The Supreme Court of South Carolina

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October 2, 2013

The Honorable Melanie Huggins-Ward
Clerk of Court
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: Poch & Key v. Bayshore Concrete - Appellate Case No. 2010-149288
Lower Court Case No. 2006CP263194R, 2006CP263195R, 2006CP263196R

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Christine Companion Varnado, Esquire
John R. Kuhn, Esquire
Barrett Ray Brewer, Esquire
Jason Scott Luck, Esquire
Robert Bratton Varnado, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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., and Bayshore Concrete Products Corporation, are Respondents.

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., and Bayshore Concrete Products Corporation, are Respondents.

Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch and Julius 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., and Bayshore Concrete Products Corporation, are Respondents.

Appellate Case No. 2010-149288

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 27304
Heard January 23, 2013 – Filed August 28, 2013

AFFIRMED AS MODIFIED

John R. Kuhn, of Kuhn & Kuhn, LLC of Charleston, Robert Bratton Varnado, of Brown & Varnado, LLC of Mt. Pleasant, Christine Companion Varnado and Jason Scott Luck, both of The Seibels Law Firm, P.A. of Charleston, for Petitioners.

Barrett Ray Brewer of Clawson & Staubes, LLC of Charleston, for Respondents.

JUSTICE BEATTY: Kenneth Poch ("Poch") and Kevin Key ("Key") were temporary workers contracted through Personnel Resources of Georgia, Inc. ("Personnel Resources") and Carolina Staffing, Inc. d/b/a Job Place of Conway ("Job Place"), to work for Bayshore Concrete Products/South Carolina, Inc. ("Bayshore SC") to clean up a concrete casting worksite and dismantle equipment used to produce concrete forms. As a result of a tragic, work-related accident, Poch was killed and Key was injured. Poch's estate and Key received workers' compensation benefits through Job Place.

Subsequently, Key and his wife and the estate of Poch ("Petitioners") filed suit against Bayshore SC and its parent company, Bayshore Concrete Products Corporation ("Bayshore Corp.").[1] The circuit court granted Respondents' motion to dismiss the actions on the ground that workers' compensation was Petitioners' exclusive remedy and, therefore, Respondents were immune from liability in a tort action. The Court of Appeals affirmed the circuit court's order. *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). This Court granted a writ of certiorari to review the decision of the Court of Appeals. Although we agree with the result reached by the Court of Appeals, we find the court incorrectly analyzed Petitioners' arguments. Accordingly, we affirm as modified.

I. Factual/Procedural History

Bayshore Corp. is a Virginia corporation that is in the business of manufacturing pre-cast concrete products for use in construction projects. On April 21, 2000, the Board of Directors for Bayshore Corp. held a meeting to discuss a bid it secured to supply pre-cast concrete forms for use in the Carolina Bays Parkway project (the "project") in Horry County, South Carolina. On that same day, Bayshore Corp. formed Bayshore SC as its wholly owned subsidiary for the purpose of acting as a remote casting yard to fulfill the bid locally for the project. Bayshore Corp. then executed a lease for the South Carolina factory site and purchased casting equipment from the previous tenant, Traylor Brothers, to be used by Bayshore SC. Bayshore SC paid the rent for the leased property and used the equipment to produce the concrete forms. As a term of the lease, Bayshore SC was required to return the worksite to its original condition.

As the project reached its final stages, Bayshore SC began the cleanup of the worksite by dismantling the equipment and casting beds that were used to create the pre-stressed concrete forms. Because many of the Bayshore SC payroll employees left to seek other employment as the project drew to a close, Bayshore SC sought to hire temporary laborers to assist in the site cleanup and equipment dismantling. Bayshore SC contracted with Job Place to hire workers to help with the project, including Poch and Key.

On June 6, 2002, Poch and Key were directed by Larry Lenart, Bayshore SC's supervisor, to enter a trench dug by Lenart in order to dig around buried steel girders to extract the concrete abutments. When the trench collapsed, Key was

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[1] Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc., related entities that performed engineering and construction services, were dismissed as defendants.

injured and Poch was killed. After the accident, Poch's estate and Key received workers' compensation benefits through Job Place.

Subsequently, Petitioners sued Bayshore Corp. and Bayshore SC in tort. In their Answer, Bayshore Corp. and Bayshore SC claimed Poch and Key were statutory employees of both the parent and the subsidiary. Based on this claim, Bayshore Corp. and Bayshore SC moved for summary judgment or, alternatively, for a dismissal due to the lack of subject matter jurisdiction because workers' compensation was the exclusive remedy for Poch and Key.

After a hearing, during which the parties submitted affidavits[2] and deposition testimony, the circuit court ruled that Bayshore Corp. and Bayshore SC were immune from civil suit as Petitioners' claims fell within the exclusive jurisdiction of the Workers' Compensation Act (the "Act"). In so ruling, the court found: (1) Poch and Key were leased employees who performed the work of Bayshore SC and, in turn, that of Bayshore Corp. at the time of the accident; (2) both corporations were entitled to immunity pursuant to the workers' compensation exclusivity provision because Bayshore SC, the special employer of Poch and Key, was performing the work of Bayshore Corp.; (3) Bayshore SC and Bayshore Corp. were statutory employers of Poch and Key because the employees were performing the work of both corporations; (4) both Bayshore Corp. and Bayshore SC were entitled to workers' compensation exclusivity under the contractor/subcontractor analysis; and (5) both corporations were entitled to tort immunity as they secured workers' compensation coverage for Poch and Key.

Following the denial of their motions for reconsideration, Petitioners appealed the circuit court's order to the Court of Appeals. The Court of Appeals affirmed the decision of the circuit court. *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). In finding that Petitioners' exclusive remedy was workers' compensation benefits, the court ruled: (1) Bayshore SC was Poch's and Key's statutory employer;[3] (2)

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[2] The court denied Petitioners' motions to exclude the affidavits of (1) S. Keith Colonna, the president of Bayshore Corp. and Bayshore SC; (2) Vernon Dunbar, an attorney who attested to the statutory employer status of the corporations; and (3) Larry Lenart, the supervisor at the Bayshore SC site.

[3] Having found that Bayshore SC was Poch's and Key's statutory employer, the court declined to address any argument regarding the borrowed-employee doctrine. *Id.* at 26, 686 S.E.2d at 696.

Petitioners failed to present evidence as to any exception or statutory provision that would eliminate Bayshore SC's immunity;[4] (3) Poch and Key were statutory employees of Bayshore Corp. under a contractor/subcontractor analysis and, thus, Bayshore Corp. could invoke the workers' compensation exclusivity provision; and (4) the admission of certain affidavits did not warrant reversal. *Id.* at 23-32, 686 S.E.2d at 694-99.

This Court granted a writ of certiorari to consider whether the Court of Appeals erred in holding that: (1) Bayshore Corp. was entitled to tort immunity as an upstream, statutory employer of Poch and Key; and (2) Bayshore Corp. and Bayshore SC complied with the statutory requirements of securing workers' compensation coverage for Poch and Key. We denied the petition as to Petitioners' challenge regarding the admission of the affidavits.

II. Discussion

A. Jurisdictional Implications of Exclusive-Remedy Doctrine

"The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury." *Edens v. Bellini*, 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Id.* at 441-42, 597 S.E.2d 867. This exclusivity provision states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies

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[4] *See Cason v. Duke Energy Corp.*, 348 S.C. 544, 547 n.2, 560 S.E.2d 891, 893 n.2 (2002) ("The only exceptions to the exclusivity provisions are: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations" (citations omitted)). Recently, this Court adopted the "dual persona" doctrine as a narrow exception to the exclusivity provision. *Mendenall v. Anderson Hardwood Floors*, L.L.C., 401 S.C. 558, 738 S.E.2d 251 (2013). Our decision in *Mendenall*, however, does not affect the disposition of the instant case as the facts do not warrant an application of the "dual persona" doctrine.

> of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> *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 (1985). "The exclusivity provision of the Act applies both to 'direct' employees and to those termed 'statutory employees' under § 42-1-400."[5] *Edens*, 359 S.C. at 445, 597 S.E.2d at 869.

"South Carolina courts have repeatedly held that determination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Consequently, this Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). "Any doubts as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008).

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[5] Section 42-1-400 provides:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985).

B. Status of Bayshore SC

Petitioners assert the Court of Appeals erred in determining that Bayshore Corp.[6] was entitled to workers' compensation exclusivity as a statutory employer of Poch and Key. In support of this assertion, Petitioners claim that Bayshore Corp. was a "co-subcontractor" with Bayshore SC. Citing section 42-1-540 of the South Carolina Code, Petitioners contend this status negates workers' compensation exclusivity as it does "not apply to injuries resulting from acts of a subcontractor of the employer or his employees." Petitioners explain that "Poch, Key, and Lenart were co-subcontractors hired by a common employer on the Carolina Bays Parkway project." In turn, "Lenart's employer, Bayshore Corp. (VA) is not entitled to immunity" from tort liability.

