THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles
Circuit Court Judge

Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which, Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

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INTRODUCTION

In January of 2017 the Appellant, Evarista Lorenzo ("Eva") was left quadriplegic after falling down an unsecured elevator shaft while working as a painter on a construction project located at Gasparilla Circle in Murrells Inlet (the "Property"). She subsequently brought this action against various parties alleged to be associated with the project, including Beverly Homes, LLC ("Respondent"). In February of 2020, Respondent sought summary judgment on the basis that, among other things, the circuit court lacked jurisdiction because Respondent was entitled to immunity under the exclusivity provision of the South Carolina Worker's Compensation Act (the "Act") as a statutory employer. (R. p. 728). Judge Culbertson denied this motion and Respondent's subsequent motion to reconsider. (R. pp. 768 & 782). Shortly thereafter, Respondent made the same motion again, this time labeled as a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), SCRCP. (R. p. 279). On January 13, 2020, Judge Nettles found that the circuit court lacked jurisdiction because Respondent was entitled to immunity under the Act as a statutory employer—effectively reversing Judge Culbertson's prior order. (R. pp. 1-9). Further, the circuit court proceeded to *sua sponte* grant summary judgment in favor of Respondent finding it had nothing to do with the project. (R. pp. 9-34).

After the circuit court issued its order, the South Carolina Supreme Court published its decision in *Keene v. CNA Holdings, LLC*, 436 S.C. 1, 870 S.E.2d 156 (2021)[1], which confirmed that the circuit court's ruling is inconsistent with the plain language and public policy of the exclusivity provision of the Act. Similarly, the Supreme Court has declined to adopt the rule on which the circuit court relied for the purported authority to *sua sponte* grant summary judgment. Therefore, this Court should reverse.

[1] Rehearing denied April 5, 2022.

ISSUES ON APPEAL

I. The circuit court erred in ruling it lacked jurisdiction under the Act because a different circuit judge had already ruled the court had jurisdiction and a circuit judge is prohibited from reversing the previous decisions of another circuit court judge in the same case.

II. The circuit court erred in finding that Respondent was a statutory employer under the Act, because its ruling is inconsistent with the law and applicable public policy considerations of the Act as clarified by the South Carolina Supreme Court's recent decision in *Keene v. CNA Holdings, LLC.*

III. The circuit court erred in finding it had the authority to *sua sponte* grant summary judgment because the South Carolina Supreme Court has declined to adopt the rule the circuit court relied on for this purported authority, and this Court should likewise decline to adopt such a rule.

IV. Even assuming this Court disagrees with the South Carolina Supreme Court and decides to adopt a new rule that permits the *sua sponte* grant of summary judgment, it should nonetheless reverse the circuit court's grant of summary judgment because there is more than a scintilla of evidence creating a question of fact and the circuit court improperly weighed the evidence rather than basing its decision on the existence of evidence.

STATEMENT OF THE CASE

Eva brought this action against several parties associated with the project, including her direct employer(s), the property owner, and a general contractor that was employed by the owner. (R. p. 716). Pursuant to the exclusivity provision of the Act, those parties were determined to be immune from civil prosecution because Eva's remedy against these employers was covered by the Act. (R. pp. 790 & 797). This appeal primarily concerns whether Respondent is entitled to bootstrap the immunity provided to these other parties under the Act. It cannot.

Factual Background

According to the Georgetown County Register of Deeds, at the time of the accident, Carlton Pender and Joan Pender (the "Penders") were the record owners of the Property. (R. p. 419). In June 2016, the Penders signed a construction contract with Beverly Construction Group, LLC (herein "BCG"). (R. pp. 194-97). Prior to this agreement, in March of 2016, the Penders

wrote a $2,000 check for an "initial deposit," payable to Respondent not BCG. (R. p. 199). Similarly, shortly after executing the contract the Penders wrote another check for a $20,000.00 deposit, made payable to Respondent not BCG. (R. p. 198).

Much of the argument in this case revolves around Respondent's involvement with the construction project as well as Respondent's relationship to BCG. To this point, BCG purports to be a construction company, owned by Forrest Beverly and his sister Rebecca Beverly. (R. p. 379). Meanwhile Respondent, which purports to be a real estate development company, is owned by Forrest Beverly and his father Randy Beverly. (R. p. 547). BCG and Respondent share a mailing address in Myrtle Beach. (R. p. 391).

BCG subcontracted with various subcontractors for various aspects of the project, including Strand Paint Contractors, LLC ("Strand Paint"), and Strand Paint in turn sub-subcontracted with DePaz Painting, LLC ("DePaz Painting"). At the time of the accident Eva was employed as a painter by either (or both) Strand Paint and/or DePaz Painting. While it is unclear precisely who Eva's direct employer was, it makes no difference to the issue here because both Strand Paint and DePaz Painting were working under BCG, not Respondent. Since both Strand Paint and DePaz Painting carried worker's compensation insurance these parties were dismissed. Similarly, on September 11, 2020, the circuit court issued an order declaring BCG to be Eva's "statutory employer" under the Act and therefore immune from civil prosecution. (R. p. 797).

Eva does not dispute that BCG operated as a general contractor for this project. However, there is evidence which suggests that Respondent also acted as a general contractor (or "co-general contractor") by subcontracting with at least one subcontractor—specifically, Port City Elevator Inc., which was hired to construct and install the elevator for the project. (R. pp. 160-64). This written sub-contract executed in December of 2016, identifies the parties to that agreement as

Respondent and Port City Elevator although it appears to have been signed by a construction supervisor for BCG. (R. at *id.*). While Respondent claims it was not involved with the project, evidence gathered through discovery suggests otherwise. For example, a written Builder's Warrantee identified Respondent as the "Builder." (R. pp. 218-19). Similarly, Forrest Beverly identified Respondent as the owner of the project on the application for the building permit, and Rebecca Beverly applied for and obtained the electrical service for the construction project in the name of Respondent not BCG. (R. pp. 201, 206 & 278). Moreover, there were at least six different subcontractors working on the project that submitted invoices to Respondent rather than BCG. (R. pp. 207-13);[2] *see also.* (R. pp. 440-44).

Ultimately, although there is a dispute as to the nature of Respondent's involvement with the project there is no dispute that Respondent's involvement—whatever it was or was not—did not relate to the painting or hiring of Strand Paint or DePaz Painting. This is the primary fact supporting Eva's assertion that Respondent is not a statutory employer under the Act.

Procedural History

- *Respondent's first motion for immunity under the Act is denied by Judge Culbertson.*

On February 21, 2020, Respondent filed a Motion for Summary Judgment making two mutually exclusive arguments; first, that it "did not have anything to do with the job" and was therefore entitled to summary judgment; and secondly that it was entitled to immunity under the exclusivity provision of South Carolina' Workers Compensation Act (the "Act"). (R. p. 728). Eva filed a memorandum and exhibits in opposition. (R. p. 731). On April 23, 2020, Judge Culbertson denied Respondent's Motion for Summary Judgment in a Form 4 Order, effectively finding there

[2] These subcontractors include Chris Langston LLC, B&A Quality Construction, Strand Engineering, Faith Landscaping, Palmetto Concrete, LLC, and Gale Construction Services.

was a question of fact regarding Respondent's involvement in the project, and that Respondent was not entitled to immunity under the Act. (R. p. 768). On April 27, 2020, Respondent filed a Motion to Reconsider, which Judge Culbertson denied on June 25, 2020. (R. p. 782).

On August 31, 2020, Respondent made a second motion for immunity under the Act, differing from its prior motion only in title—this time labeled a "Motion to Dismiss" for lack of jurisdiction pursuant to Rule 12(b)(1). (R. p. 279). Importantly, this second motion did not seek summary judgment. (R. at *id.*); *see also* (R. pp. 346-61). Eva filed a memorandum and exhibits in opposition to this motion on September 30, 2020. (R. p. 281). This second motion came before Judge Nettles on December 4, 2020. (R. p. 552). It is this second motion that precipitated this appeal.

