IN THE

Supreme Court of Virginia

RECORD NO. 171467

CHARLIE JEFFREYS,

Appellant,

v.

THE UNINSURED EMPLOYER'S FUND, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS……i-ii

TABLE OF AUTHORITIES……..ii

CORRECTION OF MISREPRESENTATION OF
FACTS BY THE UNINSURED EMPLOYER'S FUND……..…1-6

THE FOUNDING DOCUMENTS OF MT. LEBANON BAPTIST
CHURCH ARE NOT RELEVANT—THOSE OF THE HARVEY
SCHOOL RESTORATION SOCIETY ARE…….…6

THE FUND UTILIZES THE ANALYSIS REFUTED IN
ESTATE OF RODRIGUEZ v. LEESBURG BUSINESS PARK……...6-7

THE SHELL OIL CO. TEST IS CRITICALLY APPLIED,
AND IS NOT USEFUL HERE……..…7-10

THE RECORD DEMONSTRATES THAT THE
HARVEY SCHOOL RESTORATION SOCIETY WAS
FOUNDED FOR, AND CARRIED OUT, ITS DECLARED
GOAL "*TO PURCHASE, RESTORE, PRESERVE, AND
MAINTAIN*" THE HARVEY SCHOOL……10-14

IF THIS COURT DOES NOT CORRECT THE NEW DISPOSITIVE
FACTUAL FINDINGS OF THE COURT OF APPEALS FOR WHICH
THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH
FINDING, MR. JEFFREYS IS DENIED DUE PROCESS OF LAW…….14

CONCLUSION……14-15

CERTIFICATE OF SERVICE…….16

TABLE OF AUTHORITIES

Bamber v. City of Norfolk,
138 VA. 26, 121 S.E. 564 (1924)……12

Bassett Furniture v. McReynolds,
216 VA. 897, 902, 224 S.E.2d 323, 326 (1976)……...12

Cinnamon v. IBM Corp.,
238 VA. 471, 478, 384 S.E.2d 618, 621 (1989)……7

Fauver v. Bell,
192 VA. 518, 522, 65 S.E.2d 575, 577 (1951)……..12

Feity v. Chalkley,
185 VA. 96, 98, 38 S.E.2d 73, 75 (1996)……..12

Henderson v. Central Telephone Co.,
233 VA. 377, 382, 355 S.E.2d 596, 599 (1987)……7-8, 12

Nichols v. VVKR,
241 VA. 516, 521, 403 S.E.2d 701 (1991)……10, 14

Rodriguez, Adm'r v. Leesburg Business Park, LLC,
287 VA. 187, 195, 754 S.E.2d 275, 279 (2014)……6-8, 10-11

Smith v. Horn,
232 VA. 302, 308, 351 S.E.2d 14, 17 (1986)…….……8

Now before this Honorable Court comes the Appellant, Charlie Jeffreys, pursuant to Rule 5:29 files this Reply Brief.

CORRECTION OF MISREPRESENTATION OF FACTS BY THE UNINSURED EMPLOYER'S FUND

The Fund's statement to this Court found at the bottom of p. 10 of its Brief is a gross misrepresentation of the record. The Fund wrote: "*The Historical Society remained as an auxiliary of the Church for the purpose of community relations, but it had no other involvement with the restoration of the school*". (J.A. p. 53) "*The accident in question occurred over 9 years later, during which time the Historical Society had little to no involvement whatsoever with the restoration of the school*." The Fund says the Historical Society had "*no involvement whatsoever with the restoration of the school*" but the Historical Society's own newsletter at J.A. p. 857-858 states:

> ***Building Projects Scheduled for 2013-2014***
>
> "*A year starting, August 2012 and ending August 2013, we moved the school out of the woods and reassembled it. We still have a few major renovation projects to complete on the exterior and interior.*
>
> *The following projects are to start as soon as finances are available:*
>
> 1. *Electrical*
> 2. *Insulation*
> 3. *Replace bead boards on interior walls*

4. Interior & exterior painting
5. Underpinning

We would like to finish the remaining projects by Spring of 2014. If you would like to help us with this project, please call Annie Mosby @ 707-277-252 or email annie.mosby@mchsi.com .

Thank You,

Annie L. Mosby
President"

(J.A. pp. 857-858)

The after-the-fact efforts by Ms. Mosby and the Fund to make it appear the Restoration Society was not involved in the reconstruction of the Harvey School is belied by the contemporaneously-created documents. The Fund's statement "*The Historical Society had little to no involvement with the restoration of the school*" is false.

