THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Paul M. Burch
Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 4617 (S.C. Ct. App. filed September 9, 2009)
Appellate Case No. 2010-149288

PETITION FOR REHEARING

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch, ...Petitioner,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., ...Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation are the .....Respondents.

and

Kevin Key and Sandra Key, ...Petitioners,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products

Corporation, Tidewater
Skanska Group, Inc., and
Tidewater Skanska, Inc.,.....Defendants,

of whom Bayshore Concrete
Products/South Carolina, Inc.,
Bayshore Concrete Products
Corporation are the .....Respondents.

and

Thelma M. Poch, as Personal
Representative for the Estate of
Kenneth O. Poch and Julius
Poch,.....Petitioners,

v.

Bayshore Concrete
Products/South Carolina, Inc.,
Bayshore Concrete Products
Corporation, Tidewater
Skanska Group, Inc., and
Tidewater Skanska, Inc.,.....Defendants,

of whom Bayshore Concrete
Products/South Carolina, Inc.,
Bayshore Concrete Products
Corporation are the .....Respondents.

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Pursuant to Rules 221 and 240, SCACR, Petitioners Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch, Kevin Key and Sandra Key ("Petitioners") hereby petition for rehearing of this Court's August 28, 2013 Opinion No. 27304 ("the Opinion") and request that the Court issue revised opinion remanding the matter back to the trial court for a complete, fair and full evidentiary hearing.

ARGUMENT

I. The Record on Appeal does not support the factual conclusions of Section II.D.1 of the Opinion.

Section II.D.1 of the Opinion attempts to apply the holding of *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) to both Bayshore Corp. and Bayshore SC. However, the Record on Appeal either: (a) contradicts the entire factual underpinning of Section II.D.1; or (b) reveals a material contradictions between the testimony of Richard Stadler and Stewart Colonna that cannot be harmonized.

1. *Analysis of Stewart Colonna Testimony.*

The Opinion states that "Colonna, who is the president of both corporations, testified that workers' compensation was secured for the South Carolina site at the time of the accident." (Op. p. 17). However, this statement is incorrect as to Poch and Key.

In his deposition taken June 29, 2005 – a little over three years after the accident – Colonna was expressly asked if workers' compensation coverage was secured for Poch and Key; Colonna unequivocally answered "no":

Q: Who was responsible for securing workers' compensation coverage for those workers for Personnel Resources, Inc. and/or Job Place?

A: The temporary service.

Q: So Bayshore Concrete Products Corp. and Bayshore Concrete of South Carolina, Inc. did not secure workers' compensation coverage for those workers, correct?

A: Correct.

(R 625).

If this testimony is true – and there is no reason to doubt it – then the case should be open and shut. The president of both Bayshore entities has expressly and unequivocally denied securing workers' compensation for Poch or Key; instead, both Bayshore entities relied on the leasing agencies' policies.

But under *Harrell* – which the Court unanimously agrees is controlling precedent – Bayshore Corp. and Bayshore SC are only entitled to tort immunity under the Workers' Compensation Act ("Act") if they had in their possession at the date of hire valid workers' compensation certificates from the leasing companies covering both Poch and Key. *Harrell* makes this a brightline test. Either you had the certificates in your possession on the date of hire or you didn't. Unfortunately for the Bayshore entities, they did not.

Neither Bayshore company, in fact, has presented any evidence that they obtained insurance certificates from PRI or Job Place on Poch's and Key's effective date of hire. In fact, there is strong, compelling evidence to the contrary: Henry Bouffard, a Virginia attorney, wrote the leasing agency five days after the accident and expressly stated that Bayshore SC "searched the job file and noted that we did not have a current insurance certificate for your company." (R. 927)

Petitioners have argued this point every step of the way on appeal. If *Harrell* is the law of South Carolina, as this Court agrees – and if Colonna is to be believed – then the Court of Appeals must be reversed and the matter remanded for further proceedings under both *Harrell* and S.C. Code Ann. § 42-5-20.

But what about the place where the majority finds that Colonna "testified that workers compensation coverage was secured for the South Carolina site at the time of the accident?" (Op. p. 17). True, Colonna said something similar earlier in his deposition:

Q.: I'm assuming that the South Carolina site workers' compensation coverage was secured?