- *Judge Nettles reverses Judge Culbertson's ruling on jurisdiction under the Act.*

At the hearing on Respondent's second motion for immunity, Respondent seemingly took the position that either it was not involved in the project and therefore Judge Culbertson should have granted summary judgment, or in the alternative, if Respondent was involved in the project, it should have been granted immunity under the Act. (R. pp. 552-70). After the hearing, and because Respondent's arguments at the hearing belied a clear attempt to relitigate the requests previously denied by Judge Culbertson, Eva submitted supplemental memoranda and exhibits consisting primarily of items that had previously been presented to the Court. (R. pp. 461-51).

On January 13, 2021, the circuit court issued a lengthy order that found Respondent was entitled to immunity under the Act because as a "co-general" contractor on the project Respondent was Eva's statutory employer. (R. pp. 1-9). Therefore, the circuit court dismissed the claims against Respondent for lack of jurisdiction. (R. at *id.*). Further, and although no motion for summary judgment was made, the circuit court proceeded to *sua sponte* grant summary judgment

in favor of Respondent by incongruously concluding that Respondent did not have any involvement with the project. (R. pp. 9-34). This holding is not only inconsistent with the circuit court's determination that it lacked jurisdiction, but also the factual conclusion on which that jurisdictional decision was made.[3] Therefore, on January 25, 2021, Eva filed a Motion to Reconsider which the circuit court denied. (R. p. 276). Notice of appeal was timely filed on March 25, 2021. The Supreme Court issued its opinion in *Keene v. CNA Holdings, LLC* on August 11, 2021, which Eva asserts confirms the circuit court committed reversible error in finding Respondent is entitled to immunity under the Act.

ARGUMENT & LAW

I. The circuit court erred in finding it lacked jurisdiction under the exclusivity provision of the Act because Respondent has previously made and lost this motion and Judge Nettles lacked authority to reverse the prior decision of Judge Culbertson.

"Whether or not an employer-employee relationship exists is a jurisdictional question." *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 866 (Ct. App. 2004);(*citing Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002) (overruled on other grounds by *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300 n.3, 676 S.E.2d 700, 702 (2009)). The determination is a question of law, and "[a]s a result, this Court has the power and duty to review the entire record and decide jurisdictional facts in accord with . . . its own view of the preponderance of the evidence." *Id. (citing Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999)). "The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment

[3] In short, the circuit court concluded that Respondent was entitled to immunity under the Act because it was involved in the project to such a significant extent that it was deemed Eva's statutory employer on the project. Alternatively, it based its *sua sponte* grant of summary judgment on a factual conclusion that Respondent was not involved with the project in any way. These two findings are mutually exclusive. Either Respondent was involved, or it was not. It cannot be both.

pursuant to Rule 56, SCRCP." *Id.* at 441, 597 S.E.2d at 867 (*citing Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds* by *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002)).

As a threshold matter, Respondent has already made and lost the motion that is before this Court. Judge Culbertson determined the circuit court had jurisdiction when it denied Respondent's February 2020, Motion for Summary Judgment. Although this motion was captioned as one for summary judgment, the law is clear that regardless of the title, "[i]f a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss." *Id.* (Internal citations omitted). Thus, there is no substantive difference between Respondent's previously denied motion and the motion that is before this Court. *See* (R. p. 560 at lns. 12-22). As such, Judge Nettles was without authority to rule on the instant motion. *See Enoree Baptist Church v. Fletcher,* 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."); Rule 43(l), SCRCP ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action."); *accord Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008).

Respondent attempted to justify its duplicative motion by claiming that because Eva referred to Respondent as a general contractor or "co-general contractor" in her prior arguments it was therefore entitled to immunity. However, this misapprehends that jurisdiction under the Act is based on *fact* and Eva's arguments do not change the facts or warrant a duplicative motion. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000) ("Before provisions of the Workers' Compensation Act can apply, an employer-employee relationship must exist; this

is an initial **fact** to be established.") (emphasis added); *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 399 (Ct. App. 2008) ("the existence or absence of an employment relationship is a jurisdictional **fact**") (emphasis added) *citing Sabb*, 350 S.C. 416, 567 S.E.2d 231. Yet these arguments are all the circuit court relied on, holding: "Therefore, based on Plaintiff's repeated **argument** that [Respondent] was a general contractor . . . [Respondent] is entitled to dismissal under Rule 12(b)(1)." (R. p. 9) (emphasis added); *see also* (R. pp. 555-56) (Respondent explaining the basis for its motion as being the labels Eva gave it in her argument). Therefore, the trial court committed reversible error when it overruled Judge Culbertson's prior order. *See* Rule 43(l), SCRCP (when a circuit judge has previously ruled on a motion "no subsequent motion upon the same state of facts shall be made to any other judge in that action.").

II. The circuit court erred in finding Respondent was entitled to immunity under the exclusivity provision of the Act because Respondent is not an "upstream" employer in the chain of employment.

The exclusivity provision of the Act, states:

> The rights and remedies granted by this title to an employee . . . [for compensation] on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee . . . against his employer, at common law or otherwise, on account of such injury. . . Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S.C. Code Ann. § 42-1-540.

The exclusivity provision applies "to both direct employees and those that are termed statutory employees" under the Act. *Poch v. Bayshore Concrete Prods./South Carolina, Inc.*, 405 S.C. 359, 366, 747 S.E.2d 757, 761 (2013). Thus, where the injured worker is not the direct

employee of the defendant, as is the case here, application of the exclusivity provision turns on whether the defendant is a statutory employer of the injured worker.

The statutory employer doctrine is comprised of several sections of the code, which this Court has explained as follows:

> Section 42-1-400 [] makes a [business or what the statute coins an] owner liable to employees of [its] subcontractors . . . Section 42-1-410, makes a contractor liable to employees of [its] subcontractors . . . Section 42-1-420 makes subcontractors liable to employees of [sub]-subcontractors . . . Section 42-1-440 provides that when an owner or **upstream** contractor or subcontractor must pay an employee, indemnity may be had from the immediate employer or any intermediate subcontractor who failed to provide Worker's Compensation coverage.

Brittingham v. Williams Sign Erectors, 299 S.C. 259, 263, 384 S.E.2d 319, 321 (Ct. App. 1989) (emphasis added); *Miller v. Lawrence Robinson Trucking*, 333 S.C. 576, 580, 510 S.E.2d 431, 434 (Ct. App. 1998) ("The employee of the subcontractor may look to an **upstream** employer for benefits without regard to whether the subcontractor has workers' compensation coverage.") (emphasis added) *citing Freeman*, at 95, 447 S.E.2d 197; *see also Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009) ("Generally, a higher tier contractor is considered the statutory-employer of an employee of a lower tier contractor."); S.C. Code Ann. § 42-1-400; *Harrell*, 337 S.C. at 330 n.7, 523 S.E.2d at 775 (recognizing that a statutory employer must be upstream).

The law has developed a variety of tests as to whether an upstream employer will be considered a statutory employer, all of which are intended to answer what the Supreme Court has dubbed the "key question" of whether the work the injured worker was performing is "part of the [purported statutory employer's] trade, business, or occupation." *Keene*, 436 S.C. at 7, 870 S.E.2d at 159 (internal citation and quotation omitted). If the work is part of the defendant's trade, business, or occupation it satisfies the test for being a statutory employer. However, not every

statutory employer is entitled to immunity. Any statutory employer that does not have worker's compensation insurance has therefore "fail[ed] to secure the payment of compensation as prescribed in Section 42-4-20 [and] loses its immunity under the Act's exclusive remedy provision." *Poch*, 405 S.C. at 377, 747 S.E.2d at 766 (emphasis supplied by court) (*citing Harrel*, 337 S.C. at 327, 523 S.E.2d at 773); *See* S.C. Code Ann. § 42-1-540 (limiting immunity to those statutory employers that "have accepted the provision of this title, to pay compensation" to injured workers).

