Petr's Reply in Supp. of Pet. for Reh'g 5-7 (discussing who provided the benefits and paid for them).)

"double protection"—is not in the statutory text, it is grounded in and flows from what is in the text. With respect, the Opinion's newly stated "original purpose" does not.

Fifth, a statute's language and "original purpose" should not be modified by what the Opinion states has changed since 1936 to now "become standard in the modern economy." (Op. No. 28052 at 62.) The original purpose was to protect workers; whether the "modern economy" does it differently than in 1936, or whether in the modern economy it is now "standard . . . for business to bear the cost of insuring workers against injury,"[4] in the real world example posed above, even the most financially secure contractor can unexpectedly face financial ruin. The statute was enacted to protect workers from the risk of such outcomes.

In sum, the Opinion strips Section 42-1-400 of all meaning because the Opinion's rationale focuses not on the question of whether the outsourced work is a "part of" the owner's business, but instead concludes that it does not matter whether the work is or is not "part of" the owner's business, so long as the statutory purposes were fulfilled at the time of contracting. That is not what the statute provides.[5]

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[4] The Opinion does not discuss the reasons for why this "standard in the modern economy," (Op. No. 28052 at 62), has developed since 1936, but one strong reason logically would be that business owners believed as a result 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 business are their statutory employees and thus require business owners to put in place the necessary workers compensation system protections.

[5] Now, perhaps the rejoinder is, that the statutory employer-employee relationship is not measured only at the time of contracting, but also at the time of injury. But that cannot be the answer, as it would create yet another problem, and one that would result in mass confusion in the courts, the Commission, and marketplace as to who is responsible for providing workers' compensation benefits to subcontracting employees. For example, a business owner makes a "legitimate" business decision to outsource with a responsible subcontractor. Under the Opinion's rationale, the business owner is not a statutory employer. The owner thus does not pay for or otherwise provide the requisite workers compensation insurance, as there is no obligation for it to do so, and also no point to doing so. Then, three years later, the subcontractor goes under, and it is determined that there are no workers compensation benefits available for an injured subcontracting employee.

2. The Opinion's Business Decision Rationale Rewrites The Statute.

As Celanese discussed on pages 1-5 of its September 9, 2021 Petition for Rehearing, the Opinion's new test and rationale also focus "on what the owner decided is part of its business." (Op. No. 28052 at 61.) Thus, the Opinion states:

> "The question posed by section 42-1-400 today is the same key question we addressed in *Marchbanks*: whether the work contracted out is 'part of [the owner's] trade, business or occupation.' Over time, we developed what we called 'tests' for courts and the workers' compensation commission to use in answering the key question. While each test remains a valid consideration, today, we *refocus* on the key question posed by the statute.
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> In answering the question posed by section 42-1-400—whether the work contracted out is 'part of [the owner's] trade, business or occupation'—the court should focus initially on what the owner decided is part of its business. . . . In reality, therefore, what is or is not 'part of' the owner's business is a question of business judgment, not law. If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company's business to not include that particular work." (Op. No. 28052 at 61 (citations and parentheticals omitted).)
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> "In this case, there is no question [Celanese] made a legitimate business decision to outsource its maintenance and repair work. [Celanese] clearly had no intention of avoiding the cost of insuring the workers who did the work against work-related injuries. In fact, 'to its credit' as we stated, [Celanese] provided in its contract with Daniel that the workers must be insured and [Celanese] would pay for it. [Celanese] business mangers considered the economic interests of the company and determined maintenance and repair was not 'work which is a part of [its] trade, business or occupation." (Op. No. 28052 at 62 (citation omitted).)
>
> "Seay's family presumably received the worker's compensation benefits [Celanese] obligated through contract that Daniel must provide. The original purposes of the statutory employee doctrine ware not served by making [Celanese]

What then? Under the Opinion's rationale, the injured worker is out of luck—unless implicit in the Opinion is a holding that the business owner becomes retroactively liable for the workers compensation obligations. But if that is the case, then the statute makes no sense whatsoever—*i.e.*, the business owner is not a statutory employer unless the subcontractor defaults on its obligations in which case it is. Such a statutory rewrite makes business owners strictly liable and responsible for subcontracting employees no matter what, but without ever receiving the benefits of statutory civil immunity, which after all is the *quid pro quo* for providing workers with workers compensation protection in the first place.