"In determining whether an employee is engaged in activity that is 'part of [the owner's] trade, business, or occupation' as required under section 42-1-400, this Court has applied three tests." *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). "The activity is considered 'part of [the owner's] trade, business, or occupation' for purposes of the statute if it (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; ***or*** (3) has previously been performed by the owner's employees." *Id.* "If the activity at issue meets even *one* of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.' " *Id.*

We find Bayshore SC qualifies as a statutory employer under one, if not all three, of these tests. First, the work being performed by Poch and Key was an important part of Bayshore SC's business activities as Colonna, the president of both Bayshore SC and Bayshore Corp., testified the collapsed trench was dug in order to dismantle a concrete casting bed by removing concrete abutments from steel piles driven into the ground. He confirmed that dismantling casting beds was performed regularly by Bayshore employees as Bayshore "couldn't be in the business of precast concrete for long if [it] didn't have the capacity to change [] form size and be able to meet customer needs."

Second, Colonna testified that dismantling casting beds was a necessary and integral part of Bayshore's business, which was routinely completed by regular,

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[6] Based on our review of Petitioners' briefs, it appears they concede that Bayshore SC was a statutory employer as they primarily challenge Bayshore Corp.'s status. However, for the purposes of analytical progression, we have analyzed Bayshore SC's status.

payroll employees at every Bayshore facility. He also noted that the concrete bed being dismantled by Poch and Key had been constructed by regular Bayshore SC employees. Furthermore, Lenart stated that he dug the trench around the abutments and then instructed Poch and Key to enter the trench and dig around the pile caps and steel beams so that Bayshore SC welders could cut the steel beams.

As to the third test, there is evidence that the dismantling of the concrete forms and the worksite cleanup had previously been performed by Bayshore SC employees for several months prior to leasing Poch and Key. Colonna and Lenart testified that Bayshore SC leased Poch and Key to assist the remaining regular Bayshore SC employees in restoring the site to its original condition. Lenart, the Bayshore SC supervisor who dug the trench, testified that both leased and regular employees all worked together to disassemble the facilities, dig trenches, separate steel, burn wood, load equipment, and dispose of trash.

Because Bayshore SC qualified as Poch's and Key's statutory employer, it was immune from liability in tort under the Act's exclusivity provision.

C. Extension of Tort Immunity to Bayshore Corp. as Parent of Subsidiary

Even if Bayshore SC qualified as a statutory employer, Petitioners contend the Court of Appeals erred in extending tort immunity to Bayshore Corp. based on a contractor/subcontractor analysis. Petitioners assert the appropriate analysis is governed by *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962) and *Monroe v. Monsanto Co.*, 531 F. Supp. 426 (D.S.C. 1982), as these cases assess the identity between a parent corporation and its subsidiary for workers' compensation and tort immunity purposes.

Applying this legal standard, Petitioners assert Bayshore Corp. cannot claim immunity based on its relationship to its subsidiary because Bayshore SC was a separate and distinct corporate entity at the time of the accident. In support of this claim, Petitioners characterize the parent-subsidiary relationship as follows: (1) Bayshore SC, rather than Bayshore Corp., was the "owner" of the project; (2) Bayshore Corp. set up Bayshore SC as a "separate entity to independently perform work in South Carolina"; (3) Bayshore Corp. and Bayshore SC were "formally recorded as being separate corporate entities at the time of the accident"; (4) the Board of Directors of both companies were not "identical"; (5) the Bayshore "entities kept separate corporate minutes"; (6) the corporations were headquartered and transacted business in separate locations; (7) the corporations hired and paid their own employees separately; (8) the corporations "strictly maintained separate books, account records, and bank accounts"; and (9) the corporations maintained

separate federal tax identification numbers and were required to file separate tax reports.

1. Alter Ego Theory

We agree with Petitioners that the Court of Appeals applied an incorrect legal standard; however, as will be discussed, we conclude the Court of Appeals reached the correct result despite this error.

In assessing whether the employees could maintain a tort action against Bayshore Corp., we consider the following general rule:

> A parent corporation is generally not immune from an action in tort by an injured employee of its subsidiary by virtue of the employee's entitlement to workers' compensation. Where an employee of a subsidiary is injured while working on property owned by the parent corporation and receives workers' compensation benefits from the subsidiary, the employee may maintain an action in tort against the parent corporation even though parent and subsidiary are covered by same policy of workers' compensation insurance.
>
> However, a parent corporation's immunity has been recognized in some instances on the theory that the parent is or may be found to be the alter ego of the employer-subsidiary corporation.

82 Am. Jur. 2d *Workers' Compensation* § 90 (2003) (footnotes omitted); *see* Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R.4th 948, § 2 (1984 & Supp. 2013) (discussing alter ego theory by which a parent corporation may seek tort immunity via its interest in the employer-corporation; noting that immunity does not extend where: (1) parent and subsidiary are separate and distinct entities; or (2) there is evidence of fraud, abuse of corporate privilege, or an attempt to circumvent the law to avoid liability).

Initially, we note that Bayshore Corp., in seeking immunity, did not rely solely on the parent-subsidiary designation. Instead, Bayshore Corp. presented evidence through affidavits and deposition testimony to establish that the two corporations could be viewed as only one economic entity.

In examining the relationship between the two corporations, we recognize the correct approach is the one found in *Monroe v. Monsanto Company*, 531 F.

Supp. 426 (D.S.C. 1982).[7] *See* John D. DeDoncker, Note, *Adopting an Economic Reality Test When Determining Parent Corporations' Status for Workers' Compensation Purposes*, 12 J. Corp. L. 569, 577 (1987) (analyzing different theories to assess parent-subsidiary relationship for workers' compensation purposes; discussing *Monroe* and stating, "[t]he alter ego theory functions on the premise that when two corporations operate essentially as one, they should be considered as one for workers' compensation purposes").

In *Monroe*, the plaintiff sustained injuries while employed at the Fovil Manufacturing Company. *Monroe*, 531 F. Supp. at 427. The plaintiff lost his arm in a machine called the Gamble Cutter, which was designed, built, and placed in the Fovil plant by the Hale Manufacturing Company and the Monsanto Company. *Id.* After receiving workers' compensation benefits from Fovil, the plaintiff filed suit against Monsanto and Hale. *Id.* at 428. Monsanto owned all outstanding capital stock of Fovil and Hale. *Id.* at 431. The defendants moved for summary judgment on the ground the action was barred by the exclusivity provision of the Workers' Compensation Act. *Id.* at 427. The basis for the motion was their claim that both Fovil and Hale were wholly owned corporate subsidiaries of Monsanto and that all three corporations were in essence a single entity. *Id.* The plaintiff only opposed the motion as to Hale. *Id.* Ultimately, the United States District Court of South Carolina denied the motion, finding Hale was a separate and distinct corporate entity from that of the plaintiff's employer, Fovil. As a result, the court found that Hale could not escape tort liability. *Id.* at 434-35.

In reaching this conclusion, the court analyzed South Carolina law[8] and gleaned eight factors that courts should consider in determining whether two related businesses are separate and distinct corporations for workers' compensation purposes. *Id.* at 432-34. These factors may be assessed by answering the following questions:

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[7] Although the Court of Appeals referenced *Monroe*, it declined to apply it as the court believed the contractor/subcontractor analysis was more appropriate. *Poch*, 386 S.C. at 27 n.3, 686 S.E.2d at 697 n.3 ("Though we believe *Monroe* is persuasive, we do not believe it is controlling, and we rely upon other case law from South Carolina.").

[8] Specifically, the court considered the following cases: (1) *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E.2d 718 (1948); (2) *Brown v. Moorhead Oil Co.*, 239 S.C. 604,124 S.E.2d 47 (1962); and (3) *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.S.C. 1977).

(1) Did the two businesses maintain separate corporate identities?

(2) Did the two businesses maintain separate Boards of Directors?

(3) Did the two businesses transact business from different locations under different managers?

(4) Did the two businesses hire and pay their own employees?

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

(6) Did the two corporations engage in different business activities?

(7) Did the two corporations maintain separate books, bank accounts, and payroll records?

(8) Did the two corporations file separate tax returns?

Id. at 434. Although the court enumerated these eight factors, it emphasized that these factors were not the only relevant factors and that none of the factors alone provided immunity. *Id.*

2. Application of *Monroe* Factors

Keeping in mind that no one factor is controlling, the weight of the evidence supports a finding that Bayshore SC was the alter ego of Bayshore Corp.