Thus, whether a purported statutory employer is entitled to immunity is a three-fold inquiry. First: Do they meet the prerequisite of being an "upstream" employer? Second: If they are an upstream employer, do they satisfy the "key question" test? Third: if all other requirements are met, are they entitled to immunity under Section 42-1-540, or did they lose that immunity by failing to provide proof of worker's compensation insurance? Respondent fails each of these three inquires, and the circuit court's ruling is reversible error because: (a) Respondent is not an "upstream" employer; (b) even if Respondent were an upstream employer the circuit court's ruling is inconsistent with both the law and public policy considerations of the Act as established by the Supreme Court's decision in *Keene*; and (c) even if Respondent satisfied the test for a statutory employer it is not entitled to immunity under the terms of Act because it admits it had no worker's compensation coverage.

A. The circuit court erred as a matter of law because Respondent is not an "upstream" employer and therefore not eligible to qualify as a statutory employer.

In the context of the construction project, there may be many contractors, subcontractors, and/or sub-subcontractors on the job. However, not all of them are potential statutory employers. Only those that are "upstream" or up the "chain of employment" are eligible to be a statutory employer. *See e.g., Brittingham*, 299 S.C. at 260-61, 384 S.E.2d at 320 (for an example of

"upstream" employer in a construction project where, through a series of contracts and subcontracts, there were four intermediate employers between the injured worker' direct employer and the owner); *Hopper*, 383 S.C. at 314, 680 S.E.2d at 3 (*supra*) (*citing* S.C. Code Ann. § 42-1-400). In the typical construction project, an owner would hire a general contractor, who would in turn hire a variety of subcontractors for all the various aspects of the job—for example, the foundation, framing, roofing, electrical, or plumbing. Each of those various subcontractors may hire sub-subcontractors, who themselves may hire sub-sub-subcontractors and so on. *Brittingham*, 299 S.C. at 260-61, 384 S.E.2d at 320 (*supra*). Consequently, the relationships between the various parties involved in a construction project expands much like a family tree and can be similarly mapped. *See e.g., id.* at 261, 384 S.E.2d at 320 (showing the relationship of parties graphically); *see e.g.*, Appendix 1 (showing the relationship of parties here graphically). However, there is no requirement that there can be only one general contractor on a project.

Starting with the injured worker's direct employer, the potential statutory employers are identified by moving "upstream" to the contractor that hired the direct employer, then the party that hired them, and so on, all the way up to the owner. [4] This process creates a linear "chain" connecting the injured worker's direct employer to the owner. Any party in that "chain" is

[4] To avoid confusion, "chain of employment" is a term used by Eva throughout this litigation to refer to all those parties in the linear series of employee/employer relationships that connect the injured worker (*i.e.*, Eva) to the owner (*i.e.* the Penders). Each party in the chain is the employee of the party above and the employer of the party below and thus serves as a necessary link connecting the injured party to the owner. The process being much like one would trace family lineage to a distant ancestor through their parent, grandparent, great-grandparent and so on. Similarly, the chain of employment does not include parties which are downstream from the injured worker, nor does it include lateral deviation. Again, this being akin to tracing familial lineage to a grandparent which would be through one's parent (upstream) not their child (downstream), sibling (cross-stream), or uncle (upstream but also lateral). *See* Appendix 1 for visual depiction of the meaning of the term "chain of employment" as intended by Eva.

potentially eligible to be deemed a statutory employer—and by extension potentially eligible for immunity under the Act.

Here, when the chain of employment is traced between Eva and the Penders (owners), it does not include Respondent. Although it is unclear whether Eva's direct employer was Strand Paint or DePaz Painting this does not change the analysis. If Eva was employed by DePaz Painting, the chain of employment would be: DePaz Painting > Strand Paint > BCG > Penders. On the other hand, if Eva's direct employer was Strand Paint, the chain of employment would be: Strand Paint > BCG > Penders. In neither case does the chain of employee/employer relationships that links Eva to the Penders pass through Respondent. The mere fact that Eva has alleged (and the evidence suggests) that Respondent acted as a co-general contractor by hiring the elevator subcontractor, does not place Respondent in the chain of employment because Eva's connection to the owner does not depend on Respondent's relationship with the elevator subcontractor. *See* Appendix 1. Consequently, as a matter of law Respondent cannot be a statutory employer because it does not meet the prerequisite of being an "upstream" employer in the chain of employment. The circuit court erred in finding otherwise.

B. Regardless of whether Respondent is in the "chain of employment," the circuit court's analysis and ruling is contrary to the law and public policy considerations of the Act as articulated by the Supreme Court in *Keene v. CNA Holdings, LLC.*

On August 11, 2021, the Supreme Court published its decision in *Keene v. CNA Holdings, Inc.,* which compels reversal here for two reasons. First, it directs that the Act requires a narrow application of the statutory employer doctrine which focuses on the specific business activities of the purported statutory employer rather than what may be typical in the industry. Second the *Keene* Court explains that the public policy of the Act which favors inclusion does not have immunity as its objective, but instead immunity is merely a collateral consequence of protecting workers.

Where, as here, the injured worker is protected by worker's compensation coverage, public policy does not favor inclusion simply for the sake of immunity. Here, the circuit court's ruling analyzed the statutory employee issue broadly, rather than narrowly, it also rests on a misplaced contention that public policy favors immunity in this case. Thus, the circuit court's conclusion violates both primary tenants of the Supreme Court's decision in *Keene*, and should be reversed.

1. The circuit court's order violates *Keene* because it failed to analyze the statutory employee doctrine narrowly.

Not every upstream employer in the chain of employment is a statutory employer. Over time, the courts have developed three tests for whether an upstream employer will be considered a statutory employer: "(1) Is the activity an important part of the contractor's business or trade? (2) Is the activity a necessary, essential, and integral part of the contractor's trade, business, or occupation? Or (3) Has the identical activity previously been performed by the contractor's employees?" *Posey,* 378 S.C. at 218, 661 S.E.2d at 399 (*citing Edens*, 359 S.C. at 443, 597 S.E.2d at 868 *and Olmstead v. Shakespeare*, 354 S.C. 421, 425, 581 S.E.2d 483, 486 (2003)).

As the Supreme Court explained in *Keene,* all these tests are intended to answer the "key question" of whether the work the injured party was contracted to perform is "part of the [purported statutory employer's] trade, business, or occupation." *Keene,* 436 S.C. at 7, 870 S.E.2d at 159 (internal citation and quotation omitted). The gravamen of the Supreme Court's ruling in *Keene* is that the answer to this "key question" cannot be founded on a broad or generalized analysis of the type of work typical to those in the purported employer's industry. Instead, it must be narrowly focused on the specific business of the purported employer. *Id.* at 13-14, 870 S.E.2d at 163. The *Keene* Court outlined in exceptional detail, the history and rationale behind this narrow application, explaining that "[i]n reality, [] what is or is not part of' the owner's business is a question of business judgment, not law." *Id.* at 14, 870 S.E.2d at 163. It is a case specific analysis that inquires

"what the owner decided [or explained] was part of its business" not what others in the industry may do. *Id.* A court cannot "lay down any hard and fast rule with regard to such activities" that might be typical of any particular industry because "different business managers make legitimate choices about the scope of their company's business based on circumstances the manager deems important to the company." *Id.* at 8, 870 S.E.2d at 160 (stating "[t]he practices of different concerns operating in the same field often vary").

