RECEIVED

Dec 03 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Hon. D. Garrison Hill, Circuit Court 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 PROFESSOR THOMAS P. CROCKER AS AMICUS CURIAE OPPOSING PETITIONER CNA HOLDINGS LLC'S PETITION FOR REHEARING

Anne McGinness Kearse
T. David Hoyle
W. Taylor Lacy
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, South Carolina 29464
(843) 216-9000
(843) 216-9450 facsimile
Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

Pursuant to Rule 213 of the South Carolina Rules of Appellate Procedure, Professor Thomas P. Crocker[1] respectfully files this *amicus curiae* brief in opposition to the Petition for Rehearing ("Petitioner's Brief") filed by CNA Holdings, LLC's ("Celanese") and Celanese's Brief in Response to the Court's October 11, 2021 Order ("Petitioner's Response").

I. "THE RATIONALE AND CONSEQUENCES OF THE OPINION'S . . . ANALYSIS" FOLLOWS SOUND METHODS OF TEXTUAL INTERPRETATION, CLARIFIES JUDICIAL DOCTRINE IN ACCORDANCE WITH STATUTORY PURPOSE, RESPECTS PRINCIPLES OF STARE DECISIS, AND ADHERES TO PROPER SEPARATION OF POWERS PRINCIPLES

A. The Opinion's Textual Analysis Is Sound

This Court has explained repeatedly that it must adhere to the plain meaning of a statute and thereby give effect to the intent of the General Assembly. "The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001). Moreover, "[u]nder the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The primary rule of statutory construction is to ascertain the intent of the General Assembly. . . . Accordingly, [the Court must] 'give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021) (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010));

---

[1] As noted in his October 26, 2021 motion for leave to file, and pursuant to this Court's November 10, 2021 Order granting leave, Professor Crocker submits this amicus curiae brief in his individual capacity and with compensation solely from the Law Firms identified herein. Affiliations and titles with Professor Crocker's current employer, the University of South Carolina School of Law, are listed for identification purposes only; this brief does not purport to present the institutional views of the University of South Carolina generally, or of any of the University's constituent departments, colleges, or institutions, including but not limited to the School of Law.

see also Creswick v. Univ. of S.C., 434 S.C. 77, 81, 862 S.E.2d 706, 708 (2021) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly.").

The Court's analysis begins with the statutory text from which the statutory employee doctrine derives:

> When any person, in this section . . . 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 . . . referred to as "subcontractor") for the execution or performance by . . . such subcontractor of . . . any part of the work undertaken by such owner, the owner 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.

Keene v. CNA Holdings, LLC, Op. No. 28052, at 3 (S.C. Sup. Ct. filed Aug. 11, 2021) (hereinafter "Opinion") (quoting S.C. Code Ann. § 42-1-400 (2015)) (available at 2021 WL 3521085).

Based upon the text of section 42-1-400, this Court developed a "statutory employee doctrine" to give effect to the meaning of this statute. "At the time of the original Act, it was feared employers would reject the new expense of insuring workers and find ways to avoid that expense by contracting out 'part of [their] trade, business or occupation' to a subcontractor." Op. at 4 (alteration in original). To avoid such an end-run around its workers' compensation system, the General Assembly created a statutory category of employer who would 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." § 42-1-400. Even if the owner subcontracts work to another entity who then provides the worker, such an owner can become an employer by statute in order to ensure that compensation for the worker is paid. On the basis of this statutory category of employer, this Court created a "statutory employee doctrine." "[T]he purpose of the statutory employee doctrine 'is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries in the course of employment.'" Op. at 4-5 (quoting *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997)).

The key doctrinal question becomes: "to whom does the statutory employer doctrine apply?" While this question appears straightforward, prior to the *Keene* decision, answering it—and thus ascertaining how the doctrine is to be applied—was frequently convoluted. As the Opinion describes at the outset, "[f]or eighty-two years, this Court struggled to correctly apply . . . the 'statutory employee doctrine.' The resulting body of jurisprudence is confusing, often conflicting, and always difficult for the workers' compensation commission and the circuit court to apply." Op. at 2. As the Opinion explains, over time the Court provided both a broad and a narrow doctrinal approach to the question of who qualifies as a statutory employer. These different doctrinal approaches sought to apply the statutory standard "whether the work contracted out is 'part of [the owner's] trade, business or occupation." Op. at 11 (alteration in original).

When construed broadly, almost any contracting party's workers would qualify as statutory employees because their activities could be seen as "particularly necessary and essential in the operation and carrying on of the business." *Boseman v. Pac. Mills*, 193 S.C. 479, 483, 8 S.E.2d 878, 880 (1940). Reading "part of the trade" as anything that is a necessary condition for carrying out the trade, the Court in *Marchbanks v. Duke Power Co.* reasoned "it is difficult to see how the Power Company could carry on its business if its lines of wires were not kept in sound condition, or how [keeping the wires in sound condition] could be done if the posts to which they are attached were not kept in safe and sound condition." 190 S.C. 336, 365, 2 S.E.2d 825, 837 (1939). Thus, through a chain of inferences from one necessary condition to the next, a subcontracting painter became "part of the trade" of a power company's transmission of electricity.

Recognizing the overly broad, yet murky, fact-intensive inquiry as to what is a sufficiently necessary activity to count as "part of [the owner's] . . . business," the Opinion explains that "[i]n *Glass*, we recognized that not all work 'necessary' for the owner to 'carry on its business' . . . was

'part of his . . . business' under section 42-1-400." Op. at 8 (second ellipsis in original). With *Glass* the Court began to tether the doctrine more closely to evidence of what constitutes "part of . . . [a] business" according to what a business does through the decisions it makes. The Opinion explains that in *Glass*, "we relied primarily on our finding that the employees' 'activities were not related to the basic operation of Dow's business,' but 'stemmed simply from Dow's desire to avoid litigation costs.'" Op. at 8. Thereafter, the Court concluded that activities such as delivery and transportation—which might be *necessary* to almost any business—are not a constitutive "part of . . . [a] business." *See Olmstead v. Shakespeare*, 354 S.C. 421, 425, 581 S.E.2d 483, 485 (2003). As the Opinion explains, "[i]n *Abbott*, we held that just because work is *important to* a business does not mean the work is *part of* the business." Op. at 10 (citing *Abbott v. Ltd., Inc.*, 338 S.C. 161, 163, 526 S.E.2d 513, 514 (2000).

