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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2019-00816
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 *AMICUS CURIAE*
SOUTH CAROLINA MANUFACTURERS ALLIANCE

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INTEREST OF AMICUS CURIAE

The South Carolina Manufacturers Alliance ("SCMA") is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code and is the only statewide association dedicated exclusively to the interests of manufacturers, having served as the manufacturing industry's government liaison in South Carolina for over one hundred years. SCMA's membership ranges from small businesses to global operations, spanning numerous industry sectors. SCMA's goal is to be the voice of these manufacturers to the state's legislative and regulatory branches of government, as well as to promote and preserve the economic health of manufacturers in South Carolina by seeking positive action in state government. SCMA emphasizes that maintaining strong manufacturing industries in the state will foster and promote the strength of South Carolina's economy. There are more than 6,000 manufacturing facilities in the state and the manufacturing sector employs, directly or indirectly, more than 700,000 individuals, accounting for approximately 30% of all jobs in South Carolina.[1]

The instant action is of significant interest to SCMA because its members require a clear understanding of the state's workers' compensation laws to make a multitude of critical business and contracting decisions. SCMA shares the concerns of the Petitioner and the other *amici curiae* that the Court's August 11, 2021, Opinion in this case (Opinion No. 28052, Howard Adv. Sh. No. 27 at 50-70, referred to hereinafter as the "Opinion") has created significant uncertainty with respect to the future application of these laws to manufacturers and workers. This uncertainty negatively impacts current manufacturers as well as South Carolina's ability to attract new manufacturers (and the jobs associated with those manufacturers) to the state. SCMA, on behalf

[1] *See* SOUTH CAROLINA MANUFACTURERS ALLIANCE, *SC Manufacturing Facts*, https://myscma.com/sc-manufacturing-facts/

of its members, therefore, supports the granting of the Petition for Rehearing so that the status of—and the standard applicable to—the statutory employment doctrine in South Carolina can be clarified.

ARGUMENT

I. The Opinion has created uncertainty that should be addressed.

Since the Opinion was issued, manufacturers across South Carolina have struggled to determine its meaning and impact. The fundamental question being asked by manufacturers is: does the statutory employment doctrine still exist in South Carolina? And this is not just an academic exercise. As set forth below and addressed by the Petitioner and the other *amici curiae*, the potential consequences of the Opinion's stated conclusion will be real, far-reaching, and harmful to manufacturers and workers. However, the most immediate issue—and why, at a minimum, the Petition for Rehearing should be granted—is that clarification is needed with respect to the Opinion's conclusion and the current standard for determining whether a worker is a statutory employee.

On the one hand, the Opinion provides that each of the three tests historically used to determine whether any work contracted out by a company is "part of [the owner's] trade, business or occupation" under S.C. Code Ann. § 42-1-400 "remains a valid consideration." Op. at 61; *see Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997) (providing that, in determining whether a worker is a statutory employee, the courts should consider whether the worker'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.").

On the other hand, however, the Opinion provides that the new focus of the inquiry should be on what "the owner decided is part of its business," and concludes that if an owner decided to outsource certain work other than for the purpose of avoiding the cost of workers' compensation insurance, then the owner "has legitimately defined the scope of her company's business to not include that particular work." Op. at 61. Notwithstanding the pronouncement that the three historic tests remain a "valid consideration," it is hard to imagine any situation now in which these tests would ever be considered.

The statutory employment doctrine ***only*** applies when a company outsources work; however, under the Opinion, it appears that the very act of outsourcing work necessarily means that such work is not part of the company's business and ***requires*** the conclusion that the workers performing such work are not statutory employees. If this is, in fact, the holding of the Opinion, then there will never be a reason to apply the three historic tests, and the statutory employment doctrine will have been effectively eliminated in South Carolina. If this is not the intent of the Opinion, then rehearing and a new opinion are needed in order to (at a minimum) provide clarification as to how each of the three tests remains a consideration in light of the Opinion's new "outsourcing decision" focus.

In addition, although what a company decides is its business is certainly a valid consideration in determining whether particular work is a part of that business, it does not necessarily follow—as the Opinion concludes—that by outsourcing certain work, the owner has decided that work is not part of the owner's business. For example, a manufacturer may contract out certain work on its production line to subcontractors or other third parties, including, in some

cases, affiliated entities.[2] The contract workers (*i.e.*, the third-party's direct employees) may perform the same work as the manufacturer's employees, or they may perform distinct jobs not performed by the manufacturer's employees. The actual delegation of responsibilities is often fluid and changes over time based on many factors including seasonal demands, production ramp-ups, and availability of workers. Regardless, these contract workers work with and alongside the manufacturer's employees and are directly involved in the manufacturing process. Under the Opinion's reasoning, however, none of the work performed by these production line workers—those that perform the same jobs as the manufacturer's employees or those that perform different jobs—would be considered to be within the scope of the company's business (and these workers would not be considered statutory employees) ***solely*** because the manufacturer decided to "outsource" this work.[3] Simply put, and contrary to the apparent reasoning of the Opinion, the decision to outsource certain work does not define the scope of a company's business.