In the context of this case, *Keene* directs that what may be typical as part of the trade, business, or occupation of one general contractor cannot be determinative of what is part of Respondent's trade, business, or occupation. Yet that is precisely what the circuit court did.[5] The circuit court analyzed whether the painting work performed by Eva (on behalf of Strand Paint and/or DePaz Painting) was "an important part of the business or trade when [sic] constructing a new home" and determined it is a "necessary, essential, and integral part of **any** prime contractor's trade or business." (R. p. 8) (emphasis added). The circuit court reasoned that "[c]ompletion of interior painting of a newly constructed home was part of the construction process [here] and for construction [] **generally**." (R. at *id.*) (emphasis added). However, the question is not whether this is part of the trade or business of *any* contractor, or construction *generally*. Instead, the focus must be on Respondent's specific business. For this the Supreme Court directs looking to "what the owner decided [or explained] was part of its business." *Keene,* at 14, 870 S.E.2d at 163. In this case, the evidence is plain, Respondent conceded that neither construction nor interior painting are part of its trade, business, or occupation. (R. pp. 387-92). Further, while the circuit court suggests

[5] Although *Keene* was decided after the circuit court issued its order in this case, the Supreme Court held that its decision does not change the law but clarified the state of the law as it exists. *Keene,* at 60. (Explaining that the "trend away from . . . the broad view of an employer's 'trade, business or occupation' . . . was firmly established by [the Supreme Court] by the time [*Keene*] reached the court of appeals.").

that this was within the scope of general contracting on this job by pointing to the specifications required of the construction contract between BCG and the Penders, this analysis is similarly flawed. (R. p. 8). What work was within the scope of BCG's business on this job is not the point. This is precisely the broad and generalized analysis that the *Keene* Court explains the Act forbids. Thus, the circuit court's analysis and conclusion are fatally flawed.

Without meaningful factual support that painting was within Respondent's trade, business, or occupation, the circuit court ultimately recognized that its ruling is premised not on facts but the title that Eva used to refer to Respondent, stating in its order that: "[Eva's] argument that [Respondent] was a general contractor results in [Eva] being considered the statutory employee of [Respondent] at the time of the accident." *See* (R. pp. 7); *see also* (R. p. 9) (order concluding: "Therefore, based on [Eva's] repeated argument that [Respondent] was a general contractor . . . Respondent is entitled to dismissal"). Not only does this mischaracterize Eva's argument, but it demonstrates that the circuit court's analysis is wholly divorced from the facts. *Keene* makes plain the court cannot simply assume a party is a statutory employer because other entities in that line of work are typically statutory employers. Simply put, the circuit court cannot assume that every general contractor is a statutory employer in all circumstances.[6] If Respondent cannot show facts

[6] To the extent the circuit court cites *Freeman Mech. v. J.W. Bateson Co.*, 316 S.C. 95, 447 S.E.2d 197 (1994) for the premise that simply referring to a party as a general contractor or "co-general contractor" entitles them to *per se* immunity under the Act, this was error. *See* (R. p. 7) (the circuit court's order stating that "South Carolina Court's interpret S.C. Code Ann. § 42-1-10 et. seq. to provide **any** general contractor who is potentially liable to pay Worker's Compensation benefits to an injured employee with immunity from tort liability.") (emphasis added). *Freeman*, concerns whether a subcontractor is entitled to indemnity from an upstream prime contractor. The court determined because the right to indemnity flows downstream a general contractor who is otherwise deemed a statutory employer could seek indemnity from those below him, but those below the general contractor could not seek indemnity from the general contractor. *Freeman* simply does not stand for the proposition that a general contractor is entitled to immunity *per se.* Here, because Respondent was not in the chain of employment it was simply not a party that was "potentially

to demonstrate the work Eva was performing was part of its business or trade—which it cannot—then the law will not abide a finding it is a statutory employer. Thus, the circuit court's ruling should be reversed.

2. The circuit court erred in finding that the public policy considerations of the Act supported a finding that Respondent is a statutory employer.

The Supreme Court's decision in *Keene,* is also significant because it clarified the public policy implications of the exclusivity provision do not prioritize immunity. Rather, the immunity afforded to employers (statutory or otherwise) is merely collateral to the primary policy objective of ensuring an employee is protected by worker's compensation coverage.

Here, the circuit court's order begins with the premise that public "policy holds to resolve jurisdictional doubts [under the Act] in favor of the inclusion of employers and employees under the Act." (R. pp. 5-6) (emphasis supplied by circuit court). However, this views the issue through the wrong lens. As the Supreme Court explained in *Keene,* "**it is important to note that the public policy at issue** [when applying the exclusivity provision] **is not to provide civil immunity** to employers." *Keene*, 436 S.C. at 13, 870 S.E.2d at 162 (emphasis added). Instead, the primary "applicable public policy [] is to ensure that workers are covered" for worker's compensation benefits. *Id.* (*citing Glass v. Dow Chem. Co.,* 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 (1997)) (the "rationale [of the Act] is to prevent [employers] from avoiding liability for injuries incurred").[7]

liable" to pay Eva's worker's compensation benefits. Therefore, it is not entitled to immunity—regardless of what title it has.

[7] As a practical matter the circuit court's order fundamentally violates the public policy of the statute by affording immunity from tort liability under the Act, while simultaneously finding Respondent can avoid liability by way of summary judgment for precisely the reason why Respondent would not be immune under the Act. In other words, the circuit court adopts a scheme that categorically permits a party in Respondent's position to avoid liability, because under its interpretation of the Act, any party associated with the project would be immune from liability; while simultaneously creating a common law rule that would entitle any party who is not

"It does not matter to the fulfillment of this policy [objective] who provides the coverage." *Id.* If, in serving this primary policy objective, a party is determined to be a statutory employer, immunity under the Act comes merely "as the collateral consequence of that finding." *Id.* Where the goal of ensuring the employee is covered "is satisfied—as it was here—that policy [objective] has nothing to say about providing immunity." *Id.*; *accord Olmstead*, 348 S.C. at 441, 559 S.E.2d at 373 ("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."); *aff'd as modified*, 354 S.C. 421, 581 S.E.2d 483. Thus, the Supreme Court has rejected the argument that public policy considerations can be invoked to support a finding of immunity. *Keene,* 436 S.C. at 13, 870 S.E.2d at 162 (finding that a defendant's argument that the Act's policy favoring inclusion supported a finding of immunity was "misplaced").

In this case, the circuit court's reliance on public policy to support its finding of immunity is equally as "misplaced" as it was in *Keene. See id.* (*supra*). The circuit court's reasoning replaces the Act's primary public policy objective of protecting workers with the collateral consequence of the objective—*i.e.*, immunity. This was reversable error. The circuit court's finding that Respondent is a statutory employer does nothing to serve the Act's primary objective of ensuring Eva is covered by worker's compensation insurance. This is particularly true since Respondent does not have worker's compensation insurance, which the statute contemplates to be a necessary requirement for immunity. (R. p. 33 at lines 5-8); (R. p. 548 at lines 5-8); (R. pp. 311-14); *see* S.C. Code Ann. § 42-1-540 (*infra*). Thus, the circuit court's ruling should be reversed because it is contrary to the public policy considerations of the Act.

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associated with the project to summary judgment. This is contrary to the Act which contemplates civil liability in certain circumstances.

C. Even if Respondent were a statutory employer, it is not entitled to immunity because it does not have worker's compensation insurance and the law prohibits immunity for a purported employer who does not have worker's compensation insurance.

