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)
Appellate Case No. 2010-149288

PETITIONERS' REPLY TO RESPONDENTS' RETURN TO 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.**

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Pursuant to Rule 240(f), SCACR, Petitioners submit the following Reply to Respondents Bayshore Corp. and Bayshore Corp. (SC)'s Return (designated as a "Reply") to the Petition for Rehearing.

REPLY

The Bayshore entities' Return does not directly address several of Petitioners' key arguments in favor of reversal and remand. To the extent the Record in this matter can even be used for an analysis under *Harrell* and *Monroe*, the Bayshore entities have failed to address the misapprehension of facts that underpin the August 28, 2013 Opinion. Rehearing, reversal, and remand is appropriate.

I. The Bayshore entities do not address the Court's misapprehension of the evidence (or lack thereof) of a workers' compensation policy.

In their Return, the Bayshore entities completely and willfully fail to address the wild inconsistency between the deposition testimony of their president, Keith Colonna, and the affidavit of Richard Stadler, a St. Paul's *construction* – not workers' compensation – underwriter (R. 845).

Keith Colonna testified under oath in his deposition that: (a) the Bayshore entities were relying on the temporary services provider to provide coverage for Poch and Key (R. 625); (b) that the Bayshore entities did not secure workers' compensation for Poch and Key (R. 625); and (c) that the Bayshore entites were in fact ***self-insured*** at the relevant time period, with an excess policy in place (R. 611-615).

This is no mere "statement" by Colonna; this is sworn deposition testimony by Respondents' chief executive officer of a plan of self-insurance that did not cover Poch or Key. By choosing to ignore Colonna's unequivocal testimony that there was ***self***

insurance, the Bayshore entities basically concede Petitioners' main point in the Petition for Rehearing: *i.e.*, Colonna's deposition testimony is diametrically opposite Staldler's threadbare and conclusory affidavit. Despite the efforts of the Bayshore entities to supplement the Record (both via motion and unilaterally[1]), the Record on Appeal in this matter does not contain a copy of a workers' compensation policy, the declarations page for such a policy, *or even the policy number for a workers' compensation policy.*

The weight of Colonna's specific, unequivocal testimony of self-insurance has been overlooked by this Court, and by the Bayshore entities in their Return. Petitioners submit that Colonna's testimony should trump Stadler's vague affidavit on a *de novo* review, and/or the case should be remanded to the circuit court to determine which of the Bayshore entities' witnesses is telling the truth.

II. The Bayshore entities do not address the Petitioners' argument that "securing compensation" is a term of art and has not been performed by the Bayshore entities.

The Bayshore entities also fail to comprehend the requirements of *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) – or to rebut Petitioner's second argument: *i.e.*, that "secure the compensation" does not mean having a workers' compensation policy, or even accepting workers' compensation liability. Under *Harrell*, "securing the compensation" means compliance with S.C. Code Ann. § 42-5-10 *et seq.*

[1] Exhibits A-D to the Bayshore entities' Return were added in contravention of Rule 212, SCACR, and should be disregarded by this Court. While consideration of these exhibits (and the issues they raise) exceeds the scope of this Court's review, Petitioners maintain that the documents produced in response their discovery requests differ materially from the documents attached to the Bayshore entities' Motion to Supplement.

Instead, the Bayshore entities want their tort immunity without having to show that they touched this base – arguing that because it is the responsibility of their workers' compensation carrier to make the filings with the Workers' Compensation Commission, the Bayshore entities do not have to show that this took place.

While carriers do make the administrative filings, an insured employer who wishes to claim tort immunity must still show that their agent (*i.e.*, the carrier) complied with this requirement. Respondent's argument would eviscerate the plain holding of *Harrell*. It bears repeating that in *Harrell*, the injured employee had coverage, too – yet the failure by Pineland to "secure the coverage" denied it the benefit of tort immunity. *Harrell* at 329.