With this "conflicting" case history, the Opinion proposes to "refocus on the key question posed by the statute." Op. at 11. By refocusing on the key question raised by the statute's text, and not merely on attempting to reconcile the sometimes "conflicting" caselaw, the Opinion properly adheres to principles of strict textual analysis as required by precedent. *See Creswick*, 434 S.C. at 82, 862 S.E. 2d at 708 ("The best evidence of legislative intent is the text of the statute."); *see also* NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 132 (2019) ("[T]extualism offers a known and knowable methodology for judges to determine impartially . . . what the law is."). This textual focus means that, when determining "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." Op. at 6 (alteration in original). In a marketplace with frequent outsourcing, the best test for what is a constitutive "part of . . . [a] business" is to look at what an owner actually does—who the business employs itself, and to whom it contracts out for services

by others. Since the statute is clear that liability for compensation attaches to contracts with other persons "for the execution or performance . . . of . . . any part of the work undertaken by such owner" that is "a part of [the owner's] . . . business," § 42-1-400, a doctrine that is expansive enough to cover work performed by others through contract that is merely important or even necessary for a business, as the Opinion explains, sweeps much broader than the statutory text's plain meaning.

Instead, the Opinion recognizes that "what is or is not 'part of' the owner's business is a question of business judgment, not law." Op. at 12. Rather than having courts make fact-intensive assessments of whether a contracted activity is merely important to, or even necessary for (as opposed to being a constitutive "part of") the business, the Opinion reasons that a "business manager has legitimately defined the scope of her company's business to not include," *id.*, work that she chooses to outsource. Thus, the Opinion's instructions to refocus future analysis of statutory employers on business judgment about a business's employment practices, squarely fits the plain meaning of the text. "Part of" does not mean "important to" or even "necessary for" an owner's business. A statutory employer doctrine that gave emphasis to these alternative phrasings, thereby expanding the scope of who could qualify as a statutory employer, sweeps broader than the text. Against such a reading, the Court's principle of statutory interpretation requires that it "give words their plain and ordinary meaning without resort to subtle or forced construction *to limit or expand the statute's operation*." *S.C. Pub. Int. Found.*, 432 S.C. at 497, 854 S.E.2d at 838 (emphasis added) (quoting *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575).

Since the Court's task is to give effect to a statute's plain meaning—and that is exactly what the Opinion does—there is no basis for a rehearing as it will shed no new light on the Court's well-considered rationale.

B. The Opinion's Textual Argument Properly Fits the Statutory Purpose

Not only must the Court interpret a statute by focusing on its plain meaning, but it must also give effect to the General Assembly's purpose. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). What is the purpose that section 42-1-400 seeks to achieve in the context of the General Assembly's Workers Compensation Law? The Opinion's answer is that "the General Assembly's original purpose for enacting it [was] 'to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." Op. at 2 (quoting *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1).

The Opinion's rationale adheres to the text and the purpose of the statute, both of which make clear that the goal is for workers to receive coverage under the Workers' Compensation Law. Since the Court's statutory employee doctrine must fulfill the "original purpose," it must be tailored "to prevent business managers from outsourcing work for the purpose of avoiding workers' compensation costs." Op. at 12-13. Moreover, "[t]hat purpose has nothing to do with outsourcing work for legitimate business reasons." *Id.* at 13. Following this rationale, the Opinion adds to its analysis that determining what is "part of" a business requires focusing on the business judgements that managers make when deciding to outsource work, provided that "the decision . . . is not driven by a desire to avoid the cost of insuring workers." *Id.* at 12. The best indication of whether outsourcing is driven by an attempt to avoid workers compensation obligations (by the owner or the contracting business) is whether the employee was properly covered. In this case, Celanese "made a legitimate business decision to outsource its maintenance and repair work" and was not seeking to avoid the cost of workers compensation. *Id.* Having made the decision to outsource the work, Celanese is understood to have made its own judgment about what is a constitutive "part of" its business and courts have no basis to question the decision unless the

contract left the worker uncovered. In this case, both the statutory text and the purpose are fulfilled when the workers for the contractor doing the work are covered as the statute requires.

Because the General Assembly's overriding goal "is to ensure that workers are covered under the Workers' Compensation law[, i]t does not matter to the fulfillment of this policy who provides the coverage." *Id.* at 10 (citations omitted). Celanese and their Amici object, claiming that who provides the coverage does matter. But if employee coverage is the statutory goal, and the means of thwarting that goal is through unscrupulous contracting practices which would leave workers uninsured, then, as the Opinion explains, when contracting parties scrupulously adhere to their legal obligations under the Act, the legislative purpose is fulfilled. Under the statute, it does not take two employers to fulfill the obligation owed by one. Recognizing this simple statutory truth, the Opinion correctly observes that "[t]he original purposes of the statutory employee doctrine are not served by making CNA Holdings an additional provider of workers' compensation benefits, because Daniel provided those benefits." Op. at 7.

C. The Primary Statutory Purpose Is *Not* to Provide Civil Immunity to Business Entities Obligated to Provide Workers Compensation Under the Statute

The Opinion's clarifying interpretation of statutory text and purpose focuses on the General Assembly's creation of employers by statute to ensure that workers are covered. The statutory employer was created to impose liability to pay the cost of workers compensation for those who outsource work in attempt to avoid the cost of coverage. As far as the text of section 42-1-400 provides, that is all that is in question. But Celanese is not complaining that the Commission has failed to find that it has liability as an employer in this case. Nor is Celanese trying to avoid the statutory penalties that would apply were they to shirk their legal obligation to provide coverage for an employee through outsourcing its work. Rather, it is complaining that the Court's Opinion deprives them of an economically valuable benefit—civil immunity from its wrongful conduct.