First, the two businesses did not clearly maintain separate identities as Colonna, the president of both corporations, testified that "Bayshore" was used "interchangeably" in signing documents, including the lease agreement for the project and the Job Place contract. Furthermore, documents such as letterhead, employment applications, benefits packages, and safety manuals used at the South Carolina site displayed a standard Bayshore Corp. designation. In terms of workers' compensation coverage, Colonna testified that one policy covered all corporations but that separate, self-insured reserve funds were set up for each corporation.

Second, with the exception of two people, the corporations shared the same officers and directors. In fact, Bayshore SC's Board of Directors was comprised

entirely of members of the Bayshore Corp.'s Board of Directors. All officers received their salaries from Bayshore Corp. Notably, the same legal counsel, safety director, and engineers were used for both corporations and paid by Bayshore Corp.

As to the third factor, Bayshore Corp. was headquartered in Virginia whereas Bayshore SC operated exclusively in South Carolina. However, Bayshore Corp. entered into the lease agreement in South Carolina, purchased the equipment to be used on the jobsite, and periodically sent several Bayshore Corp. employees to oversee the completion of the project. Significantly, all of the billing invoices and normal correspondence for Bayshore SC were sent to Bayshore Corp. in Cape Charles, Virginia. Bayshore Corp. also retained all of Bayshore SC's corporate and personnel files.

In terms of the fourth factor, Colonna testified that the hiring and firing of salaried employees at the South Carolina site was done by a Bayshore Corp. employee. He further testified that salaried employees, who worked on the South Carolina site, received a paycheck from Bayshore Corp. and were provided 401(k) plans and healthcare coverage through Bayshore Corp. These salaried employees included: (1) Lenart, the production supervisor; (2) Brandon Rowe, the plant manager; and (3) Randy Maccoon, the quality control supervisor. Hourly employees were paid through Bayshore SC. Bayshore SC also hired the temporary workers, including Poch and Key, to assist on the site. Toward the conclusion of the project, the invoices for these workers were paid through the accounts payable department at Bayshore Corp.

Regarding the fifth factor, the two corporations did not hold themselves out to their employees as separate entities as Bayshore SC employees were provided with employment documents that were standard for Bayshore Corp.

As to the sixth factor, both corporations engaged in the same business activity of providing concrete forms for construction sites. Both corporations also used the same process and equipment in performing this work.

In terms of the seventh factor, the two corporations maintained separate books, accounting records, and bank accounts for purposes of financial accountability. However, Bayshore SC contributed to Bayshore Corp.'s gross revenues. More importantly, Bayshore Corp. was entirely responsible for the financial operation of Bayshore SC.

Finally, as to the eighth factor, the two corporations maintained separate tax identification numbers and filed separate tax returns. Admittedly, the separate tax return filings militate against the Respondents; however, this one factor, though weighty, is not dispositive in the workers' compensation context. Considering the preponderance of the evidence, we conclude that Bayshore Corp. and Bayshore SC operated as one economic entity.

Based on the foregoing, we find the circuit court and the Court of Appeals correctly determined that Bayshore Corp. was immune from the employees' tort actions as the two corporations could be viewed as only one economic entity.[9] *See* 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43.80 (Supp. 2012) ("A holding company and its wholly owned subsidiary will be considered a single employer for workers' compensation purposes if the two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity.").[10]

D. Bayshore Corp.'s Status with Respect to Procurement of Workers' Compensation Insurance

If Bayshore Corp. and Bayshore SC were immune from tort liability due to their employment/corporate status, Petitioners claim the Court of Appeals erred in finding the corporations could benefit from this immunity as they failed to offer proof of or secure workers' compensation coverage for Poch and Key in violation of the provisions of the Act.

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[9] In applying the eight-factor *Monroe* test, the dissent reaches the opposite conclusion. The dissent's position, which is contrary to our view, the decision of the Court of Appeals, and the circuit court's holding, is based on no specific evidence. Rather, the dissent offers a cursory review of the few factors that favor its position. Although the *Monroe* test is not mathematically precise and no single factor is determinative, we believe the dissent may have overlooked the preponderance of the evidence to reach a desired result.

[10] In view of this conclusion, we reject Petitioners' "co-subcontractor" contention as neither corporation comes within the definition of a "subcontractor." *See Black's Law Dictionary* 1437 (7th ed. 1999) (defining "subcontractor" as "One who is awarded a portion of an existing contract by a contractor, esp. a general contractor").

Citing section 42-5-40[11] of the South Carolina Code and this Court's decision in *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999), Petitioners assert that "each entity who seeks to take advantage of Workers' Compensation immunity must demonstrate that it secured Workers' Compensation benefits for the statutory employee, even if the statutory employee's immediate employer has already secured those benefits."

Petitioners further assert that "neither Bayshore Corp. (VA) nor Bayshore SC secured compensation directly or indirectly for Poch and Key, nor did they meet the requirements of section 42-1-415(B)" of the South Carolina Code,[12] which provides a method by which a corporation can demonstrate that their statutory employees are covered by workers' compensation insurance at the time of hiring even though the corporation is not directly liable as a statutory employer.

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[11] Section 42-5-40 provides:

> Any employer required to secure the payment of compensation under this Title who refuses or neglects to secure such compensation . . . shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Title or at law in an action instituted by the employee or his personal representative against such employer to recover damages for personal injury or death by accident and in any such action such employer shall not be permitted to defend upon any of the grounds mentioned in Section 42-1-510.

S.C. Code Ann. § 42-5-40 (1985). This code section was amended effective July 1, 2007. However, because the work-related accident occurred on June 6, 2002, we cite to the earlier version of the statute.

[12] Section 42-1-415 provides in relevant part:

> To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) 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 and must be turned over to the commission at the time a claim is filed by the injured employee.

S.C. Code Ann. § 42-1-415(B) (Supp. 2012).

Essentially, Petitioners challenge the following findings of the Court of Appeals: (1) section 42-5-40 concerns only the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state Uninsured Employer's Fund and cannot be applied to prevent an employer from benefitting from the exclusivity provision; and (2) section 42-1-415(B) applies only to situations when a person seeks to qualify for reimbursement from the Uninsured Employer's Fund.

Insurance Requirements as Interpreted in *Harrell*

We find the Court of Appeals' interpretation of section 42-5-40 is erroneous as it is in direct conflict with this Court's decision in *Harrell*. In that case, Harrell, an employee of Folk Land Management, Inc., filed a negligence action against Pineland Plantation, Ltd., the partnership that owned and operated a plantation maintained as a vacation resort where Harrell sustained an injury for which he received workers' compensation benefits from Folk. *Harrell*, 337 S.C. at 317-19, 523 S.E.2d at 768-69. After settling his workers' compensation claim against Folk, Harrell brought a tort action against Pineland for negligence. *Id.* at 319, 523 S.E.2d at 769. The circuit court dismissed Harrell's complaint on the ground his exclusive remedy was under the Workers' Compensation Act. *Id.*

On appeal, the Court of Appeals reversed the circuit court's order, finding Harrell could sue Pineland in an action at law. *Id.* This Court granted a writ of certiorari to consider whether Pineland was Harrell's statutory employer under the Act and whether Pineland was immune from tort pursuant to the Act's exclusive remedy provision even though it did not purchase its own workers' compensation coverage or otherwise qualify as self-insured under the Act. *Id.* at 320, 523 S.E.2d at 769.

Having found Pineland was Harrell's statutory employer, we analyzed whether Pineland could claim immunity under the Act even though it did not provide any form of workers' compensation insurance. *Id.* at 325, 523 S.E.2d at 772. Because Pineland failed to secure the payment of compensation as prescribed by sections 42-5-10 and -20 of the Act, we held that Pineland could not avail itself of tort immunity under the Act's exclusive remedy provision. *Id.* at 331, 523 S.E.2d at 775. In reaching this conclusion, we explained that "an employer who fails to secure the payment of compensation as prescribed in section 42-5-20 loses its immunity under the Act's exclusive remedy provision" and becomes liable

either under the Act or in an action at law pursuant to section 42-5-40. *Id.* at 327, 523 S.E.2d at 773 (emphasis added).

In *Glover v. United States*, 337 S.C. 307, 523 S.E.2d 763 (1999), we reaffirmed our decision in *Harrell*, explaining that:

> Under the Act, the basic duty of any employer, whether it be the direct employer or statutory employer, is the obligation to secure the payment of compensation as prescribed by section 42-5-20. Compliance with this obligation is the *quid pro quo* exacted from the employer in exchange for immunity. Thus, a statutory employer who fails to secure the payment of compensation as prescribed by section 42-5-20 may not claim immunity under the Act.

Id. at 310-11, 523 S.E.2d at 764.

1. Procurement of Insurance

Based on *Harrell* and its progeny, Petitioners are correct that Bayshore Corp. and Bayshore SC could have lost their tort immunity had they failed to procure workers' compensation coverage for Poch and Key at the time of hiring. However, we hold the corporations preserved their immunity as there is evidence to support the circuit court's finding that "both retained worker's compensation insurance that would have covered [Petitioners] had Job Place/Personnel Resources failed to secure coverage."

