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. 2019-000816
Case No. 2013-CP-42-3915

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

v.

CNA Holdings, LLC, *Petitioner*.

AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR REHEARING

LITTLER MENDELSON, P.C.
William H. Foster, Bar No. 66221
Katie E. Towery, Bar No. 103219
110 East Court Street, Suite 201
Greenville, SC 29601
(864) 775-3191

Attorneys for Amicus Curiae
The National Association of Manufacturers

Pursuant to Rule 213 of the South Carolina Rules of Appellate Procedure, the National Association of Manufacturers ("NAM") respectfully files this Amicus Curiae Brief in Support of CNA Holdings, LLC's ("Celanese") Petition for Rehearing.

By way of brief introduction, NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector, including numerous South Carolina-based manufacturers as well as global manufacturers with substantial presence in the State of South Carolina. Manufacturing contributes roughly $2.35 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the nation.

The NAM files this Amicus Curiae Brief in response to the Court's August 11, 2021 Opinion No. 28052 ("Opinion" or "Op."), and in accordance with the Court's October 11, 2021 Order granting the NAM's Motion to File an Amicus Curiae Brief.

In short, the NAM is deeply concerned with the Opinion's destabilizing impact on the manufacturing sector should the Court's construction of the statutory employee doctrine not be reconsidered. The Opinion's departure from decades of precedent will severely undermine the strength of South Carolina's essential manufacturing industry by depriving responsible manufacturers who have fully complied with their obligations under the established framework of the Workers' Compensation Law (and invested millions of dollars in subsidizing workers' compensation insurance premiums of their subcontractors) of their bargained-for benefit of civil liability immunity. Such seismic shifts should not be undertaken drastically by our courts, but should rather be examined and undertaken, if at all, via the legislative process pursuant to which

interested stakeholders and experts have the opportunity to review and comment upon the proposed change.

If allowed to stand, the Court's decision will inflict significant harm upon South Carolina workers, manufacturers, the health of the State's economy and economic development efforts, as well as South Carolina's ability to retain and recruit manufacturers to employ South Carolina workers. For the reasons set forth herein, the NAM respectfully requests that this Court reconsider its Opinion, and either issue a new ruling in favor of Celanese or order rehearing and further argument.

I. The Opinion Conflicts with the Workers' Compensation Law, As Written, and Impairs the Very Policies the Law Was Adopted to Achieve.

The core objective underpinning the South Carolina Workers' Compensation Law is to provide compensation for employees that are injured on the job. *See* S.C. Code Ann. §42-1-10, *et seq*. The workers' compensation system replaced the common law tort system and the negligence standard for workplace injuries and is now the exclusive remedy for work-related injuries. *See Mendenhall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 562, 738 S.E.2d 251, 253 (2013). Through this no-fault system, employers are held strictly liable for providing benefits for injured workers. *See* S.C. Code Ann. § 42-1-160. In return for the employers' forfeiture of traditional common law defenses, injured workers waive their right to seek redress for their injuries and losses through the tort system, and the benefits and damages available have a measure of certainty. *See* S.C. Code Ann. § 42-1-540.

Thus, the "concept of workmen's compensation is founded upon recognition of the advisibility, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault, to compensate the

employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of the employment." *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 530–31, 115 S.E.2d 57, 66 (1960).

Through this comprehensive approach to the provision of compensation for injured employees, "the employee receives the right to swift and sure compensation; [while] the employer receives immunity from tort actions by the employee." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980). This "quid pro quo approach" works to the advantage of the employer and employee alike, and to the economy of the State of South Carolina as a whole. *Id*. As the South Carolina Department of Insurance noted in its most recent Status Report on the South Carolina Workers' Compensation Insurance Market, "[m]any believe that the system is an important influence on the economic development of the state—due to the impact that the cost of a state's workers' compensation system has upon the state's ability to attract and retain businesses." *2020 Status Report on the South Carolina Workers' Compensation Insurance Market*, SOUTH CAROLINA DEPARTMENT OF INSURANCE, Dec. 17, 2020.