Creating opportunities to confer civil immunity for businesses who outsource work *is not* the statutory purpose of the Workers' Compensation Law. It is merely one means of achieving that goal alongside imposition of penalties for non-complying entities.

Under the Workers' Compensation Law, the benefit of civil immunity accrues to employers who provide workers compensation coverage to employees whose job duties the employers have determined to be "part of" its business. Thus, if Celanese were an employer by statute who has outsourced its work, then it also would receive the collateral benefit of valuable civil immunity. But the problem is that "[t]he original purposes are certainly not served by granting CNA Holdings immunity for its wrongful conduct." Op. at 13. Why? Because the original statutory purpose is to ensure coverage for workers, not to provide beneficial carrots to multiple businesses in order to meet the obligations held by one. Given the fact that all of the caselaw at issue concerns businesses claiming statutory employer status for purposes of civil immunity, not to establish their statutory liabilities, it is easy to see how the doctrine could lose sight of the original statutory purpose.

Losing sight of this purpose leads Celanese to claim that "the Opinion strips Section 42-1-400 of all meaning," Pet'r Resp. 10, and that the Opinion "rewrites the statute," *id. passim*. Neither claim is true, of course.[2] These protests notwithstanding, the statute has a clear meaning: an

[2] It is difficult to fathom the logic of the argument Celanese is making. Does the Opinion render the statute "meaningless," or does it have a different, rewritten meaning? Although Celanese states across two briefs that the Court's Opinion renders the statute "meaningless" or "stripped of all meaning" at least six times, it is never clear what it means—because it is so facially untrue. Celanese also argues that the statute has a rewritten meaning it does not like—namely, that the scope of "statutory employee" has been narrowed in such a way that it "now receive[s] no benefits whatsoever." Pet'r Resp. 21. To avoid an embarrassing contradiction before the Court, Celanese must intend its former claim as rhetorical overstatement and the latter is the real claim at issue (which is a charitable reading despite its disclaimer that it is not an "eleemosynary institution," Pet'r Br. 5). And if the latter is the real claim (it does not like the outcome), then its petition reduces to a simple continuation of its arguments before the Court in its primary case, and thus raise nothing new to consider on petition for re-hearing.

employer who attempts to evade workers compensation by outsourcing "*part of* . . . [its] business," § 42-1-400 (emphasis added), will still be liable for ensuring that those workers are compensated. The issue of any collateral benefits—on which Celanese focuses—are not part of the text of section 42-1-400, nor is the preservation of any such benefits a primary statutory purpose the Workers' Compensation Law could plausibly have.[3]

1. Petitioner's arguments erroneously invert the statutory purpose.

Contrary to the simple textual truth that section 42-1-400 says nothing about civil immunity, under the reasoning Celanese offers, it is as if the statutory purpose was to provide civil immunity, and the means enabling this benefit is participation in the workman's compensation system. Such reasoning clearly confuses the relative importance of means and ends. From the perspective of Celanese' financial interests, the civil immunity from suit in tort by Daniel's employees is what is most valuable. But from the perspective of the General Assembly—the legally relevant perspective—the coverage of employees is what matters. The Opinion's clarified doctrine properly focuses on the General Assembly's purpose, not upon conditions under which valuable collateral benefits might accrue as one means of achieving that purpose.

By contrast, Celanese confuses the difference between penalties and (withheld) benefits, arguing that "[t]he Opinion's rationale penalizes the party who provided the insurance," Pet'r Resp. 14, and what is more, that they have been "penalized twice, once by having wasted their corporate assets in purchasing the insurance, and then secondly, by being stripped of their civil immunity," *id.* at 26. Because "Celanese is not a charity organization," the only reason it paid for

[3] Oddly, for the number of times that Celanese claims that the Court's Opinion renders section 42-1-400 "meaningless" or "rewrites" the Statute, not once does it explain how section 42-1-400 makes reference to the necessity of conferring on it the benefit of civil immunity. Of course, it cannot, because this statutory provision says nothing at all about civil immunity.

Daniel's employees' workers compensation, its brief urges, was because it believed it was responsible. Celanese argues that it "complied with the Workers' Compensation Law at significant cost, for which they now receive no benefits whatsoever." *Id.* at 21.

In this way Celanese seems to reason—fallaciously—that if it paid for coverage, then it must be a statutory employer.[4] Since the Opinion holds that it is not a statutory employer, then there was no reason to pay for coverage. But first, there are many other reasons to pay for coverage than to receive the immunity benefit. Although courts do not peer behind the rationale of contracting parties, *see Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) (explaining "[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions"), it is not difficult to imagine that in exchange for making such payments, Daniel may have received less in payment for its services, or other valuable offsetting arrangements. Moreover, by making sure that Daniel's employees were covered while working on Celanese's equipment, both parties made sure that neither would be subject to actual statutory penalties that apply to businesses for non-coverage of workers. And even more, by making sure that Daniel's own employees were covered, Celanese also received the benefit of certainty, knowing it would not be compelled, "in the first instance to pay all benefits due," to Daniel's direct employees in the event Daniel *did not* carry workers' compensation insurance. *See, e.g.*, S.C. Code Ann. § 42-1-415(A).[5] These are all valuable benefits that flow from contracting parties ensuring workers'

[4] The proper conditional statement runs in the opposite direction: if a business is a statutory employer, then it must provide coverage to its outsourced employees. To argue from this statutorily proper conditional statement to the argument that "because it paid for coverage then it must be a statutory employer" is to commit the logical fallacy of affirming the consequent, from which no sound inferences can follow.

[5] Ensuring that Daniel's employees were covered under a workers' compensation insurance policy also benefitted Celanese in that it avoided the costs and complications that arise when employers like Daniel are found to be uninsured. Specifically, Celanese benefitted by ensuring

compensation coverage, rendering uncreditable Celanese's repeated claims to "corporate waste," or that "[t]here is no rational economic reason for why it would gratuitously pay workers' compensation." Pet'r Br. 4.