A.: Yes.

Q.: Is that correct?

A.: Yes.

(R. 611).

But this statement is taken out of context in the Opinion. As the next four pages (R. 611-615) of his deposition show, Colonna is **not** referring to a workers' compensation issued by St. Paul/Travelers. Instead, Colonna describes a detailed self-insurance plan:

Q.; As I understand your testimony, the part that I understand, Bayshore Concrete Products Corp. was self-insured?

A.: Yes. But there was an umbrella policy that we fell under. We were part of the large construction group for a large construction policy.

Q.: So Bayshore Concrete Products Corp. was self-insured, but then there was an excess or umbrella policy that sat above the self-insure. Is that fair?

A.: Yes.

Q.: Was Bayshore Concrete Products of South Carolina, Inc. self-insured?

A.: Yes.

Q.: And would there have been an excess policy above that?

A.: The same policy was over all the companies.

Note that Colonna is neither speculating nor ambiguous. He is describing a detailed self-insurance plan – with the creation of reserves; the designation of employees to administer claims; and an umbrella/excess policy above the self-insured reserve – which governs both Bayshore Corp. and Bayshore SC. *Id.*

So how does Colonna's testimony about self-insurance jive with his testimony about not securing workers' compensation for Poch and Key? Easily. Regular, salaried employees of the Bayshore entities came under this detailed, self-insurance plan; Poch and Key, however, did not. That is the only interpretation of both strands of Colonna's testimony that makes logical sense. (R. 611-615, 625) [N.B.: Colonna only testifies about workers' compensation in his deposition, and not his two affidavits (R. 836-843, 851-876)].

One might ask, notwithstanding Colonna's unequivocal testimony at R. 625 that the Bayshore entities did not secure workers compensation coverage for Poch and Key, whether the self-insurance plan he testifies to in R. 611-615 would still cover them? If that is the case, one would have to overlook the absurdity that a ranking, corporate officer – charged with obtaining workers' compensation for his companies; represented by top-shelf counsel; and providing deposition testimony in the defense of a wrongful death case – could make such a blunder. The answer is an obvious "no." The testimony at R. 625 (*Q.: So Bayshore Concrete Products Corp. and Bayshore Concrete of South Carolina,*

Inc. did not secure workers' compensation coverage for those workers, correct? A: Correct.) should be dispositive.

If Poch and Key had been covered by self-insurance, Bayshore Corp. and Bayshore SC would still have to prove they made security interest filings with the South Carolina Workers' Compensation Commission, under S.C. Code Ann. §§ 42-5-20 and -30, as well as *Harrell*. Evidence of self-insured filings, however, are completely absent from the Record on Appeal. Thus, applying *Harrell*, the Court of Appeals' decision cannot be affirmed on the basis of self-insurance – yet another legal conclusion that militates in favor of having the proceedings remanded. Thus, the majority misapprehends the facts and law when it finds that Colonna's testimony meets the test of *Harrell*.

2. *Richard Stadler Affidavit.*

On the other hand, Colonna's testimony reconcile cannot be reconciled with Stadler's affidavit.

Colonna – the president of both Bayshore Corp. and Bayshore, SC, defending a major wrongful death case – unequivocally denied that either entity secured workers' compensation for Poch or Key. (R. 625) To the extent he may have possibly secured workers' compensation for other employees, it was through a sophisticated self-insurance plan (cite) (although no certificates in compliance under S.C. Code Ann. § 42-5-20 or -30 have been produced).

In no way, however, did Colonna testify to the existence of general, first-tier workers' compensation policy as Stadler has alleged; that would have completely

undermined his testimony either way. Thus, Colonna and Stadler cannot both be correct; their testimony cannot be harmonized.

Which one should we believe? As the officer charged with securing workers' compensation coverage, isn't Colonna the best one to know; shouldn't his deposition testimony be conclusive? Petitioners have argued this point every step of the appeal.

Colonna's testimony is evidence against Stadler's Affidavit. Petitioners therefore contend that the majority has therefore misapprehended both the weight and credibility of the Stadler Affidavit.