> an additional provider of workers' compensation benefits, because Daniel provided those benefits. The original purposes are certainly not served by granting [Celanese] immunity for its wrongful conduct. It is not the role of courts to second-guess a legitimate business decision whose effect—far from the improper purpose the statutory employee doctrine was designed to prevent—was actually to guarantee that the workers affected by the decision would be insured against work-related injuries." (Op. No. 28052 at 62-63.)

Respectfully, the Opinion's rationale, that a business owner's legitimate decision to outsource means that the owner is not a statutory employer, rewrites the statute in at least three different ways.

First, the Opinion and its rationale write 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. But Section 42-1-400 does not say that, and this Court has held to the contrary. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980); *see also Gentry v. Milliken & Company*, 307 S.C. 235, 238, 414 S.E.2d 180, 182 (Ct. App. 1992) (citing *Parker* as holding that a wrongful death suit against the owner and general contractor was barred "because the owner and general contractor were [each] found to be the worker's statutory employers").

Second, the Opinion and its rationale delete and write out of the statute the following language: "a part of his trade, business or occupation." That language no longer has any relevance, as the only point that matters under the Opinion's rationale is whether the statutory purpose was fulfilled by the presence of insurance, regardless of who provides for that insurance. (Op. No. 28052 at 60: "It does not matter to the fulfillment of this policy who provides the coverage.")

Third, the Opinion and its rationale insert and write another new term into the statute, and one that precludes a business owner from outsourcing if it wants to be a statutory employer. Thus, 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.* at 61.) But this formulation encompasses all or nearly all subcontracting relationships. Indeed, it is difficult to envision, and thus far Respondents have not identified one, any subcontracting relationship that will give rise to a statutory employee relationship so long as the employee is covered by insurance. (*See* Petr's Reply in Supp. of Pet. for Reh'g 1-3 (discussing this issue).)

Section 42-1-400, in sum, has been rewritten so that whether there is a statutory employer or not turns only on answering a single, simple question: Is the subcontractor's employee covered by insurance or not? If the answer is yes, as the Opinion suggests it almost always will be because "it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury," (Op. No. 28052 at 62), then no business owner can ever be a statutory employer. But a new test for statutory employer and employee status that turns on the existence of insurance is not what the statute provides. In addition, such a test eliminates the "double protection" purpose of the statute, as discussed in this Court's *Parker* decision. (*See* Pet'r's Pet. for Reh'g 16-18; Petr's Reply in Supp. of Pet. for Reh'g 11-13 (further discussing how the Opinion rewrites the statute).)[6]

3. The Opinion's Rationale And New Test Rewrite The Statute To Render Irrelevant The Undisputed Facts Regarding The Business Owners' Outsourcing Decision And Business.

The Opinion's rationale and new test also rewrite the statute to render the facts regarding whether the outsourced work "is a part of [the owner's] trade, business or occupation," irrelevant. Thus, it is undisputed on this record that Celanese made the "business judgment" and decision that Mr. Seay's work was an essential, integral, necessary and important part of Celanese's trade, business and occupation. In fact, there is no contrary evidence or facts in the Record concerning

[6] In fact, the Opinion's holding creates a disincentive for a business owner to ever provide and pay for workers compensation insurance because, by doing so, under the Opinion the business owner has divested itself of any hope of being categorized as a statutory employer having civil liability immunity.

the business decision and judgment made by Celanese's managers in this regard. (*See* Pet'r's Pet. for Reh'g 2-5; Petr's Reply in Supp. of Pet. for Reh'g 4-5 (providing a detailed discussion of these undisputed facts).)