Second, to accept this fallacious bootstrapping argument—if a business pays for a contracted business's employee's workers compensation, it must be a statutory employer—requires accepting the implied inversion of purposes. Under this reasoning it would be the immunity that is paramount, and the means of justifying it would be to provide coverage for employees. The Opinion properly rejects this reasoning as having no basis in the statute, nor in precedent. As the Opinion explains, "[i]t is also important to note that the public policy at issue here is *not* to provide civil immunity to employers like [Celanese]." Op. at 11 (emphasis added). Moreover, "'the underlying rationale' of favoring coverage for workers 'is not as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory.'" Op. at 11 (quoting *Olmstead v. Shakespeare*, 348 S.C. 436, 441, 559 S.E.2d 370, 373 (Ct. App. 2002)). When a business entity attempts to come to the benefit of civil immunity by bathing itself in purported statutory obligations, the "'underlying rationale' of favoring coverage for workers" cuts against any such attempt to invert the statutory logic.

---

that it would not be compelled to pay out benefits and then seek reimbursement "from the Uninsured Employers' Fund as created by Section 42-7-200 for compensation and medical benefits." S.C. Code Ann. § 42-1-415(A). Likewise, by ensuring Daniel provided coverage, Celanese ensured it would never have to petition the Workers' Compensation Commission "'to transfer responsibility for continuing compensation and benefits' [from itself] to the South Carolina Uninsured Employers' Fund," particularly given that the Commission's "refusal to order a transfer of responsibility pursuant to subsection 42-1-415(A) of the South Carolina Code (2015) . . . is not a final decision, and thus not immediately appealable." *Rose v. JJS Trucking, LLC*, 411 S.C. 366, 368, 768 S.E.2d 412, 413 (Ct. App. 2015).

2. The Court follows proper separation of powers principles by declining the invitation to expand the statute's civil immunity benefits.

Celanese and their Amici's reasoning in response to a proper refocusing of statutory purpose goes something like this: because some contracting entity who provides outsourced workers might shirk their workers' compensation obligations, all contracting entities should enjoy an economically valuable benefit, thereby providing incentives for businesses to fulfill the original purpose of ensuring worker coverage. Otherwise, this reasoning goes, there is a risk that subcontractors will default, leaving workers at risk. *See, e.g.*, Pet'r Resp. 26. As a consequence, Celanese and their Amici argue that public policy favors a broad reading of section 42-1-400 as a principal way to fulfill the statutory purpose of ensuring coverage for workers.

For a judicial doctrine to sweep broader than the plain meaning of the text—as Petitioner's urge it must—it could only do so if it were necessary to give effect to the statute's purpose. "Accordingly, courts will 'give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *S.C. Pub. Int. Found.*, 432 S.C. at 497, 854 S.E.2d at 838 (quoting *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575). Because the plain meaning of the statute is clear, as the Opinion explains, there is no reason to "resort to subtle or forced construction to . . . expand the statute's operation." *Id.*

To argue that the Court should "expand the statute's operation" to confer valuable civil immunity to multiple firms for the same employee is a fact-dependent question of public policy that the Court has disclaimed power to consider. The Court recently reaffirmed that it "is constitutionally bound by the rule of law—specifically, separation of powers—to interpret and apply existing laws; we do not, and cannot, set public policy ourselves. Instead, the people of South Carolina, through their elected state representatives, set the state's policy." *Wilson v. City of Columbia*, Op. No. 28056, at 5 (S.C. Sup. Ct. filed Sept. 2, 2021). Thus, "absent a constitutional

prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination." *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017).

Petitioner's arguments to the contrary rely on two dubious considerations. First, is the claim that the Court should maintain a broad statutory reading to support a quid-pro-quo between business compliance with the statute and business benefits for complying. As a potential prophylactic, a rule that gratuitously provides beneficial carrots for compliance to firms beyond those who are textually required to provide workers' compensation, may indeed incentivize coverage for as many employees as is possible. But neither petitioner nor their Amici can point to a single passage of statutory text that justifies the gratuitous conferral of valuable economic benefits to third parties to the employer-employee relationship. It is a nice economic windfall to have, but not one established by statute. Rather, this windfall is grounded in confusing and conflicting doctrinal applications divorced from statutory text and purpose, as the Opinion explains.

But second, they also argue that in the absence of a broad conferral of benefits, the statutory purpose of ensuring maximum coverage for workers will be thwarted. It is worth quoting this argument in full to see how it makes a factual assertion about what businesses will do, and how it threatens non-compliance with statutory obligations by one or more parties:

> 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."

Pet'r Resp. 26 (emphases added). The consequences, they argue "will leave injured workers without the protections that the statute was enacted to provide." *Id*. As this brief already has argued, the "no benefit whatsoever" argument is uncreditable. The empirical claim that workers are at increased risk of non-coverage through the actions petitioner and similarly situated businesses will take, and that the only way to avoid this risk is for the Court to grant civil immunities broader than the plain meaning of the statute permits, fairs no better.

First, the argument that if Celanese or similarly situated businesses are not granted civil immunity beyond what the statute confers, then their own "rational" actions of non-payment will lead to increased risk for workers is a rather self-evidently dubious claim to make to a court. A court must presume the good-faith legal compliance of all of those tasked by law with conforming their actions to statutory obligations. But second, if businesses were to deem it "rational" not to ensure coverage for workers as the law requires in their contracting relations for outsourced workers, it is not the role of the Court to expand the scope of beneficial carrots in an attempt to incentivize compliance. Rather, it is the proper purview of either the Commission to impose penalties on non-complying businesses or the General Assembly to amend the statute to adjust the scope of benefits relative to obligations.