Petitioners, in fact, would submit the following analysis in contradiction to the majority's factual and procedural assertions regarding the Stadler Affidavit:

a. *The majority incorrectly states: "[L]ack of coverage was not directly contested before the circuit court. (Op. p. 16, ¶3, lines 1-2).*

In fact, lack of coverage was directly contested before the circuit court. Judge Burch's July 19, 2007 Order discusses this issue in at least three (3) places. (R. 13, 14, 16.) In their brief to the circuit court, Respondents argued that coverage was in place at R. 378-379. Petitioners repeatedly argued the contrary position -- that Respondents had failed to secure workers ' compensation insurance -- in their memorandum in opposition to the motion for summary judgment, (R. 181, 191-194, 198-199) and again in their memorandum in support of the motion to reconsider. (R. 546-549, 550-551, 556-559, 564, 565.)

b. *The majority opinion incorrectly finds that "Stadler attested that Bayshore Corp. and Bayshore SC had workers compensation at the time of the accident ...." (Op. p. 16, ¶3, lines 3-4).*

A plain reading of the Stadler Affidavit shows that it only mentions Bayshore SC. The language of the affidavit does not apply to Bayshore Corp. If Stadler meant to say both (because of the awkward and confusing "and [space] of" in ¶ 3), he certainly made a hash of it. (R. 845) Moreover, notice how Stadler never uses the word "both" and also how the sole reference to the "insurance policy" is in the singular. Since the policy itself is not in the record on appeal, *at best* Stadler's affidavit applies only to Bayshore SC, leaving Bayshore Corp. naked under S.C. Code Ann. §§ 42-5-20 and -30, as well as *Harrell*. At worst, the affidavit is so confusing that remand is the only way to sort out the apparent inconsistency.

c. *The majority further incorrectly finds that "Here, contrary to the dissenter's assumption, Bayshore's alleged umbrella insurance policy did not transform Bayshore into a self-insured employer." (Op. p. 17, ¶ 1, lines 10-11).*

Petitioners submit that the umbrella insurance policy described by Colonna is not "alleged" but an uncontroverted fact in the Record on Appeal. Colonna's remarks regarding self-insurance cannot be characterized as an off-hand misstatement. Rather he directly states numerous times that Bayshore Corp. and Bayshore, SC are both self-insured. (R. 611, 612) "He then goes on to describe the separate reserve system set up under each individual company for purposes of funding the self-reservation. (R.612-613.)

Thus, two of Respondents witnesses, however, apparently contradict each other – one the president, and one an underwriter. The only way to unravel this inconsistency, however, is obviously by remand. It should also be noted that the majority elides the two

entities into a single "Bayshore" which makes it impossible to tell which is being analyzed.

> d. *"The majority improperly finds 'Thus, because Bayshore procured the requisite insurance policy and was not self-insured, the insurance carrier bore the responsibility of providing proof of insurance coverage.'" (Op. p. 17, ¶1, lines 11-13).*

This conclusion Stadler avers to only carries water if the majority rejects Colonna's testimony (via a full deposition) completely in favor of Stadler (via a threadbare affidavit). While it is undeniable that an insurance carrier bears "the responsibility of providing proof of insurance coverage" to the South Carolina Workers' Compensation Commission, it should be equally undeniable under *Harrell* and S.C. Code Ann. §§ 42-5-20 and -30 that a party seeking to evoke tort immunity under the Act needs to produce those certificates from its insurance carrier. In other words, the Act requires the carrier to file proof of insurance, but that does not relieve a party seeking tort immunity from showing that the carrier performed this ministerial duty on its behalf. If the carrier fails to file, then that is an issue to be decided between the carrier and the statutory employer. [NB that Bayshore is once again discussed as a single entity with the same effect as in sub-paragraph (c) above].

> e. *"We must also recognize that there was no allegation or evidence in the record to suggest that proof of compliance with section 45-5-20 was not filed." (Op. p. 17, ¶1, lines 14-15).*

At first blush, this statement would appear anodyne and indisputable. But, in fact, upon review of the Record on Appeal it is factually incorrect. On multiple occasions, Petitioners argued to the trial court (i.e. made an "allegation") that Respondents had not filed proof of compliance under S.C. Code § 45-5-20 – both before the hearing [R.193,

199] and after [R. 550, 557-558, 560 and 569] – and as it would relate to all possibilities (i.e., relying on the leasing agencies, self-insurance and alleged first party insurance).