While coverage under the Workers' Compensation Law typically depends on the existence of an employer-employee relationship, a statutory exception is found in S.C. Code Ann. § 42-1-400. Pursuant to this Section, an employee of a subcontractor may be considered the statutory employee of the upstream business owner, depending on the nature of the work performed by the subcontractor. Like the core purpose of the Workers' Compensation Law as a whole, the goal of the statutory employee doctrine is "to afford the benefits of compensation to the men [and women] who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise." *Parker*, 275 S.C. at 73, 267 S.E.2d at 528 (citation omitted). In addition to providing security for workers, the doctrine also "prevents employers from escaping

liability by doing through independent contractors what they would otherwise do through their own employees." *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 545, 96 S.E.2d 566, 572 (1957).

For decades, South Carolina courts have fashioned a body of extensive case law that reinforces the General Assembly's legislative intent in codifying a no-fault workers' compensation system that is expressly intended to maximize the scope of coverage for all workers. Through the development of three tests, the Court established essential guideposts for upstream businesses to determine whether or not a subcontractor's employee is considered its statutory employee. The factors to be considered are: (1) whether the activity of the subcontractor is an important part of the owner's trade or business; (2) whether the activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or (3) whether the identical activity performed by the subcontractor has been performed by employees of the owner. *See, e.g.*, *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 292, 411 S.E.2d 439, 440 (1991). If any *one* of these tests was satisfied, then the Court has instructed upstream business owners to consider the worker a statutory employee and, thus, provide coverage. *See Riden v. Kemet Elecs. Corp.*, 313 S.C. 261, 263, 437 S.E.2d 156, 158 (Ct. App. 1993).

Crucially, South Carolina Courts have consistently found that any doubts as to a worker's status are to be resolved in favor of coverage under the Workers' Compensation Law. In other words, because "the basic purpose of the Compensation Act is the ***inclusion*** of employers and employees, … doubts of jurisdiction ***must*** be resolved in favor of inclusion rather than exclusion." *Adams*, 230 S.C. at 544, 96 S.E.2d at 572 (emphasis added). That fundamental presumption of coverage applies with equal force to the question of statutory employment, regardless of whether the doctrine is being used as a "sword or a shield."

As with direct employers, where a worker is properly classified as a statutory employee, his or her sole remedy for work-related injuries is under the Workers' Compensation Law, meaning a statutory employee may not maintain a negligence cause of action against either his or her direct employer or his or her statutory employer. *Carter v. Florentine Corp.*, 310 S.C. 228, 230–31, 423 S.E.2d 112, 113 (1992), overruled on other grounds, *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). In consequence, because both the owner and the subcontractor are subjected to the requirements of the Workers' Compensation Law, workers purposefully receive ***double protection***. *Parker*, 275 S.C. at 73, 267 S.E.2d at 528 (emphasis added).

By obligating business owners to protect the employees of their subcontractors, a statutory prerequisite for the upstream business owner to receive statutory civil liability immunity, the statutory employee doctrine serves a vital role in the workers' compensation scheme's fundamental purpose of maximizing coverage. The Opinion here, however, completely shatters the foundation upon which this doctrine was built by eliminating the business owners' benefit of the bargain. By removing civil immunity protections for business owners, and greatly narrowing the scope of workers who are classified as statutory employees, the Opinion effectively strips Section 42-1-400 of any significance.

The Opinion's sharp divergence from well-established precedent results from an analysis that is focused upon maximizing the instant plaintiff's potential monetary recovery at the ultimate expense of maximizing the protections of the Workers' Compensation Law. By losing sight of the cardinal concept that the Workers' Compensation Law was designed to maximize recovery for ***all*** injured workers by ensuring a uniform right to benefits without the burden of establishing employer liability, the unintended consequence of the Opinion is a diminution in coverage for injured workers. As such, the NAM respectfully urges the Court to reconsider its Opinion in light

of the broader purposes for which the Workers' Compensation Law and statutory employee doctrine were enacted.

II. The Opinion Will Have Damaging Effects on Businesses Which Have Rationally Relied Upon the Well-Established Statutory Employee Framework.