Forming a pattern of misrepresentation, the Fund attempts to portray the relationship between the Harvey School Restoration Society and Mount Lebanon Missionary Baptist Church as practically non-existent. The record clearly establishes otherwise. The "*Executive Board of Harvey School Historical Society of Mt. Lebanon Baptist Church*" during its entire existence included "*Reverend George Reynolds, Pastor*" and "*Reverend Larry Younger, Associate Pastor*", both leaders of Mt. Lebanon Baptist Church. Furthermore, the Church was regularly informed of the Restoration Society's activities. *See* J.A. p. 153, line 14 through

J.A. p. 154, line 15 (where counsel for the Uninsured Employer's Fund questioned Ms. Annie Mosby in her deposition):

> "*Q. Ms. Mosby, the Harvey School Historical Society, does it hold meetings?*
>
> *A. We are all in different parts of the country, and we use the website to keep in touch with each other. We do not hold meetings, but I communicate with my members by telephone.*
>
> *Q. And does the historical society report back to the church? Do they send reports or information to the church?*
>
> *A. The activity of the society is known by the church.*
>
> *Q. And how is it known by the church?*
>
> *A. I let them know when things are—you know, the records and whatever. They know.*
>
> *Q. When is the last time you let the church know anything about the activities of the historical society?*
>
> *A. It's done monthly.*
>
> *Q. Monthly. And you continue to do this?*
>
> *A. Yes.*
>
> *Q. Up to this day?*
>
> *A. Yes."*

The Fund's attempt to portray the lack of an ongoing relationship between the Harvey School Restoration Society and Mt. Lebanon Baptist Church is incorrect as shown by the questioning <u>of</u> <u>its</u> <u>own</u> <u>counsel</u>.

Similarly, the Fund misrepresents the facts regarding the purchase of the Harvey School. The Fund states that Ms. Mosby and her family personally bought the school, but the purchase contract shows the "*Harvey School Restoration Society agrees to purchase Harvey Elementary School from Ms. Ewell Barr for the sum of $1,500*." (J.A. p. 856) The contract was written on Harvey School Restoration Society letterhead and shows it was made by "*Annie L. Mosby, President*".

It is true that Ms. Mosby used some of her and her husband's money to purchase the school, but this was the declared, stated plan for financing the work of the Harvey School Restoration Society. See, J.A. p. 811 where Annie Mosby, on behalf of the Harvey School Restoration Society and on its letterhead wrote to Mount Lebanon Missionary Baptist Church requesting "*to be associated with Mount Lebanon Missionary Baptist Church*." Ms. Mosby made it clear that "*The members of the Restoration Society will take care of all the business and cost of maintaining Harvey Elementary School*." Annie Mosby made it clear that she was donating and spending her own money for the Harvey Restoration Society. See, e.g. J.A. p. 817 (where "*Ms. Annie Wilson Mosby, President*" wrote on Harvey School Restoration Society letterhead, showing: "*As an Auxiliary of the Church and a separate project, we feel that Harvey School Restoration Society should have a separate account from the church. The elected Secretary and Treasurer and*

Assistant Treasurer from the Harvey Restoration Society will maintain the bookkeeping and checking account. I think this will make things easier for everyone and hope the church board members will approve. I made an offer of $2,500 to Mr. Thomas for Lot 52. He 'said he would let me know something as soon as possible'").

Ms. Mosby was "*The primary force, motivating force, that caused the formation of the Society and* [she was] *the main and primary worker throughout* [its] *existence*." (J.A. p. 44, lines 3-12). Ms. Mosby may have used her own money to promote and to accomplish the work of the Restoration Society, but the money she spent was always on behalf of the Restoration Society. Ms. Mosby "*maintained the financial statement of the Harvey School Historical Society continuously from the time it was formed until today*." See, Dep. Tr. of Annie L. Mosby, J.A. p. 39, line 25- p. 40, line 9. Ms. Mosby repeatedly documented payments she made on behalf of the Restoration Society, and the deposits of her money in the "*Harvey School Historical Society Financial Statement*." See, e.g. J.A. pp. 339-344. The Fund's attempt to suggest the money Ms. Mosby spent was for her own account, and not for Harvey School Restoration Society's account, is an inaccurate portrayal of the record.

The Fund misrepresents the record in stating to this Court the Deputy Commissioner "*found that because Johnson gave Claimant direction at the job*

site, Johnson was claimant's employer." The Fund cites J.A. p. 879 as its authority for this statement. An examination of J.A. pp. 879-880 shows the Deputy Commissioner never made this ruling.