In terms of evidence, there is substantial *indirect* evidence that the filings were not made based on the fact Respondents have failed to produce them over the course of the litigation. To the extent there may be filings pursuant to Code § 45-5-20 – or not – which may be dispositive or germane to the resolution of jurisdiction, then Petitioners submit that the correct course would be remand to the trial court for further discovery on this issue.

f. The [Stadler] affidavit was not challenged during the hearing. (Op. p. 17, ¶ 2, line 7).

The majority places a great deal of emphasis on this point. However, the Petitioners repeatedly challenged the Stadler Affidavit at the trial level – in their memorandum in opposition (R.194) and in their motion to reconsider (R. 546, 550).

3. *"An Insurance Policy in Existence."*

The most troubling factual allegation in Section II.D.1 is footnote 14 which states: "[d]espite Colonna's use of the term 'self-insured,' there was an insurance policy in existence that provided workers' compensation coverage." (Op. p. 17, n. 14). What makes this otherwise innocuous footnote troubling is that no insurance policy was attached to the Stadler Affidavit, nor included in the Record on Appeal.

Is the "insurance policy in existence" taken solely from ¶ 3 of Stadler's Affidavit? Does it reference the "excess policy" to which Colonna referred to in his deposition? Or does it come from the fact Respondents attempted to supplement the Record on Appeal, and produced a policy – previously undisclosed in discovery – that was purportedly the

policy referenced by Stadler? Under any of these three scenarios, the Court should not take notice of this policy.

Scenario 1 – The policy is relevant solely by way of the Stadler Affidavit.

Stadler did not attach a policy to his Affidavit. Respondents did not produce a policy in discovery. For those who have received or litigated denial and reservation of rights letters, it is telling that Stadler – employed by one of the nation's largest insurers as a construction underwriter [not a workers' compensation underwriter] – failed to include any reference to: a policy number; policy dates; coverage amounts; premium amounts; retention amounts or deductibles and/or coverage limitations; i.e., all the staples of insurance practice. Not even a declarations page was produced. Instead Stadler merely opined that he was "familiar" with the insurance policy.

Why the paucity of information from Stadler? A plausible explanation is simply that the policy had been lost. In any event, there is no evidence that Bayshore Corp. or Bayshore, SC had such a policy in its possession – which will become germane as discussed below. Moreover, setting aside the conclusory, vague and incomplete nature of the Stadler Affidavit, it directly conflicts with the admissions of the president of the Bayshore entities, who expressly and without equivocation averred that the Bayshore entities were self-insured and/or had failed to secure workers' compensation for Poch and Key.

It is clear that Judge Burch gave little weight to the Stadler Affidavit – it appears just once in his Order (R. 14) – as a throwaway, alternative ground sandwiched between two other theories later overturned on appeal. This Court should likewise give scant

weight to the Stadler Affidavit. Rather than expressly testifying of his own personal knowledge, Stadler is vague ("I am familiar with") the policy, and because he is employed by an insurance company which may have contractual liability on the claim, there is no logical reason to put any stock in this self-serving and uncorroborated testimony. By focusing on whether the affidavit has been "challenged" for its "truthfulness," the majority Opinion falls into the classic trap of weight not admissibility. The affidavit should come in; but it should not be given much weight – especially insofar as it is contradicted by direct testimony of the Bayshore entities' president. Even on its best day, however, the Stadler affidavit only applies to Bayshore, SC.

While there may be little evidence in the record to contest the bald, conclusory assertions in the Stadler Affidavit, that does not abrogate the court's role as gatekeeper. In fact, as this evidence will never be presented to a jury, the reviewing court has a greater responsibility to discern the credibility of this evidence.

Scenario 2 – The "policy in existence" refers to the excess policy to which Colonna testified.

This scenario suffers from many of the same flaws as the first – chief among: where is the policy? No excess policy has been produced in discovery. Moreover, an excess policy is just that – excess. There has to be a valid, enforceable first tier policy or some cognizable self-insurance plan. Any evidence of that, however, is entirely void from the record. If Stadler was referring to the excess policy in his affidavit, then he seriously misunderstands Workers' Compensation law. For these reasons, the Court should not state there was an "insurance policy in existence."