But the actual, undisputed facts about Celanese's business decision—evidence coming from Mr. Seay, his co-worker (Thompson), and the Celanese witness (Bowyer)—are rendered irrelevant by the Opinion's rationale, for now, all that matters is whether the injured worker is covered by insurance. (Op. No. 28052 at 60.) Moreover, it does not matter who provided the insurance, just so long as there is insurance coverage. (*Id.*)

The Opinion's rationale penalizes the party who provided the insurance, in this case Celanese. As Celanese explained in its Petition For Rehearing at pages 2-5, Celanese is not a charity organization (although it does support them), and the only reason it provided insurance for Mr. Seay and other Daniel employees is because Celanese believed it was responsible for doing so as their statutory employer—a decision consistent with the undisputed facts regarding Celanese's business decision to outsource. But again, all of these business decision and business judgment facts are now irrelevancies under the Opinion, which simply asks whether the injured employee is covered by insurance or not.

Under the Opinion's rationale, in short, there is little need for any fact finding going forward. For one thing, the only fact that matters under the Opinion's rationale is whether the narrow statutory purpose has been fulfilled by the injured employee having insurance protection or not. All other facts under the statute's text and traditional three part test are no longer relevant. For another, the Opinion says that "[i]t is not the role of the courts to second-guess a legitimate business decision whose effect—far from the improper purposes the statutory employee doctrine was designed to prevent—was actually to guarantee that the workers affected by the decision

would be insured against work-related injuries." (*Id.* at 62-63.) But that second-guessing is what the Opinion's rationale commands. In fact, the Opinion commands far more than second-guessing; it directs that lower courts find that the mere fact of outsourcing for legitimate purposes mandates that the business owner not be treated as a statutory employer.

Finally, there are at least three errors, we submit, in the Opinion's command that lower courts find that the mere fact of outsourcing for legitimate purposes precludes an upstream employer from having statutory employer status.

First, a business owner's decision to outsource an essential, integral, necessary business function does not mean that the business does "not include that particular work." That is simply a conclusion, but not one based on the facts of the individual business decision. Nor is it based on the language of the statutory text.

Two, the undisputed factual record in this case is that Celanese's decision to outsource maintenance did not reflect a business decision by Celanese that Mr. Seay's work was not part of its trade, business or occupation. To the contrary, the only record evidence establishes that it was part of Celanese's business, which is why Celanese mandated and paid for the workers' compensation insurance in the first place.

Third, the argument that (i) manufacturing and (ii) maintenance of the manufacturing equipment are unrelated businesses, which is Respondents' principal argument, is not only divorced from the facts of record, but is an absurd proposition. Every manufacturing facility to remain in operation requires maintenance of its manufacturing equipment; again, there is no record evidence to the contrary. But there is record evidence confirming this point, including the undisputed facts 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 who previously worked for Daniel, to perform the same maintenance that Mr. Seay previously did. (*See* Petr's Reply in Supp. of Pet. for Reh'g 5, 12, 13 (discussing this point and these facts).)

The Opinion and its rationale, in short, render completely irrelevant all facts but one under the Opinion's new test: Whether the statutory purpose was fulfilled by providing the workers compensation insurance protection required.

4. The Opinion's Rationale Overrules Or Neuters Decades Of Precedent.

The Opinion and its rationale discard four separate lines of authority going back decades. First, under the Opinion's rationale the ***three factor test*** plays no role going forward. Those cases are no longer good law, and there will never be a situation, and Respondents have yet to identify one, where the three factor test can be used to determine whether or not a particular subcontracting employee is a statutory employee or not. (*See* Pet'r's Pet. for Reh'g 18-20 (discussing this problem in detail); Petr's Reply in Supp. of Pet. for Reh'g 1-3, 13-15 & n.2 (same and listing various decisions of this Court and the Court of Appeals that are no longer good law under the Opinion).)

Second, the ***liberal construction rule*** cases, which hold that the Workers' Compensation Law and the statutory employee doctrine should be liberally construed to include the subcontractor's employee as a statutory employee, are equally set aside under the Opinion. Liberal construction plays no role under the Opinion's rationale. The Opinion confirms this when it states: "The reality, however, is that none of our recent jurisprudence on this question is consistent with the broad interpretation of 'trade, business or occupation' in our original cases." (Op. No. 28052 at 56) (*See* Pet'r's Pet. for Reh'g 6; Petr's Reply in Supp. of Pet. for Reh'g 20 (discussing the Opinion's conflict with the liberal construction rule in detail).)