But third, to accept their argument at face-value—that "rational businesses (like Celanese) will not pay" in light of the Opinion's clarification of the statutory employee doctrine—belies everything we know from decades of law and economics scholarship. Sophisticated firms, scholars have explained, are capable of bargaining to efficient solutions against the background of legal rules. Extensive analysis in law and economics based on the Nobel-Prize Winning economist Ronald Coase's work in R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ 1 (1960),

demonstrates that in the absence of high transaction costs, firms will bargain against the background of legal rules—such as the legal requirement here to provide worker compensation coverage to employees and subcontractor employees—to economically efficient solutions. Here, the law requires coverage, exposure to unlimited civil liability looms for every contracting party in the absence of coverage, and the law provides penalties for non-coverage. Against these background rules, there is no reason to think that firms such as Celanese would be unable to decide rationally through their contract negotiations how best to comply with the law to ensure that outsourced workers are covered and thereby manage their own civil liability risk exposure under the Court's clarified doctrine.[6] It would certainly rationally behoove them to do so in light of the liability risk that non-coverage entails—which would also be reflected in their liability insurance rates applicable to their risk exposure—rather than, as Celanese urges, potentially allow workers in a subcontracting relation to slip through the cracks uncovered. Thus, only if we assume *irrational* or *legally deficient* business behavior in contravention to law and economics models and rule of law assumptions will the Court's Opinion lead to the dire results Celanese paints. No matter the truth of either assumption, given the background empirical component to accurate analysis of such market behavior, the proper body to whom Celanese's arguments should be addressed is the General Assembly, not to this Court on petition for rehearing.

In sum, neither the argument that a broad quid-pro-quo of obligation and benefit justifies expanding the plain meaning of the statute nor the argument that failure to do so will lead to increased risk of statutory frustration provide adequate reasons for this Court to "resort to subtle or forced construction to . . . expand the statute's operation." *S.C. Pub. Int. Found.*, 432 S.C. at

[6] Celanese cites to no economic studies or experts to substantiate their claims of possible negative marketplace effects of this clarified doctrinal rule. And if they did, the proper body to direct such market studies would be the General Assembly, not this Court on petition for rehearing.

497, 854 S.E.2d at 838 (quoting *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575). This limitation is particularly applicable in light of the Court's separation of powers duty "to ascertain and give effect to the intent of the General Assembly." *Creswick*, 434 S.C. at 81, 862 S.E.2d at 708.

D. The Opinion Properly Clarifies Doctrine Consistent with Stare Decisis Principles

Clarifying doctrine and reconciling conflicting lines of cases is a proper judicial role. As the Opinion explains from the outset, "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 their work to avoid liability for injuries incurred in the course of employment.'" Op. at 2 (quoting *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1). When fashioning doctrine to apply a statutory provision, the Court is in the best position to clarify conflicting lines of cases to better reflect statutory purpose. This judicial role is particularly important when, as in the case of the statutory employer doctrine, the "body of jurisprudence is confusing, often conflicting, and always difficult for the workers' compensation commission and the circuit court to apply." *Id.* In this case, principles of stare decisis create no conflict with the Opinion's clarification of the doctrine. As this Court has admonished, "stare decisis is not an inexorable command: 'There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. . . . There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.'" *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (alteration in original) (citation omitted). Stare decisis does not preclude doctrinal clarification and development.

The Opinion clarifies a line of cases that are more aptly characterized as applying doctrine on top of doctrine to the point that the doctrine became unmoored from the statutory text and

purpose. *Glass* explained that past cases had construed the statutory requirement "to include activities that: (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." 325 S.C. at 201, 482 S.E.2d at 50. Despite Petitioner's and their Amici's contrary claims, *Glass* does not concretize a three-factor "doctrinal test." *Glass* establishes no analogue to a three-factor test (for example standing, which requires a showing of injury in fact, causation, and redressability). *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("First, the plaintiff must have suffered an 'injury in fact' . . . . Second, there must be a causal connection . . . . Third, it must be 'likely,' . . . that the injury will be 'redressed by a favorable decision.'" (citations omitted)). Rather, *Glass* observed that these three "tests" are prior inquiries in which courts have engaged and that, moreover, "no easily applied formula can be laid down for determining whether work in a particular case meets these tests, [and therefore] each case must be decided on its own facts." 325 S.C. at 201, 482 S.E.2d at 51. Similarly, this Court "has recognized that the construction of the statutory employment statute, and the tests established to interpret that statute, do not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486. Given the diversity of holdings in statutory employer cases, and the lack of an easily administered "test," the principle of stare decisis does not prohibit the Court from reasoning that, although "the concepts we discussed in those cases are relevant to the analysis of this case and all statutory employee cases," there nonetheless is a "trend away from . . . the broad view of an employer's 'trade, business or occupation.'" Op. at 10.

A decide-each-case-on-its-own-facts test is hardly a solidified approach to doctrine for which a "petrifying rigidity" in adhering to precedent is even relevant, contrary to the arguments

stressed by Celanese and their Amici. *See, e.g.*, *Brown v. Anderson Cnty. Hosp. Ass'n*, 268 S.C. 479, 486, 234 S.E.2d 873, 876 (1977) (superseded by statute on other grounds) ("This doctrine is not intended 'to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability.'" (citation omitted)); *see also Payne v. Tenn.*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (citation omitted)).

As "tests," each of the *Glass* inquiries asks different questions. An activity that is "a necessary, essential, and integral part of the business" would be a far more demanding inquiry than one that is "an important part of the trade." The latter might simply be a more permissive version of the former, and as this brief has argued, open to just about any contracted activity—from plumber to painter to cleaner. Moreover, a question of work "previously performed by employees" could be met even if neither a necessary nor an important part of the business. In light of this diversity of inquiry, the Opinion observes that, "[w]hile each test remains a valid consideration, today we refocus on the *key question posed by the statute*." Op. at 11 (emphasis added). That key question is whether the work is "part of [the owner's] . . . business," *id.*, and not whether it is important to it or necessary for it. Judicially created doctrines are subject to further clarification, particularly where, as here, the doctrine exists to apply statutory text and purpose, not to persist in potential error by concretizing as "tests" prior inconsistent inquiries that the Court has employed. As this Court has made clear, "[s]tare decisis should be used to foster stability and certainty in the law, but, not to perpetuate error and injustice." *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981) (superseded by statute as stated in *McLeod*).