The South Carolina manufacturing industry, and the business sector as a whole, has been built upon reliance in the Court's well-established framework for determining whether a subcontractor's employee constitutes the upstream owner's statutory employee. Business owners have made the legitimate business decision that a subcontractor's employees who provide activities that are an important, necessary, essential and integral part of their business, are their statutory employees. As a result, these businesses have established business practices and taken the necessary steps to ***guarantee*** workers' compensation coverage for their statutory employees (just as they are statutorily required to do) and, as a consequence, to subsidize that coverage via additional payments to their subcontractors earmarked to pay for those premiums. In other words, most subcontracts require the subcontractor to maintain adequate workers' compensation insurance coverage for their employees, with the upstream employer covering the costs of these insurance premiums for their statutory employees. Thus, the value of subcontracts has been greatly affected by the statutory employee framework, and coverage for workers is, in effect, baked into the very contractual relationship itself.

Likewise, South Carolina manufacturers (and other businesses) have made their purchasing decisions for general liability insurance in reliance on the strength of this established framework—*i.e.*, not purchasing amounts of liability protection sufficient to cover civil negligence actions from injured workers who are deemed to be their statutory employees, because the statute provides that the upstream business owners are immune from civil liability. Because businesses have

determined that a subcontractor's work is an important, necessary and essential part of their trade, business, or occupation, they have foregone general tort liability protections in favor of ensuring adequate workers' compensation coverage for their statutory employees.

These business decisions were made in legitimate reliance upon decades-worth of precedent establishing the circumstances under which an upstream business owner is deemed to be a statutory employer. Stated differently, the business community made decisions reflecting their informed judgment regarding which of their subcontractor's employees constituted their statutory employees. This is reflected by the current industry standard for business owners to require their subcontractors to maintain workers' compensation coverage, and to even reimburse workers' compensation insurance premiums for workers deemed to be their statutory employees. The public policy favoring coverage has thus been fulfilled because, pursuant to prior precedent, businesses made the rational decision that they were obligated to do so.

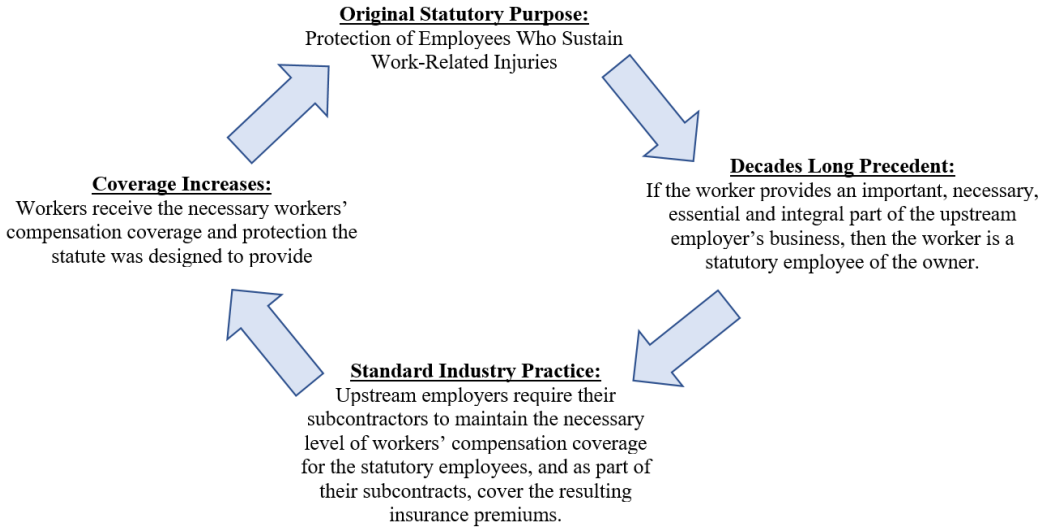
The Opinion, however, finds that these businesses who have mandated and agreed to pay for insurance coverage (thus fully complying with their obligations under the Workers' Compensation Law) are nevertheless ***not*** entitled to the accompanying civil liability immunity. Companies have detrimentally relied upon the Court's well-established, three factor test in forming their current business models and in shaping their coverage decisions. Despite this reasonable and good faith reliance, the Opinion changes the entire landscape, leaving businesses without any framework for how to ensure compliance under the Workers' Compensation Law in their subcontracting relationships and no means to address the exposure created by the Opinion's departure. With more uncertainty than ever, and an utter lack of predictability, the unknowns created by the Opinion will certainly wreak havoc on the costs of doing business in South Carolina.