Third, the Opinion overrules ***the "double protection"*** line of authority as discussed in *Parker*, authority which recognizes that the Workers' Compensation Law's statutory purposes are

far broader than the narrow purpose that the Opinion describes. (*See* Pet'r's Pet. for Reh'g 13-16; Petr's Reply in Supp. of Pet. for Reh'g 10-11 (discussing this issue in detail).)

Last, the Opinion sets aside ***the maintenance worker line of authority***, specifically, the decisions of this and the lower courts which have held for several decades that maintenance workers are statutory employees. (*See* Br. of Pet'r at 25-43 (discussing this problem and the many maintenance worker cases—all of which have been neutered by the Opinion's rationale and holding).) Here, the facts are that the particular maintenance worker, Mr. Seay, maintained the very manufacturing lines themselves.

In sum, under the Opinion's rationale, long-standing precedents of this Court and the Court of Appeals are no longer good law. Notably, the above summary is not rhetorical hyperbole, for both the Majority and Dissent agree that, under the prior decisions of the Court, Celanese would have been found to be a statutory employer, and Mr. Seay a statutory employee. In this regard, *the Majority* said: "[i]f the infrequently-performed work the subcontracted employees performed in *Marchbanks*, *Boseman*, and *Bell* qualified for statutory employee statute, it is difficult to imagine the regular—daily, in fact—maintenance and repair work Seay and his co-workers performed at [Celanese] does not also qualify." (Op. No. 28052 at 56.) And *the Dissent agreed*, stating: "The majority writes that our decisions in *Marchbanks v. Duke Power Co.*, *Boseman v. Pacific Mills*, *Bell v. South Carolina Electric & Gas Co.*, and *Glass* were consistent with a broad view of what was part of an owner's 'trade business, or occupation.' The majority concedes it is hard to imagine that in light of those decisions, Seay was not a statutory employee of [Celanese]. I agree, and I would stop the analysis there and hold Seay was [Celanese's] statutory employee." (Op. No. 28052 at 65; *see also id.* at 69.)

5. The Opinion And Its Rationale Violate The Principles Of *Stare Decisis*.

The *amicus* brief of the South Carolina Chamber of Commerce correctly observes that in addition to rewriting the Workers' Compensation Law and adopting a new test "of uncertain origin," the Opinion violates the settled principles of *stare decisis*. (Br. of S.C. Chamber of Commerce as *Amicus Curiae* in Support of Rehearing 1, 4-5, 8-10, filed September 29, 2021.) Celanese agrees with the Chamber of Commerce on this *stare decisis* point, but also identifies one additional problem for the Court's consideration.

Under the Opinion's rationale, the same "original purpose" analysis can be used in other cases to upend any long-settled rule of law and prior precedent involving any claim based upon a statute. The *stare decisis*, prior precedent, and significant reliance interests at issue are not limited only to Celanese's case here, or to Workers' Compensation Law cases, but will apply broadly to cases and claims of all types based upon or involving the statutes of this State.

Statutes should be enforced as written; it is for the General Assembly to change or rewrite its statutes, and not the courts. Further, persons should be able to rely upon this Court's prior opinions regarding the manifest purposes of such statutes and long-standing tests regarding statutory application. The Opinion, if left unchanged, could be used in the future to argue for the overruling of other precedents and statutory application changes in other contexts by analogy.

6. The Opinion And Its Rationale Impose Retroactive Liability Where None Previously Existed.

The Chamber of Commerce's *amicus* brief raises another point regarding the Opinion that is worthy of this Court's serious consideration. Specifically, Celanese and other employers throughout the State have for decades relied upon the settled three part test and the Workers' Compensation Law as written in structuring their contractual relationships with subcontractors. As discussed in its Petition For Rehearing as well as its Reply In Support Of Is Petition For

Rehearing,[7] Celanese paid for the workers compensation premiums in exchange for which it was to receive the civil liability immunity provided for by the statute. It never would have done so if it was not a statutory employer under the statute, for if not covered by that statute, the payments for such insurance payments were a complete waste of corporate assets. Celanese relied upon the existing three part test and the Workers Compensation Law as it was written and had been interpreted for decades to structure its contractual relationship with Daniel. (*See* Pet'r's Pet. for Reh'g 1-5; Petr's Reply in Supp. of Pet. for Reh'g 4-5 (discussing these facts in detail).)