Setting aside the issue that the President of the Bayshore entities, Keith Colonna, unequivocally testified that the Bayshore entities did not secure workers' compensation coverage for Poch and Key – and were, in fact, ***self-insured*** at the relevant time period (R. 611-615) – where is the proof in the record on appeal that Bayshore (or its agent) made any filing with the Commission (or met the test of *Harrell*)?

That proof is absent. *Harrell* requires a showing of compliance with Section 42-5-10 *et seq*. The Bayshore entities do not even attempt to rebut this argument. Their argument that this issue is unpreserved is specious; Appellants have argued the applicability of *Harrell* at every level. Accordingly, rehearing, reversal, and remand is appropriate.

III. The Bayshore entities do not provide a response to the Petitioners' argument that remand for a new hearing is appropriate in this circumstance.

The Bayshore entities' criticism of the *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989), case ignores the larger point of law in the Petitioners' argument, and completely ignores Petitioners' other cited authority: *R.L. Jordon Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) and *Patel v. Patel*, 347 S.C. 281, 555 S.E.2d 386 (2001). *Anderson* was indeed a partition action. *Boardman Petroleum* was a certified question on a constitutional issue. *Patel* was a divorce and custody matter. In each of these actions, the reviewing courts changed the applicable legal standard and, while the courts could have reviewed the facts *de novo* under the new standard, they chose to remand the action for a decision at the trial court. The common thread in each of these appeals was a factual record inadequate for use under the new standard, and the Bayshore entities have not provided any authority to counter this principle of law.[2]

Similar to the cases set forth above, the Record in this appeal is inadequate for use under the new *Monroe* standard. As set forth in the Petition, there are new factors that are applicable, and thus new discovery must take place on them (Petition 15-18). Though unintentionally, the Bayshore entities also appear to agree the Record is inadequate, as they have now attempted to supplement the Record *twice*: first, via a Motion to Supplement the Record (which this Court denied); and now, via the 24 pages of new documents attached unilaterally to their Return (in violation of Rule 212, SCACR). Apparently, all parties agree a new Record is necessary; remand for a new hearing is

[2] The Bayshore entities do cite Cooke v. Palmetto Health Alliance, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), but Cooke was affirmed without any change in South Carolina law. It has no similarity or applicability to the facts of this appeal.

warranted.

IV. The Petitioners did not consent to a hearing with the evidence in the Record.

The Petitioners vigorously opposed the use of certain affidavits at the motion hearing at issue in this appeal, going as far as filing motions to exclude those affidavits from consideration, as they had not been presented with a full and fair opportunity to depose the subjects of the affidavits. (R. 474-539). It is incorrect to argue, as the Bayshore entities do, that the Petitioners consented to the hearing they received (especially in light of the two levels of appellate review they have pursued).

V. The Bayshore entities' arguments in opposition to the Petition for Rehearing are unsupported and should be disregarded.

The Bayshore entities' arguments in their Return (particularly arguments IV, V, and VI) are practically devoid of authority in support of these arguments. This failure to properly support their bare, conclusory arguments constitutes an abandonment of the same. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the failure to cite to authority in support of argument constitutes abandonment of issue on appeal); *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 714 S.E.2d 904, 916 (Ct. App. 2011) (*citing Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (finding appellants abandoned an issue on appeal where they failed to cite any case law for a proposition and made only conclusory arguments in support)). Accordingly, this Court should decline to consider the Bayshore entities' arguments in opposition to the Petition for Rehearing.

CONCLUSION

For the argument set forth above, and it its Petition, this Court should grant rehearing, reverse the trial court under *Monroe* and/or *Harrell*, or at the bare minimum, remand this case for application of the *Monroe* and *Harrell* standards by the trial court with a new, fully-developed factual record.

Dated: September 30, 2013

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I certify that I have served the *Petitioners' Reply to Respondents' Return to Petition for Rehearing* on the Clerk of the South Carolina 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 30, 2013 to the following:

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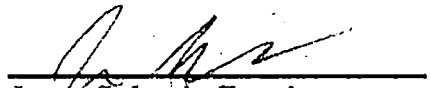

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