Not every statutory employer is entitled to immunity under the exclusivity provision of the Act. Instead, immunity is provided only to those statutory employers which "have accepted the provision of this title, to pay compensation" to injured employees or statutory employees. *See* S.C. Code Ann. § 42-1-540. Our Supreme Court has explained that although the exclusivity provision of the Act "shrouds an employer with immunity . . . [s]uch immunity is part of a broader *quid pro quo.*" *Harrell*, 337 S.C. at 326, 523 S.E.2d at 772. The obligation to procure worker's compensation insurance to secure the payment of compensation to an injured worker is "the basic duty of any employer, whether it be the direct employer or statutory employer . . . [and c]ompliance with this obligation is the *quid pro quo* exacted from the employer in exchange for immunity." *Poch*, 405 S.C. at 377, 747 S.E.2d at 766-67 (*citing Glover v. United States*, 337 S.C. 307, 523 S.E.2d 763 (1999)). Thus, "an employer who fails to secure the payment of compensation as prescribed in Section 42-4-20 loses its immunity under the Act's exclusive remedy provision and becomes liable either under the Act or in an action at law." *Id.* (*citing Harrel*, at 327, 523 S.E.2d at 773) (emphasis supplied by court) (Internal quotations omitted) ("Based on *Harrell* and its progeny, [it is] correct that [a statutory employer] could have lost their tort immunity had they failed to procure worker's compensation coverage.").

"Without dispute, evidence of compliance with section 42-5-20 is required of every employer subject to the provisions of the Workers' Compensation Act." *Poch*, 405 S.C. at 378, 747 S.E.2d at 767 (requiring such proof be provided by a purported statutory employer even where the lack of coverage was not directly contested in the circuit court); *accord Harrell*, 337 S.C. at 320, 523 S.E.2d at 769 (finding this court reviews this jurisdictional issue based upon its own view

of the preponderance of the evidence.). Here the record includes the declarations page of Respondent's insurance policy which does not reflect any worker's compensation coverage. (R. pp. 311-14). Further, Respondent's Rule 30(b)(6) designee Randy Beverly testified that Respondent did not have worker's compensation coverage. (R. p. 33 and 548 at lines 5-8). Therefore, even if Respondent were a statutory employer (which it is not) Respondent nonetheless lost any immunity it would otherwise be entitled to. *See Poch*, 405 S.C. at 377, 747 S.E.2d at 766-67 ("[A]n employer who fails to secure the payment of compensation as prescribed in Section 42-4-20 loses its immunity under the Act's exclusive remedy provision.") (emphasis supplied by court). Therefore, the circuit court's finding that Respondent is entitled to immunity should be reversed.

III. The circuit court erred in finding it had the authority to *sua sponte* grant summary judgment because the Supreme Court has declined to adopt the rule on which the circuit court relied for this purported power, and this Court should likewise decline to adopt such a rule.

In this case, the only motion before the circuit court was Respondent's Motion to Dismiss for lack of subject matter jurisdiction. Nonetheless, the circuit court *sua sponte* granted summary judgment in favor of Respondent.[8] In support of its ability to do so, the circuit court cites *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 421, 756 S.E.2d 148, 155 (2014) for the proposition that "it is generally recognized to have the power to *sua sponte* grant summary judgment to a non-movant when there has been a motion but no cross-motion." (R. p. 9 at n. 4) (*also citing Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000)). However, the circuit court overlooks that in *Stevens*, the Supreme Court specifically declined to adopt this

[8] As practical matter, the circuit court's ruling that it lacked jurisdiction poses the seemingly illogical question: How can a court that lacks jurisdiction rule on summary judgment? The circuit court does not answer this question.

rule. The language the circuit court quotes from *Stevens* is part of a passage in which the Supreme Court was pointing out that other jurisdictions have permitted the *sua sponte* grant of summary judgment by "an appellate court [but] only under limited circumstances." *Id.* Importantly, the *Stevens* Court declined to adopt the rule because those limited circumstances were not present in that case holding: "We need not decide whether to adopt the rule from these other jurisdictions because the limited circumstances wherein an appellate court may grant summary judgment are not present here." *Id.* Therefore, the Supreme Court reversed the lower court's *sua sponte* grant of summary judgment.

Here, this Court should follow the Supreme Court's lead, and decline to adopt this new rule for the same reason—even if it were adopted it would not apply here. This is apparent from the very language of the rule as quoted by the circuit court where it claims to have "the power to *sua sponte* grant summary judgment to a **non-movant** **when there has been a motion** but no cross-motion." (R. p. 9 at n. 4). Here there has been no motion for summary judgment, and even to the extent the court were to interpret the Rule 12(b)(1) motion as a motion for summary judgment, this rule would only permit a *sua sponte* order in favor of Eva (*i.e.*, the non-movant), not Respondent. Finally, this rule only gives the *sua sponte* authority to appellate courts, not trial courts. *See id.* ("the rule in other jurisdictions is that an appellate court may do so only under limited circumstances."); *citing Kassbaum*, 236 F.3d 487.[9]

[9] Interestingly the circuit court also cited *Kassbaum,* which likewise does not stand for the proposition which the circuit court seemed to cite it for. In *Kassbaum*, although the Ninth Circuit acknowledged that as an *appellate* court, the law from that jurisdiction likely supported its ability to *sua sponte* grant summary judgment; however, it declined to do so favoring instead to let the issue be decided through its normal procedure. *See Kassbaum*, 236 F.3d at 495 ("[w]hile these circumstances do not preclude us from granting summary judgment to Kassbaum . . . in the exercise of caution we decline to grant *sua sponte* summary judgment").

Thus, even if this Court were to adopt the rule quoted by the circuit court, it still would not apply here. Instead to justify the action of the circuit court, this Court would need to adopt a much broader rule. However, to adopt such a rule would be contrary to fundamental fairness and the well settled law of this State. While some motions pursuant to Rule 12(b) can be "converted" to a motion for summary judgment when the circuit court considers matters outside of the pleadings, this Court's prior decisions prohibit such "conversion" in the context of a Rule 12(b)(1) motion for immunity pursuant to the Act. *See Posey*, 378 S.C. at 217, 661 S.E.2d at 399 (providing the "proper procedure is to file a motion to dismiss pursuant to Rule 12(b)(1)" and explaining that "[i]f a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss")*; citing Edens*, 359 S.C. at 439, 597 S.E.2d at 866. Thus, even if Respondent had made a motion for summary judgment the circuit court would have been prohibited from treating it as a motion for summary judgment and would have been obligated to treat it as a Rule 12(b)(1) motion instead.[10]

The prohibition on treating a motion for immunity under the Act as one for summary judgment is more than semantic because it fundamentally affects the burdens that applies. For instance, here the circuit court asserted: "in sum, [Eva] did not provide any evidence that [Respondent] knew anything about the alleged dangerous condition [and therefore] did not breach

[10] The rationale for this rule is plain when considering that the immunity provision of the Act is "jurisdictional." It would be illogical that the circuit court could pass on a motion for summary judgment when it lacked jurisdiction to hear it. *See Dove v. Gold Kist*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) ("A court lacking subject matter jurisdiction, however, has no authority to act regardless of the geographical location or consent of the litigants.")(citing *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 482, 242 S.E.2d 683, 685 (1978) *reversed on other grounds, Farmer v. Monsanto Corp.*, 353 S.C. 553, 557, 579 S.E.2d 325, 327 (2003)). Thus, the circuit court's reference to its grant of summary judgment as "an alternative and separate ground for dismiss[al]" is wrong. It can only be an *alternative;* it cannot be separate. The ability of the circuit court to rule on a motion for summary judgment requires it to have jurisdiction.

any duty." (R. pp. 12-13). However, under Rule 12(b)(1), Eva had no burden to come forward with evidence on this issue regarding this ultimate question in dispute. Instead, it would only be in the context of a motion for summary judgment where Eva would be required to submit evidence. However, Eva's burden would only arise after Respondent has first carried its initial "burden of clearly establishing the absence of a genuine issue of material fact." *Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007). Thus, where a party like Respondent is able to obtain summary judgment, *sua sponte*, it is relieved of this fundamental initial burden and leaves a party like Eva unclear as to what evidence and on what issues, is required to defeat summary judgment. Such a rule—as the circuit court applied here—not only creates fundamental unfairness,[11] but it also alters the entire body of law regarding summary judgment. Therefore, this Court should reverse the circuit court's *sua sponte* grant of summary judgment.