THE FOUNDING DOCUMENTS OF MT. LEBANON BAPTIST CHURCH ARE NOT RELEVANT—THOSE OF THE HARVEY SCHOOL RESTORATION SOCIETY ARE

The Fund repeatedly argues that Mr. Jeffreys did not introduce into evidence the Church's "*charter or constitution*" or "*tax filings*", and that this is significant to the outcome of this case. Mr. Jeffreys has never asserted the Church's founding documents or tax filings are relevant. What is relevant are the founding documents of the Harvey School Restoration Society, and those were introduced into evidence. (J.A. pp. 801-805) Mr. Jeffreys does not assert "*dogmatic*" reliance on these founding documents **alone**, as the Fund portrays. The actual working documents, also introduced into evidence, establish the Harvey School Restoration Society did what it declared it would do over the course of its entire long existence. *See*, *generally* J.A. pp. 807-858. *See specifically* J.A. pp. 857-858, quoted in its entirety at pp. 1-2 *infra*.

THE FUND UTILIZES THE ANALYSIS REFUTED IN *ESTATE OF RODRIGUEZ v. LEESBURG BUSINESS PARK*

The Fund repeatedly urges this Court to find the Restoration Society was not "*in the trade, business, or occupation*" of construction. This is the exact analysis rejected by this Court in *Rodriguez*: *"In determining whether* [Jeffreys]

construction work was part of [The Church and Restoration Society's] *trade, business, or occupation, we therefore* ***do not*** *simply examine whether* [The Church and the Restoration Society] *engaged in construction…Rather we must determine whether* [Jeffreys'] *construction work at the time of his* [quadriplegic] *accident was a part of the* [Church and Restoration Society's] *business*." See, 287 VA. 187 (emphasis added.) The Fund's argument rejected by this Court in Rodriguez should also be rejected now.

THE SHELL OIL CO. TEST IS CRITICALLY APPLIED, AND IS NOT USEFUL HERE

Many cases of this Court instruct that the Shell Oil Co. test—"*whether this indispensable activity is, in the business, normally carried on through employees rather than independent contractors*"—"*is merely an approach that is useful in determining an entity's trade, business, or occupation. It is not designed for every situation…If the Shell Oil Co. test is uncritically applied, the result would be that owners who subcontract out all their work would never have workers' compensation liability because their own employees would never normally do anything*. Henderson v. Central Telephone Co., 233 VA. 377, 383, 355 S.E.2d 596, 599-600 (1987). (Emphasis in original) See also, Cinnamon v. IBM Corp., 238 VA. 471, 478, 384 S.E.2d 618, 621 (1989) (Shell Oil Co. test is "*only a corollary guide, sometimes useful but not indispensable, in applying the literal language of the statutes to the facts in a particular case*").

Application of the Shell Oil Co. test here would result in the outcome forecasted in *Henderson*—the Harvey School Restoration Society of Mt. Lebanon Baptist Church would never have workers' compensation liability because Restoration Society employees would never normally do anything.

"*The express exception to the* [Shell Oil Co.] *test requires that it not be applied 'where the work is obviously a subcontracted fraction of a main concern*.'" *Smith v. Horn*, 232 VA. 302, 308, 351 S.E.2d 14, 17 (1986). The construction work Mr. Jeffreys was engaged in is obviously a subcontracted fraction of the Appellees' main concern. The Fund's argument that the Shell Oil Co. test applies here is incorrect.

Similarly, the Fund's reliance on *Rodriguez v. Leesburg Business Park, LLC*, 287 VA. 187, 754 S.E.2d 275 (2014) is misplaced here. In *Rodriguez* the examination of Leesburg Business Park's actual activity led the Court to rule that Leesburg Business Park did not carry its burden of proof to show the construction Rodriguez was engaged in was a part of its trade, business, or occupation. 287 VA. 197-198.

Here, the record demonstrates that, pursuant to its foundational documents and right from the beginning of becoming part of Mt. Lebanon Baptist Church, "*The members of the Restoration Society will take care of all the business and cost of maintaining Harvey Elementary School*." (J.A. p. 811) *See also*, J.A. pp. 809-

810, minutes of Restoration Society meeting stating "*Annie will be talking to house moving contractors, purchasing land and make preparation for the moving of the school*." Pursuant to this Annie Mosby wrote the Church on October 26, 2003 "*I made an offer of $2,500 to Mr. Thomas for Lot 52…Blake Moving Company will be looking at Harvey School in about two weeks.*" See also, J.A. p. 819 letter dated March 25, 2005 to Blake Moving Company. (Reporting on progress made in the restoration of the Harvey School and discussing future plans for what needed to be done next.) See also, J.A. p. 820, letter dated June 4, 2007 announcing a celebration for the 4th Anniversary of the Harvey School Historical Society and the President's plan to move the school house at the end of the year. See also, J.A. pp. 821-858 containing detailed itemized expenses including "*lunch for workers*" kept for Harvey School Historical Society Financial Statements.