Celanese is no different in this respect from other employers, who equally relied upon and structured their contractual relationships with subcontractors based upon the Workers' Compensation Law as written. These reliance interests are grounded in contract, as well as in settled rules of statutory construction and the prior precedents of this Court. Now, suddenly, Celanese and other employers have been stripped of the benefits of the workers' compensation scheme after having provided and paid for the requisite insurance protection in reliance upon that scheme. The Opinion upends settled expectations and also raises serious questions about whether it is consistent with other precedents of this Court. As the Chamber correctly points out, the "[O]pinion would appear to impose 'liability where none previously existed.' [But w]hen courts adopt such new substantive rules, they must be applied only prospectively, for 'retroactive relief would [be] unfair and inappropriate.'" (Br. of S.C. Chamber at 11 (quoting *Toth v. Square D Co.*, 298 S.C. 6, 8-9, 377 S.E.2d 584, 585-86 (1989)).) Consistent with this principle, the "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'.:

[7] (*See* Pet'r's Pet. for Reh'g 2-4; Petr's Reply in Supp. of Pet. for Reh'g 5-6.)

'They create[] liability where none had previously existed.'" (Br. of S.C. Chamber at 11 (quoting *Toth*, 298 S.C. at 9, 377 S.E.2d at 586).)

In sum, the Opinion and its rationale upset settled reliance interests, and impose liability upon businesses like Celanese that complied with the statute, engaged in conduct and spent money that benefitted workers but now, have been stripped of the civil liability immunity under the Workers' Compensation Law that was the *quid pro quo* for their compliance and is foundational to the statutory scheme. It is unfair to apply such an unprecedented new rule of law retroactively.

B. The Opinion's Consequences.

The Opinion has significant consequences, including ones that will seriously undermine the Workers' Compensation Law and structure. These consequences include:

First, the Workers Compensation Law statutory employer-employee provision, Section 42-1-400, has been eliminated. True, it remains on the books, but it is difficult to identify any situation or fact pattern where a business ever will be found to be a statutory employer. In the end, the workers will bear the risk of this, as *Parker* warned. (*See* Pet'r's Pet. for Reh'g 16-18; Petr's Reply in Supp. of Pet. for Reh'g 11-13 (discussing this in detail).)

Second, decades of prior case law involving four separate lines of authority are no longer good law. The test for the statutory employer-employee relationship will now turn on the singular question of whether or not the injured worker is protected by insurance, and if so, it does not matter who provided and paid for that insurance. This formulation, of course, breaks the inherent economic and factual linkage between who pays for the insurance and fulfillment of the statute's public policy purpose. As a result, employees of subcontractors will now bear the risk of a subcontractor's financial failure.[8]

[8] Because the Opinion severs the link between (1) the business owner responsible for paying for the insurance from (2) the civil liability immunity benefit that until now has been attendant to

Third, the Opinion and its rationale fundamentally alter the balance struck in 1936 and relied upon ever since between workers compensation and tort law by opening the Courts to a flood of litigation from those whom workers compensation is designed to protect but who will now choose not to pursue workers compensation claims. Instead, they will file tort suits seeking greater damages against all South Carolina businesses who, until now, have been exempt from such suits.

Fourth, the Opinion's elevation of an "original statutory purpose" that is not grounded in and does not flow from the statutory text completely unsettles the standard rules of statutory construction, arrogating to the courts the power to rewrite the terms of the General Assembly's statutes.

Last, the Opinion undermines the principle of *stare decisis*, a rule long settled and one that "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) (quoting *McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985) (Chandler, J., concurring)). The opinion seriously undermines this principle. Even more troublesome, the Opinion does so in a manner that imposes liability retroactively on those business owners, like Celanese, who complied with the Workers' Compensation Law at significant cost, for which they now receive no benefits whatsoever.

III. ISSUE #3: "As addressed in Section V of the petition, whether "the opinion will produce negative outcomes in the marketplace and for subcontractor employees."