IV. Even if this Court adopts a new rule that permits the circuit court to *sua sponte* grant summary judgment, the trial court erred in granting summary judgment because it improperly weighed the evidence.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Ben. Fin. I, Inc. v. Windham*, 431 S.C.

[11] Even in the context where the rules permit a motion to be "converted" to one for summary judgment, it is still required that it be: "disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), SCRCP. These requirements include being provided 10 days' notice before a hearing on a summary judgment motion. *See* Rule 56, SCRCP; *Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 560, 521 S.E.2d 153, 157 (1999); *Baird*, 333 S.C. at 528 n.6, 511 S.E.2d at 74 ("Providing notice prior to the hearing is essential under Rule 56(c)[.]"). Yet here, Eva was given no notice that Respondents' Motion to Dismiss was to be heard as a Motion for Summary Judgment. Respondents did not serve a Motion for Summary Judgment on Eva, nor did it do so 10-days prior to the hearing held on December 4, 2020. Further, Eva was not "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" as required by Rule 12(b), SCRCP. *Contra* SCRCP Rule 56. Thus, the circuit court's ruling violates the basic tenants of fairness and due process. *See e.g., Chastain v. Hiltabidle*, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) (generally recognizing that lack of notice of summary judgment can violate due process); *see* Rule 7, SCRCP and Rule 56, SCRCP.

256, 264, 847 S.E.2d 793, 798 (Ct. App. 2020) (Internal citations omitted). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002) (Internal citations omitted). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Rainey v. S.C. Dep't of Soc. Servs.*, No. 5838, 2021 S.C. App. LEXIS 75, at *10 (Ct. App. July 21, 2021) (quoting *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)); *see also Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020) ("Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a scintilla of evidence."). "When there is conflicting evidence on some material issue, the court may not grant summary judgment." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 343, 721 S.E.2d 455, 458 (Ct. App. 2011).

"At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.*; *citing Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010). A trial court commits reversible error where it "did more than look for the existence of evidence to demonstrate an issue of material fact and instead weighed the evidence." *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 205, 743 S.E.2d 850, 853 (Ct. App. 2013) (reversing the grant of summary judgment as being an improper "weighing" of evidence). Here, the circuit court committed precisely this error—weighing the evidence rather than evaluating the existence of evidence—and therefore should be reversed.

Relying on testimony offered by Randy Beverly, that Respondent did not perform any work on the project, the circuit court concluded there was no evidence "that [Respondent] knew anything

about the alleged dangerous condition [and therefore] did not breach any duty." (R. pp. 12-13). However, this reasoning is flawed. The fact that Respondent, itself, did not perform work on the project—even if true—does not lead to the singular conclusion that it lacked knowledge of, or otherwise did not undertake to supervise or manage certain aspects of the project. *Contra*, *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (it is only "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted."). Further, this overlooks that at the summary judgment stage, Eva is only required to provide a scintilla of evidence, which when viewed in the light most favorable to her gives rise to an inference that Respondent had control or otherwise *should* have known of the potential dangers. *See e.g.*, *Abdelgheny*, 432 S.C.at 349, 852 S.E.2d at 227 (the non-moving party need only present a "scintilla" of evidence that creates the inference from which a jury could possibly find in her favor); *see Bell*, 407 S.C. at 576, 757 S.E.2d at 404 (stating the applicable duty to warn of the dangers one "should have anticipated" and explaining this is a question of fact for the jury).

Here, there is ample evidence from which a sufficient inference can be drawn. For example, the Builder's Warrantee agreement was issued by Respondent (R. pp. 218-19); (R. pp. 509-10). This creates the inference that Respondent had some duty or obligation to monitor, supervise, or approve the construction, and thus that it knew or should have known of the potential hazards. However, the circuit court, summarily concluded the fact that this warranty was issued by Respondent (rather than BCG) was the result of a "clerical error." (R. p. 29). For this, the circuit court cites the deposition testimony of Randy Beverly that he did not know why Respondent was identified as the warranting builder. (R. pp. 27-28). Thus, on the one hand there was evidence that the warranty was issued by the Respondent, while on the other hand was Randy Beverly's testimony that he did know why Respondent was listed as such. These two competing pieces of

evidence present the quintessential question of fact—did Respondent warranty the work as the document suggests or was this a mistake as Randy testified? Rather than submit this question of fact to the jury, the circuit court resolved this evidence by determining Randy's testimony outweighed the competing documentary evidence. This was error.

When viewed in the light most favorable to Eva, there is evidence from which a jury could determine there was no mistake as Randy Beverly claimed. First, Randy Beverly did not testify that there *was* a mistake in the formation of this document, instead he testified that he did not know why Respondent was identified as the builder on this document. (R. p. 145 at lines 2-5). Secondly, this document was executed at the same time as the initial contract between BCG and the Penders, thus creating a reasonable inference that because they were executed at the same time, Builder's Warranty would not have identified Respondent if it was intended to identify BCG. (R. pp. 639-42); (R. p. 643) (check to Beverly Homes); (R. pp. 440-44) (building specs issues by Beverly Homes). Further, this document purports to have been executed by Forrest Beverly, who is a joint owner of both Respondent and BCG and thus should have known the difference between the Respondent and BCG. Further, Forrest, as an owner is an interested party who stood to benefit from the purported "mistake." Thus, there is ample evidence from which a jury could reasonably infer this was not a mistake, and the circuit court erred in discounting this evidence.

The circuit court committed the same error about several other items of evidence as well. For instance, Forrest Beverly (an owner of both Respondent and BCG) when completing the application for the construction permit in which he identified Respondent as the "owner" of the project while identifying BCG as the "applicant" and himself, Forrest Beverly, as the "contractor." (R. p. 201). Here again, the circuit court summarily concluded this was a mistake. This time finding that because there were two different colors of inks on the application, the reference to Respondent

was "unquestionably" a "clerical error." (R. p. 27). The circuit court does nothing to explain how two different color inks is "unquestionable" evidence that resolves this factual dispute. Regardless, this was not a clerk's error. In the light most favorable to Eva, this was a representation by Forrest Beverly to Georgetown County that Respondent had some involvement in the project. As an owner of both Respondent and BCG, it can reasonably be inferred that Forrest knew the difference between the Respondent and BCG, and likewise knew the property was owned by the Penders. The fact that on the same document he identified both Respondent and BCG as being involved in the project creates the inference this was not a mistake. Again, just like Randy Beverly, Forrest Beverly would likewise benefit from this purported "mistake" further bolstering the inference there was no mistake.[12]

Also, several documents involving the electrical service identify Respondent as being involved with the project. Specifically, a temporary service request submitted to Santee Copper requests the account be opened by Respondent (R. p. 201), and the account was in fact opened with Respondent as the account holder. (R. pp. 202-06); (R. pp. 505-08). Here again, the circuit court. relied only on the self-serving testimony of Randy Beverly to conclude this was an "honest mistake." (R. p. 30). This despite the fact, that Randy Beverly did not create this document. (R. p. 508). Whether this was an honest mistake is a question of fact.