Although a lack of coverage was not directly contested before the circuit court, the Respondents nevertheless offered the affidavit of Richard Stadler, the construction underwriter for St. Paul/Travelers Insurance Company. Stadler attested that Bayshore Corp. and Bayshore SC had workers' compensation coverage at the time of the accident as there was an "insurance policy [that] cover[ed] Bayshore Concrete Products Corporation and of South Carolina Inc."[13]

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[13] The dissent refuses to accept this affidavit as evidence of proof of workers' compensation insurance. The dissent, however, neither challenges the truthfulness of the affidavit nor offers supporting authority for its position. Accordingly, we discern no basis for which to reject the affidavit as it is by its very nature a sworn statement intended as documentary evidence in a legal proceeding. *See Marine Wharf & Storage Co. v. Parsons*, 49 S.C. 136, 139, 26 S.E. 956, 966 (1897) ("An 'affidavit' is defined in 1 Am. & Eng. Enc. Law, p. 307, to be 'a formal written (or printed) voluntary ex parte statement sworn (or affirmed) to before an officer authorized to take it, to be used in legal proceedings.' ").

Additionally, Colonna, who is the president of both corporations, testified that workers' compensation coverage was secured for the South Carolina site at the time of the accident. He further noted that "an excess or umbrella policy," which was above the self-insured reserved, covered "all the companies."[14] Thus, without evidence to the contrary, we find the corporate entities complied with the requirements of *Harrell.*

The dissenters reach a contrary result by placing form over substance as to the issue of procurement of insurance by Bayshore Corp. and Bayshore SC. Without dispute, evidence of compliance with section 42-5-20 is required of every employer subject to the provisions of the Workers' Compensation Act. Section 42-5-20, however, allows employers to provide proof of insurance or financial ability to pay through various sources, including self-insurance. Notably, the responsibility for filing proof of compliance with section 42-5-20 falls on the insurance carrier unless the employer is self-insured. Here, contrary to the dissenters' assumption, Bayshore's alleged umbrella insurance policy did not transform Bayshore into a self-insured employer. 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. Should Bayshore be penalized for failing to do something that it was not required to do? We think not. We must also recognize there was no allegation or evidence in the record to suggest that proof of compliance with section 42-5-20 was not filed.

Furthermore, we emphasize that this case did not go to trial but, rather, was presented in the posture of Respondents' motion for summary judgment or alternative motion to dismiss. Undoubtedly, the parties were aware that the evidence presented at this hearing would include affidavits. The affidavit of the construction underwriter for St. Paul/Travelers Insurance Company specifically stated that the insurance policy covered Poch's and Key's workers' compensation claims. This affidavit was not challenged during the motion hearing. Yet, inexplicably, the dissenters find this unchallenged affidavit from the insurance carrier to be insufficient evidence at the summary judgment/motion to dismiss hearing.

Having concluded that Bayshore Corp. and Bayshore SC secured workers' compensation coverage, we find Petitioners' reliance on section 42-1-415(B) is misplaced as that provision applies only in cases involving reimbursement from the

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[14] Despite Colonna's use of the term "self-insured," there was an insurance policy in existence that provided workers' compensation coverage.

Uninsured Employer's Fund and neither corporation in the instant case sought to transfer liability to the Fund. *See Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 315, 680 S.E.2d 1, 3 (2009) (interpreting section 42-1-415 and stating, "Liability may only be transferred from the higher tier contractor to the Fund after the higher tier contractor has properly documented the lower tier contractor's claim that it retains workers' compensation insurance").

III. Conclusion

Based on the foregoing, we find the Court of Appeals correctly affirmed the decision of the circuit court as Bayshore SC and Bayshore Corp. proved they were entitled to immunity from tort under the Act's exclusivity provision. However, in reaching this decision, the Court of Appeals erred in its analysis as it should have utilized the alter ego theory rather than the contractor/subcontractor doctrine in determining whether tort immunity extended to Bayshore Corp. Furthermore, the Court of Appeals misinterpreted this Court's decision in *Harrell* as a statutory employer can lose its immunity under the Act's exclusive remedy provision if the employer fails to secure the payment of workers' compensation as prescribed by the Act. Because Bayshore SC and Bayshore Corp. secured such coverage, they retained their immunity. Accordingly, we affirm as modified the decision of the Court of Appeals.

AFFIRMED AS MODIFIED.

KITTREDGE, J., and Acting Justice James E. Moore, concur. TOAL, C.J., and PLEICONES, J., concur in part and dissent in part in separate opinions.

CHIEF JUSTICE TOAL: I respectfully concur in part, and dissent in part. First, I agree wholeheartedly with the majority's adoption of the *Monroe*[15] factors and its application of these factors in the instant case. In my opinion, the evidence supports a finding that Bayshore SC was the alter ego of Bayshore Corp. and both should be immune from liability in tort as statutory employers of Poch and Key.

As to Petitioners' next argument, that the court of appeals erred in finding that Bayshore Corp. and Bayshore SC could benefit from the immunity because they failed to offer proof of or secure workers' compensation coverage in violation of the Act and this Court's decision in *Harrell*,[16] the majority was correct in finding that the court of appeals misinterpreted *Harrell*. I agree with the majority's interpretation that, pursuant to *Harrell*, a statutory employer becomes liable under section 42-5-40 of the South Carolina Code[17] for failure to secure workers' compensation insurance for the statutory employee in accordance with the Act.

However, I join Justice Pleicones's dissenting opinion because it is my view that Bayshore Corp. and Bayshore SC did not submit adequate proof that they secured or filed evidence of workers' compensation coverage as required by the Act and *Harrell*. *See* S.C. Code Ann. § 42-5-20 (Supp. 1998) ("Every employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or mutual insurance association formed by a group of employers so authorized or shall furnish to the commission satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this title."); *id.* § 42-5-30 (Supp. 2012) ("Every employer accepting the compensation provisions of this title shall file with the Commission, in form prescribed by it, annually or as often as may be necessary evidence of his compliance with the provisions of § 42-5-20 and all others relating thereto."); *Harrell*, 337 S.C. at 328, 523 S.E.2d at 774 (refusing "to adopt an interpretation of the Act that would allow [an employer] to claim tort immunity without complying with the quintessential obligation imposed upon [the employer] by the Act—the duty to *secure* the payment of compensation." (emphasis in original) (alterations added)). With respect to Bayshore SC's coverage, the

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[15] *Monroe v. Monsanto*, 531 F. Supp. 426 (D.S.C. 1982).

[16] *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

[17] *See* S.C. Code Ann. § 42-5-40 (1985).

corporations submitted an affidavit of Richard Stadler, the construction underwriter for St. Paul/Travelers Insurance Company as proof of coverage.[18] In my view, the content of this affidavit is grossly insufficient to establish that either corporation procured workers' compensation insurance, filed evidence of workers' compensation insurance, or filed evidence of financial ability sufficient to qualify as self-insured. *See* S.C. Code Ann. §§ 42-5-10 (1985); 42-5-20; 42-5-30; 42-5-40. Stadler's affidavit does not contain the requisite specificity required under the statute, as it does not refer to the precise type of coverage or time period covered, and thus, we are unable to discern the kind and scope of coverage allegedly in effect at the time of the accident. Moreover, there is no evidence that the corporations filed proof of insurance with the Commission. The majority further relies on the testimony of Keith Colonna, the president of both corporations, who testified that the corporations secured workers' compensation insurance prior to the accident, noting that "an excess or umbrella policy" above the self-insured reserve, covered "all the companies." I agree with Justice Pleicones that "the only inference to be drawn from this record in light of Mr. Colonna's testimony is that both Bayshore entities viewed themselves as self-insured, and that the underwriter was referring to a liability umbrella policy." Thus, I join his dissent in part, as I, too, am unwilling to hold that a mere representation of coverage by an employer is sufficient to meet the statutory requirements, and I disagree with the majority's holding that the corporations retained tort immunity because they procured workers' compensation for the employees. The majority's conclusion is simply unsupported by this record.

Therefore, I would hold that because neither Bayshore SC nor Bayshore Corp. complied with the insuring requirement of the Act, they are liable in tort to under section 42-5-40. Accordingly, I would reverse the court of appeals.

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[18] I note that Stadler's affidavit makes no mention of Bayshore Corp.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree that we should explicitly adopt the *Monroe*[19] test here, but reach the opposite result when I apply that test to these facts. Further, I find no evidence that either Bayshore entity purchased workers' compensation liability insurance within the meaning of our statutes and conclude that neither can invoke tort immunity.