Before discussing the significantly negative outcomes that will take place in the marketplace and for subcontracting employees and business owners alike in the event that the

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

Opinion becomes the law, we start by addressing an objection raised by a motion to file an *amicus* recently filed in support of the Opinion. Then, after explaining why that objection is unfounded, Celanese outlines for the Court's consideration the myriad negative outcomes that the Opinion will produce.

A. The Professor Thomas P. Crocker *Amicus* Objection.

On October 26, 2021, Professor Thomas P. Crocker of the University of South Carolina School of Law, with "the financial support of" a coalition of the leading plaintiff personal injury firms in the State, filed a motion to file an *amicus*. (Mot. of Prof. Thomas Crocker for Leave to File Amicus Br. 1, filed Oct. 26, 2021.) The *amicus* motion is in opposition of Celanese's Petition for Rehearing.[9]

Professor Crocker wants to file an *amicus* brief that objects on the grounds that under the separation of powers doctrine, a court cannot set public policy itself. "Instead, the people of South Carolina, through their elected state representatives, set the state's policy." (*Id.* at 4.) True, although that objection is not the answer but instead confirms one of the problems with the Opinion. For it is the Opinion that rewrites the Workers' Compensation Law to implement its narrow view of the statute's "original policy"—a view not consistent with the statory text, prior precedent or with the broad statutory policy of worker protection previously recognized by this Court. Professor Crocker, in short, misses the point. Celanese is not asking the Court to consider or make new policy at odds with the Workers' Compensation 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. In addition, Celanese is explaining

[9] Professor Crocker makes clear that his brief is "in his individual capacity" only, and that his "brief does not purport to present the Law School's or any other institutional views." (Mot. of Prof. Thomas Crocker for Leave to File Amicus Br. 1, n.1.)

the negative outcomes resulting from the Opinion's rewriting of the statute. Surely, Professor Crocker is not suggesting that a litigant cannot, under the separation of powers doctrine outline and explain to the Court how the Opinion abrogates the statute as written and frustrates the public policy of worker protection that the General Assembly enacted the statute to achieve.

Professor Crocker also argues that "this Court is factually limited to a consideration of the Record on Appeal, which cannot 'include matter which was not presented to the lower court or tribunal.'" (*Id.* at 4.) But with respect, Professor Crocker appears unfamiliar with the extensive and undisputed factual record in this case, which is what Celanese relies upon in this appeal. Moreover, it is the Opinion, with its focus on the "modern economy" that has gone outside of the factual record, as illustrated by what the Opinion says on pages 61, 62 and 63:

> "Increasingly, business managers are outsourcing work that formerly was handled as a part of the business, and they are doing so to meet the ever-increasing competitive challenges businesses face. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1676 (2016) ('Since the end of the Great Recession, U.S. businesses have aggressively engaged in a series of organizational changes—from classifying workers as independent contractors, to hiring subcontractors, to utilizing staffing agencies—to delegate employment-related responsibilities to outsiders.') In reality, therefore, what is or is not 'part of' the owner's business is a question of business judgment, not law. If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company's business to not include that particular work." (Op. No. 28052 at 61.)
>
> "The original purpose of the statutory employee doctrine was to prevent business managers from outsourcing work for the purpose of avoiding workers' compensation costs. That purpose has nothing to do with outsourcing work for legitimate business reasons. Moreover, unlike the economy of 1936, it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury. … Seay's family presumably received the workers' compensation benefits [Celanese] obligated through contract that Daniel must provide. The original purposes of the statutory employee doctrine are not served by making [Celanese] an additional provider of workers' compensation benefits, because Daniel provided those benefits. The original purposes are certainly not served by granting [Celanese] immunity for its wrongful conduct. It is not the role of courts

> to second-guess a legitimate business decision whose effect—far from the improper purpose the statutory employee doctrine was designed to prevent—was actually to guarantee that workers affected by the decision would be insured against work-related injuries." (Op. No. 28052 at 62-63.)