Pursuant to the Opinion, the determination of whether or not a worker is a statutory employee now turns on the existence of insurance coverage—not on whether the work conducted by the subcontractor is an important, necessary, essential and integral part of the owner's business. Under the new interpretation, "when the public policy favoring coverage is satisfied—as it was here—that policy has nothing to say about providing immunity to the owner." (Op.)

The Opinion omits a crucial part of the analysis—that being, what ***caused*** workers' compensation coverage to be provided in the first place? What causal forces guaranteed that the worker in the instant case received workers' compensation coverage? The answer to that question is quite obvious—it was Celanese, complying with its obligations as the statutory employer.

The causal chain of events which led to the instant plaintiff receiving workers' compensation coverage are as follows: Celanese required its subcontractor to maintain the necessary workers' compensation coverage for its employees. As part of their contract, Celanese agreed to pay the resulting insurance premiums for those employees. Celanese made the business decision to pay those premiums based on decades-long precedent establishing that it was the statutory employer of individuals, like the plaintiff, who provided an important, necessary, essential and integral part of Celanese's business. In exchange for ensuring the plaintiff received workers' compensation coverage, Celanese likewise understood that it would enjoy civil liability immunity for any on-the-job injuries sustained by plaintiff.

The workers' compensation scheme is thus dependent upon certain causes and effects, with the original purpose of the doctrine driving the framework, as demonstrated in the diagram below:



The Opinion, however, jumps to the end effect without first analyzing the precipitating events in the causal chain. In other words, the Opinion skips to the issue of whether coverage was, in fact, provided, without first noting what triggered this end result. The Opinion's approach, with the analysis focused solely on whether coverage has been provided, will result in the causal chain being broken. If well-established precedent no longer influences industry practices in favor of providing coverage, then the result will ultimately be a decrease in the amount of coverage provided, which is most detrimental to the employees the entire system was designed to protect.

The Opinion penalizes business owners for paying premiums they reasonably believed they were obligated to cover pursuant to prior precedent, by finding that these business owners no longer enjoy civil immunity under the statute. Thus, the Opinion finds that South Carolina businesses have been paying premiums for years that they were, under the Court's analysis, not obligated to pay. Under the Court's rationale, these judicious (at the time) business decisions now constitute a complete waste of corporate assets.

If the Opinion remains, business owners will make the rational decision going forward to not pay the workers' compensation insurance premiums of subcontracting employees. As a result, the very persons the Workers' Compensation Law is supposed to protect will suffer the ultimate

consequences if their direct employers fail to provide the necessary coverage. Put differently, the Opinion creates an economic incentive for business owners that directly conflicts with the public policy underlying the Workers' Compensation Law.

Moreover, the massive amount of litigation that will ensue as a result of the Opinion will be disastrous for South Carolina businesses. Not only will businesses be faced with tort litigation from injured workers seeking damages for incidents that these businesses were previously exempt from under the statutory employee doctrine, but they will also be faced with difficult legal challenges regarding who is responsible for workers' compensation coverage in their subcontracting relationships.

The damaging effects of the Opinion will be widespread across manufacturing and other industries in South Carolina and will be felt in both the employer and employee context. For these reasons, the NAM respectfully requests that the Court reconsider the Opinion.

III. A Change in the Law of This Magnitude Is Better Suited for the Legislative Process.

Lastly, the NAM submits that a change in the statutory framework of this magnitude should be reserved for the legislative process. The statutory employee doctrine was created by the General Assembly and codified in the South Carolina Workers' Compensation Law. Despite the fact that the doctrine is not judge-made, the Opinion essentially changes the statutory effect of Section 42-1-400.