In my opinion, there is no evidence in the record that either Bayshore SC or Bayshore Corp "insure[d] and ke[pt] insured his liability" as required by S.C. Code Ann. § 42-5-20 (Supp. 2012) and therefore both are subject to a suit in tort.

S.C. Code Ann. § 42-5-40 (Supp. 2012). An affidavit from an underwriter to the effect "[t]hat the insurance policy [covering both Bayshore entities] as written would have provided Workers' Compensation coverage" for petitioners is insufficient to support a finding that the policy to which he refers contains the provisions required by S.C. Code Ann. § 42-5-70 (1984) or that imposed by § 42-5-80(A) (Supp. 2012). In fact, the only inference to be drawn from this record in light of Mr. Colonna's testimony is that both Bayshore entities viewed themselves as self-insured, and that the underwriter was referring to a liability umbrella policy. There is neither evidence nor any representation that the Bayshore entities met the South Carolina statutory requirements for self-insurers. *See* S. C. Code Ann. § 42-5-20; § 42-5-50 (1984); § 42-5-10 (Supp. 2012). I am unwilling to hold that an employer's mere representation that it is self-insured is sufficient to satisfy the statutes, nor am I willing to agree that an umbrella policy is sufficient to meet the insuring requirements. I disagree with the majority's conclusion that there is evidence the Bayshore entities directly purchased workers' compensation liability coverage.

Based upon my view of the evidence, I conclude neither Bayshore SC nor Bayshore Corp. complied with the insuring requirement of § 42-5-20, and therefore may be liable in tort to petitioners pursuant to § 42-5-40. *Harrell V. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999).

I agree we should explicitly adopt the eight-factor *Monroe* test for determining the relationship between parent and subsidiary in the workers' compensation area. In light of this decision, we should remand the case in

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[19] *Monroe v. Monsanto Co.*, 531 F.Supp. 426 (D.S.C. 1982).

order to allow the parties to present any additional relevant evidence, and to allow the Commission to make a factual determination. If, however, we are to apply this new test in this appeal, then viewing these factors in light of the facts as recited by the majority, I would conclude that Bayshore SC and Bayshore Corp. are separate economic entities. The businesses maintained separate corporate identities, had separate Boards of Directors albeit with many common members, were located in two different locations, hired and paid at least some of their own employees, maintained separate books, bank accounts, and payroll records, and filed separate tax returns. I therefore disagree with the majority's conclusion that Bayshore Corp. shares Bayshore SC's status as petitioner's statutory employer. As explained above, I also disagree with the majority's finding that the Bayshore entities met the insuring requirement found in § 42-5-20. I therefore would find both Bayshore SC and Bayshore Corp. may be liable in tort to petitioners under § 42-5-40. Finally, I agree with the majority that we should explicitly adopt the *Monroe* test, and I also agree that § 42-1-415(B) is inapplicable here.

Because I find that both Bayshore SC and Bayshore Corp. failed to meet their statutory workers' compensation insuring obligations, I would reverse the decision of the Court of Appeals which upheld the circuit court finding that both Bayshore SC and Bayshore Corp. are immune from tort liability

686 S.E.2d 689
386 S.C. 13, 686 S.E.2d 689
(Cite as: 386 S.C. 13, 686 S.E.2d 689)

H

Court of Appeals of South Carolina.
Thelma M. POCH, as Personal Representative for the Estate of Kenneth O. Poch, Appellant,
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., and Bayshore Concrete Products Corporation are the Respondents.
Kevin Key and Sandra Key, Appellants,
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., and Bayshore Concrete Products Corporation are the Respondents.
Thelma M. Poch, as Personal Representative for the Estate of Kenneth O. Poch and Julius Poch, Appellant,
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., and Bayshore Concrete Products Corporation are the Respondents.

No. 4617.
Heard April 22, 2009.
Decided Sept. 9, 2009.
Rehearing Denied Dec. 7, 2009.

Background: Personal representative of temporary worker's estate, and injured temporary worker, brought wrongful death and personal injury actions against concrete products supplier and its parent company after workers were involved in a work-related accident at the supplier's leased work site. The Circuit Court, Horry County, Paul M. Burch, J., dismissed plaintiffs' causes of action as barred by the exclusivity provision of the Workers' Compensation Act. Personal representative and injured worker appealed.

Holdings: The Court of Appeals, Lockemy, J., held that:
(1) supplier was the workers' statutory employer and, thus, was entitled to immunity under the exclusivity provision of the Workers' Compensation Act;
(2) supplier's alleged fraud and the alleged lack of meeting of the minds between supplier and workers' employer did not bar supplier from asserting entitlement to immunity under the exclusivity provision; and
(3) supplier's parent company was an upstream statutory employer of the workers and, thus, was entitled to immunity under the exclusivity provision.

Affirmed.

West Headnotes

[1] Workers' Compensation 413 ⚿1709

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)3 Questions of Law and Fact
413k1708 Employees Within Intent of Acts
413k1709 k. In general. Most Cited Cases
The existence of the employer-employee relationship for workers' compensation purposes is a jurisdictional question and one of law.

[2] Appeal and Error 30 ⚿989

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and

Findings
30XVI(I)1 In General
30k988 Extent of Review
30k989 k. In general. Most Cited Cases

Appeal and Error 30 ⚖1122(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(A) Decision in General
30k1122 Findings and Conclusions
30k1122(2) k. Authority to find facts. Most Cited Cases

When deciding questions of law, the Court of Appeals has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence.

[3] Workers' Compensation 413 ⚖1347

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(L) Presumptions and Burden of Proof
413XVI(L)2 Particular Matters
413k1343 Persons and Employments Within Act
413k1347 k. Employers within act. Most Cited Cases

Workers' Compensation 413 ⚖1348

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(L) Presumptions and Burden of Proof
413XVI(L)2 Particular Matters
413k1343 Persons and Employments Within Act
413k1348 k. Employees within act. Most Cited Cases

It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Code 1976, § 42-1-10 et seq.

[4] Courts 106 ⚖4

106 Courts
1061 Nature, Extent, and Exercise of Jurisdiction in General
106k3 Jurisdiction of Cause of Action
106k4 k. In general. Most Cited Cases

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.

[5] Workers' Compensation 413 ⚖359

413 Workers' Compensation
413V Employees Within Acts
413V(G) Employees of Contractor or Subcontractor
413k356 Insurance by Contractor or Subcontractor or Device to Escape Liability by Principal
413k359 k. Failure to insure or to require insurance. Most Cited Cases

Failure of concrete products supplier to collect insurance documentation when temporary workers were engaged to perform work on supplier's leased work site did not preclude supplier from being the workers' statutory employer and, thus, entitled to immunity under exclusivity provision of the Workers' Compensation Act with regard to work-related accident in which one worker was killed and the other was severely injured; statute requiring higher-tier subcontractor, contractor or project owner to collect documentation of insurance concerned only eligibility for reimbursement from Uninsured Employer's Fund and had no bearing on the supplier's statutory employer status. Code 1976, §§ 42-1-415, 42-1-540.

[6] Workers' Compensation 413 ⚖2161

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)1 Right of Action of Employee

or Representative Generally
413k2160 What Persons Liable as Third Persons
413k2161 k. In general. Most Cited Cases

Concrete products supplier that hired temporary workers to perform site cleanup and equipment dismantling on its leased work site was the workers' statutory employer and, thus, was entitled to immunity under exclusivity provision of the Workers' Compensation Act with regard to work-related accident in which one worker was killed and the other was severely injured; supplier had contracted with the workers' employer to provide additional workers for its site, supplier's own employees assisted in the same type of removal work, and removal work performed by the workers was essential to supplier's business because its lease agreement required supplier to leave the site in the same or better condition. Code 1976, § 42–1–540.

[7] Workers' Compensation 413 ⚿187

413 Workers' Compensation
413IV Employers Within Acts
413IV(A) In General
413k187 k. Statutory employers. Most Cited Cases

The concept of statutory employment is designed to protect the employee by assuring workers' compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business. Code 1976, § 42–1–410.

[8] Workers' Compensation 413 ⚿281

413 Workers' Compensation
413V Employees Within Acts
413V(C) Casual Employees and Employment in Trade or Business of Employer
413V(C)2 Employment in Trade or Business of Employer
413k281 k. Test and determination of employment in usual course of business in general. Most Cited Cases

In determining whether a worker is a statutory employee for workers' compensation purposes, courts consider the following three factors: (1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer. Code 1976, § 42–1–410.

[9] Workers' Compensation 413 ⚿2161

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)1 Right of Action of Employee or Representative Generally
413k2160 What Persons Liable as Third Persons
413k2161 k. In general. Most Cited Cases

Concrete products supplier's alleged fraud in misrepresenting the work to be performed by temporary workers at its leased work site, and the alleged lack of meeting of the minds between supplier and temporary workers' employer, did not bar supplier from asserting entitlement, as the workers' statutory employer, to immunity under exclusivity provision of the Workers' Compensation Act with regard to work-related accident in which one worker was killed and the other was severely injured; neither fraud nor a lack of the meeting of the minds qualified as exceptions to the exclusivity provision. Code 1976, § 42–1–540.