With this amount of uncertainty with the existence of different judicial inquiries and admitted decide-each-case-on-its-own-facts approach, the Opinion is well within the bounds of stare decisis both to respect the existence of these prior inquiries and to refocus the central inquiry on the statutory text itself. Moreover, as the Court explains, "[w]hile adherence to precedent under the rubric of *stare decisis* is commendable and provides certainty and consistency within our judicial system, adherence to precedent that is wrong serves no such laudable purpose." *Joseph v. S.C. Dep't of Labor, Licensing & Regul.*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016).

What is most important under principles of stare decisis applicable to statutory construction, the Court has held, is adherence to settled interpretations of statutory purpose. *See Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 403, 611 S.E.2d 240, 244 (2005) ("Legislative intent, once determined, is 'permanently settled' absent subsequent action by the General Assembly to effect a change in the statutory law."). *Glass* and its progeny have not provided an account of the statutory employee doctrine in light of the statute's original purpose. Therefore, there is no applicable stare decisis issue for the Opinion to overcome in refocusing the doctrinal inquiry in accordance with the original purpose of the statute.

Stare decisis principles applicable to *Keene* do not support the existence of any relevant reliance interest that the Opinion plausibly upsets, contrary to arguments advanced by Celanese and their Amici. This Court has emphasized repeatedly the fact-dependent inquiry applicable when businesses claim the shield of tort immunity as statutory employers. *Abbott*, 338 S.C. at 163, 526 S.E.2d at 514 ([T]here is no easily applied formula and each case must be decided on its own facts."); *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 ("[T]he tests established to interpret [section 42-1-400] do not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged."). Nothing in the Opinion departs from these settled

expectations: businesses seeking tort immunity as statutory employers must make arguments that depend upon the facts and circumstances of each case. The precedents always provided no more than an invitation to argue for an individualized determination that a business's choice to outsource workers qualifies it as a statutory employer so that it can receive the economic benefits of tort immunity. The Opinion does not change this settled expectation. The Opinion merely adds an additional fact and circumstance that will be particularly relevant to the Court's fact-intensive inquiry—namely an examination of the actual decisions business managers make as an important factor in determining what is "part of [a] . . . business" in light of the circumstances of modern business practices. Nor does the Opinion's refocused analysis on statutory purposes upset any relevant reliance interests. There can be no reliance interest in maintaining a judicial doctrine of statutory employment that is applied more broadly than (or inconsistently with) the statutory purpose "to ensure that workers are covered under the Workers' Compensation Law," Op. at 6 (citing *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1), especially when "[i]t does not matter to the fulfillment of this policy who provides the coverage," *id.*

Claims that settled expectations require strict adherence to precedent are not persuasive in case-by-case doctrinal inquiries. But to continue fact-based inquires without guidance from statutory purpose, as the Opinion reasons, would allow the doctrine to drift in directions that risk sweeping much broader than a strict reading of the text would allow.[7] By focusing on the actual decisions of corporate managers as central to any inquiry into what is "part of . . . [a] business,"

[7] As the dissent admits regarding the clarity of the *Glass* "tests," "[p]erhaps the first and second tests are the same." Op. at 15 (James, J., dissenting). A lack of clarity, and thus a lack of recognized doctrinal rigidity, cuts against any claim that the Opinion violates stare decisis, even if one might reasonably follow the dissent in taking a different approach to the guidance prior cases might offer. Because the Opinion and the dissent have already fully aired the merits of these alternative approaches to applying prior cases, there is nothing new to consider on re-hearing.

the Opinion forestalls overly broad inquiries untethered from statutory text and purpose. These broad inquiries invite courts to apply doctrine to the "facts and circumstances of the case" based on prior doctrine, while losing sight of what the doctrine is meant to do—namely, fulfill the statutory text and purpose as the Opinion explains. Otherwise, it is all too easy to decide cases as if the statutory purpose were to provide—and even expand—civil immunity rather than to determine who has principal liability for covering employees. The Opinion follows existing precedents in giving effect to the plain meaning of the statute and in refusing the invitation to employ its sometimes "conflicting" doctrinal "tests" unmoored from textual and purposive guidance. *S.C. Pub. Int. Found.*, 432 S.C. at 497, 854 S.E.2d at 838 ("[C]ourts will 'give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" (citation omitted)); *Glass*, 325 S.C. at 201, 482 S.E.2d at 51 ("[N]o easily applied formula can be laid down for determining whether work in a particular case meets these tests. . . .").

The fact that fewer businesses might qualify as statutory employers from a narrowed inquiry does not offend principles of stare decisis either, nor does it produce undesirable consequences. Celanese asserts that the consequence of the Opinion's analysis is that "there would be no statutory employer-employee relationship," Pet'r Resp. 8, another reason why the Chamber of Commerce claims that it violates principles of stare decisis, *see* Br. of S.C. Chamber of Commerce as Amicus Curiae in Supp. of Rehearing 11-13 ("Chamber Br."). No doubt, the broader the doctrine, the greater the number of businesses that will qualify for immunity under the statutory employee doctrine. A narrowed doctrine means that fewer businesses will qualify. To the extent that businesses have entered into outsourcing contracts with the expectation that they could thereby categorically avoid civil liability for their own tortious actions and inactions, then these interests

will no doubt be affected by the Opinion. This result would be a problem, however, only if the statute's purpose were to create opportunities for businesses to qualify as statutory employers. But as the Opinion makes clear such a claim would be inconsistent with the statute's explicit purposes of ensuring coverage for employees.