In the apparent effort to create a simpler solution for determining whether a specific worker is a statutory employee, *see* Section II *infra*, the Opinion has created more uncertainty. The Opinion's statement that each of the three historic tests remains a valid consideration is directly contradicted by the Opinion's ultimate conclusion. And that conclusion—that a company's outsourcing decisions define the scope of such company's business—is not supported. Rehearing

[2] This case was, of course, about outsourced repair and maintenance work. SCMA strongly disagrees with the conclusion that daily equipment repair and maintenance workers are ***not*** part of the "manufacturing process." Given the obvious necessity of the equipment and machinery to such process, there actually may not be a job more integral to—and a part of—the manufacturing process than daily repair and maintenance work, especially in this age of increased automation.

[3] One reading of the Opinion may be that those contract workers performing the same jobs as the manufacturer's employees would still be considered statutory employees; however, based on the plain text of the Opinion, that is unclear.

should, therefore, be granted to address these issues and clarify the appropriate standard applicable to the statutory employment doctrine.

II. The Opinion is inconsistent with the plain language and purposes of the of the state's workers' compensation laws.

As addressed by the Petitioner, the Opinion's interpretation of the relevant statutory provisions improperly narrows the application of those provisions and is inconsistent with the purposes of the workers' compensation laws.

First, the Opinion conflicts with the plain language of section 42-1-400, which provides:

> When any person . . . referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and ***contracts*** with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (emphasis added). By its plain language, this "statutory employment" provision applies when a company undertakes work that is "part of" its business and "contracts" with another for the performance of some of that work. However, as discussed above, the Opinion flips this provision on its head by stating that the very act of contracting with another—as long as it is not done for the purpose of avoiding the cost of workers' compensation insurance—means that the contracted-out work is not "part of" the owner's business. Instead of answering the question posed by section 42-1-400—that is, whether the work contracted out is "part of [the owner's] trade, business, or occupation"—the Opinion effectively rewrites the statute to pose a different, limited question: whether the outsourcing of the work was done to avoid the cost of workers' compensation insurance. But if the General Assembly had intended to limit the statutory

employment doctrine in this manner, it could have easily done so. It chose not to, thereby providing broader protection to contract workers.

Second, two underlying objectives seem to drive the Opinion away from the plain language and purposes of the workers' compensation laws: (1) finding a bright-line rule for determining a worker's statutory employment status; and (2) limiting the instances in which upstream employers are afforded statutory immunity. As to the first objective, the Opinion begins by stating that the body of jurisprudence related to the statutory employment doctrine is "confusing, often conflicting, and always difficult for the workers' compensation commission and the circuit court to apply." Op. at 51. The Opinion is an apparent attempt to fix this perceived problem; however, "striving to better, oft we mar what's well." William Shakespeare, *King Lear*, act I, sc. 4.

The three historic tests may not be perfect, and certainly there are specific cases when they may be difficult to apply, but those tests are rooted in the statutory language and overall they work in practice. They are well-known and understood and, in most situations, allow for straightforward and easy determinations of whether a specific worker is a statutory employee pursuant to section 42-1-400. The Opinion focuses on the relatively few instances in which the statutory employment question reaches the courts, but the three historic tests have been relied upon by companies making everyday business decisions for decades. And because of the historically broad interpretation of section 42-1-400, this reliance has resulted in significantly more workers being guaranteed workers' compensation coverage (with the ultimate cost of this coverage bore by the "owner" or "upstream employer").

The problem with the Opinion's solution is that its one-size-fits-all answer does not align with the plain language of statute. And given the many different types of businesses and potential relationships between companies and workers, there likely is no bright-line rule that can be applied

in all cases. The Opinion suggests that the emergence of the so-called "gig economy" has allowed for a simpler solution than the three historic tests, but the opposite is true. A "gig" worker in the manufacturing industry—which, frankly, has used "gig" workers (*e.g.*, subcontractors and their employees) for decades—is not the same as a "gig" worker in the transportation industry (*e.g.*, an Uber driver). So, a test that looks at the specific facts and circumstances of each case and takes into account the dynamics of various industries is needed just as much now (if not more than) it was before.

The second objective of the Opinion appears to be to limit the instances in which upstream employers are afforded statutory immunity. Op. at 60 ("It is also important to note that the public policy at issue here is not to provide civil immunity to employers like Hoechst or their corporate successors like CNA Holdings."). This objective seems to have led, in part, to the creation of the new "outsourcing decision" standard that will drastically reduce the number of workers that will be classified as "statutory employees" and, thus, the number of upstream employers that will be classified as "statutory employers." But the protection afforded to workers by being classified as "statutory employees" goes hand in hand with the civil immunity that accompanies the "statutory employer" classification. By creating a standard that reduces the instances in which upstream employers receive civil immunity, the Opinion necessarily limits the instances in which workers will have workers' compensation coverage. Neither the "gig economy" nor the purposes of the workers' compensation laws support such a narrowing of the statutory employment doctrine.