These documents culminate in the newsletter found at J.A. p. 857 at the bottom of the page referred to several times earlier herein (pp. 1-2 and p. 11, *infra*.) in which the Harvey School Historical Society reported and recorded what it had done in 2013-2014 when Mr. Jeffreys was hurt, and what it would do in the future with the school. Here, the primary trade, business, and occupation of the Restoration Society—judged by what it said it would do and by what it did over many years—is "*to purchase, restore, preserve and maintain the Harvey Colored School as a historical site*…" This was the nature, the raison d'etre, of the

Restoration Society. In Rodriguez the Leesburg Business Park "*made its money from the sale and lease of the warehouse*." "*It necessarily engaged in many preliminary steps or activities to accomplish its business purpose of selling or leasing the warehouse*", but that did not make the construction Rodriguez was engaged in part of Leesburg Business Park's trade, business or occupation. The construction Rodriguez was engaged in was the means leading to the business of Leesburg Business Park. Here, the trade business and occupation of the Restoration Society was to *"purchase, restore, preserve, and maintain*" the Harvey School. This was not the means necessary to accomplish some other business end. This was the business end itself. Mr. Jeffreys' spinal cord injury occurred in this trade, business, and occupation, and he is entitled to workers' compensation benefits.

THE RECORD DEMONSTRATES THAT THE HARVEY SCHOOL RESTORATION SOCIETY WAS FOUNDED FOR, AND CARRIED OUT, ITS DECLARED GOAL "*TO PURCHASE, RESTORE, PRESERVE, AND MAINTAIN*" THE HARVEY SCHOOL

Many decisions of this Court illustrate it is necessary to identify "*the nature of the particular owner*" in determining whether construction of the sort shown here is part of the trade, business, or occupation of the Harvey School Restoration Society. *See*, *e.g.*, *Nichols v. VVKR, Inc.*, 241 VA. 516, 521, 403 S.E.2d 698, 701 (1991); *Rodriguez v. Leesburg Business Park, LLC*, 287 VA. 187, 195, 754 S.E.2d 275, 279 (2014).

The nature of the Harvey School Restoration Society is clear. Starting with its very name, as described in its foundational documents, and as demonstrated in its actual performance over many years, the nature of this organization was "*to purchase, restore, preserve, and maintain*" the Harvey School. The record-keeping and newsletter reports establish the organization did what it said it was going to do. In spite of the after-the-fact efforts of the Fund and Ms. Mosby to make it appear otherwise, the contemporaneously created documents show:

> ***Building Projects Scheduled for 2013-2014***
>
> "*A year starting, August 2012 and ending August 2013, we moved the school out of the woods and reassembled it. We still have a few major renovation projects to complete on the exterior and interior.*
>
> *The following projects are to start as soon as finances are available:*
>
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>
> *We would like to finish the remaining projects by Spring of 2014. If you would like to help us with this project, please call Annie Mosby @ 707-277-252 or email annie.mosby@mchsi.com .*
>
> *Thank You,*
>
> *Annie L. Mosby*
> *President"*
>
> (J.A. pp. 857-858)

Deciding what is the trade, business, or occupation of an entity…is a question that "*does not readily yield to categorical or absolute standards*." Henderson v. Central Telephone Co. of VA., 233 VA. 377, 382, 355 S.E.2d 596, 599 (1987) (quoting Bassett Furniture v. McReynolds, 216 VA. 897, 902, 224 S.E.2d 323, 326 (1976). But when the nature of the entity clearly shows that the construction work Mr. Jeffreys was engaged in when he suffered his quadriplegic injury was the very essence of the entity's nature, then Mr. Jeffreys was injured while working in part of the Restoration Society's trade, business, or occupation.