[10] Workers' Compensation 413 ⚿2161

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)1 Right of Action of Employee or Representative Generally

413k2160 What Persons Liable as Third Persons

413k2161 k. In general. Most Cited Cases

Parent company of concrete products supplier, which was statutory employer of temporary workers who sustained severe or fatal injuries at supplier's leased work site, was an upstream statutory employer of the temporary workers and, thus, was entitled to immunity under exclusivity provision of the Workers' Compensation Act; parent company's salaried employees exercised control over the hourly employees of supplier, it was important to parent company for supplier to be successful and profitable in the business venture, supplier and parent company maintained intertwined operations, and supplier and parent company's business activities were similar, with many of the same salaried employees. Code 1976, § 42–1–540.

[11] Appeal and Error 30 ⚿970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

Trial 388 ⚿43

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k43 k. Admission of evidence in general. Most Cited Cases

In regard to evidentiary rulings, it is within the circuit court's discretion to decide what is admissible and on appeal, the appellate court should reverse the circuit court's ruling only when based on a legal error.

[12] Workers' Compensation 413 ⚿2242

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)5 Actions and Proceedings
413k2242 k. Appeal and error. Most Cited Cases

Any consideration by trial court of expert's affidavit that went to the ultimate issue of whether temporary workers were statutory employees of concrete products supplier, for purposes of tort immunity under exclusivity provision of the Workers' Compensation Act, was not outcome determinative with regard to trial court's grant of supplier's and its parent company's motion for summary judgment or dismissal, in personal injury and wrongful death actions stemming from work-related accident involving temporary workers, and thus reversal of trial court's dismissal was not required, where the supplier's and parent company's exclusivity immunity were clear. Code 1976, § 42–1–540.

[13] Workers' Compensation 413 ⚿2242

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)5 Actions and Proceedings
413k2242 k. Appeal and error. Most Cited Cases

Personal representative of temporary worker's estate and injured temporary worker failed to preserve for review, on appeal of trial court's grant of concrete products supplier's and its parent company's motion for summary judgment or dismissal in wrongful death and personal injury actions arising from work-related accident, their argument that trial court should have disregarded a certain affidavit under the "competing" or "sham" affidavit exception to judicial estoppel test, where personal representative's and injured worker's motion to exclude the affidavit relied only on the doctrine of judicial estoppel, and they did not raise the

"competing" or "sham" affidavit exception until their motion to reconsider, alter or amend judgment. Rules Civ.Proc., Rule 59(e).

[14] Judgment 228 ⚿294

228 Judgment
228VIII Amendment, Correction, and Review in Same Court
228k294 k. Nature and scope of remedy. Most Cited Cases

Motions 267 ⚿39

267 Motions
267k39 k. Reargument or rehearing. Most Cited Cases
A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Rules Civ.Proc., Rule 59.

**691 Christine Companion Varnado, John Kuhn, and Frank X. Duff, all of Charleston, and **692 Gerald E. Loftstead, III, of Wheeling, WV, for Appellants.

Samuel R. Clawson, Timothy A. Domin, and Barrett R. Brewer, all of Charleston, for Respondents.

LOCKEMY, J.

*17 Thelma Poch, as the Personal Representative for the Estate of Kenneth O. Poch and Kevin and Sandra Key appeal the circuit court's order of dismissal of their causes of actions *18 against Bayshore Concrete Products South Carolina, Inc. (Bayshore SC), and Bayshore Concrete Products Corporation, Tidewater Skanska Group, Inc., and Tidewater Skanska, Inc. (Bayshore Corp) following a finding all claims were barred by the exclusivity provision of the Workers' Compensation Act. We affirm.

FACTS

Bayshore Corp is a Virginia corporation which is in the business of manufacturing pre-cast concrete products for use in construction projects. Bayshore SC is a South Carolina corporation which is a wholly owned subsidiary of Bayshore Corp and is also in the business of manufacturing precast concrete products for use in construction projects. After securing a bid to supply pre-cast concrete forms for use in the Carolina Bays Parkway project in Horry County, Bayshore Corp formed Bayshore SC, to effectively act as a remote casting yard to fulfill the bid for the Carolina Bays project locally in South Carolina. Bayshore Corp executed a lease for a South Carolina factory site and purchased equipment on behalf of Bayshore SC so that Bayshore SC could produce the concrete forms necessary to fulfill the bid. Bayshore SC paid the rent for the leased property, and Bayshore SC used the equipment to produce the concrete forms for the Carolina Bays Project. Under the terms of the lease, Bayshore SC was required to return the work site to its original condition.

While Bayshore SC was in the final stages of finishing its Carolina Bays project, it contracted with Job Place to hire workers for the site cleanup and equipment dismantling. Job Place had previously leased several employees of Personnel Resources of Georgia (Personnel Resources), and Job Place signed a contract with Personnel Resources on June 13, 2002. Job Place provided Bayshore SC with approximately ten workers to help with the project, including Kevin Key and Kenneth Poch. During the completion of the casting removal job, Poch and Key were involved in a work related accident when the trench where they were working caved in. Poch died as a result of the accident, and Key was severely injured. When the accident occurred on June 6, 2002, Key and Poch worked directly with Larry Lenart, a Bayshore SC supervisor. *19 After the accident, Poch's Estate and Key received workers' compensation benefits through Job Place.

After receiving workers' compensation benefits, Poch's Estate and Key sued Bayshore Corp and Bayshore SC. Specifically, Thelma Poch, Kenneth's

mother, filed a wrongful death and survival action, alleging negligence, gross negligence, professional negligence, breach of a professional duty, and premises liability. Kevin and Sandra Key filed a personal injury and loss of consortium action and also alleged negligence, gross negligence, professional negligence, breach of a professional duty, and premise liability. In their answer, Bayshore Corp and Bayshore SC claimed Kenneth Poch and Kevin Key were statutory employees of both the parent and the subsidiary. In an amended complaint, Thelma Poch and the Keys added a cause of action for breach of contract accompanied by fraud and negligent and/or intentional misrepresentation and/or deceit.

Bayshore Corp and Bayshore SC then moved for summary judgment and alternatively moved to dismiss for lack of subject matter jurisdiction. Specifically, Bayshore Corp and Bayshore SC requested a hearing to determine workers' compensation exclusivity jurisdiction. On April 19, 2007, the Honorable Steven H. John issued an order confirming the agreement of the parties to schedule a hearing date for the motions hearing. In his order, Judge John noted the parties agreed to a half day hearing, that the presentation of evidence would be by way of affidavits, deposition testimony, and applicable records. Further, the order allowed both **693 parties to submit memoranda of law prior to the May 31, 2007 hearing.

Prior to the May 31 hearing, Appellants filed motions to exclude affidavits of Keith Colonna, Larry Lenart, and Vernon Dunbar. After a hearing on June 1, 2007, the circuit court addressed Bayshore's motions and included several factual findings. The circuit court determined Bayshore Corp and Bayshore SC were immune from civil suit under the workers' compensation exclusivity provisions. Specifically, the circuit court found: (1) Poch and Key were leased employees, solely performing the work of Bayshore Corp and Bayshore SC at the time of this accident; (2) Bayshore SC was a wholly owned subsidiary of Bayshore Corp formed for the purpose of filling *20 a bid secured by Bayshore Corp to supply concrete forms to the Carolina Bays project. Bayshore SC was the special employer of Appellants and, because Bayshore SC was performing the work of Bayshore Corp both parent and subsidiary were entitled to immunity pursuant to worker's compensation exclusivity; (3) under the subcontractor analysis, both Bayshore SC and Bayshore Corp were entitled to workers' compensation exclusivity; and (4) Bayshore SC and Bayshore Corp were statutory employers of Poch and Key because Appellants were performing the work of Bayshore SC and Bayshore Corp In three separate orders the circuit court denied Appellants' motion to exclude the affidavits.

The circuit court found Appellants' reliance on section 42–5–40 of the South Carolina Code (Supp.2007) for the proposition that Bayshore SC and Bayshore Corp did not secure worker's compensation coverage and were not entitled to immunity was misplaced. Specifically, the circuit court noted section 42–5–40 only concerns the ability of an upstream employer to shift the burden of worker's compensation coverage onto the state uninsured fund and explicitly cannot be applied to prevent an employer from benefitting from worker's compensation exclusivity. Accordingly, the circuit court dismissed Bayshore SC and Bayshore Corp from this case with prejudice after finding it lacked subject matter jurisdiction to hear the action.