III. The Opinion negatively impacts manufacturers, subcontractors, and workers.

SCMA agrees with the arguments of Petitioner in favor of granting rehearing and reversing the Court of Appeals and, as stated above, shares in the numerous concerns of the Petitioner and

the other *amici curiae* as to the negative consequences of the Opinion if it is left unmodified. SCMA will not repeat those arguments and concerns here but will only emphasize two main points.

First, the uncertainty as to the current standard applicable to the statutory employment doctrine resulting from the Opinion is already causing problems. Manufacturers, like all businesses, need a clear understanding of the laws applicable to them to make daily and long-term business decisions. Right now, because of the Opinion, that clear understanding is lacking with respect to the applicability of the statutory employment doctrine to work performed for the company by a subcontractor's employees. Accordingly, businesses in South Carolina do not have the requisite information to make many contracting decisions or the risk analyses that accompany those decisions.

Second, as correctly recognized by the Petitioner and other *amici curiae*, the Opinion creates a disincentive for companies to cover the costs of workers' compensation insurance for a subcontractor's employees. But, more than that, the Opinion has fundamentally altered the cost-benefit analysis for using subcontractors and third-party employees altogether. Based solely on the Opinion's change to the statutory employment standard—and notwithstanding there has been no change in real-world market conditions—a new and significant "cost" of using subcontractors has been added to the analysis: the increased threat of civil lawsuits for workplace injuries.

For decades, manufacturers have used subcontractors and their employees to perform certain work essential to the manufacturing process. There are many reasons manufacturers may use subcontractors and those business reasons vary between companies. But the primary benefits of manufacturers' utilization of subcontractors are lower costs (and, thus, lower product prices) and increased flexibility—both for manufacturers and workers. Because of section 42-1-400 and the traditional application of the three historic tests, manufacturers understood that they

nevertheless were ultimately responsible for ensuring workers' compensation coverage for these workers, and thus, these workers were largely guaranteed such coverage and protection. It was a win-win situation and aligned perfectly with the statutory purposes of making workers' compensation available for all workers—that is, the direct employees of the manufacturers and the subcontractors' employees, as well. *Parker v. Williams and Madjanik, Inc*., 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980) ("The manifest purpose [of the workers' compensation system] is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise.").

Now, because of the Opinion, the landscape has been altered. The increased threat of civil lawsuits and the associated costs (in both litigation expenses and general liability insurance costs) makes the use of subcontractors and third-party employees more expensive and less attractive. Manufacturers will either have to incur these additional expenses or decrease their use of contract labor to avoid them—either way, the overall costs of manufacturing (and, thus, product prices) are increased and the flexibility that many companies and workers want and currently enjoy is reduced. These higher costs of doing business and increased threats of lawsuits also harm the ability to attract new manufacturers to South Carolina.

Notwithstanding this increase in costs, there does not appear to be any real associated benefit to the marketplace or to workers created by the new standard announced in the Opinion—at least not one that is consistent with the overall purpose of the workers' compensation laws. As discussed, the Opinion certainly does not ***increase*** the likelihood of a worker being protected by the workers' compensation laws because it significantly reduces the number of workers that would be classified as statutory employees. So, all the Opinion really does is allow a worker that traditionally has been compensated for workplace injuries through the workers' compensation

system to now bring a civil action against its upstream employer, notwithstanding that such upstream employer was the reason why such worker had workers' compensation coverage in the first place (and ultimately paid for the cost of such coverage). This litigation can be initiated by the worker either foregoing the workers' compensation system altogether—as it appears the plaintiff did in this case—or by obtaining the workers' compensation benefits and ***then*** suing the upstream employer for the same injuries.

However, this increase in workplace injury litigation that will result from the Opinion is entirely antithetical to the primary reason for the workers' compensation laws. *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) ("The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation."). And even if the Court surmised there was some benefit to this augment in litigation through a change to the statutory employee doctrine, such is a policy decision that ought to be made by the General Assembly. As the Court of Appeals previously explained:

> An important function of legislation is to consider and to balance the competing interests and equities arising from the conduct of human affairs. Worker's compensation laws are a classic example of this legislative balancing of the equities. When the legislature has struck a balance by enacting a statutory rule, the courts have no prerogative to annul the legislative choice by applying 'chancellor's foot' notions of equity in its place. Stated differently, '[I]t is not the province of this Court to perform legislative functions.'

Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 440, 412 S.E.2d 434, 434-35 (Ct. App. 1991), *affirmed* 309 S.C. 432, 424 S.E.2d 489 (1992) (citations omitted). Therefore, to the extent any change to the statutory employment doctrine is needed, it should come from the General Assembly.

CONCLUSION

For the reasons explained above, as well as those raised by Petitioner and the other *amici curiae*, the Court should grant the Petition for Rehearing to clarify the status of—and the standard applicable to—the statutory employment doctrine in South Carolina.

Respectfully submitted,

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