Contrary to Professor Crocker's assumption, it is the Opinion, not Celanese, which introduced material outside the record regarding outsourcing and changes in employment relationships since the Great Recession as well as relationships in the "modern economy" compared to the economy of 1936. Thus, if Professor Crocker is correct that such outside the record references constitute error, it is error infecting the Opinion and not a problem with the arguments Celanese is making. Whilst Celanese does not agree with Professor Crocker or that this Court is inhibited from considering a decision's policy ramifications, particularly one that upends more than eight decades of settled law, surely Professor Crocker cannot mean that reference to extra-record materials is a one way street, where a plaintiff or an opinion can make and rely upon such references but a defendant like Celanese is not entitled to respond. Yet, that appears to be his novel, asymmetric position.

Professor Crocker's last objection is that "Petitioner is not entitled to try its case again in this court nor is it entitled to seek a judicially-declared public policy defining the purposes of sections 42-1-400 and -410 of The South Carolina Workers' Compensation Law." (Mot. of Prof. Thomas Crocker for Leave to File Amicus Br. 5.) But Celanese is doing neither. All Celanese is doing is explaining how in its view the Opinion rewrites the statute, ignores the undisputed factual record, overrules decades of precedent, and does so based upon policy considerations that do not fully or accurately reflect the policy reasons for why the Workers' Compensation Law was enacted or that were the animating principles in prior decisions of this Court.

B. The Opinion's Negative Outcomes.

The Opinion will produce a variety of negative outcomes, none of which are consistent with the General Assembly's purpose for enacting the Workers' Compensation Law and, in fact, will frustrate the General Assembly's purpose and policy of protecting injured workers. These negative outcomes include the following:

1. Elimination Of "Double Protection" For Workers.

The *Parker* decision discussed the "double protection" benefits for injured workers, that is, there was more than one statutory employer, thereby ensuring that the injured worker would not be left without recourse. (*See supra*; Pet'r's Pet. for Reh'g 13-16; Petr's Reply in Supp. of Pet. for Reh'g 10-11 (discussing *Parker* and "double protection").) The benefits of this "double protection" no longer exist under the Opinion, putting workers at risk contrary to terms and policy goals of the Workers' Compensation Law.

2. Penalizing Business Owners Who Have Paid For And Provided The Workers' Compensation Insurance.

The Opinion penalizes businesses like Celanese who have complied with and relied upon the statutory employee doctrine to purchase workers' compensation insurance to protect subcontractor employees. It is undisputed that Celanese made a "legitimate business decision" to outsource as its decision was not "driven by a desire to avoid the cost of insuring workers." (Op. No. 28052 at 61-62.) Celanese paid for the workers' compensation insurance protecting Mr. Seay and other Daniel employees, and did so because its business decision was that it was obligated to do so under the statute to protect workers who, under the three factor test, were its statutory employees. But now, the Opinion penalizes Celanese and all other similarly situated business owners because even though they paid substantial sums of money to protect subcontractor employees, they now get nothing in exchange. They do not get the civil immunity that is the *quid*

pro quo under the statute for the payments they made. But what they do get is unexpected and unbounded civil liability exposure for which they did not plan and had no reason to anticipate. Under the Opinion business owners get penalized twice, once by having wasted their corporate assets in purchasing the insurance, and then secondly, by being stripped of their civil immunity with the resulting legal exposure that will take place.[10]

3. Less Worker Protections In The Future.

The Opinion and its rationale create perverse economic incentives in the marketplace that conflict with the fundamental purpose of the Workers' Compensation Law, and in the future will likely injure subcontractor employees. Going forward, upstream business owners will no longer take steps to provide insurance protection for subcontractor employees. Why would they? If their business decision to outsource is for "legitimate" purposes they will receive absolutely no benefit whatsoever from providing or paying for the insurance premiums of downstream workers, like Mr. Seay. As a result, economically rational businesses (like Celanese) will not pay the workers compensation insurance premiums for subcontracting employees, as to do so would be a complete waste of corporate assets. Instead, they will husband their money to defend themselves in civil litigation that, until now, would have been resolved under the Workers Compensation system.

Moreover, while many subcontractors will pick up the insurance tab and comply with the Workers Compensation Law, others, particularly smaller ones likely may not. Regardless, there is always a risk of unforeseen financial difficulties, with subcontractors both large and small becoming insolvent. That will leave injured workers without the protections that the statute was enacted to provide.