But this is not the only evidence that circuit court recognized and then discounted by improperly weighing the evidence. There is also a written subcontract agreement with Port City

[12] Further, the circuit court misapprehends the significance of the fact Respondent is listed as the "owner." Eva does not point this out to suggest that Respondent held actual legal title, but instead for the simple fact that Forrest Beverly, as owner of BCG and Respondent knew, or should have known, Respondent did not own the property. Thus, when viewed in the light most favorable to Eva, this creates the inference that there was a reason the parties do not appear on this document as they would if Respondent's assertion of the facts were correct.

Elevator, which identifies Respondent as the contracting party, as well as several invoices from various subcontractors that were submitted to Respondent rather than BCG. (R. pp. 207-13); (r. pp. 532-38). With regard to the subcontract with Port City Elevator, there is competing evidence as to the intent of this contract. Although, it appears to be signed on behalf BCG, it also identifies Respondent, not BCG, as the contracting party. Thus, there is a question of fact as to the intent of the contract that should be submitted to the jury. *See Penza*, 404 S.C.at 205, 743 S.E.2d at 853 (reversing the grant of summary judgment on the question of intent of a contract).

As to the invoices from the various subcontractors that were submitted to Respondent rather than BCG, the circuit court discounted this evidence because Respondent submitted cancelled checks which purported to show these bills were paid by BCG rather than Respondent. Again, this misses the point. The summary judgment standard is concerned with the existence of evidence, not its quality. The fact that BCG paid these bills does not resolve the question of whether Respondent had any role in the project. When viewed in the light most favorable to Eva, this evidence creates the inference that the subcontractors who performed this work believed Respondent was involved, otherwise they would have submitted these invoices to BCG. That Respondent paid the bills does not exclude a jury from finding Respondent was involved. *Contra, Bell,* 407 S.C. at 576, 757 S.E.2d at 404 (summary judgment is only proper where the evidence leads to only one interpretation).

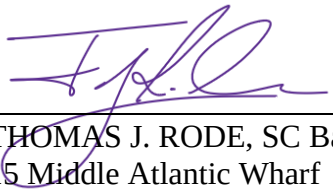
Ultimately, although the circuit court recognized the existence of all these pieces of evidence (and strangely attached most of this evidence to its order as exhibits) its ruling rests on the conclusion that all the references to Respondent in these various documents were all the result of mistake. However, whether such a mistake existed is a question of fact. *See generally, Truck S., Inc. v. Patel,* 339 S.C. 40, 48, 528 S.E.2d 424, 428 (2000) (recognizing mutual mistake and

unilateral mistake to be questions of fact for which the party claiming the mistake must prove). Here, the circuit court took it upon itself to resolve this question of fact by weighing the competing evidence. This was error. Summary judgment concerns the existence of evidence not its weight. Therefore, even assuming this Court disregards the directive of the Supreme Court and adopts a new rule that would permit summary judgment be granted *sua sponte*, the circuit court's ruling would still be in error because there is more than a "scintilla" of evidence that Respondent was involved in the construction project, thus creating the inference it knew or *should* have known of the potential danger that befell Eva which rendered her quadriplegic. Accordingly, the circuit court's grant of summary judgment was in error and should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse and remand.

THURMOND KIRCHNER & TIMBES, P.A.



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APPENDIX 1

This appendix to Appellant's Brief provides a visual representation of the "chain of employment" as discussed in Appellant's Brief. The parties identified in the table by the color GREEN are within the "chain of employement" while the parties identified with the color RED are not in the "chain of employement".

TERMS/DEFINTIONS/ABREVIATIONS

General Contractor ("GC") – Describes a contractor who is hired to perform or oversee work in many different trades and for such work the contractor will hire subcontractors.

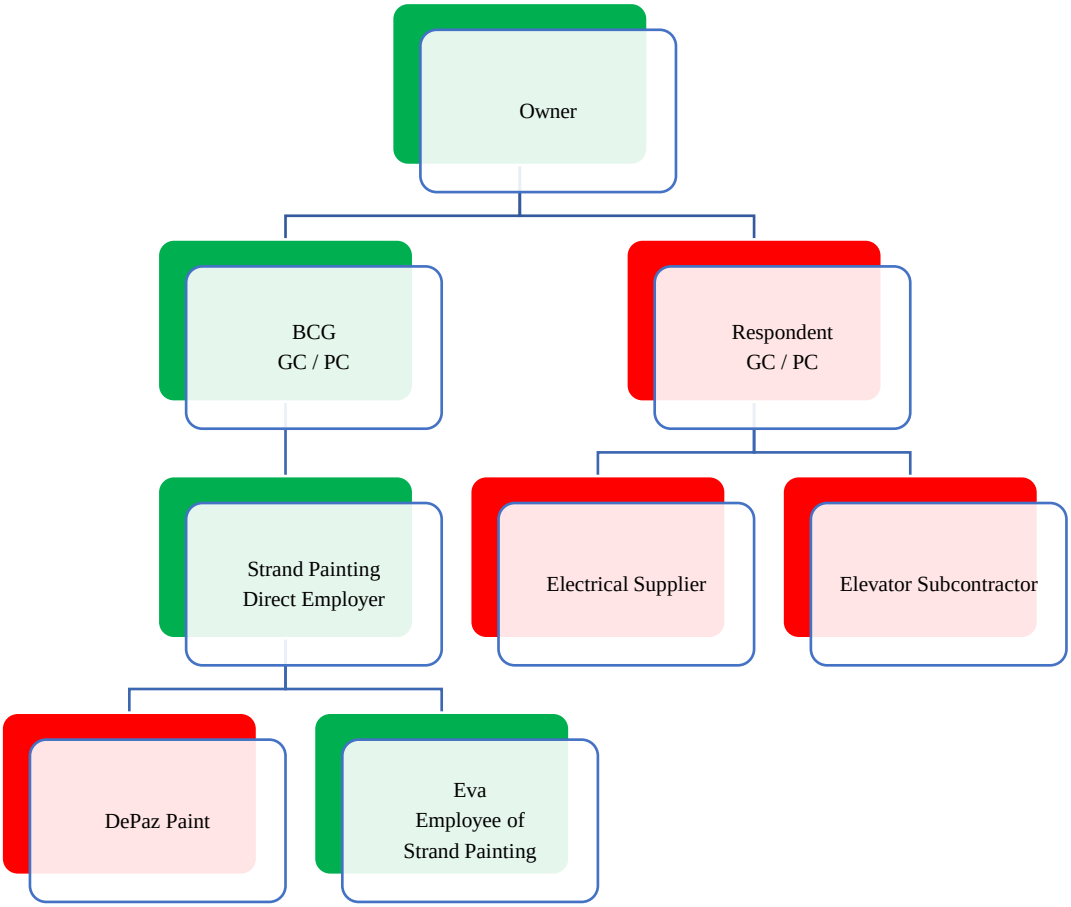
Prime Contractor ("PC") – Describes a contractor who contracts directly with the owner of a project. A prime contractor might be a general contractor but is not required to be a general contractor.