As the Court clarifies, under the explicit terms of the statute only those businesses who might attempt to avoid paying for workers' compensation by engaging in subcontracting of employees will become "statutory employers" for purposes of the legal obligation to provide coverage. In response to this reasoning, Celanese and the Chamber of Commerce argue that the Opinion threatens the statutory employee doctrine by raising the bar for who would qualify. But even if true, the fact that there might be fewer statutory employers is potentially a virtue, not a vice, of the Opinion's analysis.

In a world with perfect legal compliance with the statute—meaning all relevant parties fulfill their obligations to provide workers compensation coverage, and no relevant workers are left uncovered—then there might then be no "statutory employer-employee relationship." It is a statutory creation that by plain text covers only those firms who would seek to avoid legal obligations by subcontracting parts of their business. The statute troubleshoots this possibility by creating the category of statutory employer to guard against uncovered and outsourced employees, and by providing remedies to uncovered employees in section 42-1-415. By the terms of the text, and the purpose of the statute, however, there is no statutory necessity that any employers behave in a manner that triggers the relation of employer by statute. But as the Opinion clarifies consistent with the statute, "[t]he 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." Op. at 10 (citations omitted). One also could add that it does not matter

to the fulfillment of this policy whether or to what extent businesses qualify as statutory employers for purposes of claiming civil immunity rather than for purposes of ensuring workers are covered. If all contracting parties fulfill their statutory obligations to ensure that workers are covered, there is no other need to create employers by statute. To suggest otherwise is to invert that statute's logic and purpose as if it were designed to prioritize conferral of civil immunity rather than to ensure worker coverage. As in this case, when a worker is covered by his employer, to find that a statutory employer relation also exists, merely multiplies beneficiaries of valuable tort immunity without providing coverage to any additional employees. Thus, the claim that in order to ensure that an employer covers its employees, additional economic windfalls for businesses who are *not* the employers of covered workers are necessary to achieve the statutory purposes is an economically contestable policy argument properly addressed to the General Assembly, not to this Court.

II. THE QUESTION OF "WHETHER THE OPINION WILL PRODUCE NEGATIVE OUTCOMES IN THE MARKETPLACE AND FOR SUBCONTRACTOR EMPLOYEES" OPENS UP INQUIRIES PROPERLY ADDRESSED TO THE GENERAL ASSEMBLY, NOT TO THIS COURT ON PETITION FOR REHEARING

In response to Petitioner's August 11, 2021 submission, this Court requested that the parties and Amici address several questions, including "whether 'the opinion will produce negative outcomes in the marketplace and for subcontractor employees.'" Order at 1, *Keene v. CNA Holdings, LLC* (S.C. Sup. Ct. filed Oct. 11, 2021); *see also* Order (S.C. Sup. Ct. filed Nov. 10, 2021). Respectfully, adjudication of the future "outcomes in the marketplace and for subcontractor employees" is both a speculative and an empirically informed issue, and it therefore involves questions properly addressed to the General Assembly, not this Court. This Court recently reaffirmed that it is "a court that is constitutionally bound by the rule of law—specifically, separation of powers—to interpret and apply existing laws; we do not, and cannot, set public policy

ourselves. Instead, the people of South Carolina, through their elected state representatives, set the state's policy." *Wilson*, Op. No. 28056, at 5. Thus, "absent a constitutional prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination." *Smith*, 419 S.C. at 559, 799 S.E.2d at 485. As part of making legislative policy determinations, our General Assembly has the ability to take testimony in the form of public hearings, hire subject matter experts, and hear, collectively and as individual members, from a wide variety of stakeholders.

This Court's statutory analysis should not be influenced by speculative assertions—positive or negative—about the specific "outcomes in the marketplace" because, as this Court has made clear:

> [d]eterminations of public policy . . . are chiefly within the province of the legislature, whose authority on these matters we must respect. *See, e.g.*, *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (recognizing that the "'primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration'" (quoting *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925))).

Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 271, 802 S.E.2d 794, 797 (2017); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) ("[W]ith the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.").

Against these settled separation of powers principles, Petitioner urges this Court to engage in speculative consideration of asserted specific negative marketplace consequences said to follow

from the Opinion's doctrinal clarification.[8] Upon examination, however, Petitioner's claims about negative outcomes in the marketplace are speculative just-so stories about what rational economic actors would or might do. As this brief has already canvassed, arguments that businesses will leave workers uncovered because ensuring worker coverage for subcontractor employees would be a complete "waste of corporate assets," *see, e.g.*, Pet'r Resp. 26, are based on false premises about the continuing value—and legal duty—of ensuring that workers are covered.

Far from the dire economic consequences combined with workers' compensation failures that petitioner and their Amici predict, the actual "outcomes in the marketplace" will in all likelihood be far more positive. Rather than engaging in further rent-seeking behavior before this Court, Celanese and similarly situated businesses will continue to ensure that subcontracted workers working on their sites are covered by workers' compensation.[9] They will do this first to make sure that they comply with the law and would not be subject to potential penalties, and second, to shield themselves against run-of-the-mill workplace injuries. The distribution of the cost of ensuring this coverage will continue to be a contracting term over which owners and subcontractors will bargain to efficient solutions. Workers will continue to be covered at rates

---

[8] Petitioner asserts "perverse economic incentives" for which "economically rational businesses (like Celanese)" will refuse to pay workers compensation premiums as part of their contracts, and "[t]hat will leave injured workers without the protections the statute was enacted to provide." Pet'r Resp. 26. In their Amicus brief, the Chamber of Commerce paints a dark, "the sky is falling," economic future: "The consequences of this uncertainty would be *severe*. With the threat of eight-figure tort claims hanging over every contracting relationship, insurers will be forced to raise rates to cover South Carolina businesses. Business costs—and costs of goods to consumers—will rise. Employment will fall." Chamber Br. 16 (emphasis added).