Scenario 3 – Is the policy in existence based on the policy which Respondents attempted to supplement the record on appeal?

No one who serves the Law wants to be party to an absurdity. Respondents produced a policy as an appendix to a motion to supplement the record on appeal; Respondents contended, *inter alia*, that this was the policy which Stadler referenced in his Affidavit.

Unfortunately, as Petitioners briefed in their memorandum in opposition to the same, this 900 page "policy" – not made part of the record on appeal, but potentially casting a pall over the proceedings – is full of holes, questions marks and inconsistencies. As a threshold matter, it was never produced in discovery. But turning to the substance of the document, it does not provide clarity to the case.

It's own text declares that it is incomplete. It is uncertified. It has no reliable dates. There are internal pagination errors. There are instances of conflicting information (e.g., two (2) "first" pages). It is incompliant with Rule 901, SCRE. It appears to reference Tidewater Skanska instead of Bayshore. We are unsure if it is an excess policy or a first-tier policy; or both. The final question mark raised by the "new" policy was that the Schedule of Operations appears to exclude – for South Carolina – injuries arising out of demolition or construction.

The "new" policy should play no role in the Opinion, since it was properly excluded from the Record on Appeal by Order of the Court. Nevertheless, if it is casting a long shadow over the proceedings, Petition submits that its existence is yet further grounds to reverse and remand to the circuit court – which is best suited to unravel the impact of the "new" policy, and to test its admissibility and applicability.

II. The legal conclusions of Section II.D.1 of the Opinion are also erroneous.

The Court unanimously held that *Harrell* was controlling precedent, but the majority's statement that the dissenters place "form over substance" by demanding strict compliance to S.C. Code Ann.§ 42-5-20 for the "procurement of insurance" actually undercuts *Harrell*. So does the dictum holding that analysis under Section 42-1-415(B) is misplaced.

Strict compliance with Section 42-5-20 is the feature of *Harrell* not the bug. This is not judicial activism but derives directly from the statute: "Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter." *See* § 42-5-10.

"Secure the payment of compensation" does not mean simply procure insurance, or see that someone else has procured it, or even to accept ultimate liability to have workers' compensation coverage. Instead, it means also providing documentation to the South Carolina Workers Compensation Commission in compliance with Section 42-5-20 and/or being compliant with *Harrell*. In some ways it is a term of art.

When an entity fails to secure compensation, "nothing in the Act prohibits an employee from recovering both workers' compensation benefits from one employer and tort damages from an upstream employer who failed to secure compensation." *Id.* at 329, 523 S.E.2d at 774. Here, neither Bayshore Corp. (VA) nor Bayshore SC secured compensation directly or indirectly for Poch and Key. This is a burden the Bayshore entities had to prove. They have failed to do so. The Stadler Affidavit is insufficient to meet requirements of the Act.

The majority also incorrectly excludes analysis under section 42-1-415. This was a roadmap used by the *Harrell* Court, and it is directly applicable here today. As explained in *Harrell*, in order to demonstrate that it has secured Workers' Compensation benefits for a claimed statutory employee, a statutory employer can show that it satisfied the requirements of S.C. Code § 42-1-415(B), which provides that the employer "must collect documentation of insurance...on a standard form acceptable to the commission. The documentation must be collected *at the time* the contractor or subcontractor *is engaged* to perform work..." 337 S.C. at 330, 523 S.E.2d at 774-5 (stating that a statutory employer need not directly secure compensation for a statutory employee if § 42-1-415 is satisfied).

Thus, it is irrelevant if there was a St. Paul's/Traveler policy if the Bayshore entities did not comply with § 42-5-10, -20 or -30. The same holds true if Bayshore was self-insured or relying on the leasing companies. Only compliance with the Act insulates an "upstream statutory employer" from tort liability; strict adherence to reporting formality is a policy decision with the purpose of protecting employees of direct employers who are financially irresponsible. If a business wants to enjoy the fruits of tort immunity, then it must strictly comply with the requirements of the Act. It is a brightline and simple test which has been the law of South Carolina for almost 15 years.

III. The Opinion misapprehends the role of the reviewing court, which should not make findings of fact in an instance where the appropriate legal standard has changed.