Thereafter, Appellants filed a Rule 59(e) motion. In their motion, Appellants asked the circuit court to reconsider several factual findings and argued the circuit court erred in finding Poch and Key were employees of both Bayshore SC and Bayshore Corp and that both parent and subsidiary had workers' compensation insurance. Poch and Key argued the circuit court erred in finding Bayshore SC and Bayshore Corp were entitled to workers' compensation exclusivity because Poch and Key were (1) special or borrowed employees; or (2) statutory employees because neither Job Place nor Bayshore SC ever transferred certain documentation per statute.

Additionally, Appellants argued Bayshore SC fraudulently misrepresented the work that it required the temporary employees to perform, the elements of fraud were met, and no meeting of the minds was reached between the parties. Appellants maintained Bayshore SC and Bayshore Corp are separate entities and should be treated separately for purposes of workers' ***21** compensation coverage. Appellants argued Bayshore Corp did not own the work site where the injury occurred and thus the circuit court erred in concluding both Bayshore SC and Bayshore Corp were entitled to exclusivity under the subcontractor analysis. Appellants argued the circuit court erred in finding Bayshore Corp was Poch and Key's statutory employer. The circuit court did not specifically rule on Appellants' Rule 59(e) arguments but generally denied their motion for reconsideration. This appeal follows.

STANDARD OF REVIEW

[1][2][3] The existence of the employer-employee relationship is a jurisdictional question and one of law. *Porter v. Labor Depot,* 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007). When deciding questions of law, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.,* 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); *Harrell v. Pineland Plantation, Ltd.,* 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999). It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the ****694** inclusion of employers and employees under the Workers' Compensation Act. *Hill v. Eagle Motor Lines,* 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007); *see also Wilkinson,* 382 S.C. at 300, 676 S.E.2d at 702 (indicating the court's sensitivity "to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage").

LAW/ANALYSIS

The essential issue in this appeal is whether the circuit court can exercise subject matter jurisdiction over Bayshore Corp and Bayshore SC. The Estate and Key present several theories under which the circuit court could exercise jurisdiction. For the reasons set forth below, we believe Appellants' only remedy was workers' compensation benefits.

WORKERS' COMPENSATION EXCLUSIVITY

[4] "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the ***22** proceedings in question belong." *Sabb v. S.C. State Univ.,* 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). While the circuit court has subject matter jurisdiction over tort claims, certain cases may be taken from the circuit court's original jurisdiction by the General Assembly. *Id.* at 423, 567 S.E.2d at 234. The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over an employee's work-related injuries. *Id.* The South Carolina Workers' Compensation Act contains an " exclusivity provision." *Edens v. Bellini,* 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct.App.2004). Pursuant to this provision, the Act is the exclusive remedy for an employee's work-related accident or injury, and the exclusivity provision precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. *Id.* at 441–42, 597 S.E.2d at 867–68. "The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." *Id.* at 442, 597 S.E.2d at 868 (citing *Strickland v. Galloway,* 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct.App.2002)).

Specifically, the exclusivity provision states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall ex-

clude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

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 (1985).

In *Cason v. Duke Energy Corp.*, the South Carolina Supreme Court expressed only four exceptions to the exclusivity provision:

***23** (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations.

348 S.C. 544, 548 n. 2, 560 S.E.2d 891, 893 n. 2 (2002) (internal citations omitted).

I. Bayshore SC's Immunity[FN1]

FN1. We first address whether Bayshore SC has tort immunity under the Act. Next, we discuss whether Bayshore Corp could piggyback on Bayshore's immunity as the parent company. Finally, we address Appellants' evidentiary issues.

Appellants maintain the circuit court erred in finding Bayshore SC was entitled to immunity ****695** under the Act and present several theories for this assertion.

A. Statutory Employer Status

[5] In support of this assertion, Appellants argue Bayshore SC should not take advantage of the statutory employer status because it failed to collect insurance documentation when Appellants were engaged to performed work as required under section 42–1–415 of the South Carolina Code (Supp.2008).

Respondents assert Bayshore SC is the statutory employer of Appellants and entitled to immunity. Respondents maintain Bayshore SC was the owner of the business enterprise and was statutorily required to provide workers' compensation to the employees of its subcontractors. In support of their assertion, Respondents point to three tests articulated in *Bailey v. Owen,* 298 S.C. 36, 39, 378 S.E.2d 63, 64 (Ct.App.1989), *rev'd on other grounds, Bailey v. Owen,* 301 S.C. 399, 392 S.E.2d 186 (1990).

Here, the circuit court found Appellants' documentation argument was misplaced because the referenced code section 42–5–40 only concerns the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state uninsured fund and explicitly cannot be applied to prevent an employer from benefitting from workers' compensation***24** exclusivity. However, in Appellants' brief they reference section 42–1–415 of the South Carolina Code to support their assertion that Bayshore SC should not be allowed to take advantage of the statutory employer status.

Pursuant to section 42–1–415(B):

To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) 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 and must be turned over to the commission at the time a claim is filed by the injured employee.

(emphasis added). As the circuit court found,

we find Appellants' argument has no merit because this section concerns only whether a higher tier subcontractor, contractor, or project owner can qualify for reimbursement from the Uninsured Employer's Fund. Therefore, we find this section has no bearing on whether Bayshore SC or Bayshore Corp can take advantage of the statutory employer status.

[6][7] Furthermore, we find the circuit court properly concluded Bayshore SC was Appellants' statutory employer. "The concept of statutory employment is designed to protect the employee by assuring workmen's compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980). Pursuant to section 42–1–410 of the South Carolina Code (1985):

> When any person, in this section and §§ 42–1–420 to 42–1–450 referred to as "contractor," contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 42–1–420 to 42–1–450 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title ***25** which he would have been liable to pay if that workman had been immediately employed by him.

[8] In determining whether a worker is a statutory employee, our courts consider the following three factors: "(1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer." *Bailey*, 298 S.C. at 39, 378 S.E.2d at 64 (Ct.App.1989). As in ****696** *Bailey*, we find Bayshore SC satisfies all three tests.[FN2] *Id.*

> FN2. Though we find all three factors are met here, in doing so we note the supreme court stated in *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003): "If the activity at issue meets even one of these three criteria, the injured employee qualifies as the statutory employee of 'the owner.' "

Here, it is undisputed that Bayshore SC was not Appellants' direct employer. However, at the time of Poch's death and Key's injuries, Bayshore SC had contracted with Job Place to provide additional workers for its excavation site. Bayshore's own employees, including Lenart, assisted in the same type of removal work as Poch and Key. The work Key and Poch performed for Bayshore SC was not only part of Bayshore SC's trade or business but essential to it because its lease agreement required the company leave the leased land in the same or better condition. Therefore, we find all three *Bailey* tests are met in the present situation. Accordingly, we affirm the circuit court's legal determination that Bayshore SC is entitled to tort immunity as Poch and Key's statutory employer.

B. Borrowed Employee

Appellants maintain the circuit court should have found Bayshore SC failed to meet the first prong of the borrowed employee test because there was no express or implied contract for hire. Further, Appellants argue Bayshore SC's contract with Job Place was "fatally flawed" because neither Bayshore nor Job Place transferred workers' compensation documentation as required by sections 40–68–70–110 of the South Carolina Code. As such, Appellants contend Bayshore ***26** SC should not be deemed their employer. Bayshore maintains Poch and Key were borrowed employees performing the work of and under the direct control of Bayshore SC.

Because we found Bayshore SC was Poch and Key's statutory employer and entitled to workers' compensation immunity under that theory, we need not address the borrowed employee argument. *See*

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

C. Fraud and Meeting of the Minds

[9] Appellants maintain Bayshore SC fraudulently misrepresented the work it required the temporary employees to perform for the purpose of inducing Job Place to enter into the contract. Additionally, Appellants maintain the practice of fraud will vitiate all contracts, and here, the nine elements of fraud are met. Accordingly, Appellants assert Bayshore SC cannot rely upon workers' compensation coverage to exempt itself from its tortious conduct since an employment contract is an essential element of the defense.

Appellants also argue no contract of employment exists because the parties to the contract never reached a meeting of the minds, and therefore, acceptance of the contract terms did not occur. Thus, Bayshore SC was not entitled to hide behind the shield of workers' compensation immunity.

We find these arguments have no merit because Bayshore SC qualifies as a statutory employer and neither fraud nor a lack of the meeting of the minds were articulated in *Cason v. Duke Energy Corp.*, as exceptions to the exclusivity provision. 348 S.C. 544, 548 n. 2, 560 S.E.2d 891, 893 n. 2 (2002) (finding only the following are exceptions to workers' compensation exclusivity: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations).