[10] There are two aspects to this civil exposure: one, the cost of legal defense that was completely unanticipated given that the business owners believed based upon the statute and existing case law they were immune from suit, and two, as illustrated by this case, the substantial potential size of an adverse civil tort judgment.

4. Increased Civil Tort Litigation By Workers, Subcontractors And Business Owners.

The Opinion and its rationale will result in two broad categories of litigation that will become significant, and risk flooding the courts. First, the Opinion will incentivize injured workers and their counsel to circumvent the workers compensation system, by rewarding those who pursue tort claims. In fact, the Opinion is a road map for doing so—*i.e.*, don't file a workers compensation claim with the Commission at all, and file a tort claim instead. That, of course, is what took place here, where Mr. Seay did not even try to file a workers compensation claim. But this defeats the entire purpose of the workers compensation scheme, which was to provide swift and certain compensation to injured workers, while at the same time providing civil immunity for employers. The fact that the Crocker *amicus* motion and brief are being paid for by a coalition of the leading plaintiff's personal injury firms, whose practices are focused on bringing civil tort lawsuits in the courts, underscores how the plaintiffs' personal injury bar understands that the Opinion creates new opportunities for civil tort litigation outside of the workers compensation system. (Mot. of Prof. Thomas Crocker for Leave to File Amicus Br. 2-3.)

Second, the Opinion will result in confusion among business owners and subcontractors over who is responsible for providing the protection required under the Workers' Compensation Law. And make no mistake: given the potential number and size of civil tort lawsuit exposure, there inevitably will be litigation between business owners and subcontractors over who is responsible for protecting the injured workers, especially given the confusion that the Opinion will sow.

5. Undermining The Workers Compensation System.

The South Carolina Chamber of Commerce *amicus* brief captures well the array of economic and systemic risks to the workers compensation system if the Opinion stands. (Br. of.

S.C. Chamber at 14-22.) The business owner's civil liability immunity in exchange for protecting the subcontractor employees is central to the system. But the Opinion's new test breaks the inherent linkage between the upstream business owner protecting the subcontractor's employees and receiving civil liability immunity in exchange. Upstream business owners in the future under the Opinion will have no reason to protect downstream workers, with the result that downstream workers will suffer a loss of protection, having to rely instead upon subcontractors, the courts, or both.

In addition, the workers compensation system itself will have limited value. Injured workers will bear the risk of subcontractor financial failure or malfeasance, and regardless, will often sue the upstream business owner in tort, completely circumventing the workers compensation system altogether—precisely what has taken place in this case. These outcomes are not what the South Carolina General Assembly intended or what the Workers' Compensation Law provides.

Celanese also agrees with, but will not repeat, the detailed discussion of the Opinion's other negative outcomes outlined by the Chamber of Commerce, which as an organization speaks for businesses throughout the State. (*Id.* at 4.) But the additional risks and adverse effects of the Opinion that the Chamber properly has identified are significant, and include: (i) increased insurance costs for South Carolina businesses; (ii) increased costs of consumer goods; (iii) increased costs of litigation and insurance costs associated with unknowable but material tort liabilities; (iv) significant competitive disadvantages for South Carolina businesses as compared to other businesses operating in other States; (v) the denial of a swift and "sure remedy" for injured employees; and (vi) the serious risk of overwhelming the judiciary with masses of personal injury cases that previously could not have been brought against upstream business owners who had civil

immunity under the statute. (*Id.* at 2-3, 14-22.) These risks are not academic, but are unnecessary, as the law as it has existed for more than eight decades, whilst not perfect, was adept at balancing the competing interests of both businesses and workers, to the benefit of all. The Opinion, on the other hand, upsets this decades long balance and replaces it with the litigation costs and uncertainty that the workers compensation system was enacted to prevent.

* * *

Respectfully, Celanese requests that the Opinion be withdrawn. In its place, a new opinion should be issued and, based upon the existing law and precedent, as well as the undisputed record facts of this case, the Court should reverse the decisions of the courts below and enter judgment in favor of Celanese as a matter of law.

Signature on Following Page

Respectfully submitted,

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