In the Opinion, this Court was unanimous in its adoption of *Monroe v. Monsanto Co.*, 531 F. Supp. 426 (D.S.C. 1982) as the controlling authority for determination of

whether two business entities are "alter egos" for applicability of the South Carolina Workers' Compensation Act..

Significantly, however, the Opinion overlooks the fact that that the trial judge did not review the evidence under the *Monroe* factors but rather under *Bailey*. (R. pp. 10-17). Likewise, the Court of Appeals essentially repeated the same mistake as the trial judge, but erroneously relied on *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) and *Ost v. Integrated Products, Inc.*, 296 S.C. 241, 371 S.E.2d 796 (1988).

An appellate court has the power and duty to review the record and decide jurisdictional facts in accord with the evidence. *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). However, this becomes a practical impossibility when the standard by which the facts should be weighed changes after the trial court's decision.[1] *See Anderson v. Anderson*, 299 S.C. 110, 114, 382 S.E.2d 897 (1989) ("The

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[1] Federal appellate courts recognize that ultimately the best finder of fact is the trial court:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and...the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *DeMarco v. United States*, 415 U. S. 449, 450, n. (1974).
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U. S. 318, 331-332 (1974).

somewhat confused state of the law in this area, and the complete lack of evidence presented by the parties, make the lower court's failure to provide such findings and further instructions understandable."); *see also R.L. Jordon Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) (remanding matter to United States District Court for further proceedings in light of new legal standard adopted.); *Patel v. Patel*, 347 S.C. 281, 555 S.E.2d 386 (2001) (remanding matter to Family Court after setting new legal standard for guardian *ad litem*.).

Likewise, the Court of Appeals also remanded in the last major, statutory employment decision back to the trial court for a new hearing - *Harrell v. Pineland Plantation, Ltd.*, 329 S.C. 185, 494 S.E.2d 123 (Ct.App.1997), which this Court affirmed in *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

The above-referenced decisions have three features in common with each other and the instant case. First, the reviewing court applied a *de novo* standard of review. Second, the applicable legal standard to apply to the facts changed in the opinion. Finally, the reviewing court remanded the case to the trial court for further proceedings consistent with the new legal standard.

This action should follow an identical path as *Glass, Boardman Petroleum* and *Patel*, as well as *Harrell*. Here, the Court applied a *de novo* standard of review and changed the applicable legal standard under which the evidence was reviewed.

Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982). *See also Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011) ("Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony.").

Accordingly, this Court should remand this action to the trial court for further proceedings because, where there has been an erroneous view of the law, the usual rule is that there should be a remand back to the trial court to make missing findings. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

At no point in the proceedings has there been a full evidentiary hearing where all parties could present evidence and analysis under the correct standard.

The trial court did not even provide an alternative analysis under the correct standard, nor did the Court of Appeals.

Rather, the parties conducted trial court discovery under the rule of *Bailey v. Owen Electrical Steel Co. of S.C.*, 298 S.C. 36, 378 S.E.2d 63 (1989) not *Monroe*. The trial court decided to rule without further discovery under the rule of *Bailey* not *Monroe*. The trial court made its factual and evidentiary rulings under *Bailey* not *Monroe*.

What would the factual and evidentiary outcome have been under *Monroe*? As the Opinion states, none of the *Monroe* factors are necessarily dispositive – in fact, other factors may come into play. (Op. p. 11). Petitioners have been denied the right to make a full record under the *Monroe* factors. This is fundamentally unfair.

Petitioners – through their long persistence – have succeeded in both changing and clarifying the Workers' Compensation law of South Carolina. Future litigants (both employers and employees) will enjoy the benefit of Petitioner's perseverance when litigating statutory employer cases in the circuit court.

Shouldn't Petitioners receive the same benefit as future litigants? Shouldn't Petitioners have the same opportunity to litigate in the circuit court under the *Monroe*

factors? Petitioners ask only for the chance to present all their evidence at the trial level – where the credibility of witnesses can be judged through examination and cross-examination – and before a trial court which is in a better position to evaluate their credibility and assign comparative weight to their testimony? *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011).