APPENDIX 1

TABLES A.1 & A.2

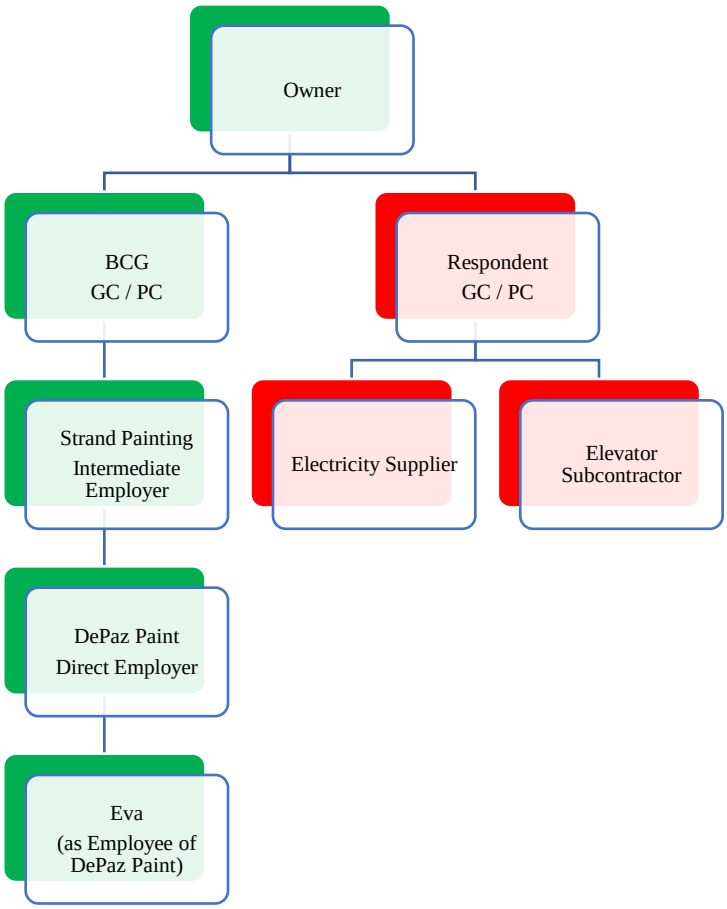
Table A.1 and A.2 depict Respondent as a "co-general contractor" and "co-prime contractor" with Beverly Construction Group ("BCG") and show Respondent is outside the chain of employment.

Table A.1 Eva as an employee of Strand Painting:



APPENDIX 1

Table A.2 Eva as an employee of DePaz Paint:

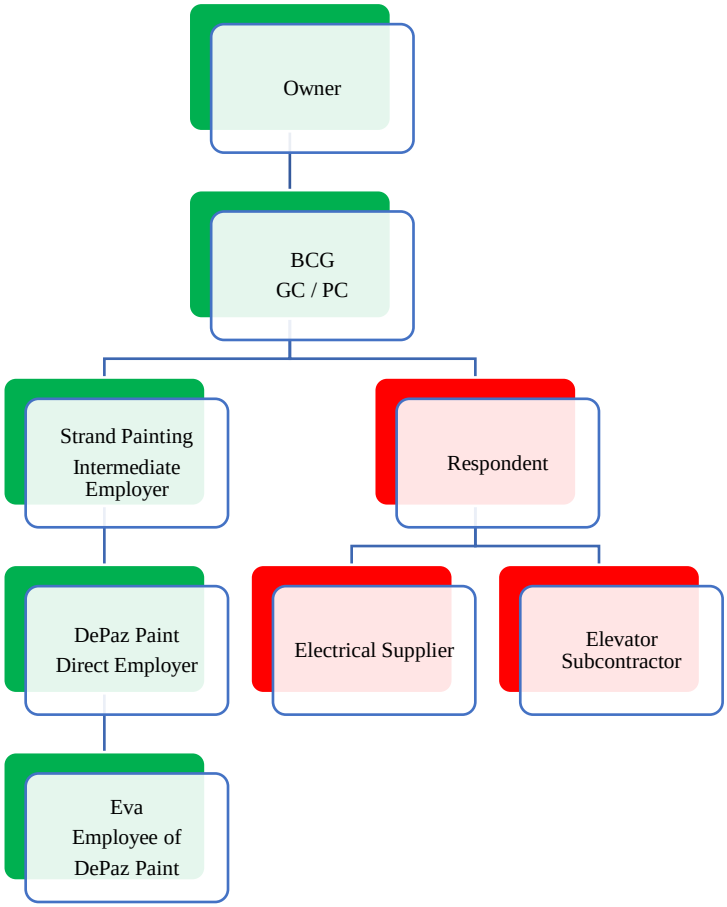


APPENDIX 1

TABLES B.1 & B.2

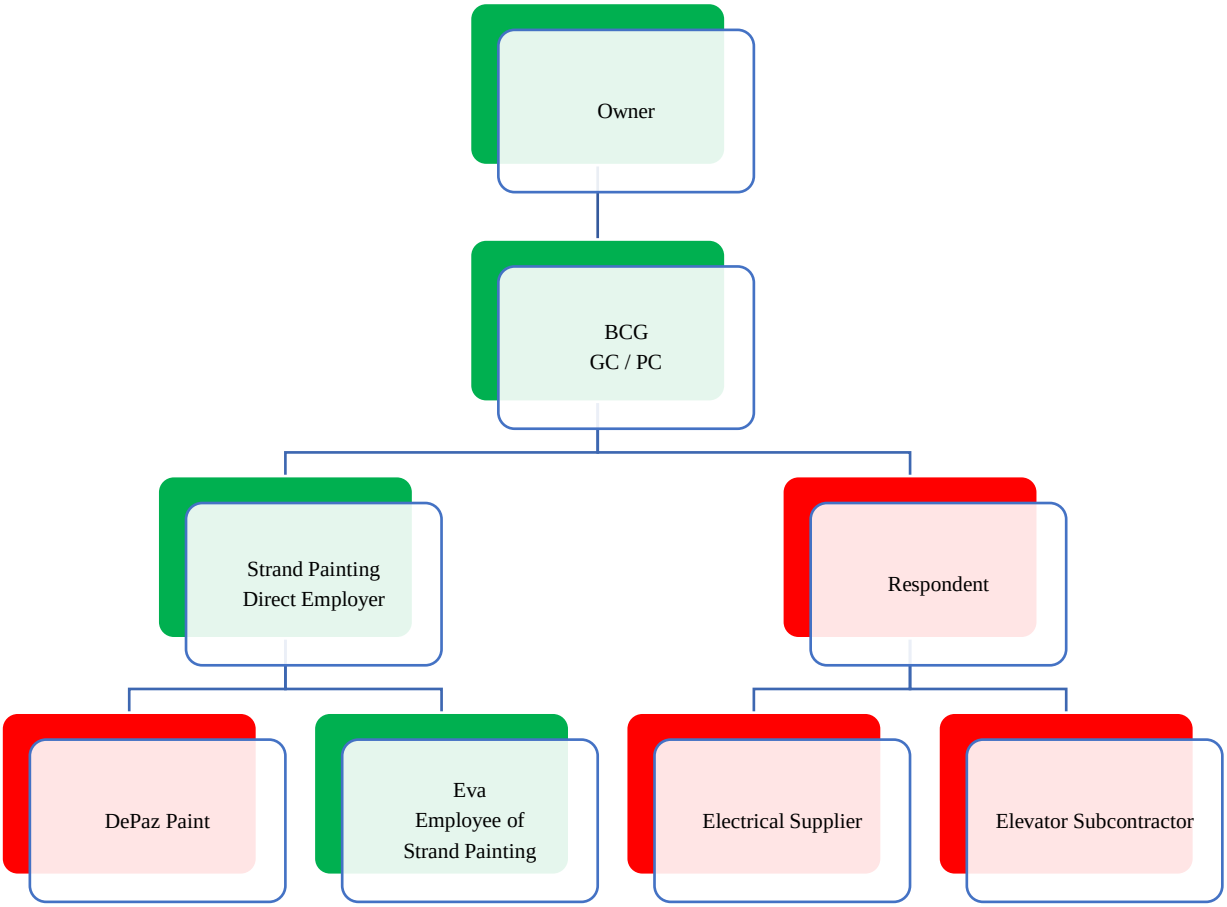
Table B.1 and B.2 depict Respondent as a higher tier subcontractor (not a GC or PC) and demonstrate that even in this situaiton Respondent is still outside the chain of employment.

Table B.1 Eva as an employee of DePaz Paint:



APPENDIX 1

Table B.2 Eva as an employee of Strand Painting:



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles
Circuit Court Judge

Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which, Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that Appellant's Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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July 6, 2022