First, the Opinion finds that any decision to outsource work necessarily means that the business owner has defined the scope of its business to not include that type of work. This concept is not encompassed within the language of the statute and, to the contrary, the statute establishes the opposite. Pursuant to the plain statutory language, the General Assembly envisioned scenarios

in which an owner would, for various business reasons, outsource work that is part of its trade, business, or occupation.

In addition, the Opinion finds that if the subcontractor's employee is covered by workers' compensation insurance provided by his or her direct employer, then the upstream business owner cannot also be a statutory employer. Thus, the Opinion finds that a worker can only have a single employer. The statute, to the contrary, does not limit employer-status to a single employer, but specifically contemplates that both a direct employer and statutory employer might be at play.[1]

The new analysis set forth in the Opinion makes it difficult (if not impossible) to perceive of any subcontracting relationship that would create a statutory employee relationship if the employee at issue is covered by his or her direct employer. This is a fundamental change in the statutory employee doctrine, effectively eliminating its application in most contexts.

If the General Assembly considered the prior, well-established precedent of South Carolina Courts to be mistaken, it could have acted and changed the language of Section 42-1-400 itself. For decades, the General Assembly has presumably been aware of this Court's rulings and, yet, felt no need to reframe the statutory language to limit its interpretation as the Court has done in this Opinion.

The legislative process better serves a change in the law of this magnitude, as it provides a mechanism through which valuable inputs are received from committees, business groups, different sectors, and members of the public. As evidenced by the numerous amicus curiae briefs to be submitted in support or opposition of the Petition for Rehearing, various business groups, defense bar organizations, and plaintiffs' counsel wish to provide feedback on the effects and

[1] In fact, S.C. Code Ann. § 42-1-415(D) specifically addresses this scenario, and finds that while the subcontractor might ultimately provide workers' compensation coverage for its employees, the upstream owner still enjoys immunity from tort liability.

consequences of the Opinion's modification of the statutory employee analysis. In the legislative process, it is only after those valuable inputs are received and fully considered by South Carolina's duly elected legislators, that a change in the law would occur.

Therefore, the NAM respectfully submits that, while the Court might believe a change in the statutory employee doctrine is necessitated, such a drastic change that will have significant and long-lasting economic impacts on the State, should be conducted through the legislative process of the General Assembly.

Respectfully submitted,

/s/ *William H. Foster*
William H. Foster, Bar No. 66221
bfoster@littler.com
Katie E. Towery, Bar No. 103219
ktowery@littler.com
LITTLER MENDELSON, P.C.
110 East Court Street, Suite 201
Greenville, SC 29601
(864) 775-3191

Attorneys for Amicus Curiae

November 8, 2021
Greenville, South Carolina

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. 2019-000816
Case No. 2013-CP-42-3915

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

v.

CNA Holdings, LLC, *Petitioner*.

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Littler Mendelson, P.C., attorneys for *Amicus Curiae* The National Association of Manufacturers, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via email pursuant to Rule 262(a)(3), SCACR and subsection (d)(1) of the Supreme Court Administrative Order 2021-08-25-02, to the following address(es):

PLEADINGS: **AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING**

COUNSEL SERVED: C. Mitchell Brown (mitch.brown@nelsonmullins.com)

A. Mattison Bogan (matt.bogan@nelsonmullins.com)

Blake T. Williams (blake.williams@nelsonmullins.com)

Richard C. Godfrey (rgodfrey@kirkland.com)

Theile B. McVey (tmcvey@kassellaw.com)

John D. Kassel (jkassel@kassellaw.com)

Chris J. Panatier (cpanatier@sgptrial.com)

Kevin W. Paul (kpaul@dobslegal.com)

Bert G. Utsey, III (bert@cfulaw.com)

Gray T. Culbreath (gculbreath@gwblawfirm.com)

Eleanor L. Jones (ejones@gwblawfirm.com)

Christopher E. Mills (cmills@spero.law)

T. David Hoyle (dhoyle@motleyrice.com)

Anne McGinness Kearse (akearse@motleyrice.com)

W. Taylor C. Lacy (wlacy@motleyrice.com)

John Roberts (jroberts@willoughbyhoefer.com)

Katie E. Towery

November 8, 2021