This Court has correctly changed the rules, so the Petitioners submit that, like other litigants, they should be entitled to a new hearing under the new law, as this Court has ordered in similar circumstances. Notwithstanding that this Court **can** make *de novo* findings, **should** it where the new standard is so open-ended? *Monroe* at 434. Petitioners, who never had an opportunity to complete discovery in this matter,[2] need the opportunity to explore what other "relevant factors" apply under *Monroe*. Petitioners ask only for the same right as future litigants will enjoy: the chance to litigate the case at a trial or evidentiary hearing on the merits.

IV. The Opinion overlooks the fact that discovery in the underlying case was truncated, incomplete and contradictory.

Notwithstanding the foregoing, Judge Burch ruled on Respondents' *Motion for Summary Judgment* before Petitioners' discovery was complete. That factor – that discovery was truncated – further militates in favor of remand.

Likewise, a critical piece of discovery was denied to Petitioners – the deposition of Larry Lennart – whose affidavit is cited in the Opinion as a basis for affirming the decision of the Court of Appeals. (Op. pp. 7-8, 12) Although this Court declined to take up that ruling on *certiorari*, it is nevertheless unfair that Petitioners were denied the

[2] See Section II, *infra*.

opportunity to cross-examine Lennart (by a duly noticed deposition). (R.519-539, 23-25) when his testimony goes to the heart of the new *Monroe* factors. *Id.*

The same holds true for the second Colonna affidavit (R 851-876) which significantly contradicts both his first affidavit (R. 836-843) and his deposition (R. 591-664). See also R. 474-509; and R. 18-20. As with the Lennart affidavit, the second Colonna affidavit is central to the majority's finding in the Opinion (Op. pp. 7-8, 11-13). Even though the Court declined to take up this matter on *certiorari*, nevertheless it is unfair to Petitioners not to be able to re-examine Colonna or have testimony serve as the basis for the opinion which conflicts with his prior testimony. Petitioners have already detailed the contradictions in the discovery between Respondents' witnesses Colonna and Stadler.

Taken together, the status of discovery – resulting in an incomplete, uneven and contradictory record on appeal (on Respondents' side!) – only further buttress arguments to remand the case. .

V. The Opinion overlooks recent developments in the standard for summary judgment.

There is some confusion in the Opinion as to whether the underlying proceedings constituted a motion for summary judgment or a motion to dismiss. In *Edens v. Bellini*, 597 SE 2d 863 (Ct. App. 2004), the Panel held:

> The court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (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 pursuant to Rule 56, SCRCP. *Woodard v. Westvaco Corp.,* 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds by Sabb v.* 441*441 *South Carolina State Univ.,*350 S.C. 416, 567 S.E.2d

231 (2002). If 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.*

Petitioners submit that a Rule 12(b)(1) hearing is for all intents and purposes a motion for summary judgment. It should be governed under the same standard as articulated in *Hancock v. Mid-South Management*, 381 S.C. 26, 673 S.E.2d 801 (2009). Although a Rule 12(b)(1) proceeding will never go to a jury, nevertheless, the trial court – acting as a finder of fact – should wait until trial if there are genuine issues of material fact touching on jurisdiction that warrant a full trial. Petitioners submit this argument as further grounds for remand.

VI. The Opinion misapprehends the application of Monroe,

South Carolina courts are generally reluctant to disregard the corporate form. *See Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 597, 649 S.E.2d 140 (Ct. App. 2007). When disregarding the corporate form for the purpose of Workers' Compensation immunity, this Court should apply the same reluctance. *See Brown v. Moorhead Oil Co.*, 239 S.C. 604, 609-10, 124 S.E.2d 47, 50 (1962).

In the instant matter, the majority has not followed these generally-accepted, common law principals in applying the *Moore* factors, particularly factors 1, 2, 4 and 5.

Did the two businesses maintain separate corporate identities?

It is incontrovertible that the Bayshore entities maintained separate corporate identities. Incorporation in separate states should be the sine qua non of separate corporate identity. Furthermore, Colonna admitted that the "South Carolina company [Bayshore SC] was run as a separate entity." (R. p. 841, ¶ 11). So did non-executive

board chairman David Eastwood (R. 61). See also R. p. 841, ¶ 11; p. 592, lines 15-19; p. 746, lines, 2-7; p. 731, lines 7-12). Moreover, Bayshore treated its subsidiary as a separate entity; as Colonna testified, Bayshore Corp. would submit and accept bids from its "subsidiary companies as customers, just like we did their competitors." (R. p. 621, lines 22-24).