***27 II. Bayshore Corp's Immunity under Workers' Compensation Act**

Appellants maintain Bayshore Corp cannot rely upon workers' compensation immunity because it was not Appellants' "employer." Instead, Appellants argue Bayshore Corp was a "co-subcontractor" to Bayshore SC and ****697** Job Place, and because co-subcontractors are excluded from workers' compensation coverage, Appellants can pursue a tort or contract remedy against Bayshore. Therefore, the circuit court erred in dismissing Appellants' claims against Bayshore. We disagree.

a. *Bayshore Corp v. Bayshore SC Relationship*

To support the assertion above, Appellants maintain the circuit court erred in failing to distinguish between Bayshore Corp and Bayshore SC in making its findings concerning whether an employment relationship existed. Essentially, Appellants argue the circuit court erroneously found Bayshore Corp stood in the same position as its subsidiary Bayshore SC in relation to the employment of Appellants. Specifically, Appellants contend the circuit court misinterpreted *Nix v. Columbia Staffing Inc.*, 322 S.C. 277, 471 S.E.2d 718 (Ct.App.1996). Instead, Appellants argue *Monroe v. Monsanto Co.*, 531 F.Supp. 426 (D.C.S.C.1982) is the appropriate case to consider when determining whether Bayshore Corp and Bayshore SC are separate and distinct entities for purposes of workers' compensation. Further, under the factors set forth in *Monroe*, Appellants argue the circuit court erred in finding Bayshore Corp was exempt from suit in tort because it stood in the same position as its subsidiary. FN3

> FN3. Though we believe *Monroe* is persuasive, we do not believe it is controlling, and we rely upon other case law from South Carolina. We also note with interest that no South Carolina court has used the test articulated in *Monroe* to date. Therefore, in analyzing whether or not Bayshore Corp is also entitled to workers' compensation immunity, we rely on our state court cases which were decided after *Monroe*.

Bayshore maintains it is immune as an upstream employer because Appellants were perform-

ing the work of Bayshore SC and Bayshore Corp. Bayshore argues it receives immunity under the exclusivity provision because Appellants were actually doing the work of Bayshore Corp not because of a ***28** parent/subsidiary relationship. However, even if *Monroe* is applicable, Bayshore contends it would still be entitled to immunity.

b. Upstream Statutory Employer

Bayshore relies on *Voss v. Ramco, Inc.*, to support its assertion that it is immune as an upsteam employer where this court found Voss was a statutory employee of Ramco even though NATCO was Voss's direct employer rather than Ramco. 325 S.C. 560, 569, 482 S.E.2d 582, 587 (Ct.App.1997). NATCO, a company owned by Jones that sold equipment manufactured by Ramco, hired Voss as a sales representative. 325 S.C. at 563, 482 S.E.2d at 583–84. The *Voss* court found selling the equipment was an essential part of Ramco's business; thus, Jones's employees were statutory employees of Ramco. *Id.* at 568, 482 S.E.2d at 586. In its holding, the court referenced section 42–1–400 of the South Carolina Code (1985) which provides:

> When any person, in this section and §§ 42–1–420 and 42–1–430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and § § 42–1–420 to 42–1–450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

325 S.C. at 566, 482 S.E.2d at 585. Thereafter, the court stated: "[D]epending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer." *Id.*

Additionally, Bayshore relies on *Ost v. Integrated Products, Inc.*, 296 S.C. 241, 371 S.E.2d 796 (1988), where the supreme court discussed several cases to determine whether employees of a secondary employer constitute statutory employees of the principal employer. There, the *Ost* court held employees of National Sales Company, a sister company of Integrated, were ***29** statutory employees of Integrated. *Id.* at 247, 371 S.E.2d at 799. In making its determination, the court considered the following factors: 1) Integrated's ****698** control over National Sales and the importance of National Sales selling Integrated's product; 2) the companies' intertwined operations; and 3) the similarity of the companies' business activities and shared employees. *Id.* at 245–47, 371 S.E.2d at 798–800.

[10] We recognize the above cases and referenced statutes involve a contractor/subcontractor relationship rather than a parent/subsidiary relationship. However, we find the statutes, cases, and factors considered therein equally appropriate to consider in the current situation. We find Poch and Key statutory employees of Bayshore Corp under *Voss* because Poch and Key's work was an essential part of Bayshore Corp's business. Furthermore, because Bayshore Corp wholly owned Bayshore SC, it was financially beneficial to the parent for Bayshore SC to be a profitable subsidiary.

We believe Poch and Key are statutory employees under the *Ost* test. First, Bayshore Corp's salaried employees, including but not limited to Lenart, exercised control over the hourly employees of Bayshore SC. As an additional factor supporting the first prong, and as mentioned above, it was important to Bayshore Corp as the parent company for Bayshore SC to be successful and profitable in this business venture. Second, the companies maintained intertwined operations whether through the hiring process, payroll and accounting, or generally shared procedures. Third, we believe the parent and subsidiary business activities were similar, while they maintained many of the same salaried employees. Accordingly, under the *Ost* test, we find Bay-

shore Corp is Poch and Key's statutory employer and therefore entitled to workers' compensation immunity.

III. Affidavits as Evidence

[11] Appellants argue this court should not consider evidence presented in the affidavits of Dunbar, Lenart, and in the second affidavit of Colonna. The wording of this argument is problematic for several reasons, most notably the fact that Appellants put together the record on appeal. We believe Appellants are trying to argue the circuit court erred in ***30** considering these affidavits in making its ruling; therefore, this is the argument we address. In regard to evidentiary rulings, it is within the circuit court's discretion to decide what is admissible and on appeal we should reverse the circuit court's ruling only when based on a legal error. *Wright v. Craft,* 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct.App.2006) ("The admissibility of evidence is within the sound discretion of the [circuit] trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant.").

A. Legal Expert Vernon Dunbar's Affidavit

[12] Appellants maintain the circuit court should disregard Vernon Dunbar's affidavit because his expert testimony was on legal issues and invaded the court's province. Appellants argue Dunbar's testimony went to the heart of the issues to be decided by the court. To support their assertion Appellants cite *Dawkins v. Fields,* 354 S.C. 58, 66–67, 580 S.E.2d 433, 437 (2003), where our supreme court held a circuit court properly refused to consider the affidavit where an expert's affidavit primarily contained legal arguments and conclusions. The *Dawkins* court stated: "In general, expert testimony *on issues of law* is inadmissible." *Id.* at 66, 580 S.E.2d at 437.

Though we agree with Appellants that Dunbar's affidavit addressed the ultimate issue of the case, we do not believe any consideration of the affidavit was outcome determinative due to the clear exclusivity immunity. *Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Therefore, whether the circuit court used Vernon's affidavit in making its determination makes no difference on appeal. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter.").

B. Company President Keith Colonna's Second Affidavit

[13] Appellants argue the circuit court erred in considering the evidence offered in ****699** the second affidavit of Colonna ***31** where he contradicted his own prior testimony. Appellants maintain Bayshore Corp and Bayshore SC should be judicially estopped from changing their position on the facts to blur the distinction between Bayshore Corp and Bayshore SC to their advantage. Specifically, Appellants maintain the circuit court can use the "competing" or "sham" affidavit exception to the judicial estoppel test set forth by the supreme court to disregard a contradictory subsequent affidavit.

[14] The "competing" or "sham" affidavit exception argument is not preserved for our review. In Appellants' motion to exclude Colonna's affidavit, they rely only on the doctrine of judicial estoppel which the circuit court ultimately denied. Though they raise the "competing" or "sham" affidavit exception in their Rule 59(e) motion, this is not enough to preserve the argument for review. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *Dixon v. Dixon,* 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRCP, motion is not preserved for review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.,* 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in peti-

tion for rehearing not preserved).

Though Appellants maintain Bayshore Corp and Bayshore SC should be judicially estopped from changing their position on the facts to blur the distinction between Bayshore Corp and Bayshore SC to their advantage, we do not believe Appellants developed this argument enough for review. *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001). ("Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

C. Larry Lenart's Testimony

Appellants argue the circuit court should disregard the affidavit of Larry Lenart because they were denied an opportunity to cross examine him. Because we do not believe Lenart's testimony was outcome determinative, we find no reversible error. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on *32 the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Furthermore, we do not believe Appellants carried their burden of proving prejudice. *See id.* Therefore, whether the circuit court used Lenart's affidavit in making its determination makes no difference on appeal. *See McCall v. Finley*, 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter.").

CONCLUSION

Bayshore SC is entitled to tort immunity under workers' compensation exclusivity. Additionally, we find Bayshore Corp should be entitled to share in Bayshore SC's statutory employer status under the *Voss* and *Ost* tests. Lastly, we affirm all of Appellants' evidentiary arguments. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.

S.C.App.,2009.
Poch v. Bayshore Concrete Products/South Carolina, Inc.
386 S.C. 13, 686 S.E.2d 689

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