[9] A widely used economic concept in legal analysis, rent-seeking behavior occurs when firms expend resources seeking to accrue economic value, not by producing a better widget, but by obtaining favorable legal rules that confer valuable entitlements or privileges (here, a valuable doctrinal immunity). *See e.g.*, ANNE O. KRUEGER, THE POLITICAL ECONOMY OF THE RENT-SEEKING SOCIETY, 64 AM. ECON. REV. 291 (1974) (coining the term "rent-seeking"); RICHARD A. POSNER, THE SOCIAL COSTS OF MONOPOLY & REGULATION, 83 J. POL. ECON. 807 (1975).

substantially similar to those prior to the Opinion's refocused analysis because it is a legal obligation and is in the best interests of all businesses to contracting relations to ensure that coverage exists. Finally, a matter about which neither Petitioner nor Amici address is also relevant. Perhaps businesses such as Celanese and those similarly situated will have a greater incentive to comply with the duties that the law of tort in South Carolina impose on them to maintain a safe working environment for all those exposed to workplace risks. Although Petitioner asserts that they will conserve corporate assets to guard against potential tort liability it claims the Opinion creates, as presumed rational economic actors, they may find, by contrast, that their resources will be better directed towards improving workplace safety rather than in compensating workers for avoidable harms. Without the ability to rely on gratuitous economic windfalls of the kind sought here—civil immunity from judgment for wrong-doing against another business's employee working on site—there will be a greater economic incentive to structure the workplace to avoid risks of injury, particularly of the kind at issue in this case. Thus, both the duties imposed by the law of tort and the Workers' Compensation Law will both be better vindicated.

If all of this sounds like economic and behavioral speculation, even "pie in the sky" legal idealism, it is no less (I think more) empirically sound than the "sky is falling" consequentialism Petitioner urges before the Court. Which is to say, that speculative questions about what businesses would or might do in relation to judicial clarification of legal doctrine in light of statutory text and purpose cannot be resolved by this Court, nor should they influence this Court's willingness to reconsider its sound statutory analysis. *See Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925 (1958) ("All considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to the General Assembly.").

Any attempt to adjudicate these empirical issues will be limited by the fact that this Court is factually limited to a consideration of the Record on Appeal which "shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. *See also Williamsburg Rural Water & Sewer Co. v. Williamsburg Cnty. Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record."). Thus, granting the Petition for Rehearing based on examining whether the Opinion will produce "negative outcomes in the marketplace and for subcontractor employees" would require consideration of empirical information of the kind that will simply be unavailable. Instead, there is a substantial risk of producing doctrine that fails to adequately fit statutory text and purpose, as well as fails to achieve economically efficient marketplace outcomes, if based on the *ipse dixit* assertions of businesses with an interest in maintaining valuable economic windfalls that they believe a broader doctrine provides. There is no reason for this Court to reconsider sound doctrinal analysis grounded in statutory text and purpose in order to consider highly speculative economic claims that are properly addressed to the General Assembly—both as practical matter and as a matter of separation of powers principle.

CONCLUSION

In short, the Court's Opinion, in reaching the same conclusion as the Circuit Court (on three occasions) and the Court of Appeals, did not overlook or misapprehend any argument or issue. *See* Rule 221, SCACR. Petitioner is not entitled to try its case again in this Court nor is it entitled to a broad statutory interpretation to "expand the statute's operation," *S.C. Pub. Int. Found.*, 432 S.C. at 497, 854 S.E.2d at 838, through a judicially-created public policy redefining the purposes of sections 42-1-400 and -410 of The South Carolina Workers' Compensation Law. This Court should deny the Petition for Rehearing.

Respectfully submitted,

THOMAS P. CROCKER
N. Heyward Clarkson, Jr. Professor
University of South Carolina School of Law

--by--

MOTLEY RICE LLC
/s/ W. Taylor Lacy
Anne McGinness Kearse (S.C. Bar No. 15642)
T. David Hoyle (S.C. Bar No. 74055)
W. Taylor C. Lacy (S.C. Bar No. 74891)
28 Bridgeside Boulevard
Mount Pleasant, South Carolina 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450
Emails: akearse@motleyrice.com
dhoyle@motleyrice.com
wlacy@motleyrice.com|

For Motley Rice LLC and as Counsel for Amicus Curiae Thomas P. Crocker, Ph.D.

HARRISON WHITE P.C.
Tom A. Killoren, Jr. (S.C. Bar No. 69490)
Post Office Box 3547
Spartanburg, South Carolina 29304
Telephone: (864) 585-5100
Facsimile: (864) 542-2993
Email: tom@spartanlaw.com

MCGOWAN HOOD & FELDER, LLC
Chad McGowan (S.C. Bar No. 9943)
1539 Health Care Drive
Rock Hill, South Carolina 29732
Telephone: (803) 327-7800
Email: cmcgowan@mcgowanhood.com

MORGAN LITIGATION GROUP, LLC
S. Kirkpatrick Morgan, Jr. (S.C. Bar No. 4089)
Post Office Box 1256
Lexington, South Carolina 29071
Telephone: (803) 359-6194
Facsimile: (803) 957-4584
Email: km@morganlitigation.com

RICHARDSON, THOMAS, HALTIWANGER, MOORE & LEWIS, LLC
Terry E. Richardson, Jr. (S.C. Bar No. 4721)
Daniel Scott Haltiwanger (S.C. Bar No. 15705)
1513 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 541-7850
Emails: terry@richardsonthomas.com
dan@richardsonthomas.com

ROGERS, PATRICK, WESTBROOK & BRICKMAN, LLC
Elizabeth Middleton Burke (S.C. Bar No. 13610)
Christiaan A. Marcum (S.C. Bar No. 16636)
Post Office Box 1007
Mount Pleasant, South Carolina 29465
Telephone: (843) 727-6522
Emails: bburke@rpwb.com
cmarcum@rpwb.com

TAYLOR LAW FIRM LLC
Heath P. Taylor (S.C. Bar No. 15517)
3227 Sunset Boulevard
Building E, Suite 101
West Columbia, South Carolina 29169
Telephone: (803) 926-2205
Email: heath@taylorlawsc.com

Mount Pleasant, South Carolina
December 3, 2021