The original Colonna affidavit testimony should also control:

> Only Bayshore Concrete Products/South Carolina, Inc. had anything to do with the accident and the activities at the Horry county site. The South Carolina company was run as a separate entity. It had its separate bank account. The employees in South Carolina ... were all paid by Bayshore Concrete Products/South Carolina, Inc.

(R. 841, ¶ 11). It is axiomatic that parties can argue multiple, inconsistent legal theories, but are only entitled to one set of facts. It is obvious that Bayshore will adopt and shed alter ego positions depending on how they view the prevailing winds of the litigation; such behavior should not be tolerated. The fact there has been some corporate sloppiness (e.g., in signing contracts) is not sufficient evidence to overcome the express intent of the Bayshore entities to maintain separate corporate existence.

Did the two businesses maintain separate Boards of Directors?

Yes. The fact there is overlap on the board should not be dispositive. The boards had separate meetings. (R. 917)

Did the two businesses hire and pay their own employees?

Yes. Bayshore SC separately employed numerous employees at the site whose wages and benefits it directly paid. (R. pp. 606-609, 670). Bayshore Corp. assigned some of its own employees to the South Carolina site to work as subcontractors to

Bayshore SC. (R. pp. 597-599). The businesses each hired and paid their own employees separately. (R. pp. 608-609, p. 670, lines 1-4). All of Bayshore SC employees were paid by the South Carolina Corporation using a South Carolina payroll service. (R. pp. 608-609, p. 670, lines 1-4). When an employee of the parent company did work on a Bayshore SC project, his wages were paid to him by Bayshore Corp., which then charged Bayshore SC for the expense like any other subcontractor. (R. p. 601, line 18-p. 602, line 5; p. 604, lines 2-12).

Did the two corporations hold themselves out to their employees as two separate identities?

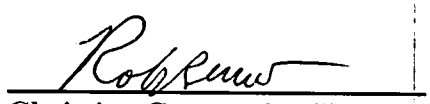
Yes. The officers consciously entered into separate contracts on behalf of the distinct corporations and differentiated between the two corporations when charging expenses. (R. p. 650, lines 11-16; p. 738, lines 3-11; p. 764, lines 22-25). Only Bayshore Corp. had the authority to hire and fire the salaried Bayshore Corp. employees. (R. p. 622, lines 3-16). Bayshore Corp. employees were paid by Bayshore Corp. with Bayshore Corp. checks. (R. p. 923). On the other hand, as Bayshore SC employees were hired they were required to fill out Bayshore SC job applications and were paid with Bayshore SC checks by a South Carolina payroll service. (R. pp. 606, p. 609, lines 2-14). The employees were aware of the distinction between the two corporations. (R. p. 731, lines 7-12; p. 732, lines 4-14).

As far as Poch and Key would have been concerned, the unequivocal testimony of Bayshore's Colonna and Eastwood was that the leasing agreement was between the leasing company and Bayshore SC:

CONCLUSION

For the argument set forth above the panel should grant rehearing and remand this case back to the Circuit Court. Remand is the only outcome that is fundamentally fair and appropriate based on the facts, procedural history and legal posture of the case.

Dated: September 11, 2013



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Paul M. Burch
Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 4617 (S.C. Ct. App. filed September 9, 2009)

CERTIFICATE OF SERVICE

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch, ...Petitioner,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., ...Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation are the .....Respondents.

and

Kevin Key and Sandra Key, ...Petitioners,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products

Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc.,.....Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation are the .....Respondents.

and

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch and Julius Poch,.....Petitioners,

v.

Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc.,.....Defendants,

of whom Bayshore Concrete Products/South Carolina, Inc., Bayshore Concrete Products Corporation are the .....Respondents.

I certify that I have served the *Petitioners' Petition for Rehearing* on the Clerk of the Supreme Court at P.O. Box 11330, Columbia, SC 29211 and on counsel for the Respondents by serving copies of the same via U.S. Mail on September 11, 2013 to the following:

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September 11, 2013