This conclusion is even more apparent when "*our consideration of this appeal is…governed by the principles that apply in a case where coverage is sought. Those principles are as follows: The Act is highly remedial and should be liberally construed to advance its purpose. See, Fauver v. Bell, 192 VA. 518, 522, 65 S.E.2d 575, 577 (1951); Bamber v. City of Norfolk, 138 VA. 26, 121 S.E. 564 (1924). Further, the fundamental purpose of the Act is to give compensation for accidental injuries resulting from the hazards of the employment. Feity v. Chalkley, 185 VA. 96, 98, 38 S.E.2d 73, 75 (1996)*." Henderson v. Central Telephone Co. of VA., 233 VA. 377, 382, 355 S.E.2d 598, 599 (1987).

Here the founding documents and the actual, recorded, self-chronicled activities of the Restoration Society establish that the construction work Mr. Jeffreys was doing when he suffered his quadriplegic injury was in the trade,

occupation, and business of the Harvey Restoration Society. There is no dispute that the Restoration Society was made part of the Mt. Lebanon Baptist Church for the mutual benefit of the organizations. See, e.g. J.A. p. 800 ["*The building will be used as a visitor center; historical landmark; under the auspices of the Church*."] The Pastor and Associate Pastor served on the Executive Board of the Restoration Society. (J.A. p. 801). The Restoration Society President kept the Church informed of all activities of the Restoration Society on a monthly basis from the beginning of the "*merger*" "*up to this day*." (J.A. p. 153, line 25- p. 154, line 15) See also, J.A. p. 817, letter from Harvey School Restoration Society to Mount Lebanon Baptist Church to Pastor Reynolds and Church Board Members ("*The Harvey School Restoration Society thanks you for your kindness. I know there will be only goodness from this* ***merger*** *and project*.") (Emphasis added.) Mr. Jeffreys has established his entitlement to benefits under the Act by which "*All workers who are engaged in the trade, business, or occupation of the owner of a project are deemed to be fellow employees. The remedy for any injury suffered by one of them…while engaged in the trade, business, or occupation of the owner, is limited to that available under the Workers' Compensation Act*." Nichols v. VVKR, Inc., 241 VA. 516, 519, 403 S.E.2d 698, 700 (1991).

IF THIS COURT DOES NOT CORRECT THE NEW DISPOSITIVE FACTUAL FINDINGS OF THE COURT OF APPEALS FOR WHICH THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH FINDING, MR. JEFFREYS IS DENIED DUE PROCESS OF LAW

Every party to a workers' compensation case is entitled to appellate review of the facts found by the Commission to establish there is credible evidence in the record to support the dispositive factual findings. When the Court of Appeals makes new dispositive factual findings no one advocated for, and for which there is no evidence in the record to support such findings, the party adversely affected is denied the due process granted to every other party in a workers' compensation case unless this Court corrects the dispositive factual error. Due to space limitations Mr. Jeffreys stands by and refers the Court to his Opening Brief and its presentation on this important Constitutional issue.

CONCLUSION

Mr. Jeffreys has established he suffered a devastating quadriplegic injury while working in the trade, business, and occupation of the Harvey School Restoration Society. The Restoration Society is part of Mt. Lebanon Baptist Church. Ms. Mosby did not buy workers' compensation insurance because she was trying to save money. J.A. p. 715; p. 358 at p. 13 of the deposition of William Johnson, lines 23-25, p. 366 at p. 48 of the deposition of William Johnson, lines 14-15. The Pastor of Mt. Lebanon Baptist Church testified he thought they had workers' compensation insurance but he was mistaken. (J.A. p. 769) Mr. Jeffreys

was rendered quadriplegic on October 31, 2012 and for the past six years has fought the Uninsured Employers' Fund to obtain his wage and medical benefits. Mr. Jeffreys moves this Honorable Court to reverse the Court of Appeals and find that he was engaged in the trade, business, and occupation of the Defendants at the time he was hurt, thereby making him a statutory employee entitled to benefits. Mr. Jeffreys further moves this Honorable Court to hold that when a party to a workers' compensation case is adversely affected by a new, dispositive finding of fact made by the Court Appeals for which there is no evidence in the record to support such dispositive finding, that party is denied the due process right of appellate review granted to all such parties, unless this Court corrects the error of the Court of Appeals. The horrendous injury suffered here, and the denial of benefits based on the Court of Appeals' new dispositive finding of fact which has no evidentiary support, demonstrates the critical need for such a ruling.

Respectfully Submitted,

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By*:/s/ James B. Feinman*

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CERTIFICATE

I hereby certify on this 30th day of August, 2018 that Rule 5:26 has been complied with and that the forgoing Reply Brief of Appellant Charlie Jeffreys was filed with the Clerk's Office of the Supreme Court of Virginia and a copy sent via email this same day to all counsel of record.

/s/ James B. Feinman

James B. Feinman